

SUPREME COURT OF NIGERIA
3RD. DECEMBER, 1999. SC. 223/1993
CORAM:- A. G. KARIBI-WHYTE, M. E. OGUNDARE, S. U. ONU,
A. I. IGUH, E. O. AYoola, JJSC

| | | |
|-------------------|-------|------------|
| B. J. NGILARI | | APPELLANT |
| AND | | |
| MOTHERCAT LIMITED | | RESPONDENT |

ACCIDENTS - Damages - Road traffic - Negligence and nuisance - What to prove - In order to ground an action in nuisance or negligence.

APPEALS - Grounds of appeal - Issues - Where the Court of appeal wrongfully treated some of the grounds of appeal as having been abandoned - But gave due consideration to all the issues of fact pertaining thereto - There was no miscarriage of justice.

DAMAGES - Pleadings - Traverse - Any allegation in pleadings that a party has suffered damage - Is deemed to be traversed - Unless specifically admitted.

DAMAGES - Special damages - Standard of pleading and proof - Required in special damages.

PLEADINGS - Evidence - Negligence - Evidence not led to support the pleading - Goes to no issue.

ROAD TRAFFIC - Nuisance - Proof - Public nuisance - Constituted by obstruction of the road - What a private person must show - To entitle him to maintain an action.

FACTS

In the High Court of Borno State holden at Maiduguri, the plaintiff/appellant sued the defendant/respondent claiming the sum of

N70,050.00 and interest at the rate of 10 percent, as special and general damages suffered by him in an accident that involved his car with a third party's vehicle. This was stated to be as a result of the respondent's obstruction and diversion of the highway without putting up notice to the road users. The respondent was engaged in carrying out excavation work and the laying of underground water pipes across Sir Kashim Ibrahim Road, Maiduguri. The road is a dual carriage way divided into two equal sections by a flower bed bounded by concrete cement blocks. The right hand side of the road was closed by the respondent and traffic from that direction was diverted to the other lane, the left hand side. There was a sign notifying motorists from the right hand side of the diversion but on the left hand side there was no such indication. Motorists from the latter side, which is the West-end Roundabout, had no warning whatsoever that only their own side of the dual carriage way was open to traffic from both directions at the material time. On the 23rd day of November, 1989, at about 6.30 pm, the appellant was driving his Peugeot 505 saloon car from the West-end Roundabout when it was already dark. Unknown to the appellant that Motorists from his opposite direction were making use of his own lane, and while just about 15 metres from the said West-end Roundabout; the appellant had a head on collision with a Peugeot 504 saloon car coming from the opposite direction. The car was damaged and repairs had to be carried out on it. Hence, the appellant instituted the action, claiming the cost of the repairs and general damages for the inconvenience he suffered as a result of the accident. In the course of the trial the learned trial judge visited the locus in quo.

At the close of the trial the learned trial judge in a considered judgment dismissed the appellant's claims in their entirety. An appeal was lodged by the appellant at the Court of Appeal, Jos, which also in a well considered judgment affirmed the decision of the High Court. The appellant has further appealed to the Supreme Court raising four issues which was adopted by the respondent.

ISSUES FOR DETERMINATION

"1. Whether the Court of Appeal was right in dismissing the nine grounds of appeal out of ten before it and refusing to consider most

part of the argument in the Appellant's Brief before it?

2. *Was the Court of Appeal right when it held the mere failure to put up any warning sign by the Defendant is not sufficient to hold it liable to the Plaintiff?*

3. *Having regard to all the circumstances of his case, the pleadings and evidence on Record, could it be right to say that the plaintiff failed to establish his case?*

4. *Is the Appellant entitled to the reliefs claimed?"*

HELD (Unanimously dismissing the appeal per lead judgment of ONU JSC)

Appeals - Grounds of appeal

1. In reply to this first question, the respondent's concession that the approach of the court below in dismissing the appellant's appeal contained in grounds 1-9 of the Notice of Appeal on the premise that the issues for determination arising therefrom were not properly formulated, did not meet the interest of justice, appears to me to be well taken care of and this, notwithstanding the fact that it was open to the court to identify and reformulate the issues and pronounce on them as the need arose. Be that as it may, in the instant appeal, I take the firm view that although the court below treated grounds 1-9 of the Appeal as having been abandoned, it nevertheless gave due consideration to all the issues of fact pertaining thereto. The omnibus ground of appeal reflected in ground 10 (See page 51 of the Record) indeed clearly and adequately highlighted the gravamen of the dispute between the parties hereto, thus enabling the court below to deal adequately with the crux of the matter, i.e. as to whether the failure of the respondent to put up a warning notice at the West-end roundabout side of Sir Kashim Ibrahim Road, was the primary/direct cause of the accident. (p. 2848 H)

Road Traffic - Accidents

2. In respect of the claim for damages for negligence and nuisance, I am of the firm view that both courts below decided matters correctly when they held that the appellant had not satisfactorily proved his case. Conse-

quently, when the court below affirmed the decision of the High Court by concluding in the leading judgment of Musdapher, J.C.A. to the effect that:-

"The crucial factor to be proved is what caused the accident. B The appellant did not lead any evidence as to how the accident occurred (sic). He merely gave evidence that the Respondent have failed to put up a notice warning him that vehicles coming from the opposite direction have been diverted to his side of the dual carriage way. This in my view C is not sufficient to ground an action in nuisance or negligence. There must be a factor connecting the accident with the failure to provide the notice. From the evidence, it cannot be said that "but for" the failure to put up the notice, the accident would not have occurred (sic), I agree with the learned trial judge that the appellant has failed to prove the fact that D it was the fault of the respondent that caused the accident" this was an unimpeachable finding of fact. (pp. 2852 G/2855 C)

Pleadings - Evidence

E 3. It is trite law that pleading is no evidence. See Obmiami Brick & Stone (Nigeria) Limited v. A.C.B. Limited (1992) 3 NWLR (Part 229) 260 at page 293. Thus, where as in the instant case, evidence is not led to support the pleading evidence led thereat goes to no issue. See Olarewaju F v. Bamigboye (1987) 3 NWLR (Part 60) 353 at 359, following Emegokwue v. Okadigbo (1973) 4 S.C. 113. In the circumstances, there is no evidence before the court to negative any inference of negligence on the part of the appellant himself. And this buttresses the fact that the appellant failed to establish by direct evidence that the accident was caused G by the negligence of the respondent. (p. 2857 C)

Road Traffic - Nuisance

H 4. On the issue of nuisance, I am in entire agreement with the respondent that the nuisance constituted by the obstruction was commonly suffered by other road users and the inconvenience was not peculiar to the appellant. In the circumstances, unless the appellant is able to establish damage which is particular (i.e. special), direct and substantial, he cannot

sustain any claim. See Benjamin v. Storr (1874) L.R. 9. C.P. 43 LJCP. 162. (Reported also on page 155 of the case book on Tort by Tony Weir, 3rd ed.)

Where the principle of law that to entitle a private person to maintain an action for a thing which amounts to a public nuisance, he must show that he has sustained a particular damage or injury other than and beyond the general injury to the public, and that such damage is direct and substantial, was applied. (p. 2857 F)

Damages - Special damages

5. I agree with the respondent that the appellant is not entitled to any damages, not having put forward a convincing case at the trial. To make matters worse, the special damages claimed by the appellant which I had set out herein-before were not sufficiently pleaded in details nor strictly proved as required by law, per Lord Goddard in British Transport Commission v. Gourley (1955) 3 ALL E.R.80. As Lord Bowen L.J. laid down in the leading case on pleading and proof of damages of Ratcliffe v. Evans (1892) 2 Q.B. 524; 61 L.J. Q.B.535 particularly in relation to special damages:-

"The character of the acts themselves which produce the damage, and the circumstances under which these acts were done, must regulate the degree of certainty and particularity with which the damage done ought to be proved. As such certainty and particularity must be insisted on in proof of damages as is reasonable, having regard to the circumstances by which the damage is done. To insist upon more would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

See also F. O. Akintunde v. Chief E. A. Ojeikere (1971) 1 NMLR. 91. This is because a claim for damages is always deemed to be in issue.

In the case in hand, the appellant at paragraph 9 (2) of his Statement of Claim set out above merely lumped several aspects of he repairs together without earmarking any sums against particular items of repairs. His evidence did not supply the details required to be pleaded. Furtherstill, the learned authors of Bullen and Leake and Jacobs - Prece-

dents on Pleadings 11th Edition at page 200 (or 12th Edition page 379) expressed the matter succinctly in similar terms as follows:-

"Special damages must allege with particularity so that the Defendant should know, not what is the amount of loss or damage which the plaintiff alleges he suffered, but also how such amount is made up or calculated."

It is for these reasons that I agree with the respondent's submission that the appellant's pleading and evidence fell short of the legal standard prescribed in the above authorities. It was thus not enough for the appellant to submit to court receipts stamped "paid" when it was the essence of the claim that costings had to be detailed and not lumped up with unrelated documents. See this court's decision in Horst Sommer v. F.H.A. (1992) 1 NWLR (Part 219) 548 at 560. (pp. 2859 B/2860 G)

Damages - Pleadings

6. It is the appellant's contention that these conclusions by these courts are erroneous, firstly because the respondent by its pleading did not controvert the claim for damages in that it merely stated in paragraph 12 of its Statement of Defence that it was not in a position to admit or deny the claim for damages. I take the view that the appellant's stand is misconceived in that it is trite law that any allegation in pleadings that a party has suffered damage and any allegation as to the amount of damages is deemed to be traversed unless specifically admitted. See Produce Marketing Board v. A. O. Adewunmi (1972) 11 S.C. 111 at 124. (p. 2860 B)

NOTABLE POINTS OF INTEREST

ONU.JSC

1. Duty of road users particularly those driving when it is dark

It is pertinent to state at this junction that the learned trial judge in the course of his judgment referred to the provisions of Section 21 of the Road Traffic Law and took the view that the appellant was obliged to drive on the diverted side of the road with due care and attention. In this regard, I am of the firm view that the learned trial judge was right in the view he took as it is the duty of all road users at all times to keep a proper

look-out so as to avoid colliding with other road users. In particular, it is the duty of those driving when it is dark to drive at such a speed in a way that they are able to stop within the range of visibility. Thus, in Baker v. Longhurst & Sons Ltd. (1933) 2 KB.461 at 468 Scrutton L.J. observed as follows:-

"If a person rides in the dark he must ride at such pace that he can pull up within the limits of his vision and if, in these circumstances, he strikes something, he is going too fast or he has not been keeping a proper look out." (p. 2854 E)

KARIBI-WHYTE JSC

2. Duty of indicating diversion in the highway

Appellant has challenged the concurrent findings of these courts. It is now argued before us that on the pleadings and evidence a case of negligence was established. Reliance is placed on the fact that Defendant did not dispute the fact that it did not notify motorists coming from the direction of the Plaintiff of the diversion on the road. Learned Counsel relied on Charlesworth and Percy on Negligence 7th Ed. at p.662. The cases of McClelland v. Manchester Corporation (1912) 1 KB.118 and Coleshill v. Manchester Corporation (1928) 1 KB.776 were also referred to. The opinion of the authors in Charlesworth and Percy do not seem to support the contention of the Appellant. The inference from the opinion is that the purpose of indicating diversion in the highway is to prevent those reasonably careful persons using the highway from going astray at the point of diversion. It is not in dispute in this case that the Defendant erected a notice at the point of the diversion of the road. There is nothing to show that there was an additional duty to install notice of diversion at the other end of the road. (p. 2864 F)

OGUNDARE JSC

3. Road traffic accident - What to prove in a claim in negligence

All that the plaintiff had succeeded in proving in this case is that there was an accident involving his vehicle. How the accident occurred was not disclosed. To succeed in a claim in negligence it is not enough to

prove there was an accident; the plaintiff must prove that the accident was as a result of the negligence of the defendant. It was not shown in this instant case how the non fixing of a notice of diversion at points on the road other than the point of diversion caused the accident. Nor that
B such omission rendered the road dangerous to road users, including the plaintiff. (p. 2877 B)

IGUHJSC

4. *What constitutes a public nuisance on the highway*
C Without doubt, it is a public nuisance to do any act on a highway which hinders or obstructs the free passage of the public along the highway and an action will lie for any damage sustained by an individual in consequence of such obstruction of a public highway. (p. 2878 A)
D

5. *Mere occurrence of an accident does not by itself prove negligent driving*
On the appellant's alternative claim, it is plain to me that negligence is a
E question of fact, not of law, and that each case must be decided in the light of its own facts. See Alhaji Kalla v. Jarmakani Transport Ltd (1961) ALL N.L.R. 747 and Morris v. Luton Corporation (1946) 1 K.B. 114. The operation of vehicles on the highway does not give rise to strict
F liability nor does the fact that an accident has occurred by itself prove negligent or dangerous driving. See Simpson v. Peat (1952) 1 ALL E.R. 448. The plaintiff, to succeed, must establish negligence against the defendant. The burden of proving such negligence is on the plaintiff who alleges it and unless he is able to produce satisfactory evidence that
G the accident was caused by the defendant's negligence, it is the duty of the trial court to dismiss the action and enter judgment for the defendant. (p. 2880 F)

H REPRESENTATION

Appellant absent and not represented by counsel
O. Olayinka, for the respondent

CASES REFERRED TO

- Obmiami Brick & Stone (Nigeria) Limited v. A.C.B. Limited (1992) 3 NWLR (Part 229) 260 at page 293
- Olarewaju v. Bamigboye (1987) 3 NWLR (Part 60) 353 at 359 B
- Emegokwue v. Okadigbo (1973) 4 S.C. 113
- Benjamin v. Storr (1874) L.R. 9. C.P. 43 LJCP. 162
- Transport Commission v. Gourley (1955) 3 ALL E.R.80
- Ratcliffe v. Evans (1892) 2 Q.B. 524; 61 L.J. Q.B.535 C
- Akintunde v. Ojeikere (1971) 1 NMLR. 91
- Sommer v. F.H.A. (1992) 1 NWLR (Part 219) 548 at 560
- Produce Marketing Board v. Adewunmi (1972) 11 S.C. 111 at 124
- Kalla v. Jarmakani Transport Ltd (1961) ALL N.L.R. 747
- Morris v. Luton Corporation (1946) 1 K.B. 114 D
- Simpson v. Peat (1952) 1 ALL E.R. 448

BOOKS REFERRED TO

- Tony Weir, Casebook on Tort, 3rd ed. E
- Kodilinye, Nigerian Law of Torts, p.90
- Bullen and Leake and Jacobs - Precedents on pleadings 11th ed. at p.200 or 12th ed. at p.379.

LEAD JUDGMENT BY ONU JSC

In the High Court of Borno State holden at Maiduguri in Suit No. M.396/1989, the plaintiff, now the appellant (a Legal Practitioner by Profession) claimed as per his paragraph 10 of the Statement of Claim against the defendant, the respondent herein, special and general damages suffered by him in an accident that involved his car with a third party's vehicle. This was stated to be as a result of the respondent's obstruction and diversion of the highway without putting up notice to the road users as follows:- G H

"10. Whereof the plaintiff claims from the defendant as follows:

- (a) As special damages the sum of N35,050.00 being cost of*

the repairs paid by the plaintiff as a result of the accident as per Bill No.000073 dated 24/11/89, issued to the plaintiff by Denjoe Panel Beating and Spraying Works for the sum of N14,600.00 (Fourteen thousand, six hundred Naira), and Delivery Note No.000068 dated 24/11/89 for the sum of N20,450.00 (Twenty thousand, four hundred and fifty naira) also issued to the plaintiff by Adirika Goddy Enterprises Nigeria, both documents covering the cost of materials and labour charges paid by the plaintiff in effecting repairs to his said car.

(b) Thirty five thousand naira (N35,000.00) as general damages for pain and suffering and mental anguish caused as a result of the accident.

(c) Interest at the court's rate of 10% on the above total sum of N70,050.00 with effect from the date of judgment until final liquidation thereof.

(d) Costs of this Suit."

Pleadings having been filed, delivered and exchanged as ordered, the case went to trial, at the close of which the learned trial judge Kuyatsemi J. in a considered judgment, (having earlier visited the locus in quo) dismissed the appellant's claims in their entirety.

An appeal was lodged at the Court of Appeal, Jos which also in a well considered judgment on the 17th day of May, 1993, affirmed the decision of the High Court. It is that judgment of the court below which is now the subject matter of this present appeal wherein, in place of the original Notice of Appeal containing three grounds and dated 16th August, 1993, there was by leave of this court, substituted an amended Notice of Appeal containing five grounds dated 14th June, 1994, and filed on 15th June, 1994.

The parties exchanged Briefs of argument in accordance with the Rules of Court.

The four issues formulated by the learned counsel for the appellant which necessitated the amendment of his brief and which learned Counsel for the respondent adopted for the determination of this appeal, are as follows:-

"1. Whether the Court of Appeal was right in dismissing the

nine grounds of appeal out of ten before it and refusing to consider most part of the argument in the Appellant's Brief before it?

2. *Was the Court of Appeal right when it held the mere failure to put up any warning sign by the Defendant is not sufficient to hold it liable to the Plaintiff?*

3. *Having regard to all the circumstances of his case, the pleadings and evidence on Record, could it be right to say that the plaintiff failed to establish his case?*

4. *Is the Appellant entitled to the reliefs claimed?"*

Before I proceed to consider these issues, I deem it pertinent to state briefly the facts of this case which, by and large, are undisputed save the inferences drawn by the two courts below from the evidence placed at their disposal and to which I shall later advert in the course of this judgment.

The respondent was engaged in carrying out excavation work and the laying of underground water pipes across Sir Kashim Ibrahim Road, Maiduguri. It is a dual carriage way with flowers enjoying the protection of concrete wall almost 11/2 feet high along its middle.

The right hand side of the road was closed by the respondent and traffic from that direction was diverted to the other lane, the left hand side. There was a high post on the right hand side notifying motorists from that direction of the diversion. On the left hand side, there was no sign post at all indicating that there was a diversion ahead. Motorists from this side, which is the West - end Roundabout, had no warning whatsoever that only their own side of the dual carriageway was open to traffic from both directions at the material time.

On the 23rd day November, 1989, at about 6.30p.m the appellant was driving his Peugeot 505 Saloon Car with registration No.BO.8669 MD from the West-end Roundabout towards the Leventis Stores junction of Sir Kashim Ibrahim Road when it was already dark. Unknown to the appellant that motorists from his opposite direction were making use of his own lane, a Peugeot 504 No.39 BOSG 23 driven by one Festus Ayodele was involved in a head on collision with the appellant's vehicle, or so it appeared. The collision had taken place about 15 meters after the

appellant had negotiated the West-end Roundabout and the car was damaged. Repairs had to be carried out on it. The appellant therefore brought the suit in the High Court culminating in this appeal, claiming the cost of the repairs and general damages for the inconvenience he suffered as a result of the accident. Now to the consideration of the issues:

ISSUE NO.1: DISMISSAL OF NINE GROUNDS OF APPEAL AND REFUSAL TO CONSIDER ENTIRE ARGUMENT..

In arguing this issue in relation to the first and second grounds of appeal before the Court of Appeal, our attention was adverted to pages 82-84 of the Record, following which it was pointed out how pertinent it is that the parties herein were never called upon to address the court on whether or not the only issue raised covered all the ten grounds of appeal, adding that the point was taken suo motu by it. This, it was argued, contravened the right of the parties to fair hearing. Furthermore, it was contended, the respondent did not raise objection to the appellant's Brief on the sole issue for determination. The case of The Road Transport Employers Association of Nigeria v. The National Union of Road Transport Workers (1992) 2 NWLR (Part 224) 381 at page 392 (per Uwais, JSC, as he then was) was called in aid for the proposition that"..... It has numerously been stated that when an appellate court decides to deal with an issue which is not raised by any of the parties before it, it is mandatory for the appellate court to give the parties the opportunity to address it on the issue".

It was further submitted that the principle was restated in the recent case of Adeyemi v. Y.R.S. Ike-Oluwa & Sons Ltd. (1993) 8 NWLR (Part 309) 27 at page 40 per Uwais, JSC. (as he then was). It was further argued that considering the contents of the ten grounds of appeal referred to, it was appropriate to have argued the whole grounds together under the only issue formulated for determination. A careful examination of each ground, it is observed, will clearly show that those grounds which in fact are interwoven, are confined to the use and principles of pleadings at the trial court. The argument based on the ten grounds of appeal before the lower court, is therefore that since the respondent (Defendant) has admitted the issue raised by the appellant as (Plaintiff) through

its Statement of Defence, the non cross-examination of its witnesses for the appellant and the respondent's failure to adduce evidence in support of its averments in the statement of defence, enables the appellant to be entitled to judgment. Hence, that sole issue for determination, bearing in mind that it is trite law that one issue can cover several grounds of appeal, vide Olaniyan v. University of Lagos (1985) ALL NLR. 363 at 370, Nwosu v. Imo State Environmental Sanitation Agency (1990) 2 NWLR (Part 135) 688; and Adelaja v. Fanoiki & Anor. (1990) 2 NWLR (Part 131) 137 at 148. B

It was further contended that in the Appellant's Brief before the court below, all the grounds of appeal were thoroughly argued and adopted at the hearing as exemplified on page 75 of the Record which contains the submission of appellant's counsel to the effect that his argument therein related to all the grounds before the court. It was then maintained that having regard to the fact that the whole grounds of appeal were argued together, the court would have entertained the whole appeal and possibly couched its own issues for determination based on the argument in the Brief, adding that it is trite law that a brief cannot be struck out because the issues for determination were not properly framed. The cases cited in support of these propositions were those of Titiloye v. Olupo (1991) 7 NWLR (Part 205) 519 at 537 per Akpata, JSC; Bankole v. Pelu (1991) 8 NWLR (Part 211) 523 at 537 per Omo, JSC, and Akpan v. The State (1992) 6 NWLR (Part 248) 439 at 465-6 per Karibi-Whyte, JSC. It was further argued that rather than follow the case of Adeniyi v. Fabiyi (1992) 5 NWLR (Part 242) 489 at 497, which is on all fours with those in this appeal, one would have expected the erudite and highly respected justice (viz. the writer of the leading judgment) to have followed the above philosophy in the instant case; rather, their Lordships of the court below relied on the case of Aja v. Okoro (1991) 7 NWLR (part 203) 206 at 272-73 in dismissing the nine grounds of appeal before them and which did not support their position. The latter case, it was pointed out, was considered in its own peculiar context, as for instance, where the learned justices of the court below rightly held, inter alia, as follows:- C D E F G H

".....There is no doubt that a number of grounds

of appeal may raise a single issue"

It was next argued that with respect to their Lordships, if the grounds of appeal had been carefully scrutinized and pigeon-holed into the sole issue for determination, they would have come to a different decision, adding that the lower court was right when it held at page 82 of the Record thus:-

"Failure to argue grounds of appeal incorporated into an issue for determination amounts to abandonment of the ground of appeal....." And again, on issue for determination must be based on the ground of appeal"

Interestingly, it is contended, the appellant did not offend the above rules; rather he complied with them religiously in the sense that the ten grounds of appeal were succinctly argued under one broad issue for determination. After the court below had dismissed the main nine grounds of appeal, it was pointed out, they proceeded to decree that:-

"Any other matters canvassed on the Appellant's brief will be ignored."

For that reason, it is argued, they ignored the argument contained in paragraph 5. 09 at pages 60-61 of the Record, adding that the liability of a person who obstructs or diverts the use of the highway without notice to the road users was never considered and determined. A litigant, it is contended, has a constitutional right to have all issues in his case considered and determined one way or the other. The cases of Katto v. C.B.N. (1991) 9 NWLR Part 214) 126 at 152 (per Omo, JSC) and Sapara v. U.C.H. (1988) 4 NWLR (Part 86) 58 at 82 were relied on to ground the submission.

In conclusion, contended the appellant, a careful examination of the nine grounds of appeal dismissed and the said argument on pages 60-61 of the Record, which were not considered by the lower court, demonstrated. As they raised an issue for the court to determine, accordingly it is argued, they ought not to have been dismissed or ignored.

In reply to this first question, the respondent's concession that the approach of the court below in dismissing the appellant's appeal contained in grounds 1-9 of the Notice of Appeal on the

premise that the issues for determination arising therefrom were not properly formulated, did not meet the interest of justice, appears to me to be well taken care of and this, notwithstanding the fact that it was open to the court to identify and reformulate the issues and pronounce on them as the need arose. Be that as it may, in the instant appeal, I take the firm view that although the court below treated grounds 1-9 of the Appeal as having been abandoned, it nevertheless gave due consideration to all the issues of fact pertaining thereto.

The omnibus ground of appeal reflected in ground 10 (See page 51 of the Record) indeed clearly and adequately highlighted the gravamen of the dispute between the parties hereto, thus enabling the court below to deal adequately with the crux of the matter, i.e. as to whether the failure of the respondent to put up a warning notice at the West-end roundabout side of Sir Kashim Ibrahim Road, was the primary/direct cause of the accident.

Consequently, my answer to issue 1 is in the affirmative. ISSUES NOS. 2 & 3: Is the Respondent liable to the Appellant for not placing a warning sign indicating the obstruction and diversion?

In his treatment of these two issues considered together which relate to grounds 3 and 4 of the Amended Notice of Appeal on damages for negligence and nuisance, we were referred to an extract in the leading judgment of Musdapher, JCA. Wherein the learned justice was quoted as holding at page 87 of the judgment under attack thus:-

"The case as filed stood to fail or succeed on whether the mere failure to put up any warning sign should make the respondent liable and it has not been shown that that failure was the cause of the collision."

The above, it is submitted, was the main ground upon which the court below dismissed the appellant's case and that from it, emanated the third ground of appeal and the second issue for determination herein.

The appellant then went ahead to contend that the facts on this issue are not in dispute. After proceeding to enquire as to what is the correct inference in law to be drawn from the facts as proved and admitted by the parties, our attention was drawn to appellant's statement of

claim wherein paragraphs 1,2,3,4,5,6, and 9(b) (1) (ii) and (e) were admitted by the respondent in its Statement of Defence, adding that under the rules of pleadings, there was no more burden on the appellant to establish those facts as pleaded and admitted. The cases of Olale v. B Ekwelendu (1989) 4 NWLR (Part 115) 326 at 361-362 (per Oputa, JSC) and Jozebson v. Lauwers (1988) ALL NLR 310 at 332, were called in aid to demonstrate how a plaintiff can discharge the onus of proof in his pleadings etc. After pointing out how the respondent led no evidence in support of paragraph 7 of the Statement of Defence, our attention was C adverted to the evidence of the respondent's lone witness at page 16 of the Record, adding that evidence of the respondent in no small way supported the appellant's case. After referring us to part of the latter's testimony, to wit:-

D " I passed through West-end roundabout i.e. junction of Shehu Laminu Way, Baga Road, and Sir Kashim Ibrahim Road, Maiduguri. About 15 metres on the said Sir Kashim Ibrahim Road, in the Leventis Stores direction, I had head-on collision with 504 Peugeot Saloon Registration No. 39 BOSG 23..... if there were a (sic) warning E notice of the West-end roundabout junction, the accident would not have happened. The accident happened as a result of blocking the Leventis Stores junction and consequently diverting traffic from the correct lane F on my opposite direction to my own lane. This was what caused the accident."

It was argued that there was no cross-examination just like in the evidence of PW.2 who was shown as having said:-

G "I was also surprised because the defendant did not put any warning sign post at the West-end Roundabout portion of the road, i.e. Kashim Ibrahim Road."

The appellant further submitted that the issue of not notifying motorists from the appellant's direction was quite settled as shown on the Record. H From the available facts, the relevant applicable law thereto would from the pleadings and evidence establish a case of negligence vide Charlesworth & Percy On Negligence 7th Edition at page 662 under the heading:

"DAMAGES CAUSED BY DIVERSION OF HIGHWAY"

"When a highway is diverted, protection must be provided at the point of diversion. This is in order to prevent those reasonably careful persons, using the highway, from going astray at the point of diversion, since it may be implied otherwise that the original highway can be used safely. See the cases of :

Mcclelland v. Manchester Corporation (1912) 1 K.B. 118; Coleshill v. Manchester Corporation (1928) 1 K.B. 776 at pages 597-598 of the aforementioned text is the following:-

"OBSTRUCTION ON HIGHWAY: If a highway is obstructed a person who is injured as a result of that obstruction, can recover damages against..... the tortfeasor himself....."

Cases of Penny v. Wimbledon U.D.C. (1889) 2 Q.B. 72, and Hill v. Tottenham (1899) 79 LT. 495, were cited in support thereof.

The evidence on record, the appellant maintained, shows that the respondent placed a sign post regarding the diversion only at one end of the road. This he added, was not done at the other end, hence the appellant could not know of it until after the accident. Not only that, the respondent admitted this fact in paragraph 3 of the statement of defence. It did not see the need to challenge it under cross-examination or adduce evidence to the contrary.

It is a common practice, it is asserted, that where there is a diversion directing vehicles to us one lane instead of the former two lanes, signs are normally placed on both ends to notify road users. The respondent's failure to carry out this duty, it is further argued, is a clear case of negligence. Two cases, U.B.A. Ltd. v. Ngozi Achoru (1990) 6 NWLR (Part 150) 254 at 277; and Esiegbé v. Agholor (1990) 7 NWLR (Part 161) 234 at 247 were cited in support of the propositions wherein Karibi-Whyte, JSC and Uche Omo, JCA (as he then was) each held as follows:-

".....Negligence being the failure to take reasonable care, where there is a duty, is attributed to the person whose failure to take such reasonable care has resulted in damage to another" and "To establish negligence the Appellant must show that the respondents owe him (her) a duty of care which they have breached. There

is no doubt as to the duty of care which one road user owes to the other particularly on the highway."

In the circumstances of this case therefore, it is contended, the responsibility of the third party is not material in determining liability, adding that
B if there was a sign at the appellant's end, the accident might have been avoided. But since the respondent failed or neglected to perform its duty owed to road users, the intervention of a third party cannot exonerate it from liability.

C Having regard to the above analysis on this second issue, it is maintained that the court below was wrong when it held:

*"The crucial factor to be proved is what caused the accident. The Appellant did not lead any evidence as to how the accident occurred (sic). He merely gave evidence, that the respondent have (sic) failed to
D put a notice warning him that vehicles coming from the opposite direction have been diverted to his side of the dual carriage way. This in my view is not sufficient to ground an action in nuisance of negligence. There must be a factor connecting the accident with the failure to provide
E the notice....."*

The appellant next argued that with due respect to their Lordships, the above does not represent the true position of the law albeit in fairness to them, that no legal principle or authority was referred to in support of
F that stand.

As argued herein before, the appellant contended, the undisputed fact the respondent failed to place a sign post at the side of the appellant is enough to adjudge it liable or else why did it (respondent) put the sign post at the other end? Thus, what is good for the goose is also
G good for the gander, he concluded.

**In respect of the claim for damages for negligence and nuisance, I am of the firm view that both courts below decided matters correctly when they held that the appellant had not satisfactorily
H proved his case.** Instances of such findings by the trial court may be gleaned from the following extracts:-

"There is no pleading and evidence on these by the plaintiffs; how the accident happened, the point of impact on the diverted road and

the negligence of either or both drivers i.e. the plaintiff as driver of 505 Peugeot GLBO 8669 MB and Festus Ayodele as driver of Peugeot 504 Saloon 39 BOSG 23. It appears that the plaintiff relies solely on the assertions in paragraph 8 of his Statement of Claim, already set out in detail, that the collision was caused by the nuisance created by the Defendant in diverting all traffic on the dual carriage road to the plaintiff's own lane so that the diversion of traffic on the dual carriage way became an obstruction on the road, which rendered the road dangerous to the plaintiff and other persons lawfully using the same."

I therefore agree with the respondent's submission that the sum total of the above observation is that the appellant had failed to establish that the accident was inevitably due to the diversion created by the respondent.

Further, I share the respondent's view that the learned trial judge took the view and rightly so, that the diversion did not of its own render the carriage way inherently dangerous as there is evidence to show that several other cars plied that same road on the fateful day and there was no record of any other accident apart from the appellant's. Thus, the learned trial judge's position is re-inforced when he observed as follows:-

"Significantly with the period of the closure of one side of the road at 7.30 a.m. at Leventis Stores junction and the time of the accident in the evening, there is nothing to show that any accident happened apart from the plaintiff's or the one in question. It was therefore implied that the road was not dangerous or as dangerous as the plaintiff might put it or portray. On the pleadings and evidence, that at the time of accident, behind the motor vehicle involved in the accident there were other motor vehicles".

Further, the learned trial judge did inspect the scene of the accident and from the report of the scene contained in the record (see page 38 hereof) the carriage way in question was a tarred road divided into two equal sections by a flower bed bounded by concrete cement blocks. Expatriating on how the accident occurred or would have been averted and at what location it happened, the learned trial judge observed that:-

"Because there are at least two convenient motor traffic lines on

each side of the road into which motor vehicles were diverted, the accident in the normal course of driving of the plaintiff and Festus Ayodele in opposite directions on the same side of the road would not have happened. That the accident happened without any explanation as to what occurred (sic) between them suggest (sic) that either or both of them were to blame for not driving with due care and attention or with reasonable consideration for other road users or themselves".

Throwing more light on above reasoning the learned trial judge added thus:-

"It has been settled as far back as 1952 in R. v. Tatimu (1952) 20 NLR 60 that mere occurrence of an accident is no proof of negligence. Therein a lorry was being driven by an unlicensed driver who was arraigned as an accused following the accident which occurred (sic). This, it was held, was not by itself proof of reckless or dangerous driving, nor was it proof of negligence. The circumstances, nature and extent of the accident must be pleaded and evidence be adduced thereon. Then the court would be able to determine whether partially or wholly either the plaintiff or the other driver or both or the Defendant caused the accident. Such is a matter of evidence based on pleading; and it is non-existent in the present case."

It is pertinent to state at this junction that the learned trial judge in the course of his judgment referred to the provisions of Section 21 of the Road Traffic Law and took the view that the appellant was obliged to drive on the diverted side of the road with due care and attention. In this regard, I am of the firm view that the learned trial judge was right in the view he took as it is the duty of all road users at all times to keep a proper look-out so as to avoid colliding with other road users. In particular, it is the duty of those driving when it is dark to drive at such a speed in a way that they are able to stop within the range of visibility. Thus, in Baker v. Longhurst & Sons Ltd. (1933) 2 KB.461 at 468 Scrutton L.J. observed as follows:-

"If a person rides in the dark he must ride at such pace that he can pull up within the limits of his vision and if, in these circumstances, he strikes something, he is going too fast or he has not been keeping a

proper look out."

The Court below as earlier pointed out, affirmed the decision of the trial court thus resulting in concurrent decisions of the two lower courts which ought not to be disturbed unless there is some miscarriage of justice or violation of some principles of law or procedure. See Osayeme v. The State (1966) NWLR 399; Sanyaolu v. The State (1976) 6 S.C. 37; Wankey v. The State (1993) 5 NWLR (Part 295) 542 at 552; Enang & Ors. v. Adu & Ors. (1981) 11-12 S.C. 25 at 42, and Kofi v. Kofi 1 W.A.C.A. 284.

Consequently, when the court below affirmed the decision of the High Court by concluding in the leading judgment of Musdapher, J.C.A. to the effect that:-

"The crucial factor to be proved is what caused the accident. The appellant did not lead any evidence as to how the accident occurred (sic). He merely gave evidence that the Respondent have failed to put up a notice warning him that vehicles coming from the opposite direction have been diverted to his side of the dual carriage way. This in my view is not sufficient to ground an action in nuisance or negligence. There must be a factor connecting the accident with the failure to provide the notice. From the evidence, it cannot be said that "but for" the failure to put up the notice, the accident would not have occurred (sic), I agree with the learned trial judge that the appellant has failed to prove the fact that it was the fault of the respondent that caused the accident" this was an unimpeachable finding of fact.

The result is that my answer to these two issues argued together is in the positive.

ISSUE NO. 4: which is concomitant with ground 5 asks whether the appellant is entitled to the reliefs he has claimed.

Before answering the question whether the appellant is entitled to the reliefs he claimed, one cannot help but set out the following paragraphs of the Statement of Claim as a guide to wit: Paragraphs 3,8, 9 and 10 (the latter having earlier on been set out in this judgment one does not need any recapitulation of it here) as follows:-

"3 The plaintiff avers that in or about Thursday the 24th of

November, 1989, at about 6.30p.m. when it was already dark, the plaintiff was driving his aforesaid peugeot 505 carefully and slowly on his own side of the West-end to Leventis Stores dual carriage section of the Sir Kashim Ibrahim Road (a public highway owned and maintained by the Borno State Government).

8 The plaintiff will contend at the trial of this suit that the collision referred to herein was caused by the nuisance created by the defendant in diverting all traffic on the dual carriage road to the plaintiff's own lane in the circumstances described above so that the said diversion of traffic on the said dual carriage road which thereby rendered the said road dangerous to the plaintiff and other persons lawfully using same.

9. Further or in the alternative, the said collision was caused by the negligence of the defendant, its servants or agents.

PARTICULARS

(a) Failing to take any or any proper precautions for the safety of the plaintiff and other road users coming from the Westend roundabout side of the said Kashim Ibrahim dual carriage road.

(b) Diverted all traffic on the said Kashim Ibrahim dual carriage road at the Leventis junction to the plaintiff's own lane without sign or notice placed at the said Westend roundabout side of the road to warn the plaintiff then lawfully coming from the said Westend side of the dual carriage road that all traffic on the said dual carriage road has been diverted at the Leventis junction of the road to the plaintiff's lane.

Particulars of damage to Plaintiff

(i) As a result of the collision, the plaintiff's vehicle was extensively damaged and had to undergo repairs.

(ii) Following the accident the plaintiff did suffer mental pain and suffering.

Particulars of Special damages

"Cost of spare parts, panel beating, spraying and labour paid by the plaintiff in effecting repairs to his said vehicle as per Bill No.000073 and Delivery Note No.000068 both dated 2/11/89 - N35,050.00 (Thirty five thousand, and fifty naira)."

Now, in paragraph 3 of his Statement of Claim (supra) the appellant

did in fact aver that he drove "carefully and slowly on his own side of the Westend to Leventis Stores dual carriage section of the Sir Kashim Ibrahim Road" but at no time in the course of giving his testimony did he confirm this averment by oral evidence. The other eye witness PW.2, John Jilantikiri, also never gave evidence on this point. However, in the course of his evidence, the appellant mentioned that one Ibrahim Gazali also witnessed the accident.

Unfortunately, Gazali also never gave evidence in the matter. As matters therefore stood, the appellant pleaded that he drove carefully and slowly, but no such evidence was given at the trial. **It is trite law that pleading is no evidence.** See Obmiami Brick & Stone (Nigeria) Limited v. A.C.B. Limited (1992) 3 NWLR (Part 229) 260 at page 293. Thus, where as in the instant case, evidence is not led to support the pleading evidence led thereat goes to no issue. See Olarewaju v. Bamigboye (1987) 3 NWLR (Part 60) 353 at 359, following Emegokwue v. Okadigbo (1973) 4 S.C. 113.

In the circumstances, there is no evidence before the court to negative any inference of negligence on the part of the appellant himself. And this buttresses the fact that the appellant failed to establish by direct evidence that the accident was caused by the negligence of the respondent.

On the issue of nuisance, I am in entire agreement with the respondent that the nuisance constituted by the obstruction was commonly suffered by other road users and the inconvenience was not peculiar to the appellant. In the circumstances, unless the appellant is able to establish damage which is particular (i.e. special), direct and substantial, he cannot sustain any claim. See Benjamin v. Storr (1874) L.R. 9. C.P. 43 LJCP. 162. (Reported also on page 155 of the case book on Tort by Tony Weir, 3rd ed.) Wherein he observed inter alia:

".....If the alleged nuisance be the obstruction of a highway..... Other cases show that the injury to the individual must be direct and not a mere consequential injury; as where one way is obstructed, but another (though possibly a less convenient one) is left open; in such

a case the private and particular injury has been held not to be sufficiently direct to give a cause of action. Further, the injury must be shown to be of a substantial character, not fleeting and evanescent. If these propositions be correct, in order to entitle a person to maintain an action for damage caused by that which is a public nuisance, the damage must be particular, direct and substantial."

See also Adeshina v. Lemomu (1965) ALL NLR 245; Boyce v. Paddington Borough Council (1906) A.C. 1, and this court's latest decision of Abraham Ipadeola & Anor. v. Abiodun Oshowole (1987) 3 NWLR (Part 59) 18, in which what constitutes a private or public nuisance is defined. See Nigerian Law of Torts by Kodilinye at page 90 as to when a public nuisance is committed. When pitched against the above pronouncement, it will be seen that the appellant's case is tenuous given the unsatisfactory nature of the evidence or none at all led by him. The evidence led failed to satisfy the key requirement of directness of the injury which is necessary to sustain the claim.

Compare the case of Benjamin v. Storr (supra), **where the principle of law that to entitle a private person to maintain an action for a thing which amounts to a public nuisance, he must show that he has sustained a particular damage or injury other than and beyond the general injury to the public, and that such damage is direct and substantial, was applied.**

In that case, the plaintiff kept a coffee-house in a narrow street near Covent Garden. The defendants carried on an extensive business as auctioneers in the same neighbourhood, having an outlet at the rear of their premises next adjoining the plaintiff's house, where they were constantly loading and unloading goods into and from vans. The vans intercepted the light from the plaintiff's coffee-shop to such an extent that he was obliged to burn gas nearly all day, and access to the shop was obstructed by the horses standing in front of the door, and the stench from their frequent staling there rendered the plaintiff's dwelling incommodious and uncomfortable:-

It was held, inter-alia, (1) that the evidence disclosed such a direct and substantial private and particular damage to the plaintiff beyond that

suffered by the rest of the public, as to entitle him to maintain an action, and (2) that evidence that the premises were rendered uncomfortable by reason of the offensive smells arising from the stabling of the horses which were kept constantly standing opposite to them, was properly admitted.

B

On the issue of damages:

I agree with the respondent that the appellant is not entitled to any damages, not having put forward a convincing case at the trial. To make matters worse, the special damages claimed by the appellant which I had set out herein-before were not sufficiently pleaded in details nor strictly proved as required by law, per Lord Goddard in British Transport Commission v. Gourley (1955) 3 ALL E.R.80. As Lord Bowen L.J. laid down in the leading case on pleading and proof of damages of Ratcliffe v. Evans (1892) 2 Q.B. 524; 61 L.J. Q.B.535 particularly in relation to special damages:-

C

D

"The character of the acts themselves which produce the damage, and the circumstances under which these acts were done, must regulate the degree of certainty and particularity with which the damage done ought to be proved. As such certainty and particularity must be insisted on in proof of damages as is reasonable, having regard to the circumstances by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

E

F

See also F. O. Akintunde v. Chief E. A. Ojeikere (1971) 1 NMLR. 91. This is because a claim for damages is always deemed to be in issue.

See Osuji v. Isiocha (1989) 3 NWLR (Part 111) 623. Commenting on the claim for damages, the learned trial judge took the view that the claim for damages was not sufficiently particularized. He further held that aspects of the evidence were at variance with the pleadings. Indeed, the monetary claims put forward by the appellant seemed staggering and unfortunately as the learned trial judge found, the evidence lacked sufficient credibility. For instance, there was nothing like a police report which would have confirmed the extensive nature of the damage to the car as

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H

alleged by the appellant. Hence, the learned trial judge was right when he stated thus:-

"There is complete silence as to the injury suffered by either the plaintiff or the All these create doubt in my mind of the accident, as to how and what caused the accident."

The learned justices of the court below in unanimously affirming the decision of the trial court held that damages were not satisfactorily proved.

It is the appellant's contention that these conclusions by these courts are erroneous, firstly because the respondent by its pleading did not controvert the claim for damages in that it merely stated in paragraph 12 of its Statement of Defence that it was not in a position to admit or deny the claim for damages. I take the view that the appellant's stand is misconceived in that it is trite law that any allegation in pleadings that a party has suffered damage and any allegation as to the amount of damages is deemed to be traversed unless specifically admitted. See Produce Marketing Board v. A. O. Adewunmi (1972) 11 S.C. 111 at 124.

Secondly, the appellant has further contended in his Brief that he adduced sufficient evidence to buttress his claims for special and general damages. I am of the view that this contention is tenuous given the rule concerning the pleading and proof of special damages which requires that special damages must be pleaded in detail and strictly proved. See Oshinjinrin v. Elias (1970) 1 ALL N.L.R. 153 at 156-157; Perestrello v. United Paint Co. Ltd. (1969) 1 WLR 57 Agunwa v. Onukwe (1962) 1 ALL N.L.R. 537 and A.G. of Oyo State & Anor. v. Fair Lakes Hotels Ltd. & Anor. (No.2) (1989) 5 NWLR (Part 121) 255 at 277 - 278 & 279.

In the case in hand, the appellant at paragraph 9 (2) of his Statement of Claim set out above merely lumped several aspects of he repairs together without earmarking any sums against particular items of repairs. His evidence did not supply the details required to be pleaded. Thus in the Perestrello case (supra) Lord Donovan at page 456 summarized the position in the following words:

"The obligation to particularize in the latter case arises not because the nature of the loss is necessarily unusual but because a plaintiff

who has the advantage of being able to base his claim on a precise calculation must give the defendant access to the facts which make such calculation possible."

Furtherstill, the learned authors of Bullen and Leake and Jacobs -
Precedents on Pleadings 11th Edition at page 200 (or 12th Edition B
page 379) expressed the matter succinctly in similar terms as follows:-

*"Special damages must allege with particularity so that the Defendant should know, not what is the amount of loss or damage C
which the plaintiff alleges he suffered, but also how such amount is made up or calculated."*

It is for these reasons that I agree with the respondent's submission that the appellant's pleading and evidence fell short of the legal standard prescribed in the above authorities. It was thus not D
enough for the appellant to submit to court receipts stamped "paid" when it was the essence of the claim that costings had to be detailed and not lumped up with unrelated documents. See this court's decision in Horst Sommer v. F.H.A. (1992) 1 NWLR (Part 219) 548 at E
560.

Issue 4 is accordingly answered in the negative.

It is for the above reasons that I see no merit in the entire issues canvassed which accordingly fail.

The appeal is accordingly dismissed with N10,000.00 assessed F
as costs in favour of the respondents.

KARIBI-WHYTE JSC

I have read the leading judgment of my learned brother S. U. Onu, JSC in this appeal. I agree entirely with his reasoning and decision, that this appeal is without merit and ought to be dismissed.

The appeal arose from a claim of negligence at nuisance by the H
plaintiff against the defendant. The facts of the case have been carefully summarized in the judgment of my brother Onu, JSC. In his statement of claim, Plaintiff averred as follows:-

"4. The Plaintiff avers that having passed the said west end Round about, heading towards the Leventis Stores junction of the said Sir Kashim Ibrahim Road, and while just about 15 metres from the said West end Round about; the Plaintiff had a head on collision with a Peugeot 504 saloon car with Registration No.39 BDSG 2B belonging to the Borno State Government, which said vehicle together with others in a row behind it were coming from the aforesaid Leventis junction (opposite direction) of the dual carriage road but on the plaintiff's own side of the dual carriage lane.

"8 The plaintiff will contend at the trial of this suit that the collision referred to herein was caused by the nuisance created by the defendant in diverting all traffic in the dual carriage road to the Plaintiff's own lane in the circumstances described above so that the said diversion of traffic on the said dual carriage road became an obstruction on the said road which thereby rendered the said road dangerous to the plaintiff and other persons lawfully using the same Plaintiff pleaded negligence in the alternative, as follows-

9. Further in the alternative, the said collision was caused by the negligence of the defendant, its servants or agents.

Particulars

(a) Failing to take any or proper precaution for the safety of the plaintiff and other road users coming from the West end round about side of the Kashim Ibrahim dual carriage road.

(b) By diverting all traffic on the said Kashim Ibrahim dual carriage road at the Leventis junction to the Plaintiff's own lane without any warning sign or notice placed at the said West end round about side of the road to warn Plaintiff then lawfully coming from the said West end side of the dual carriage road that all traffic on the said dual carriage road has been diverted at the Leventis junction of the road to the Plaintiff's own lane."

The Defendant in his statement of defence specifically denied the above averments as follows-

"7. In further answer to paragraph 7, the Defendant here by states that there was a proper notice placed at the West end side of he

road, warning all the road users of the said diversion and indicating the use of the only lane. Evidence shall be led during the trial to buttress this assertion.

8. The Defendant strenuously deny the averment contained in paragraph 8 of the Plaintiff's statement of claim, to the effect that the Defendant caused nuisance on the said High way by diverting all traffic on the dual carriage to one lane. B

9. In further answer to the averment contained in paragraph 8, the Defendant states that the said diversion never caused any obstruction on the said Highway on the day in question, and that Defendant did all that is humanly possible to make the said High way safe for all the road users. C

10. The Defendant further aver that if there was such accident at the time and place on the day in question, it was never caused as a result of the nuisance, created by the servants of the defendant, but rather as result of the failure of the Plaintiff but rather as a result of the failure of the Plaintiff, to carefully drive and manage his vehicle on the said highway. D E

11. The Defendant deny (sic) all the averments contained in paragraph A & B of the Plaintiff's statement of claim and aver, that the Plaintiff's servants were not negligence whatsoever, in their action on the day in question, rather, the Plaintiff was negligent in not keeping a proper look out." F

It could be seen from the pleadings that the parties joined issue in respect of the allegation of nuisance or negligence alleged by Plaintiff. After trial, in a hearing in which the parties gave evidence; the trial judge held that Plaintiff had failed to prove his case and dismissed the action. Plaintiff G appealed to the Court of Appeal without success. He has further appealed to the Court. He filed five grounds of appeal challenging the findings of the Court below.

Parties filed and exchanged briefs of argument. Appellant though H absent, had formulated the issue for determination in his brief of argument. The issues formulated are-

1. Whether the Court of Appeal was right in dismissing the nine

grounds of appeal out of ten before it and refusing to consider most part of the argument in the Appellant's brief before it.

2. *Was the Court of Appeal right when it held that mere failure to put up any warning sign by the Defendant is not sufficient to hold it liable to the Plaintiff.*

3. *Having regard to all the circumstances of this case, the pleadings and evidence on record, could it be right to say that the Plaintiff failed to establish his case?*

4. *Whether Appellant is entitled to the reliefs claimed. Learned Counsel to the Respondent adopted these issues as formulated by Appellant's Counsel.*

I agree with the conclusion of the Court below that the nine grounds of appeal not covered by the issues formulated had been abandoned. They were accordingly properly struck out. - See Obasi v. Owuba (1987) 3 NWLR. 523.

Issues 2 and 3 as formulated relate to findings of facts made by the learned trial judge and affirmed by the court below. They concern findings that the accident subject matter of the action happened before or at 6 p.m when it was not dark. It was also found that the other vehicle involved in the accident and others in a row behind it were in their correct line of traffic, and driven with due care and attention or with reasonable consideration for other users of the highway. There was no evidence to suggest that the diversion of vehicles to the Plaintiff's lane was the cause of the accident. The damages claimed by the Plaintiff was not directly traceable to any nuisance created by defendant.

Appellant has challenged the concurrent findings of these courts. It is now argued before us that on the pleadings and evidence a case of negligence was established. Reliance is placed on the fact that Defendant did not dispute the fact that it did not notify motorists coming from the direction of the Plaintiff of the diversion on the road. Learned Counsel relied on Charlesworth and Percy on Negligence 7th Ed. at p.662. The cases of McClelland v. Manchester Corporation (1912) 1 KB.118 and Coleshill v. Manchester Corporation (1928) 1 KB.776 were also referred to.

The opinion of the authors in Charlesworth and Percy do not seem to support the contention of the Appellant. The inference from the opinion is that the purpose of indicating diversion in the highway is to prevent those reasonably careful persons using the highway from going astray at the point of diversion. It is not in dispute in this case that the Defendant erected a notice at the point of the diversion of the road. There is nothing to show that there was an additional duty to install notice of diversion at the other end of the road.

It seems to me that Plaintiff succeeded only in establishing that there was an accident in which his vehicle was involved. There is no evidence as to how the accident occurred. It is well established that for a claim in negligence to succeed, plaintiff must prove that defendant owes him a duty of care, and was in breach of that duty - See Oyidiobu v. Okechukwu (1972)5 SC.191. Accordingly plaintiff must prove that the accident was a result of the negligence of the defendant. - See Orhue v. N.E.P.A (1998) 7 NWLR (pt.557) 187.

It was not shown in the instant case how the absence of the notice of a diversion at the points on the road caused the accident. Indeed that the absence of the notice rendered the road dangerous to users, including the plaintiff.

I am satisfied by the findings of facts made by the trial judge adequately supported by the evidence on record and affirmed by the Court below, that the burden on the plaintiff to establish negligence on the conduct of the defendant has not been satisfied.

There is no basis for interfering with the findings. I do not agree that they are perverse. Plaintiff has failed to prove a case in nuisance and/or negligence against the Defendant. The claims were rightly dismissed. The claims having been dismissed consideration of the question of damages does not arise.

The appeal is accordingly dismissed. Appellant is to pay N10,000.00 as cost to Respondents.

OGUNDARE JSC

The Plaintiff who is now Appellant before us has sued the Defendant now Respondent, claiming a sum of N70,050.00 and interest at the rate of 10 per cent, as damages suffered by him as a result of damage to his vehicle. He filed a Statement of Claim, the penultimate paragraphs of which read:

"3. The plaintiff avers that in or about Thursday the 24th of November 1989, at about 6.30 p.m. when it was already dark, the plaintiff was driving his aforesaid peugeot 505 carefully and slowly on his own side of the Westend to Leventis Stores dual carriage section of the Sir Kashim Ibrahim Road (a public highway owned and maintained by the Borno State Government)

4. The plaintiff avers that having passed the said Westend Roundabout heading towards the Leventis Stores junction of the said Sir Kashim Ibrahim Road, and while just about 15 metres from the said Westend roundabout; the plaintiff had a head on collision with a peugeot 504 saloon car with Registration No.39 BOSG 23 belonging to the Borno State Government, which said vehicle together with others in a row behind it were coming from the aforesaid Leventis junction (opposite direction) of the dual carriage road but on the plaintiff's own side of the dual carriage lane.

8. The plaintiff will contend at the trial of this suit that the collision referred to herein was caused by the nuisance created by the defendant in diverting all traffic on the dual carriage road to the plaintiff's own lane in the circumstances described above so that the said diversion of traffic on the said dual carriage road became an obstruction on the said road which thereby rendered the said road dangerous to the plaintiff and other persons lawfully using same.

9. Further or in the alternative, the said collision was caused by the negligence of the defendant, its servants or agents.

Particulars

(a) Failing to take any or any proper precaution for the safety of the plaintiff and other road users coming from the Westend round-

about side of the said Kashim Ibrahim dual carriage road.

(b) By diverting all traffic on the said Kashim Ibrahim dual carriage road at the Leventis junction to the plaintiff's own lane without any warning sign or notice placed at the said Westend round about side of the road to warn the plaintiff then lawfully coming from the said Westend side of the dual carriage road that all traffic on the said dual carriage road has been diverted at the Leventis junction of the road to the plaintiff's own lane.

Particulars of damage of plaintiff

(i) As a result of the collision, the plaintiff's vehicle was extensively damaged and had to undergo extensive repairs.

(ii) Following the accident the plaintiff did suffer mental pain and suffering.

Particulars of special damage

Cost of spare parts, panel beating, spraying and labour paid by the plaintiff in effecting repairs to his said vehicle as per Bill No. 000073 and delivery Note No. 000068 both dated 24/11/89 - N35,050.00 (Thirty five thousand and fifty Naira).

10. Whereof the plaintiff claims from the defendant as follows:-

(a) As special damages the sum of N35,050.00 being cost of the repairs paid by the plaintiff as a result of the accident as per Bill No.000073 dated 24/11/89 issued to the plaintiff by Denjoe Panel beating and spraying works for the sum of N14,600.00 (Fourteen thousand six hundred Naira) and delivery Note No. 00068 dated 24/11/89 for the sum of N20,450.00 (Twenty Thousand four hundred and fifty Naira) also issued to the plaintiff by Adirika Goddy Enterprises Nigeria both documents covering the cost of materials and Labour charges paid by the plaintiff in effecting repairs to his said car.

(b) Thirty five thousand Naira (N35,000.00) as general damages for pain and suffering and mental anguish caused as a result of the accident.

(c) Interest at the court's rate of 10% on the above total sum of N70,050 with effect from the date of judgment until final Liquidation thereof."

The defendant filed a Statement of Defence. Part of which read:

"7. In further answer to the said paragraph 7, the Defendant hereby state, that, there was a proper notice placed at the Westend side of the road, warning all the road users of the said diversion and indicating the use of the only lane. Evidence shall be led during the trial to buttress this assertion.

8. The Defendant strenuously deny the averment contained in paragraph 8 of the Plaintiff's statement of Claim, to the effect that the Defendant caused nuisance on the said Highway by diverting all traffic on the dual carriage to one lane.

9. In further answer to the averment contained in the said paragraph 8, the Defendant states that, the said diversion, never caused any obstruction on the said Highway on the day in question, and that Defendant did all that is humanly possible to make the said Highway safe for all the road users.

10. The Defendant further aver that if there was such accident at the time and place on the day in question, it was never caused as a result of the nuisance created by the servants of the defendant, but rather as a result of drive failure of the plaintiff, to carefully drive and manage his vehicle on the said Highway.

11. The Defendant deny (sic) all the averments contained in paragraph 9(a) & (b) of the Plaintiff's statement of claim, and aver, that the plaintiff's servants were not negligent whatsoever, in their action on the day in question, rather, the Plaintiff was negligent in not keeping a (could not be deciphered.....)"

The action proceeded to trial at which evidence was led on both sides. At the conclusion of trial and after a visit to the Locus in quo the learned trial judge in a reserved judgment concluded that the plaintiff failed to prove his case and dismissed same.

The plaintiff appealed unsuccessfully to the Court of Appeal and has now further appealed to this Court upon five grounds of appeal contained in his amended Notice of Appeal. The parties filed and exchanged their written briefs of argument. The plaintiff amended his own and this appeal was argued on the basis of the plaintiff's amended Appellant's

brief dated 6th February 1995 and the Respondent's brief filed on 7th September 1994. The Appellant was absent and was not represented by counsel at the oral hearing of the appeal. Being satisfied that the Appellant's counsel was served with the hearing notice, the Court heard the appeal on the basis of the Appellant's amended brief. Respondent was represented by counsel Mr. O. Olayinka who adopted the Respondent's brief and urged the Court to dismiss the appeal. B

In the Appellant's brief the following four questions are formulated as calling for determination in this appeal:

"1 Whether the Court of Appeal was right in dismissing the nine grounds of appeal out of ten before it and refusing to consider most part of the argument in the Appellant's Brief before it?" C

2 Was the Court of Appeal right when it held that mere failure to put up any warning sign by the Defendant is not sufficient to hold it liable to the Plaintiff?" D

3. Having regard to all the circumstances of this case, the pleadings and evidence on Record, could it be right to say that the plaintiff failed to establish his case?" E

4. (..... could not be deciphered) is the plaintiff/Appellant entitled to the reliefs claimed?"

The Respondent adopted these issues in its own brief. The case for the plaintiff is as contained in the evidence of the plaintiff himself. He testified thus: F

On 23/11/89 at about 6.30p.m., on that day, I was driving the motor car along Sir Kashim Ibrahim Road, towards Leventis Super Stores, Maiduguri. This is a public highway owned and maintained by Borno State Government. I passed through Westend roundabout i.e. juncture of Shehu Laminu Way, Baga Road and Sir Kashim Ibrahim Road in the Leventis Stores direction, I had head-on collision with 504 Peugeot Saloon registration No. 39 BOSG 23 driven by Festus Ayodele. The accident happened on my side of the dual carriage way of Sir Kashim Ibrahim Road, Maiduguri. I then alighted or get down from my car and said to the other driver. What a hell are you doing on my own lane on a dual carriage way. The driver was coming from the opposite direction to me, G H

yet he was on my own lane. He said the defendant had blocked or barricade the lane on his side and diverted traffic to my own lane. During the discussion and my inquiry, there were other vehicles coming on my own lane instead of the other lane. Some people and vehicles coming on my lane in the same direction as mine stopped to see what was happening. One of such people was Ibrahim Gazali.

I left the spot of the accident and walked to the Leventis Stores direction to see whether or not the road was blocked and traffic diverted as alleged by Festus Ayodele, I saw at the diversion spot, i.e. Leventis Stores junction, equipment and materials bearing the defendant's name. The defendant had done some excavation and was refilling the place. There I saw an expatriate staff who was senior and supervising other workers of the defendant. I asked why they diverted the road at the Leventis Junctions Maiduguri without warning those coming from West End junction so that they would know about the diversion. The expatriate said he was sorry but that it was not his duty to place any notice or warning at the West end junction....."

He opined thus:

"If there were a warning notice at the West end Roundabout junction, the accident would not have happened. The accident happened as a result of blocking the Leventis Stores junction and consequently diverting traffic from the correct lane on my opposite direction to my own lane. This was what caused the accident."

His witness John Jilantikiri testified that he witnessed the accident. He gave the following account in his evidence:

" On 23rd November 1989 at about 6.p.m. I was driving a car along Kashim Ibrahim Road Maiduguri in the direction of Leventis Stores. Just after the West End roundabout I saw a vehicle 9 BOSG 23 of the Ministry of Justice Maiduguri coming from Leventis direction. But this vehicle was on same lane with me coming from Leventis Stores direction and I was going to the opposite direction. This vehicle collided with a motor vehicle driven by Bala Ngilari, Plaintiff who is identified."

It is generally accepted by both sides that the blocking of the Sir Kashim Ibrahim road by the defendant was at the Leventis Stores end of

the road. It would appear from the evidence on both sides that the road runs from the Leventis Stores end to the West end roundabout although the distance is not given in evidence. The diversion of the road at the Leventis Stores end was as a result of civil works being carried out by the defendant at the instance of the State Government. There was a B warning sign put at the side of Leventis Stores where there was the diversion but none at the West-end roundabout.

I now consider the issues formulated by the Appellant.

QUESTION (1)

In his Notice of Appeal to the court of Appeal the plaintiff raised 10 grounds of appeal. In his Brief of Argument, however, under the "issue for determination," he wrote:

"Having carefully read the record of proceedings herein, the following appears to me to be the only issue for determination in this appeal:-"

Having regard to the circumstances of this case, the pleadings and evidence before the court below, was the learned trial judge right in dismissing Appellant's claim."

No doubt this sole issue related only to the omnibus ground. In its judgment, the court below, per Musdapher JCA, observed:-

"..... the appellant has filed ten grounds of appeal running up to 6 pages. The question that arises for discussion is which of the grounds or ground the issue quoted above covers or cover. It is important to resolve that issue because failure to argue ground of appeal incorporated into an issue for determination amounts to abandonment of the ground of appeal. See Onifade v. Olayiwola (1990) 7 NWLR (pt.161) 130. And again, an issue for determination must be based on the grounds of appeal, and where an issue is formulated which does not arise from any of the grounds of appeal is not to be accepted. See general Ogunlade v. Adeleye (1992) 8 NWLR (pt.260) 409, Guinness (Nig) Ltd. v. Agoma (1992) 7 NWLR (Pt.256) 728; A.G. of Anambra State v. Eboh (1992) 1 NWLR (pt. 218) 419. In the case of Labiya v. Anretiola (1992) 8 NWLR. (Pt.258) 139 at 157, the Supreme Court held that, where in an appeal, an issue formulated by the appellant is not supported by any of the grounds

filed, such and issue is not for determination by the Court and would be discountenanced. In any event, one issue for determination has been formulated in this appeal. It seems to me to be an omnibus issue."

After referring to the judgment of the Supreme Court in Aja v. Okoro B (1991) 7 NWLR 260 at 272-273 the learned Justice of the Court of Appeal went on to say:

"Applying the above principle, which is binding on me, it appears that this omnibus issue as formulated in the appellant's brief to the omnibus ground of appeal which happily in this appeal is the 10th ground of appeal. Therefore grounds 1-9 of the grounds of appeal which complain of specific matters in the judgment are deemed to have been abandoned are accordingly liable to be struck out. An issue, for the purposes of an appeal, is a substantial question of law or of fact or both arising D from the grounds of appeal filed in the appeal which when resolved one way or the other will affect the result of the appeal. The issue formulated in the appeal at hand and reproduced above deal and concern with only the question of whether the learned trial judge was right in dismissing the E appellant's claim having regard to the evidence led. As mentioned above, this is the complaint on omnibus ground of appeal No. 10 as contained in the Notice of Appeal. This appeal will accordingly be decided only on the issue of facts as adduced and evaluated by the learned trial judge. F The other grounds of appeal Nos. 1-9 are deemed abandoned by not forming part of the only issue raised for determination and are hereby dismissed by me."

The plaintiff has complained in his brief that in arriving at the above conclusion the Court below did not invite the parties to address it G on the question whether or not the only issue raised cover all the ten grounds of appeal. It is submitted that as the issue was raised suo motu by the Court below and decided by the court without first hearing the parties on it there was a breach of the right of the parties to fair hearing. H It is submitted also that considering the complaints of the plaintiff in the ten grounds of appeal before the court below, it was appropriate to argue the whole ground together under the only issue formulated for determination. It is equally submitted that the ten grounds of appeal are interwo-

ven. It is further submitted that one issue could cover several grounds of appeal. It is plaintiff's case that in its brief before the Court below all the grounds of appeal were thoroughly argued under the one issue formulated.

The defendant, too, in its brief does not support the approach of the Court below. B

I have given careful consideration to all the arguments advanced by the plaintiff in his brief before us and I have examined the ten grounds of appeal contained in its Notice of Appeal before the Court below. I find no substance in the submissions now placed before us. Grounds 1 and 2 complained of error in law in that the Court below ought to have found the averments in paragraphs 3 of the plaintiff's Statement of Claim as proved and should also have ignored part of the evidence of PW.2 which ran contrary to those averments. Ground (3) complained of error in law and on the facts by the trial judge holding that the plaintiff did not establish his cause of action in the tort of nuisance. Ground (4) also complained of error in law and on the fact in that the learned trial judge concluded that the plaintiff did not establish a cause of action in the tort of negligence. Ground (5) read thus: C D E

"The learned trial judge erred in law in failing to hold that on the available evidence; the doctrine of res ipsa loquitor applied in the alternative."

Ground (6) complained of error in law in that the trial judge took into account the occurrence or non occurrence of other accidents on the day in question in coming to the conclusion that the plaintiff failed to prove his case. Ground (7) complained of error in law and on the facts in the conclusion of the learned trial judge that the plaintiff must prove that either himself or the other driver or both were driving with due care and attention on the day of the accident. Ground (8) also complained of error in law and on the facts in the trial judge holding that the plaintiff did not prove the special damages claimed. Lastly, Ground (9) complained of error in law in the learned trial judge finding that there were two convenient motor traffic lines on the side of the road where the accident occurred; the finding according to the ground of appeal was speculative F G H

and perverse not arising from the issues joined in the pleadings.

How can anyone argue that all the above grounds are covered by the sole issue formulated by the plaintiff in his brief before the Court below? I think the court below was clearly right in holding that there was no issue placed before it based on those nine grounds of appeal. It is now settled that where a ground of appeal is not covered by the issues for determination set out in the appellant's brief of argument, that ground of appeal must be deemed to have been abandoned and should be struck out - see: Western Steel Works v. Iron & Steel Workers Union (1987) 1 NWLR 284, 304; Iyaji v. Eyigebe (1987) 3 NWLR 364, 369; Obasi v. Owuba (1987) 3 NWLR 523. Their Lordships of the Court below were therefore right to hold that those 9 grounds must be deemed to have been abandoned; they were rightly struck out.

With this conclusion I must answer Question (1) in the affirmative.

QUESTIONS 2 & 3

These questions relate to the findings of fact made by the learned trial judge and affirmed by the Court below. The learned trial judge had found-

1. *that the accident involving the plaintiff's vehicle happened before or at 6pm when it was not dark;*
2. *that the other vehicle involved in the accident together with others in a row behind it were being driven in their correct traffic line with due care and attention or with reasonable consideration for other persons, including the plaintiff, using the highway;*
3. *that there was no evidence to make such a similar finding in favour of the plaintiff.*
4. *that there was no evidence whatever to suggest that the diversion of vehicles to plaintiff's lane was the cause of the accident;*
5. *that the plaintiff's damages being claimed were not directly traceable to the nuisance.*

It is upon these findings that he dismissed plaintiff's claim in nuisance and negligence.

The Court below in affirming these findings found, per Musdapher

J.C.A. that-

"On the question of the liability for nuisance and or negligence, the respondents did not admit that their action or conduct was the cause of the accident, and there was no evidence adduced as to how the accident took place. It is clearly evident that the appellant's vehicle did not fail into any pit dug by the respondents, nor was there any evidence that the respondents' obstructed the road and thereby caused the appellant not to see the on coming vehicles. The appellant's vehicle had a head on collision with the vehicle of a third party and the appellant did not sue the driver or owner of the vehicle which primarily collided with the appellant's vehicle. The trial court was right in holding that the action of the respondent was not proved to have been the cause of the accident."

The Court observed:

"The only (matter) arising therefore for considering (sic) is whether on the facts the appellant had proved that it was the respondent who was responsible for the accident? In otherwords, could it be said that the failure of the respondent to put the warning sign that there was diversion of the road from the opposite (direction) caused the accident? The crucial factor to be proved is what caused the accident. The appellant did not lead any evidence as to how the accident occurred. He merely gave evidence, that the respondents have failed to put up a notice warning him that vehicles coming from the opposite direction have been diverted to his side of the dual carriage way."

and held-

"This in my view is not sufficient to ground an action in nuisance or negligence. There must be a factor connecting the accident with the failure to provide the notice. From the evidence it cannot be said that 'but for' the failure to put up the notice, the accident could not have occurred. I agree with the learned trial judge that the appellant has failed on the facts to prove that it was the fault of the respondent that caused the accident. The appellant and the other driver under the circumstances, must be held wholly or partially responsible for the collision that took place. There is nothing in the evidence indicating that the carelessness of the respondent in not putting up the notice caused or in

any way contributed to the accident. Accordingly, on the facts pleaded and adduced, the learned trial judge was right in dismissing the appellant's claims."

B The appellant has now in this appeal challenged the concurrent findings of the two Courts below. It is submitted that on the pleadings and evidence, a case negligence was established more so that Defendant did not dispute the fact that it did not notify motorists coming from the plaintiff's direction of any diversion on the road. It is argued as follows:

C *"The evidence on record shows that the respondent placed a sign post regarding the diversion only at one end of the road. This was not done at the other end, hence, the Appellant could not know of it until after the accident. This occurred immediately after he had just negotiated a round about."*

D It is finally submitted thus:

"As argued above, the undisputed fact that the Respondent failed to place a sign post at the side of the Appellant is enough to adjudge it liable. Why did the Respondent put the sign post at the other end? What is good for the goose is also good for the gander."

In support of his submissions learned counsel for the plaintiff relies in his brief on a passage from Charlesworth on Negligence by Percy 7th edition at page 662 which runs thus:

F "DANGERS CAUSED BY DIVERSION OF HIGHWAY"

"When a highway is diverted, protection must be provided at the point of diversion. This is in order to prevent those reasonably careful persons, using the highway, from going astray at the point of diversion, since it may be implied otherwise that the original highway can be used safely."

G and also on McClelland v. Manchester Corporation (1912) 1 KB 118 and Coleshill v. Manchester Corporation (1928) 1 KB 776.

H In my humble opinion, plaintiff's contentions are not well founded. The passage in Charlesworth relied on by him is clearly against him. It is not in dispute that the Defendant erected a notice at the point of diversion of the road, that is the Leventis Stores end. It has not been shown that the Defendant had the additional duty to instal a notice at the other end of

the road. Sir Kashim Ibrahim Road being a dual carriage way has at least two lines on each lane. With the diversion of the traffic from one half of the road to the other, there would still be two lines for traffic to use. On the authorities cited by the plaintiff in his brief, I think the Defendant fulfilled the obligation imposed on it by fixing a notice of diversion at the point of diversion. B

All that the plaintiff had succeeded in proving in this case is that there was an accident involving his vehicle. How the accident occurred was not disclosed. To succeed in a claim in negligence it is not enough to prove there was an accident; the plaintiff must prove that the accident was as a result of the negligence of the defendant. It was not shown in this instant case how the non fixing of a notice of diversion at points on the road other than the point of diversion caused the accident. Nor that such omission rendered the road dangerous to road users, including the plaintiff. D

I have considered the findings of fact made by the learned trial judge and affirmed by the Court below. I am satisfied that these findings are adequately supported by the evidence on record. I have no reason to interfere with them. I am not persuaded that the findings are perverse. On the evidence on record I agree entirely with the two courts below that plaintiff failed woefully to prove a case in nuisance and/or negligence against the Defendant. His claims were rightly dismissed. F

In view of the conclusion I have just reached I see no purpose in considering Question 4 which relates to the issue of damages.

It is for the reasons I state above that I agree with the conclusion of my learned brother Onu JSC that the appeal is lacking in merit. I too, therefore, dismiss it with N10,000.00 costs as assessed by my learned brother Onu, JSC. G

IGUH JSC

I have had the privilege of leading in draft the judgment just delivered by my learned brother, Onu, J.S.C. and I agree that this appeal is devoid of merit and ought to be dismissed. H

Without doubt, it is a public nuisance to do any act on a highway which hinders or obstructs the free passage of the public along the highway and an action will lie for any damage sustained by an individual in consequence of such obstruction of a public highway. However, a private individual has such a right of action in respect of a public nuisance if he can prove that he has sustained a particular damage other than and beyond the general inconvenience and injury suffered by the public and that the particular damage which he has sustained is direct and substantial. In other words, the conditions under which a private person may succeed in such a case are-

(1) *where he establishes a particular injury to himself as a result of the nuisance beyond that which is suffered by the rest of the public at large;*

(ii) *the particular injury or damage is direct, substantial and in consequence of the nuisance and not a mere consequential damage.*

See Fritz v. Hobson (1880) 14 Ch. D 542 at 554 - 556 and vanderpant v. Mayfair Hotel Co. Ltd (1930) 1 Ch. 138 at 153-154.

In the present case, the trial court did advert its mind to a pertinent aspect of the claim when it asked whether the particular damage alleged by the appellant was as a direct result of the nuisance in issue or too remote. It then proffered an answer thus-

"Plaintiff did not drive straightaway onto the obstruction forming the nuisance by the defendant. The obstruction on one side of the road was some distance away from West-End Roundabout. The accident happened about 15 metres from this Roundabout at the opposite direction of the obstruction The plaintiff must that either himself or the other driver or both were driving with due care and attention or with reasonable consideration on the diverted side of the road. There is no such proof nor am I satisfied with such proof, if any. In the final analysis, to my mind, the plaintiff's damages being claimed are not directly traceable to the nuisance and such damages are too remote, contrary to what is required in element (iii) aforementioned."

The court below for its own part dealt with the same issue and observed as follows -

"On the question of the liability for nuisance and or negligence, the respondents did not admit that their action or conduct was the cause of the accident, and there was no evidence adduced as to how the accident took place. It is clearly evident that the appellant's vehicle did not fall into any pit dug by the respondents, nor was there any evidence that the respondents obstructed the road and thereby caused the appellant not to see the on-coming vehicles. The appellant's vehicle had a head-on collision with the vehicle of a third party and the appellant did not sue the driver or owner of the vehicle which primarily collided with the appellant's vehicle. The trial court was right in holding that the action of the respondent was not proved to have been the cause of the accident." A little later in its judgment, the Court of Appeal added -

"The only arising, therefore, for consideration is whether on the facts the appellant had proved that it was the respondent who was responsible for the accident? In other words, could it be said that the failure of the respondent to put the warning sign that there was diversion of the road from the opposite caused the accident? The crucial factor to be proved is what caused the accident. The appellant did not lead any evidence as to how the accident occurred. He merely gave evidence, that the respondents have failed to put up a notice warning him that vehicles coming from the opposite direction had been diverted to his side of the dual carriage way. This, in my view, is not sufficient to ground an action in nuisance or negligence. There must be a factor connecting the accident with the failure to proved the notice. From the evidence, it cannot be said that "but for" the failure to put up the notice, the accident could not have occurred. I agree with the learned trial judge that the appellant has failed on the facts to prove that it was the fault of the respondent that caused the accident. The appellant and the other driver under the circumstances, must be held wholly or partially responsible for the collision that took place. There is nothing in the evidence indicating that the carelessness of the respondent in not putting up the notice caused or in any way contributed to the accident. Accordingly, on the facts pleaded and adduced, the learned trial judge was right in dismissing the appellant's claims."

A close examination of the above findings of both courts below discloses that they are fully supported by the evidence on record and I can find no reason to fault them.

In cases arising from public nuisance, the damage or injury alleged must not only be direct and substantial, it must be as a result of or in consequence of the particular nuisance alleged. In the present case, the alleged damage or injury said to have been suffered by the appellant was not proved to have been as the direct result of the respondent's alleged act of nuisance. It was not established to have any direct bearing with the nuisance alleged or to have been caused without negligence on the part of the appellant or that of the driver of the third party vehicle he collided with. On this ground alone, it seems to me that the appellant's claims must be liable to fail.

Additionally, it appears to me a correct proposition of law that when a highway is diverted, protection must be provided at the point of diversion so as to prevent persons using the highway with reasonable care from going astray at the point of diversion, since it may be implied otherwise that the original highway can be used safely. It is not in dispute that the respondent in the present case duly placed a protective warning sign post regarding the condition of the relevant road at the point of diversion. I find it difficult to identify any specific act of the respondent in the present case that occasioned the collision in issue.

On the appellant's alternative claim, it is plain to me that negligence is a question of fact, not of law, and that each case must be decided in the light of its own facts. See Alhaji Kalla v. Jarmakani Transport Ltd (1961) ALL N.L.R. 747 and Morris v. Luton Corporation (1946) 1 K.B. 114. The operation of vehicles on the highway does not give rise to strict liability nor does the fact that an accident has occurred by itself prove negligent or dangerous driving. See Simpson v. Peat (1952) 1 ALL E.R. 448. The plaintiff, to succeed, must establish negligence against the defendant. The burden of proving such negligence is on the plaintiff who alleges it and unless he is able to produce satisfactory evidence that the accident was caused by the defendant's negligence, it is the duty of the trial court to dismiss the action and enter judgment for the defendant.

In the present case, the plaintiff/appellant, as found by the trial court and affirmed by the Court of Appeal, was unable to establish any act of negligence against the defendant/respondent as a result of which the collision occurred. There is ample evidence on record in support of these findings and I cannot see my way clear to disturb them. B

It is for the above and the more detailed reasons contained in the judgment of my learned brother, Onu, J.S.C. that I, too, dismiss this appeal as totally unmeritorious. I abide by the order for costs made in the leading judgment. C

AYOOLA JSC

I agree that this appeal should be dismissed because it lacks substance. The detailed reasons for that opinion are in the judgment of Ogundare and Onu J.S.C. with which I agree. I too dismiss the appeal with N10,000.00 costs to the respondent. D

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