

SUPREME COURT OF NIGERIA
30TH APRIL, 1999, SC.166/1992
CORAM:- S. M. A. BELGORE, M. E. OGUNDARE, S. U. ONU,
O. ACHIKE, U. A. KALGO, JJSC

ALHAJI OTARU & SONS LTD APPELLANT
AND
1. AUDU IDRIS
2. JULIUS BERGER NIGERIA LIMITED) RESPONDENTS

DAMAGES - Award - Of Damages - Which was not pleaded or established - Is erroneous.

DAMAGES - Special damages - Award for loss of income - Where the appellant failed to plead and prove special damages - Award for loss of income and use of the vehicle - Is erroneous.

DAMAGES - Special damages - Strict proof - In the instant case since there was no evidence - Of the pre-accident value of the damaged vehicle - The award made by the learned trial judge - Ought to be set aside.

EVIDENCE - Negligence - Burden of proof - Falls upon the plaintiff who alleges negligence.

EVIDENCE - Proof - Of the particulars of negligence - Failure to adduce evidence - Is fatal to the appellant's case.

JUDGMENTS - Award - Of Damages - Which was not pleaded or established - Is erroneous.

JUDGMENTS - Special damages - Strict proof - In the instant case since there was no evidence - Of the pre-accident value of the damaged vehicle - The award made by the learned trial judge - Ought to be set aside.

NEGLIGENCE - Dangerous driving - Proof of - Dangerous driving ought not to be inferred.

NEGLIGENCE - Proof - Of the particulars of negligence - Failure to adduce evidence - Is fatal to the appellant's case.

TORTS - Negligence - Burden of proof - Falls upon the plaintiff who alleges negligence.

FACTS

The plaintiff/appellant instituted an action at Kwara State High Court holden in Okene claiming against the defendants/respondents jointly and severally, the sum of N66,400.00 being special and general damages for negligence. On 20th June, 1981, two vehicles were being driven along the Okene - Auchi Road, in the direction of Auchi. The first a Mercedes 911 tipper lorry belonging to the appellant was being driven by one Lamidi Lani (PW5), while the second vehicle, a Man Articulate Trailer was being driven by one Audu Idris, servant of the 2nd respondent. It was appellants case that the trailer was negligently driven along the road from behind the tipper which was being driven in the same direction to hit the tipper on the right hand side apparently in an attempt to overtake it. That after hitting the tipper which came to a halt on being hit, the trailer went several yards ahead and fell down, caught fire and got burnt.

The case went on trial and in a considered judgment, the learned trial judge found for the appellant to whom he awarded the sum of N22,000.00 for the pre-accident value of its damaged vehicle; N12,000.00 for loss of use, while disallowing the claims for cost of hiring alternative vehicle and for general damages. The respondents dissatisfied appealed to the Court of Appeal, Kaduna division which by a majority decision allowed the appeal as the appellant was found to have failed to prove negligence as required by law but was granted N12,000.00 for loss of use of his tipper for four months. The appellant has now appealed to the Supreme Court raising 15 issues but the Court considered the 3 issues raised by the respondents as adequate.

ISSUES FOR DETERMINATION

1. *Did the Plaintiff/Appellant make out a case of negligence on its pleading and in evidence in proof thereof at the trial? Or, whether there was sufficient evidence adduced by the Appellant at the trial to support a case of negligence against the Respondents as formulated in the Statement of Claim?*

2. *Whether the judgment of the Court of Appeal reversing the order by the High Court of N22,000 as the pre-accident value of the Appellant's vehicle ought to be disturbed having regard to the pleadings and evidence adduced at the trial as well as further evidence exhibits CAA and CAB admitted after judgment concerning the sale of the damaged vehicle as scrap?*

3. *Whether on the evidence at the trial, the Court of Appeal was right in upholding award for loss of income and of use especially as the particulars of the gross income and of the expenses deducted therefrom were neither pleaded nor proved.*

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

Torts - Negligence

1. I am not satisfied and I agree with learned counsel for the respondents that on the main issue which arose in this case both on the pleadings and evidence, that the appellant made out a case of negligence against the 1st respondent. In establishing its claim, it must be borne in mind constantly that the burden of proof lies with plaintiff (the appellant herein), for he who asserts must prove. See Imana v. Robinson (1979) 3-4 SC. I at 9; Odunkwe v. Administrator- General of East- Central State (1978) 1 SC.25 at 31 and Atare v. Amu (1970) 10 SC.237 at 243 - 244. What the law requires is that the burden of proof of negligence falls upon the plaintiff who alleges negligence. See Donoghue v. Stevenson (1932) A.C. 562 at 622 per Lord Macmillan; Duclaud v. Ginour & Anor. (1969) All NLR 26 at 34. (p. 861 B)

Negligence - Dangerous driving

2. Clearly therefore, it was the learned trial Judge's imagination or "pre-sumption" that the trailer "swerved to the right in panic before it brushed the right side of the Tipper." The law is trite that dangerous driving ought not to be inferred. See R. v. Tatimu 20 NLR 60. From the foregoing, it is my firm view that it would be more consistent with a need on collision while negotiating a U-turn from the right hand side of the road then a side brush. Be it noted that the appellant did not plead a side brush and a hit on the right hand side of the tipper as the point of impact - a most vital fact which ought to be pleaded but the appellant failed to so plead, is more consistent with what transpired. Thus, any evidence adduced to the contrary goes to no issue. See NIPC v. Thompson Organization (1969) NMLR 99 at 104; Uredi v. Dada (1988) 1 NWLR (Part 69) 237 at 246. (pp. 864 A/865 A)

Negligence - Proof

3. Moreover, it has not been suggested that the evidence of 5 PW that the trailer hit the tipper "on the right hand side" coming from behind was in proof of paragraph 9 of the Statement of Claim wherein it is pleaded:-

"The Plaintiff pleads that or about the 20th of June, 1981, at a point along Okene - Auchi Road, the first defendant negligently drove the said vehicle Reg. No. LAA 7641 A with great force against the plaintiff's Mercedes Benz Tipper Reg. No. KW 58 D."

It must not be overlooked that both vehicles were going along the same side of the road and there was no evidence of overtaking. Beside, no iota of evidence was adduced in proof of the particulars of negligence, or any of them pleaded in paragraph 11 of the Statement of Claim. Its failure to do so is fatal to the appellant's case and I so hold. Issue I is accordingly resolved against the appellant. (p. 865 D)

H Judgments - Award

4. With due respect to the learned trial Judge, the appellant did not plead the pre-accident value of its car and as there was no such claim before the court; neither was any iota of evidence led to establish the pre-acci-

dent value at the trial. I am therefore of the firm view that it was wrong of the trial Judge to make out a case which was not before him since what indeed was before him was a claim for N30,000.00, being the value of the vehicle for which a purchase receipt for N25,000 and the delivery note depicting N30,000.00 were tendered. It is therefore wrong in law B for the learned trial Judge to make out a case which was not before him. See Elike v. Nwankwoala (1984) 12 SC. 301 at 311 - 312, Orizu v. Anyaegbunam (1978) LRN 216 at 222. See also Overseas Construction Ltd v. Creek Enterprises Ltd (1985) 3 NWLR (Part 13) 407. C (p. 866 C)

Damages - Special damages

5. It is trite law that special damages must be proved strictly. Thus, in Dumez Nigeria Ltd. v. Patrick Nwaka Ogboli (1972) 1 All NLR 241; D (1972) 3 SC.196 at 204-205 Lewis, JSC said:

"It is axiomatic that special damages must be strictly proved So far as special damages are concerned, a trial Judge cannot make his individual assessment but must act strictly on the evidence before him which he accepts as establishing the amount to be awarded...." E

See also WAEC v. Koroye (1977) 2 SC. 45 at 54; LCC v. Unachukwu (1978) 3 SC 199 at 203-204; and F.O. Akintunde v. Chief E. A Ojeikere (1971) NMLR 91. In the case in hand, since there was no evidence of F pre-accident value of the damaged vehicle and the learned trial Judge used the figure N30,000.00 pleaded as the purchase price of the vehicle for his assessment of the pre-accident value which was not pleaded, the award he made of N22,000.00 to the appellant as the pre-accident value, G ought in law and in good sense, to be set aside. (p. 867 B)

Special damages - Award for loss of income

6. The court below having disallowed the appellant's entire claim for failing to plead and prove special damages, for negligence, I am at a loss H that the self court turned round to affirm the trial court's award for loss of income and use of the vehicle to the appellant. The Court below therefore palpably wrong when it arrived at what I regard as irrelevant

conclusions, to wit:-

" The last award made by the learned trial Judge was for the loss of income and use of the vehicle. The respondent in this claim said that he was earning N120 per day from the running of the tipper after the expenses were deducted which included payment of food money to the driver and 6 loaders. Mr. Okunnu argued that this claim had not been pleaded. I do not agree. It has been pleaded in paragraph 16 of the statement of claim and when the respondent gave evidence before the court, he described how he was earning about N120 a day from his business of carrying gravels, sand and other materials with the tipper. The learned trial Judge considered the claim because the appellant threw no challenge to the evidence adduced by the respondent"

The act of the court below is to be likened to the throwing away of the child with the water in the tub after bathing it. The grant of the N12,000 to the appellant ought therefore to be disallowed and it is accordingly disallowed by me. My answer to issue three is accordingly rendered in the negative. (p. 869 G)

NOTABLE POINTS OF INTEREST

ONUJSC

1. Proliferation of issues should be avoided in brief writing

This Court has said times without number that a proliferation of issues ought to be discouraged in the course of brief-writing by counsel. See Agu v Ikewibe (1991) 3 NWLR (part 180) 385 at 401 and Bankole v. Pelu (1991) 8 NWLR (part 211) 523. Thus, in the instant case, the submission of fifteen issues where three as postulated by the respondents would have been enough to dispose of the entire appeal, should have been a more prudent course of action to adopt. Be that as it may, since this Court has before now taken the stance that a bad, faulty or inelegant brief or one which is procedurally irregular though may attract some adverse comments from the appellate court, is still a brief and such shortcomings displayed e.g. in poorly written briefs are liable to be overlooked in this Court's quest to do substantial justice to the parties before it. See Obiora v. Osele (1989) 1 NWLR (Part 97) 279 at 300; Ojikutu v. Odeh

(1954)14 WACA 640 at 641; Akpan v. The State (1992) 6 NWLR (part 248) 439 at 457; Onyekwulu v. The State (1988) 1 NWLR (part 72) 565 at 571 and Makanjuola v. Balogun (1989) 3 NWLR (part 108) 192 at 205. (p. 856 B)

B

REPRESENTATION

Appellant absent. Not represented.

Alhaji Femi Okunnu, SAN, with him Jibo Ibrahim and N.C.O. Okafor Esq. for the Respondents.

C

CASES REFERRED TO

Finnih v. Imade (1992) 1 SCNJ 87

Orji v. Zaria Industries Ltd. (1992) 1 SCNJ 29

Agu v Ikewibe (1991) 3 NWLR (part 180) 385 at 401

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Bankole v. Pelu (1991) 8 NWLR (part 211) 523

Obiora v. Osele (1989) 1 NWLR (Part 97) 279 at 300

Ojikutu v. Odeh (1954) WACA 640 at 641

Akpan v. The State (1992) 6 NWLR (part 248) 439 at 457

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Onyekwulu v. The State (1988) 1 NWLR (part 72) 565 at 571

Faloye v. Olanyian 14 WACA 108

Imana v. Robinson (1979) 3-4 SC. I at 9

Atare v. Amu (1970) 10 SC.237 at 243 - 244

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Rahimi v. Adegunle (1959) 4 FSC 19

Donoghue v. Stevenson (1932) A. C. 562 at 622

LEAD JUDGMENT BY ONU JSC

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This appeal is sequel to the majority judgment of the Court of Appeal, Kaduna Division (Coram: Mohammed, J.C.A as he then was, Akpabio J.C.A *vis a vis* the minority judgment of Ogundare, J.C.A) which on 24th July, 1989, set aside the judgment of the Kwara State High Court (Olagunju, J. as he then was) holden in Okene dated the 4th day of May, 1987. H

The plaintiff/Appellant's claim, founded in negligence as against the Defendants/Respondents jointly and severally and as contained in

paragraph 21 of its Statement of claim was as follows:-

"21. By reasons of the above premises the plaintiff claims as per the Writ of Summons and as follows:-

SPECIAL damages

B	<u>Value of Vehicle</u>	- N30,000.00
	<u>Loss of income and use</u>	
	Income/loss of income per day at N120	- N20,000.00
	Loss of use for construction work	
	(Cost of hire of alternative Vehicle)	- N12,000.00
C	General Damages	- <u>N 4,000.00</u>
	TOTAL	- <u>N66,400.00</u>

Pleadings were ordered, filed and exchanged by the parties with the Defendants/Respondents amending their Statement of Defence. The case subsequently went to trial with the plaintiff/Appellant (herein after referred to as appellant) calling six witnesses while the Defendants/Respondents (in the rest of this judgment referred to as respondents) for their part, called five witnesses.

Prior to the commencement of trial the trial court had raised the possibility of consolidating this suit with Suit No. KWS/OKHC/ 13/82 filed by the 2nd respondent against the appellant, being an off-shoot thereof for N304,500, the same being founded on the same facts on the issue of negligence or to stay the second action pending the determination of this suit. The High Court having opted in its ruling to stay the other action and to proceed with the one in hand, it so ordered accordingly.,

The facts of this case briefly stated are as follows:-

On 20th June, 1981, two vehicles were being driven along the Okene-Auchi Road, in the direction of Auchi. The first, a Mercedes 911 tipper lorry with registration No. KWA.58 D belonging to the appellant was being driven by one Lamidi Lani (alias Lamidi Lawani) i.e. PW5, while the second vehicle, a Man Articulate Trailer with registration No. LAA.7641 A was being driven by one Audu Idris, servant of the 2nd respondent. It was appellant's case that the trailer was negligently driven along the road from behind the tipper which was being driven in the same direction to hit the tipper on the right hand side apparently in an attempt

to overtake it. That after hitting the tipper which came to a halt on being hit, the trailer went several yards ahead and fell down, caught fire and got burnt. The case went to trial and in a considered judgment, the learned trial Judge found for the appellant to whom he awarded the sum of N22,000.00 for the pre-accident value of its damaged vehicle; N12,000.00 B for loss of use, while disallowed the claims for cost of hiring alternative vehicle and for general damages.

The respondent being dissatisfied with the trial court's decision appealed to the court below which reversed it; hence the appellant's ap- C
 appeal to this Court on six grounds.

Briefs of argument including appellant's Rely Brief were exchanged by the parties in accordance with the rules of this Court. The appellant proffered fifteen issues for the determination of this Court while the re- D
 spondents for their part, equally raised three issues for determination.

In his approach to the formulation of issues for determination in this appeal, judgment therein which learned counsel for the appellant said was well considered as against the reversal verdict of the court below, learned counsel for the appellant commenced the appellant's brief by stating E
 in solemn language as follows:-

*"In view of the clear judgment of the trial court and it's unequivocal pronouncement and having regard to the confused and unsatisfactory handling of the appeal brought before it by the Court of Appeal F
 and more particularly in view of the apparent confusion of issues in the majority decision of the said Court of Appeal, the following issues seem to stand out for determination of the Supreme Court and are suggested for Court's consideration in all it (sic) ramification especially as this G
 Court is the final appellate one. The issues are..."*

Learned counsel then proceeded to submit fifteen such issues (i) - (XV) which he set out (to these will come shortly) in this judgment) and concluded his comments before arguing them as follows:-

*"The arguments will follow the line of issues as set out above as H
 enjoined by the Supreme Court in the cases of Finnih v. Imade (1992) 1 SCNJ 87 and D.O. Orji v. Zaria Industries Ltd. Anor. (1992) 1 SCNJ 29, and subsidiary issues will be considered in the course of the arguments of*

the above that are regarded as the principal issues for determination. For clarity they are tied to ground (sic) of appeals (sic) filed."

It is here necessary to comment on the approach adopted by learned counsel a follows:-

B This Court has said times without number that a proliferation of issues ought to be discouraged in the course of brief-writing by counsel. See Agu v Ikewibe (1991) 3 NWLR (part 180) 385 at 401 and Bankole v. Pelu (1991) 8 NWLR (part 211) 523.

C Thus, in the instant case, the submission of fifteen issues where three as postulated by the respondents would have been enough to dispose of the entire appeal, should have been a more prudent course of action to adopt. Be that as it may, since this Court has before now taken the stance that a bad, faulty or inelegant brief or one which is procedurally D irregular though may attract some adverse comments from the appellate court, is still a brief and such shortcomings displayed e.g. in poorly written briefs are liable to be overlooked in this Court's quest to do substantial justice to the parties before it. See Obiora v. Osele (1989) 1 NWLR (Part E 97) 279 at 300; Ojikutu v. Odeh (1954) 14 WACA 640 at 641; Akpan v. The State (1992) 6 NWLR (part 248) 439 at 457; Onyekwulu v. The State (1988) 1 NWLR (part 72) 565 at 571 and Makanjuola v. Balogun (1989) 3 NWLR (part 108) 192 at 205. In the brief before us the learned F counsel for the appellant contracted the issues broadly under three heads when he eventually argued them but as can be deciphered, its Reply brief has virtually outstripped the brief itself in volume.

Now, the issues posed by the appellant are whether:

G *(i) on the facts before the trial court about the accident negligence has been proved.*

(ii) the Court of Appeal applied extent (sic) legal principles of the law of negligence to the case in hand.

(iii) the Court of Appeal applied the correct test of proof in H connection with the negligence

(iv) the standard of proof in a case of negligence is on the balance of probabilities or beyond reasonable doubt.

(v) the Court of Appeal applied the correct standard of proof to

the case before it

(vi) *the standard of proof in this case is affected by the absence of a sketch map of the accident.*

(vii) *the Court of Appeal was right in considering a discharge in a criminal prosecution as a ground of proving the absence of negligence* B

(viii) *the alleged discharge of the first defendant/respondent in a criminal trial goes to issue in a case of claim for damages*

(ix) *the introduction of a hypothetical case is extraneous to the matter before the appeal court and whether it led to a confusion which led it to a wrong conclusion* C

(x) *there was proof of the pre-accident value of the plaintiff's vehicle in view of the data provided before the trial court*

(xi) *the case has to be on all fours with the Ubani Ukoma v. Nicol case in order for the principles used in it to apply* D

(xii) *the principle of res ipsa loquitur applied in the circumstances of this case.*

(xiii) *the Court of Appeal considered the rule in res ipsa loquitur along with negligence before coming to its decision.* E

(xiv) *a miscarriage of justice is occasioned by the overall stance of the majority judgment.*

(xv) *in the Court of Appeals decision, count (sic) is taken of the weight of evidence before the court.* F

Learned counsel for the appellants, on their behalf, while identifying three issues for determination, in an apt preview commented as follows:-

"Shorn of the unwarranted aspersion on the integrity of the Justices of the Court of Appeal who allowed the appeal against the judgment of Olagunju, J. shorn of all verbiage which featured prominently in the Appellant's Brief, the issues for determination would with respect, appear to be:" G H

1. Did the Plaintiff/Appellant make out a case of negligence on its pleading and in evidence in proof thereof at the trial? Or, whether there was sufficient evidence adduced by the Appellant at the trial to

support a case of negligence against the Respondents as formulated in the Statement of Claim?

2. Whether the judgment of the Court of Appeal reversing the order by the High Court of N22,000 as the pre-accident value of the Appellant's vehicle ought to be disturbed having regard to the pleadings and evidence adduced at the trial as well as further evidence exhibits CAA and CAB admitted after judgment concerning the sale of the damaged vehicle as scrap?

3. Whether on the evidence at the trial, the Court of Appeal was right in upholding award for loss of income and of use especially as the particulars of the gross income and of the expenses deducted therefrom were neither pleaded nor proved.

I take the firm view that a consideration of the three issues formulated by the respondents would be enough to dispose of the main points in this appeal in that by and large, these three issues overlap and amply cover what the fifteen issues contain irrespective of its (appellant's) criticism of them in its Reply Brief. I shall now proceed to consider the three issues seriatim thus:

ISSUE NO.1

The Appellant's main grouse in the argument of its learned counsel is that the learned Justices in their majority judgment erred in law and on the facts in holding that the appellant did not make out a case in negligence in the trial court. After referring us to extracts in the judgments of Mohammed, J.C.A as he then was and Akpabio J.C.A. respectively, it is submitted that in order to have an insight in to the error complained of, it is necessary to set out briefly the extent and acceptable principle of the law of NEGLIGENCE as a TORT, to wit :

That NEGLIGENCE is the omission to do something which a reasonable man would do, or doing something which a prudent and reasonable man would not do. Further, negligence consists of failure to exercise due care in the circumstances in which a duty of care exists. It was further submitted that a duty of care, namely that which is owed to persons so closely and directly affected by the act of another and who ought to be in his contemplation existed vide Donoghue v. Stevenson

(1932) AC .562 at 580-581. Such that in final analysis the tort of NEGLIGENCE in involves (i) a careless act or omission and (ii) a duty to the person injured.

Applying the principles of law enunciated above, it is contended, it can be seen that the respondents' drive was driving behind the appellant's driver. That he had a duty of care to the vehicle ahead of it to ensure that there was no careless act could affect that vehicle in front. It is further argued that he failed in the exercise of that duty of care, side-brushed the appellant's vehicle on the right side and damaged it, adding, that the hitting of the vehicle on the right side is a careless act - all of which totalled in negligence. Collision between the two vehicles, it is maintained, raised an inference of negligence which rested on the respondents. The learned Justice who read the majority judgment, it is maintained, never pondered over this part of the record but merely glossed over it by forgetting to pin-point it for close scrutiny and so failed to rest it against the respondents' account of the incident. After our attention was adverted to the evidence of witnesses for respondents and that of the appellant, it is contended that there is obvious conflict between the story the appellant told and those of the respondents, adding that 2 DW's account is entirely different from that of 3 DW because the tipper cannot cross in front of the trailer suddenly from a bush, make a U-turn and then hit the trailer on the right side. Thus, neither 2DW nor 3DW with different accounts was believed by the trial court, it was pointed out, adding that it was right to hold the 1st respondent liable for negligence and 2nd respondent vicariously liable.

The testimony of 4DW, the vehicle Inspection Officer, it is asserted, showed positive evidence of the side brush and he went on to demonstrate that if there were a head-on collision between the two vehicles, the damage to KW 58 D would be more extensive. This piece of evidence, it is further pointed out, gave the lie to the evidence of 2DW and 3DW who said that there was a collision with the trailer on the right side by a tipper which emerged from the bush on a side road by the right. It further contended that if the tipper collided with the trailer after or in the course of a U-turn, its left side would have been affected. The fore-

going evidence, it is maintained, is also buttressed by the evidence of 5DW who stated that the front part of the tipper on the right got damaged and that the accident could not have been described as a collision.

One more important point, it was further contended, is the variance between the pleadings of the respondents and their evidence before the court but outside the pleadings, namely following a comprehensive amendment particularly in paragraph 5 of their (respondents') Amended Statement of Defence alleging that the appellant's driver drove negligently without explaining how. The case of Olumuyiwa Faloye & 2 Ors. v. Abraham Olanyian & 1 Or. 14 WACA 108 was called in aid for the proposition that the nature of the accident raised a presumption and this the driver in that case failed to rebut, adding that where a thing is shown to be under the management of the defendant or his agent and where an accident in the ordinary course of events does not happen when the business is properly conducted, the accident itself if it happens raises a presumption of negligence. From the above, it is pointed out, it will be clear that the failure of the 1st respondent to manage the thing that has been shown to be under his management in such a way as not to cause an accident, raises a presumption of negligence which has not been rebutted, respondents should be found liable to the appellant. Not only that, it is stressed, it having been amply shown in the trial court that the 1st respondent was a servant of the second respondent and so the latter is vicariously liable for the negligence of the former, the reason being, it is maintained, that the 1st respondent as a servant of the 2nd respondent was driving the second respondent's vehicle No. LAA 7641 A at the time of the collision and that he was driving as such in the normal course of his employment. The case of Alhaji Rahimi v. Adegunle & 1 Or. (1959) 4 FSC 19 was cited to buttress the proposition. We were accordingly urged to uphold the finding of the trial court and to reject the stance of the court below, particularly the end of the first paragraph of page 228 of the Record herein and in the concurring judgment of Akpabio, J.C.A at page 237, first paragraph on the page 238 last paragraph.

We were finally urged to find that the trial Judge was correct in finding negligence proved by upholding its decision - the reason being

that that court made findings of fact on all issues canvassed before it and there was evidence which it accepted to support such findings. Negligence, it is concluded, is a fact on which the trial Judge made findings of fact which are matters especially reserved for the trial court while the court below is wrong to substitute its own views for those of the trial Judge who heard the case and saw the witnesses. B

I am not satisfied and I agree with learned counsel for the respondents that on the main issue which arose in this case both on the pleadings and evidence, that the appellant made out a case of negligence against the 1st respondent. In establishing its claim, it must be borne in mind constantly that the burden of proof lies with plaintiff (the appellant herein), for he who asserts must prove. See Imana v. Robinson (1979) 3-4 SC. I at 9; Odunkwe v. Administrator- General of East- Central State (1978) 1 SC.25 at 31 and Atare v. Amu (1970) 10 SC.237 at 243 - 244. The learned trial Judge was therefore, in my view, in error when he said:- C D

"I am left with no choice but to rely on the evidence of the parties which are mutually contradictory but which I must sieve in order to weave together what can be the truth as regards the cause of the accident about which neither or the parties gave any chronological and detailed account of how it happened." E

From the above extract, what the learned trial Judge was doing and he was saying so unequivocally, is that the burden of proof in this case of negligence is no both parties to discharge by sifting their evidence to seek the truth. **What the law requires is that the burden of proof of negligence falls upon the plaintiff who alleges negligence. See Donoghue v. Stevenson (1932) A. C. 562 at 622 per Lord Macmillan; Duclaud v. Ginour & Anor. (1969) All NLR 26 at 34 and Imana v. Robinson (supra). See also Anichebe v. Onyejekwe (1965) NMLR 108; Okeke v. Obidife (1965) NMLR 113 and Mercantile Bank v. Abusomwan (1986) 2 NWLR (Part 22) 270.** F G H

As pointed out in the lead judgment of Mohammed, J.C.A. as he then was, the appellant's case for negligence on the pleadings is based on paragraphs 9, 10, 11 and 12 of the Statement of Claim. Paragraph 9

alleges that the 1st respondent drove the 2nd respondent's trailer "with great fore" against the appellant's tipper lorry. Paragraph 10 simply states that the 1st respondent drove the trailer "negligently," while paragraph 11 further states that the 1st respondent in driving the vehicle Reg. No.

B LAA 7641 A:-

"(i) Failed to keep a proper look out for any other vehicle on the road

(ii) failed to keep the vehicle under proper control

(iii) failed to apply his brakes.

C

(iv) drove on the wrong side of the road

(v) drove too fast at an excessive speed

(vi) drove without reasonable care and attention

(vii) failed to stop when necessary."

D

Paragraph 12, on the other hand, pleads in the alternative the doctrine of "res ipsa loquitur." During trial and in his address, learned counsel for the appellant never raised this issue of "res ipsa loquitur," and appellant would therefore appear clearly to have abandoned it. In any case, Mohammed, J.C.A. as he then was, laid the ghost of the doctrine to rest when he observed in his judgment as follows:-

"It cannot be possible to apply the doctrine of "Res Ipsa Loquitur" because there is evidence of how the accident happened."

F

Vide Management Enterprises Ltd v. Otusanya (1987) 2 NWLR (Part 55) 179 at 185.

Apart from the two drivers and 3DW, none of those who testified was an eye-witness to the accident i.e., 1st Appellant (IPW) While IPW was told of the accident by the driver, 2PW had "no idea of the closeness of the two vehicles," this was what he said under cross-examination :-

G

"I have no idea which of the vehicles, was trying to branch in any direction as I was in my house."

H

That there was no strong evidence in support of the appellant's claim for negligence can be gleaned from the following finding by the learned trial Judge who apparently frustrated by the evidence of 3PW said:-

"However, what appears to be a simple issue for decision is com-

plicated by the inconclusive evidence of the Police who inspected the scene of the accident, took measurements and drew up sketch of the accident but who neither produced the sketch nor came out with any positive evidence of the position of the two vehicles at the time of the accident and the probable driving style of the two drivers that could yield a clue about responsibility for the accident between either of them. The evidence of the leader of the Police investigation Team, Cpl. Sumaila Audu, who testified for the plaintiff as the 3PW and was recalled by the defence for whom he also testified as 5DW was shifty, defensive and not particularly straight-forward."

The learned trial Judge continued:-

"However that may be, apart from what one may consider to be the corroborative evidence of the Police who claimed to have investigated the accident such evidence as the Police offered are (sic) insufficient to determine the crucial issue of negligence between the two drivers which was not investigated by them. Therefore, I am left with no choice but to rely on the evidence of the parties which are (sic) mutually contradictory but which I must sieve in order to weave together what can be the truth as regards the cause of the accident about which neither of the parties gave any chronological and detailed account of how it happened."

(Underlining is mine for emphasis). Even though appellant failed to tender the sketch of the scene of accident the learned trial Judge had this to say of that scene:-

"I must accept the opinion of that expert during re-examination that the collision was one of a brush, a view which is consistent with the Plaintiff's version that the Trailer ran into the Tipper from the rear and presumable swerving to the right in panic brushed the right side of the Tipper."

It is pertinent to note that the driver (5PW) said nothing as enacted above by the trial Judge. What indeed he said in his testimony is as follows:-

"On 20/6/84 as I was going towards Auchi road from Okene, there was a trailer coming behind me and it hit me on the right hand side. After the trailer hit me it swerved forward and fell off the road on the left

of the road after it had tumbled following the impart (sic) with my vehicle."

Clearly therefore, it was the learned trial Judge's imagination or "presumption" that the trailer "swerved to the right in panic before it brushed the right side of the Tipper." The law is trite that dangerous driving ought not to be inferred. See R. v. Tatimu 20 NLR 60. For as Mohammed, J.C.A (as he then was said:-

"It is pertinent to mention that none of the witnesses testified to the fact that the trailer hit the tipper from the rear. But the learned trial Judge said so in his judgment. This is what he said: "the trailer ran into the tipper from the rear and presumably swerving to the right in panic brushed the right side of the tipper." (Underlining is also mine for emphasis).

It was this scenario that the learned writer of the leading judgment, Mohammed, J. C. A. (as he then was) definitely refused to accept when he said:-

"My difficulty in agreeing with the learned trial Judge that the 1st Appellant was the driver who negligently drove the trailer and thereby causing the accident is based on the incongruous picture of the accident scene. If it is correct that the trailer was being driven behind the tipper how come it managed to hit the tipper on its right side? There is no evidence that it was about to overtake the tipper on the right, instead of on the left. And if it was not a head on collision or rear it why were the headlights of the tipper broken. A witness for the respondent, PW4, included the radiator, the bumper, the windscreen in the items that got damaged. Can all these got (sic) damaged through only a side brush?"

The question which I too will pose here is, can they? Thus, the picture which Mohammed, J. C. A (as he then was), tried to reconstruct was well thought cut and based on the findings of the trial Judge that the 2nd respondent's trailer "brushed the right hand side of the tipper," contrary to the assertion of the appellant who argued in his Brief that the majority Judges "never read and ponder over or merely glossed over" the record. It ought to be noted in this regard, that most of the parts of the tipper allegedly damaged were in front of the vehicle, and not at the right

hand side. Contrast paragraph 14(i) to (x) of the Statement of Claim at page 7 of the record. **From the foregoing, it is my firm view that it would be more consistent with a head on collision while negotiating a U-turn from the right hand side of the road then a side brush. Be it noted that the appellant did not tipper a side brush and a hit on the right hand side of the tipper as the point of impact - a most vital fact which ought to be pleaded but the appellant failed to so plead, is more consistent with what transpired. Thus, any evidence adduced to the contrary goes to no issue. See NIPC v. Thompson Organization (1969) NMLR 99 at 104; Uredi v. Dada (1988) I NWLR (Part 69) 237 at 246; Chief Abah Ogboda v. Daniel Adulugba (1971) I All NLR 68 at 72-73; Atanda v. Ajani (1989) 3 NWLR (Part 111) 511, and Olarenwaju v. Bamigboye (1987) 3 NWLR (Part 60) 353 at 359. Moreover, it has not been suggested that the evidence of 5PW that the trailer hit the tipper "on the right hand side" coming from behind was in proof of paragraph 9 of the Statement of Claim wherein it is pleaded:-**

"The Plaintiff pleads that or about the 20th of June, 1981, at a point along Okene - Auchi Road, the first defendant negligently drove the said vehicle Reg. No. LAA 7641 A with great force against the plaintiff's Mercedes Benz Tipper Reg. No. KW 58 D."

It must not be overlooked that both vehicles were going along the same side of the road and there was no evidence of overtaking. Beside, no iota of evidence was adduced in proof of the particulars of negligence, or any of them pleaded in paragraph 11 of the Statement of Claim. It's failure to do so is fatal to the appellant's case and I so hold. Issue I is accordingly resolved against the appellant.

ISSUE NO. 2.

The complaint here is whether the judgment of the court below reversing the order by the high Court of N22,000 as the pre-accident value of the Appellant's vehicle ought to be disturbed having regard to the pleadings and evidence exhibits CAA and CAB admitted after judgment concerning the sale of the damaged vehicle as scrap.

I wish to commence consideration of this issue by first advert-

ing to what the learned trial Judge said about the condition of the tipper after the accident. Said he:

"Therefore, I find as a fact that the Tipper is a complete wreck and, consequently, it cannot be restored into use by diligent mechanical repairs."

He then concluded by saying:

"In the result, I give judgment for the plaintiff in the sum of N22,000.00 for the pre-accident value of it damaged vehicle"

(Underlining above is mine for comments).

With due respect to the learned trial Judge, the appellant did not plead the pre-accident value of its car and as there was no such claim before the court; neither was any iota of evidence led to establish the pre-accident value at the trial. What in fact the appellant

claimed was the sum of N30,000.00 as the value of the vehicle vide paragraph 21 of the Statement of Claim and the evidence in proof of that claim was in form of documents tendered as exhibits 2 and 3, to wit: the invoice and the delivery note tendered by 6PW. **I am therefore of the**

firm view that it was wrong of the trial Judge to make out a case which was not before him since what indeed was before him was a claim for N30,000.00, being the value of the vehicle for which a purchase receipt for N25,000 and the delivery note depicting N30,000.00 were tendered. It is therefore wrong in law for the learned trial Judge to make out a case which was not before him.

See Elike v. Nwankwoala (1984) 12 SC. 301 at 311 - 312, Orizu v. Anyaegbunam (1978) LRN 216 at 222. See also Overseas Construction Ltd v. Creek Enterprises Ltd (1985) 3 NWLR (Part 13)

407. In further expatiation in the instant case, what was before the learned trial Judge was a claim for N30,000, being value of the vehicle for which a purchase receipt for N25,000.00 and the delivery note showing N30,000.00 were tendered. A claim for the pre-accident value was given

during the trial in the trial court. 1PW, Alhaji Ibrahim Otaru said:

"I bought the vehicle at N30,000.00. I ask the court to help me recover that amount from the defendant."

Although 1PW testified that he bought the vehicle for N30,000.00,

the invoice (Exhibit 2) shows that N25,000.00 was what was paid,. Also, although Exhibit 3 shows N30,000.00 no evidence was led to prove that the balance of N5,000 was ever paid. Be that as it may, 6PW who tendered Exhibits 2 and 3 was described by the learned trial Judge as "a very untruthful witness."

It is trite law that special damages must be proved strictly. Thus, in Dumez Nigeria Ltd. v. Patrick Nwaka Ogboli (1972) 1 All NLR 241; (1972) 3 SC.196 at 204-205 Lewis, JSC said:

"It is axiomatic that special damages must be strictly proved So far as special damages are concerned, a trial Judge cannot make his individual assessment but must act strictly on the evidence before him which he accepts as establishing the amount to be awarded...."

See also WAEC v. Koroye (1977) 2 SC. 45 at 54; LCC v. Unachukwu (1978) 3 SC 199 at 203-204; and F.O. Akintunde v. Chief E. A Ojeikere (1971) NMLR 91. In the case in hand, since there was no evidence of pre-accident value of the damaged vehicle and the learned trial Judge used the figure N30,000.00 pleaded as the purchase price of the vehicle for his assessment of the pre-accident value which was not pleaded, the award he made of N22,000.00 to the appellant as the pre-accident value, ought in law and in good sense, to be set aside. The court below (per Mohammed, J.C.A. as he then was) after setting out how the trial Judge made up his pre-accident value of the tipper conceded that 1PW's evidence being devoid of the evidence of the vehicle model, age and the mileage it had covered, was parsimonious of any helpful details about the vehicle before the accident. It is in this regard that the case of Ubani Ukoma v. Nicol (1962) 1 All NLR (Part 1) 105 relied on by the learned trial Judge is distinguishable from the case in hand in that in the learned Justice's own view:-

"In hand in the Plaintiff/Appellant adduced evidence of (a) the original value of the car; (b) the age of the car (c) the mileage it had covered and (d) the amount claimed by the Plaintiff, less depreciation.

In this case the only evidence given was of its date of purchase and value. There is no mileage it had covered before the accident or the

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pre-accident value, even estimated." (Underlining supplied by me for
emphasis).

Returning to Dumez v. Ogboli (supra), this court held that so
far as special damages are concerned, a trial Judge cannot make his own
B individual assessment but must act strictly on the evidence before him
which he accepts as establishing the amount to be awarded. Thus, in the
instant case where the appellant had failed to strictly prove the claim for
the value of his tipper that got damaged as a result of the accident, he is
not entitled to an award of damages in respect of that head of claim. In
C paragraph 7.5 at page 25 of the appellant's Brief, it was contended inter
alia that "absence of the model and the consequence of its not being any
longer available is sufficient basis for a trial Judge to make a reasonable
estimate of the value of the tipper." With utmost due respect, that on the
D authorities, is not the law. The proposition is rejected out of hand.

The matter does not end there. There is yet another fatal flaw to
appellant's case. The 4PW under cross-examination asserted that he had
"no idea of what the scrap value of the vehicle would be because there
E are specialists whose business is to buy some vehicles." During his
address on the 18th February, 1987, the appellant's counsel, Mr.
Folaranmi, said:

"We were unable, however, to give evidence of the value of the
F *scrap. I leave this to the court to determine this on principles."*

As later transpired, known to learned counsel, the scrap had long before
then been disposed of. He therefore deliberately failed to disclose this
fact before the trial High Court delivered its judgment on 14th May, 1987
and information had to be squeezed out of him on 22nd June, 1987 through
G a letter and a reply thereto (Exhibits CAB and CAA) followed by a counter-
affidavit wherein it was deposed to the effect "that when it was deterior-
ating and parts were still being pilfered from it, I had to sell it at
N2,500." The true pre-accident value, assuming N22,000.00 was genu-
H ine and correct, would be N19,500.00 less the cost of "the parts which
were still being pilfered from it" before the sale of the scrap. As it would
appear clear that it was not all the other parts given in evidence that were
damaged and evidence proffered in respect thereof goes to no issue, the

pre-accident value would naturally be greatly diminished. It therefore follows, in my view, that the learned trial Judge was in error in accepting the bulk of the evidence of 4PW and a fortiori in the conclusion he reached that "the plaintiff's tipper was totally damaged and cannot be repaired at a reasonable or affordable cost. Therefore, I find as a fact B that the Tipper is complete wreck and, consequently, it cannot be restored into use by diligent mechanical repairs. In consequence, I hold that the Plaintiff is entitled to the value of that vehicle."

In the premises, I hold that appellant failed to prove the value of its vehicle as claimed and Issue 2 is accordingly resolved against it. C

ISSUE NO.3

My consideration of this issue necessarily involves a consideration of paragraph 21 of the Statement of Claim as an item of special Damages. When in it, the appellant pleaded inter alia as to loss of income D and use as follows:-

"However, the Plaintiff did not state either in its Statement of Claim or in evidence offered on its behalf the period over which the sum of N20,000.00 claim as loss of use relates." E

he proceeded to help the appellant calculate that period for it and the sum of money derived from his arithmetical figure-juggling.

This applies with equal force to the claim for N12,400.00. However, in his evidence-in-chief, 1PW simply said:- F

"After expenses are deducted I make at least N120.00 a day from the running of the tipper."

What constitute these expenses were not pleaded and set out with particularity and any evidence given thereon goes to no issue. See Uredi v. Dada (supra) and NIPC v. Thompson Organization Ltd. (supra). G

The court below having disallowed the appellant's entire claim for failing to plead and prove special damages, for negligence, I am at a loss that the self court turned round to affirm the trial court's award for loss of income and use of the vehicle to the appellant. The Court below therefore palpably wrong when it arrived at what I regard as irrelevant conclusions, to wit:- H

" The last award made by the learned trial Judge was for the

loss of income and use of the vehicle. The respondent in this claim said that he was earning N120 per day from the running of the tipper after the expenses were deducted which included payment of food money to the driver and 6 loaders. Mr. Okunnu argued that this claim had not been pleaded. I do not agree. It has been pleaded in paragraph 16 of the statement of claim and when the respondent gave evidence before the court, he described how he was earning about N120 a day from his business of carrying gravels, sand and other materials with the tipper. The learned trial Judge considered the claim because the appellant threw no challenge to the evidence adduced by the respondent"

The act of the court below is to be likened to the throwing away of the child with the water in the tub after bathing it. The grant of the N12,000 to the appellant ought therefore to be disallowed and it is accordingly disallowed by me. My answer to issue three is accordingly rendered in the negative

The result of all I have been saying is that the appeal fails and it is accordingly dismissed with N10,000.00 costs to the respondents.

BELGORE JSC

I had the privilege of reading in draft the judgment of my learned brother, Onu, JSC., and for the reasons contained therein, I also find no merit in this appeal and I dismiss it with N10,000.00 costs to the respondents.

OGUNDARE JSC

On or about the 20th of June 1981, two vehicles, one a Mercedes Benz tipper lorry Reg. No. KW58D belonging to the plaintiff and driven by its driver, the other, a MAN diesel articulate vehicle with Registration No. LAA7641A owned by the 2nd defendant and driven by the 1st defendant (a servant of the 2nd defendant) were being driven along Okene - Auchi road. At a point on the road there was a collision between the two

vehicles resulting in the articulate vehicle being burnt. There were damages also to the tipper lorry. The plaintiff in consequence sued the two defendants claiming a total of N66,400.00 as special and general damages for negligence.

In a statement of claim the plaintiff pleaded inter-alia as follows: B

"9 The plaintiff pleads that on or about the 20th of June, 1981, at a point along Okene-Auchi Road, the first defendant negligently drove the said vehicle Reg. No. LAA7641A with great force against the plaintiff's Mercedes Benz Tipper Reg. No. KW58D, The plaintiff adds that as a consequence of the said collision the plaintiff's vehicle was badly damaged. C

10. The plaintiff avers that the first defendant drove the vehicle Reg. No. LAA7641A negligently at the material time and place and hereby pleads NEGLIGENCE on his part. D

11. The plaintiff further pleads specifically the following particulars of negligence:-

That the first defendant in driving the vehicle Reg. No. LAA7641A:- E

(i) failed to keep a proper look out for any other vehicle on the road.

(ii) failed to keep the vehicle under proper control.

(iii) failed to apply his brakes. F

(iv) drove on the wrong side of the road.

(v) drove too fast at an excessive speed.

(vi) failed to stop when necessary.

12. In the alternative the plaintiff pleads the doctrine of res ipsa loquitor and will rely on the principle at the trial to show that the very collision itself is evidence of negligence." G

In their joint amended statement of defence, the defendants pleaded as regards the issue of negligence, as hereunder:

"5. Paragraph 9, 10, 10a, 11 (i), (ii), (iii), (iv), (v), (vi), (vii), 12, 13, 14 (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), (ix), (x) of the plaintiff's statement of claim together with all particulars thereto are denied.

5a. In further answer to paragraph 9 of the statement of claim,

the defendants deny it completely and say that it was the plaintiff's driver Lamidi Lani who drove Mercedes Tipper Regd. No. KW58D negligently by diverting his vehicle suddenly to the right with the intention to stop without trafficking while he knew that the Man-Ackerman trailer driven by the 1st defendant was following him closely on the highway. The defendants further content that the negligence of the plaintiff's driver caused the accident.

5b. In further answer to paragraph 10 of the statement of claim, the defendants vehemently deny it and say that the plaintiff's vehicle was not badly damaged as :-

- i. the steering*
- ii. wheel alignment;*
- iii. springs*
- iv. wheels and tyres*
- v. suspension*
- vi. engine*
- vii. clutch;*
- viii. Gear-box*
- ix. horn*
- x. chassis*
- xi. windscreen wiper*
- xii. brake equipment*
- xiii. electrical circuit;*
- xiv. right head-lamp and*
- xv. right door and other body work which form the vehicle were not damaged and were alright.*

5c. The defendants in answer to paragraph 10a of the statement of claim deny it and say that Lamidi Lani, the driver of the plaintiff was the person who drove Mercedes Tipper Regd. No. KW58D negligently as shown in the police sketch-map which is hereby pleaded and shall be founded upon during the Hearing of this case."

They also pleaded further -

11. The defendants further aver that the plaintiff's driver Lamidi Lani negligently left his land (sic) by diverting suddenly the Tipper Regd.

No. KW58D to the left hand side of the road with intention to stop by the left hand side of the road without trafficking and knowing very well that the 1st defendant was following his vehicle behind.

11a. The defendants plead the statement of the driver of the Tipper Regd. No. KW58D as to the negligence avered in paragraph 11 of the statement of defence above and contained in the police case diary and shall be founded upon at the hearing of this suit.

12. The 1st defendants contends that the sudden diversion of plaintiff's driver Lamidi Lani with his vehicle tipper Regd. No. KW58D to the left lane caused the accident, which could not have been obviated by any ordinary care, caution and skill on the part of the 1st defendant or anybody for that matter."

At the trial of the case evidence was led by both sides and after addresses by learned counsel for the parties, the learned trial Judge, in a reserved judgment, found for the plaintiff and awarded in his favour the total sum of N34,000.00, whereof N22,000 was the pre-accident value of the plaintiff's vehicle and N12,000.00 for loss of use. The learned Judge disallowed the claims for cost of hiring alternative vehicles and for general damages. The learned Judge had found negligence proved against the 1st defendant, the 2nd defendant being vicariously liable also.

On appeal to the Court of Appeal (Kaduna Division) that Court in a split decision (Uthman Mohammed JCA (as he then was) and Akpabio JCA, Ogundere JCA dissenting) I found that plaintiff did not prove negligence and allowed the appeal, set aside the judgment of the trial High Court and dismissed plaintiff's claim on damages, the Court found that it would have disallowed the award of N22,000.00 as pre-accident value for the plaintiff's vehicle but would have allowed N12,000.00 for loss of use. The plaintiff has now appealed to this Court against the judgment of the Court below.

The plaintiff was not represented by counsel at the oral hearing of the appeal before us. Briefs however, having been filed by the parties, the appeal was taken as argued on the plaintiff's Brief. Mr. Okunnu SAN learned leading counsel for the defendants proffered oral arguments in further elucidation of the submissions in the defendants' Brief.

I have given careful consideration to the arguments proffered in the Briefs and in the oral arguments of Mr. Okunnu. The main question calling for determination in this appeal is as to whether the plaintiff proved negligence as pleaded by it in its statement of claim. Both in his Appellant's Brief and Reply Brief, the plaintiff through his learned counsel Mr. Folaranmi argued forcefully that the plaintiff had proved negligence both on the pleadings and on the evidence. Reliance was placed on the evidence of plaintiff's driver PW5. It is submitted that a driver from behind another vehicle, such as 1st defendant in this case, has a duty of care not to run into the vehicle in front in any way. It is argued that the hitting of the plaintiff's vehicle on the right hand side was a careless act on the part of the 1st defendant and this amounted to negligence. It is further argued that the mere collision between the two vehicles raised a presumption or inference of negligence and the onus rested on the 1st defendant to rebut that presumption. It is submitted that the 1st defendant failed to do this and that the learned trial Judge was, therefore, right in finding negligence prove.

For the defendants, it is contended by learned Senior Advocate that the learned trial Judge was wrong in his approach. It is submitted that the burden of proof of negligence fell upon the plaintiff who alleged negligence and it was not for the trial Judge to sift through evidence to find the truth. Learned Senior Advocate, both in his Brief and in his oral arguments, submits that negligence as pleaded in the statement of claim was not established. He observes that at the trial, the plaintiff did not rest his case on the doctrine of res ipsa loquitor, and, therefore, paragraph 12 of the statement of claim must be deemed to have been abandoned. In any event, learned Senior Advocate argues, having stated the particulars of negligence, there was no room any longer for the doctrine of res ipsa loquitor. What was required was proof of the averments in the pleadings. He relies on Management Enterprises Limited v. Otusanya H (1987) 2 NWLR 175 at 185.

The learned trial Judge in his judgment had said:

1. *"However that may be, apart from what one may consider to be the corroborative value of the evidence of the Police who claimed to*

have investigated the accident such evidence as the Police offered are insufficient to determine the crucial issue of negligence between the two drivers which was not investigated by them. Therefore, I am left with no choice but to rely on the evidence of the parties which are mutually contradictory but which I must sieve in order to weave together what can be the truth as regards the cause of the accident about which neither of the parties gave any chronological and detailed account of how it happened."

2. *"Obviously, the defendants' story that the Tipper emerged from the right side of the road and hit the Trailer in the process of making a U-turn to face the direction of Okene is not borne out by the fact that after the impact the two vehicles were facing the same direction, i. e. Auchi, or can that story be reconciled with the fact on which all the witnesses, except the second defendant's account, were unanimous that the impact with the Tipper was on the right hand side."*

3. *"I must accept the opinion of that expert during re-examination that the collision was one of a brush, a view which is consistent with the plaintiff's version that the Trailer ran into the Tipper from the rear and presumably, swerving to the right in panic brushed the right side of the Tipper."*

4. *"Therefore, I reject the story of the defence that the Tipper came out suddenly from a side road. I prefer the evidence of the plaintiff that at the time of the collision the Tipper was travelling on the main road and was being followed behind by the first defendant's trailer. Consequently, I find as a fact that the Trailer ran into the plaintiff's Tipper from the back to the right and overwhelmed by the weight of the Trailer (see the evidence of the 4DW about the relative weight of the two vehicles) the two vehicles were pulled to the left side of the road by sheer gravity where their wreckages ultimately laid. In consequence, I find evidence of negligence on the part of the first defendant, the driver of the Trailer, and as in law a master is liable for the tort committed by his servant in the course of his employment. I find the second defendant vicariously and jointly liable with the first defendant to the plaintiff for the damage done to its vehicle."*

It is necessary now for me to consider the evidence of the plaintiff's

driver, that of the expert whom the trial Judge relied on and the evidence of the 1st defendant. The plaintiff's driver is one Lamidi Lani . He testified as PW5. Giving his account of how the accident occurred, the witness testified thus:

B *"On 20/6/84, as I was going towards Auchi road from Okene, there was a trailer coming behind me and it hit me on the right hand side. After the trailer hit me it swerved forward and fell off the road on the left of the road after it had tumbled following the impact with the vehicle. The trailer caught fire and got burnt."*

C Cross-examined, he said:--

"The accident occurred at about 12 noon. I did not notice the distance between the two vehicles at the time he hit me. I did not swerve to the left when the first defendant's vehicle hit me. I do not know the number of the trailer that hit me. I was not injured in the accident."

D That is all the account of the accident given by this witness and upon which the learned trial Judge found negligence proved against the 1st defendant.

E 1st Defendant gave evidence in which he gave his own account of how the accident occurred, he testified thus:

"On 20/6/81 I left Ajaokuta going to the defendant's Quarry along Auchi road with my vehicle Ackama Trailer Tipper to collect gravel. The trailer is Reg. No. LAA7641A, 18-wheeler trailer. About five kilometers from Okene on the way to assess in the location of the Quarry. About 3 kilometers from Okene at a sloppy place a tipper lorry carrying gravel first burst out on the road in front of me carrying gravel on the right hand side. I was keeping to the right side of road. When it burst out from the right it made U-turn heading for Okene in that process the tipper hit my vehicle on the right hand side. As a result of the impact my own vehicle tumbled to the "Filling Station" on the left hand side. Half the body of the vehicle entered the "Filling station". At the time of the accident I was driving slowly. Following the impact I lost control of the vehicle. My vehicle caught fire and people came and got us out through the windscreen. I and Yakubu Idris my motor mate were inside the vehicle at the time of the accident. I sustained burns on my hands and

F

G

H

legs. My motor mate also sustained burns on his face, hand and back. He was also injured around his "private part", i. e. the public region. We were taken to the General Hospital, Lokoja. The number of the tipper that hit mine is 6-wheelers, Registration No. KW58D. It is called 911 Mercedes. I later know the name of the driver of that vehicle who is B
called Lamidi Lani."

Testifying further he said:

"The accident was sudden as the other vehicle emerged from the bush, i.e. a feeder or minor road. I was carrying gravel and cement with C
my vehicle, but the vehicle was empty at the time of the accident, the vehicle was lighter."

Cross-examined, the 1st defendant deposed:

"18-wheeler vehicle is a heavy vehicle. It is true that 6-wheeler D
vehicle is not as heavy as mine. My vehicle carries 27 tons - has capacity for 27 tons. Mercedes 911 has capacity to carry 10 tons. It is not true that a vehicle is lighter when it is speeding. I now agree that a vehicle is lighter when it is speeding. The tipper that hit me did not fall down. It E
stood on its wheels after the impact, the tipper was behind my own vehicle after the impact. I did notice the direction the vehicle 911 was facing after the impact between Okene - Auchi directions. The tipper was not in front of my vehicle. From the point of impact to the place where my vehicle fell was about 40 feet." F

Re- examined, the witness said -

"The 911 vehicle was heavier than mine at the time of the impact and that is why it did not fall following the impact."

1st defendant's motor mate at the time of the accident, Yakubu Idris also testified. He gave the following account of the accident: G

"On 20/6/81, I was travelling with the 1st defendant to carry gravel from the 2nd defendant's Quarry. We travelled in the first defendant's vehicle; a trailer. I am not literate I cannot tell the number of the vehicle. As we were approaching Olepella, one tipper lorry came H
out from a side road on the right and hit the 1st defendant's vehicle. We were going to Auchi Quarry to carry gravel. The tipper hit our own vehicle at the centre and on the right side of the road. The 1st defendant's

vehicle was travelling on the right side of the road. After the impact the 1st defendant lost control of the vehicle which fell off and caught fire on the left hand side of the road. I cannot tell how I got out of the vehicle. That must be an act of God.' I suffered burns on my face, legs and hands and back. I do not know what happened to the tipper lorry. We were later taken from the scene of the accident to the General Hospital, Okene, from where we were taken to Lokoja General Hospital. I was in the hospital for 18 months. The 2nd defendant bore the expenses."

Cross-examined, he said:

"The 911 hit the tyres of the trailer I did not see the tipper going in front of our own vehicle."

The Vehicle Inspection Officer who examined the two vehicles after the accident also testified. Gabriel Orisaji DW4 testified thus:

"I inspected the 911. Things damaged from it are: the two head lamps were broken; the rear side front door, i. e. the right side door was damaged; as also the rear side front mudguard and trafficators other parts of the vehicle are not physically damaged but I did not test the brakes."

Cross-examined, the witness deposed as follows:

"The damage to the tipper is not the type that can be sustained with head long collision. The damage does not also look like as if the tipper had run into the alternated vehicle from the side. A vehicle is lighter when it is on speed than when it is stationery or moving slowly."

Re-examined, he explained:

"If it were a head on collision the damage would be extensive affecting the radiator and other parts. It looks like a side brush."

The learned trial Judge placed reliance on the evidence of this witness in coming to his conclusion that negligence was proved against the 1st defendant.

In his lead judgment with which Akpabio JCA agreed, Uthman Mohammed JCA (as he then was) observed:

"I must say that I had encountered great difficulty in establishing, from the evidence adduced by both sides, who is to be blamed for the accident. The investigation police officer could hardly be relied upon

having given evidence on both side of the combatants. He also failed to produce the sketch map taken by him at the scene of the accident, soon after the collision. The learned trial Judge called the evidence of the investigating police officer shifty, defensive and not particularly straight forward and I believe the learned Judge is quite right in declaring him B so. With the evidence of the police investigating officer off the record what is left are the testimonies of the two drivers only, and the motor mate of the 1st appellant, being witnesses who were involved in the accident. It is always difficult to pin point the guilty with each side throwing C the mud against the other."

After holding that the doctrine of res ipsa loquitor would not apply the learned Justice of Appeal continued:

"My difficulty in agreeing with the learned trial Judge that the D 1st appellant was the driver who negligently drove the trailer and thereby causing the accident is based on the incongruous picture of the accident scene. If it is correct that the trailer was being driven behind the tipper how come it managed to hit the tipper on its right side? There is no evidence that it was about to overtake the tipper on the right, instead of E on the left. And if it was not a head on collision or near it why were the head-lights of the tipper broken. A witness for the respondent, PW4 included, the radiator, the bumper, the windscreen in the items that got damaged. Can all these get damaged through only a side brush? Assuming F I agree that it was a side brush, we are in a drought of information on how the side brush occurred."

The learned Justice of Appeal considered the picture of the scenario and was of the view that the learned trial Judge was in a similar predicament G as he. He then observed:

"It is not the judge's duty however in a negligence claim to pick and choose in finding who is to blame. I agree with Mr. Okunnu that the burden of proof is squarely on the party who claims through negligence. H I have earlier mentioned that in the statement of claim the respondent had sufficiently pleaded the act of negligence. It is indeed the duty of the respondent to prove through evidence what he had pleaded. The trial court would be in error to do it for him."

I pause here to say that I agree entirely with the learned Justice of Appeal's approach to this case. The plaintiff in its pleadings had set out the particulars of negligence, the burden is on him to prove these particulars or sufficient of them to justify a finding in its favour. See Imana v. Robinson (1979) 3- 4 SC 1 at page 9-10, the case cited by the learned Justice of Appeal

Dealing with the submission of Mr. Folaranmi, learned counsel for the plaintiff, the learned Justice of Appeal went on to say:

"Negligence is a question of fact, not law, and it is a duty on he who asserts it to prove it. In cases of accidents the test to be applied in determining who was negligent is to look for the person whose negligence substantially caused the accident by determining whether or not that person could have avoided the collision by the exercise of reasonable care. The evidence given by the respondent before the trial court was not enough to establish the proof required that it was the 1st appellant who drove the trailer negligently and thus caused the damage on the right side of the tipper. I, therefore, agree that the respondent had not proved negligence against the 1st appellant and since the 1st appellant has not been found negligent in the way he drove the trailer, the 2nd appellant could not be held vicariously liable."

I agree entirely with the view expressed above by the learned Justice of Appeal. I cannot see how on the evidence of the plaintiff's driver a finding of negligence against 1st defendant could be made, regard being had to the pleadings. The findings of the learned trial Judge were based more on conjectures than on evidence given before him. This, unfortunately, was also the approach of Ogundere JCA who wrote the minority judgment in the court below. Such approach cannot be right. I think Akpabio JCA correctly stated the law when he said:

"Finally, it must be emphasized that under our law, the mere fact that an accident occurred or even that a person died could not ipso facto make a defendant liable for negligent or dangerous driving. The particular way or ways in which he was negligent in the management and control of his vehicle must be proved before the court. (See the case of R v. Tatimu XX NLR 60.."

In view of what I have said above, I have come to the conclusion that the Court below was right in its conclusion that plaintiff failed to prove negligence. I, therefore, agree with my learned brother Onu JSC that this appeal is lacking in merit and should be dismissed.

In view of the conclusion I have now reached I do not consider it necessary to deal with the issues relating to the award of damages. Suffice it to say however, that I agree entirely with the Court below that the learned trial Judge was wrong in awarding N22,000.00 to the plaintiff as the pre-accident value of its vehicle. There was no specific claim for this item in the plaintiff's pleadings nor were facts given from which any court could have made such an award. It was just a gratuitous award made by the learned trial Judge. Strangely however, the Court below affirmed the award of N12, 000.00 for loss of use. I would have thought that for the reasons given by it is rejecting the award of N22,000.00 as pre-accident value it would have been sufficient also to reject the award for loss of use. The plaintiff did not state how many days it was claiming for loss of use. Indeed the evidence in support of that head of claim was very nebulous.

Finally, I dismiss this appeal with N10,000.00 costs to the Defendants/Respondents.

ACHIKE JSC

I have had the privilege of reading, in draft, the judgment just delivered by my learned brother, Onu, JSC. and I am in full agreement with the reasoning and conclusions therein

The main thrust in this appeal was whether the plaintiff/appellant made out a case of negligence both in its pleadings and the evidence placed before the trial court. The responsibility of establishing negligence was undoubtedly on the appellant. But it appeared that this task was not effectively discharged yet the learned trial Judge hesitated to say so. The trial Judge could not conceal the state of his dilemma. Thus after evaluating the evidence tendered on both sides. This is what he said, *inter alia*,

" I am left with no choice but to rely on the evidence of the parties which are mutually contradictory but which I must sieve in order to weave together what can be the truth as regards the cause of the accident about which neither of the parties gave any chronological and detailed account of how it happened."

The above perceived function of the trial Judge in an action for negligence is erroneous. The burden of establishing negligence is not on both parties but as earlier stated, solely on the plaintiff, the appellant herein. Where the trial Judge is satisfied that the evidence adduced by plaintiff does not go far enough in proof of negligence, then he has no responsibility to "sieve and weave together what can be the truth as regards the cause of the accident".

It is clear from the plaintiff's pleadings that the plaintiff sought to establish the negligence of the defendant by his averments in paragraph 9, 10, 11 and 12 of the Statement of Claim. These paragraphs are the typical averments that prima facie show that the defendant's act or acts were negligent or contributed in no small measure to the cause of the accident. For example, paragraphs 9 alleges that the 1st defendant drove the 2nd defendant's trailer "with great force " against the plaintiff's tipper lorry . There is however no evidence led to establish this allegation.

Testifying to the cause of the accident, this is what the driver of the tipper said, inter alia:

" On 20/6/84 as I was going towards Auchi Road from Okene, there was a trailer coming behind me and it hit me on the right hand side. After the trailer hit me it swerved forward and fell off the road on the left of the road after it had tumbled following the impact (sic) with my vehicle."

In contrast, this is what the trial Judge stated in his judgment, bearing in mind that for no good reason, the sketch of the scene of accident was not tendered:

" I must accept the opinion of that expert during re-examination that the collision was one of a brush, a view which is consistent with the plaintiff's version that the trailer ran into the tipper from the rear and

presumably swerving to the right in panic brushed the right side of the Tipper."

"Obviously, the learned trial Judge was making a presumption that the trailer swerved to the right in panic before it brushed the right side of the tipper". The above evidence of 5PW was clear and did not leave any room for the Judge's presumption as to the cause of the accident.

The respondent's version of the circumstances leading to the accident was that appellant was negotiating a U-turn from the right hand side of the road when the accident occurred. Now there was evidence that the items that got damaged on the tipper included its head-lights, radiator, the bumper, and the windscreen. Clearly, the items damaged on the tipper re more consistent that the accident arose from a near head-on collision, seeing that the parts of the tipper damaged were frontal rather than a hit or a brush on its right hand side.

Be that as it may, the appellant failed woefully to prove the particulars of negligence pleaded in paragraph 11 of the statement of claim. Of course, failure to do so is fatal to the appellant's case. The net result is that the appellant failed to establish negligence. This is enough to conclude this case because the various heads of claim for damages do not deserve my consideration where appellant has failed to establish that it was the respondent's negligence that precipitated or contributed to the accident.

The above as is I have said is enough to resolve the appeal against the appellant. Nevertheless, issue three dealing with "special damages" calls for a brief comment. This head of claim is set out under paragraph 21 of the statement of claim, being claim for loss of use/income as an item of Special Damages and is set as follows:

" Special Damages

Value of Vehicle N30,000.00

Loss of Income and Use

Income /Loss of Income per day at N120.00 N20,000.00

Loss of use for construction work

(Cost of hire of alternative vehicle N12,000.00

General Damages N4,000.00

Total = N66,000.00

The trial Judge disallowed the claim for loss of use of the vehicle and made the following remarks:

" However, the plaintiff did not state either in its statement of claim or in the evidence offered on its behalf the period over which the sum of N20,000 claimed as loss of use relates"

With regard to loss of income, even though there was no particularization in the pleadings as the basis of the 'daily take home ' of the appellant's tipper, it simply testified that the tipper made N120 a day after expenses. These expenses were not pleaded nor particularized nor was evidence given in respect thereof, though any such evidence would have been disallowed in any event as not having been pleaded. See NIPC v. Thompson Organization Ltd (1969) NMLR 99 at 104. Being a head of special damages the law enjoins the appellant to establish such claim strictly; see Oshinjinrin and ors v Alhaji Elias and ors (1970) 1 All NLR 153. Surprisingly, the claim for loss of income and use of vehicle was awarded by the lower court despite the error of failure to plead to the particularity of loss of income and use of vehicle. The lower court contended that the trial Judge allowed "the claim because the appellant (herein respondent) threw no challenge to the evidence adduced by the respondent". Surely, no court has the power to allow inadmissible evidence to be led in respect of unpleaded facts because such evidence goes to no issue. The court ought to ignore such evidence. And, in any event , an appellate court should remedy such error by expunging or ignoring such evidence. It offends the rules of pleadings for any court to act on evidence of unpleaded facts. See Etim v Ekpenyong (1975) 2 SC. 71 at 80-81. The leading judgment of Mohammed, JCA (as he then was) which allowed this head of special damages for loss of income and use of vehicle, in the circumstances stated above, must be disturbed to that extent. Thus that head of special damages wherein the appellant was granted N12,000.00 cannot be allowed to stand, the same is refused and set aside.

It is for the above and more detailed reasons contained in the leading judgment that I too, hold that the appeal fails and it is dismissed

with N10,000 costs to the respondents.

KALGO JSC

I have had the privilege of reading in draft the leading judgment B of my learned brother Onu JSC and I entirely agree with his reasoning and conclusions reached therein.

It is clear from the pleadings of the parties and the evidence adduced at the trial that the main issue in contention between the parties C was whether the respondent was negligent or not. It is common ground that there was a motor vehicle accident involving the appellant's Mercedes 911 lorry Tipper Registration No. KWA 58 D and the 2nd respondent's Man Articulate Trailer Registration No. LAA 7641 A (hereinafter referred to as tipper and trailer respectively). The 1st respondent was the D driver and employee of the 2nd respondent.

On the 20th of June, 1981, both the tipper and the trailer were being driven in the same direction along Okene-Auchi road when the accident giving rise to this action happened. As a result of the accident, E the trailer which was being driven by the 1st respondent hit the tipper on the right hand side, swerved ahead of the tipper, and fell on the left hand side of the road. It then caught fire and was completely burnt.

The appellant, as plaintiff at the trial claimed against the 1st and F 2nd respondents jointly and severally, the sum of N66,400.00 being special and general damages for negligence. In his statement of claim, paragraphs 8, 10 and 13, the appellant stated that:-

"8. The plaintiff further pleads that the 1st defendant is and G was at all material times a paid driver of the second defendant and that at the time material to this action was acting in the course of duty as the second defendant's servant.

"10. The plaintiff avers that the first defendant drove the vehicle Registration No. LAA 7641 A negligently at the material time and H place and hereby plead NEGLIGENCE on his part.

"13. The plaintiff pleads that the defendant being the owner of the vehicle Registration No. LAA 7641 A driven by the first defen-

dant with great force against the plaintiff's vehicle Reg. No. KW 58 D is vicariously liable for the act of the first defendant"

the appellant has also set out seven items of particulars of negligence against the 1st defendant/respondent in paragraph 11 of the statement of B claim.

At the end of the trial, in which both parties adduced evidence, the learned trial judge made the following finding in his judgment (page 84 of the record):-

C *"In consequence, I find evidence of defendant, the driver of the trailer and as in law a master is liable for the tort committed by his servant in the course of his employment I find the second defendant vicariously and jointly liable with the first defendant to the plaintiff for the damage done to its vehicle".*

D He then examined the evidence relating to each item of claim both special and general damages and came to the following conclusion where he said (page 93 of the record):-

E *" In the result, I give judgment for the plaintiff in the sum of N22,000.00 for the pre-accident value of its damaged vehicle and N12,000.00 for loss use. I disallow the claims for cost of hiring alternative vehicles and for general damages"*

F The respondent appealed to the Court of Appeal Kaduna Division which by a majority decision allowed the appeal as the appellant was found to have failed to prove negligence as required by law, but was granted N12,000.00 for loss of use of his tipper for four months. The appellant appealed to this Court.

G In this Court, it was argued by the learned counsel for the respondent both orally and in his brief that the appellant has failed to prove negligence on the part of the 1st respondent in causing the accident and that the principle of res ipsa loquitur does not apply in this case. The learned counsel for the respondents further argued that the question of H pre-accident value of the appellant's vehicle was not in issue at the trial and it was not pleaded by the appellant.

The appellants counsel was absent at the hearing of his appeal in this Court and since he had filed a brief, the appeal was deemed argued

on that brief in accordance with the rules of this Court.

There is no doubt that the appellant must prove negligence as pleaded in paragraph 9, 10 and 11 of the statement of claim in order to succeed in this case. There was no such evidence on the record of appeal. The testimony of the witnesses for the parties was criss-crossing and contradictory and the learned trial judge was in great pains in putting together the pieces of evidence from each side coupled with his presumptions rather than reasonable inference to come to the conclusion that there was negligence. The totality of the evidence was that there was a "side brush" between the two vehicles. But there was evidence to indicate that there was no head on collision either. Hence the finding of the learned trial judge when he said on page 83 in his judgment thus:-

"If the possibilities of a head long collision and side way thrust are eliminated I must accept the opinion of that expert during re-examination that the collision was one of a brush, a view which is consistent with the plaintiff's version that the trailer ran into the Tipper from the rear and presumably swerving to the right in panic brushed the right side of the tipper." (underlining mine)

With due respect to the learned trial judge, there was no evidence to support the finding that the tipper was hit on the rear. All the items of damage to the tipper as a result of the accident were those in the front and right side of the tipper and there is nothing to suggest that the tipper was hit on the rear.

The difficulty of the learned trial judge to find negligence in this case, was clearly evident in his judgment where after a review of the relevant evidence on negligence had this to say on page 80 of the record:-

" However that may be, apart from what one may consider to be the comparative value of the evidence of the Police who claimed to have investigated the accident such evidence as the Police offered are insufficient to determine the crucial issue of negligence between the two drivers which was not investigated by them. Therefore I am left with no choice but to rely on the evidence of the parties which are mutually contradictory but which I must sieve in order to weave together what can be the truth as regards the cause of the accident about which neither of

the parties gave any chronological and detail account of how it happened". (underlining mine)

The learned trial judge had recognized that the issue of negligence in this case is the crucial issue but that neither of the parties had given any evidence upon which it can even be properly inferred. Instead, they both gave contradictory evidence of how the accident happened and the Police who investigated the matter did not help the situation either. But unfortunately the learned trial judge did it himself by saying that he must "sieve" the evidence "in order to weave together" what he perceived to be the truth, and not what the parties told him. This he did, and on page 84 of the record said:-

"Consequently, I find as a fact that the trailer ran into the plaintiff's tipper from the back to the right and overwhelmed by the weight of the trailer (See the evidence of the DW 4 about the relative weight of the two vehicles) the two vehicles were pulled to the left side of the road by sheer gravity where their wreckages ultimately laid".

This finding, with due respect to the learned trial judge was not supported by the evidence at the trial. It was as a result of this wrong finding that the learned trial judge proceeded in his judgment on the same page to say:-

"In consequence, I find evidence of negligence on the part of the first defendant, the driver of the trailer".

Having found negligence, as above, he proceeded to examine the claim for special damages. He started with the value of the damaged vehicle. The evidence of the appellant was that he bought the tipper lorry for N30,000.00 in December, 1980 and wanted to recover the whole amount after the accident in June 1981. He offered no evidence of the model, age, mileage covered before accident, mileage per day, or how many working days in a week, and there was nothing in the pleadings to this effect. The learned trial judge on the other hand, without referring to or relying on any evidence at all, worked out what he estimated to be relevant to the appellants' claims under this head, without any supporting evidence, and awarded what he called "pre-accident value" of the vehicle. The appellant has not claimed or pleaded "pre-accident value".

This is how the learned trial judge arrived at the pre-accident value in his judgment on page 89-90 of the record:-

"On the value of the vehicle at the time of the accident, the plaintiff's Managing Director told the Court that the vehicle was being used for diverse commercial purposes and travelled at the average of 150 kilometers per day otherwise the evidence is persimonious of any helpful details about the vehicle before the accident as there is no evidence of the model, age and the mileage it had covered at the time of the accident. However, on average running figure of 150 kilometers per day given, allowing for six working day week plus two days monthly for servicing and other contingencies during which the vehicle would not have been working I estimate the monthly mileage at about 3,750 kilometers for 25 working days. On the strength of the evidence that the vehicle was bought on 11/2/80 I find that it was in use for a period of 16 months as of the 20th of June 1981 when it was damaged. This brings the approximate mileage it had travelled to about 60,000. Kilometers over 16 months usage. Given conservative use of 150 kilometers a day, I assess the life span of the vehicle at 5 years and its annual rate of depreciation of 20% which works out at N3000 x 16 and is equal to N8000. All over 60. Therefore, the pre-accident value of the plaintiff's vehicle will be N22,000 i.e. N30,000 less depreciation of N8,000. The plaintiff is entitled to that amount as the pre-accident value of his vehicle: Ubani Ukoma v. Nicol (1962) 1 AU NLR (part 1) 105". (underlining mine)

It is pertinent to observe that in all what the learned trial judge said above, the only available evidence on record is the cost of the vehicle (N30,000) and the average run of 150 kilometers per day of the vehicle. There was no evidence of how many days the vehicle ran in a week, the period for servicing, the life span of the vehicle or the percentage of its depreciation. All these were estimated and worked out by the learned trial judge on his own before he arrived at the pre-accident value. With due respect to the learned trial judge, apart from the fact that pre-accident value was not pleaded, he cannot sit down in his room or chambers to work out the figures as he has done in this judgment. This is what is regarded as an

extra judicial act which cannot be allowed to stand. A judge should not embark upon an extra-judicial act without proper evidence laid before him. See Durumin Iya v. Comm. of Police (1961) NNLR 70 at 73; Onibudo v. Akibu (1982) 7 SC at 62.

B In the Onibudo case (supra) Bello JSC (as he then was) said:-

" It needs to be emphasized that the duty of a Court is to decide between the parties on the bases of what has been demonstrated, tested, canvassed and argued in Court. It is not the duty of a Court to do cloistered justice by making an inquiry into the case outside Court even if such inquiry is limited to examination of documents which were in evidence, when the documents had not been examined in Court and their examination out of Court disclosed matters that had not been brought out and exposed to test in Court and were not such matters that, at least, must have been noticed in Court."

In the majority decision of the Court of Appeal, Mohammed JCA (as he then was) found that there was no evidence of negligence on the part of the 1st respondent which could make the 2nd respondent vicariously liable. I agree with him entirely on this. And in respect of the pre-accident value, I also agree with the Court below that the appellant has failed to prove the value of the vehicle as special damages as required by law and this head of claim must therefore fail. I am also in full agreement with Mohammed JCA (as he then was) that the case of Ubani Ukoma v. Nicol (supra) cited and relied upon by the learned trial judge in making his own assessment of the pre-accident value, could not properly apply to the facts and circumstances of this case.

G In sum, it is my respectful view, that since the appellant failed to prove negligence on the part of the 1st respondent in this case, there is nothing upon which any claim can be based. One cannot build something on nothing. It is therefore wrong for the Court below to allow the claim of N12,000.00 for loss of use to stay. It is hereby set aside. I agree with my learned brother Onu JSC in the leading judgment that this appeal must fail. I accordingly dismiss it and award N10,000.00 costs in favour of the respondents.