

SUPREME COURT OF NIGERIA

14TH APRIL, 2000. SC 20/1997

**CORAM:- A. G. KARIBI-WHYTE, I. L. KUTIGI, U. MOHAM-
MED, A. I. KATSINA-ALU, E. O. AYoola, JJSC**

MR. EMMANUEL AGBANELO PLAINTIFF/APPELLANT/
(Trading in the name and style of RESPONDENT
EPACO NIGERIA MARKETING COMPANY)

AND

UNION BANK OF NIGERIA LTD DEFENDANT/RESPONDENT/
(WARRI BRANCH) APPLICANT

BANKING - Banker and customer relationship - Duty to exercise reasonable care and skill - A bank has a duty under its contract with its customer - To exercise reasonable care and skill.

BANKING - Banker's draft - Nature of banker's draft - And the duty of an issuing bank.

BANKING - Negligence - Dishonoured draft - Where a bank dishonoured a banker's draft issued by it - An act of negligence has been committed.

COURTS - Defamation - Inference from facts - When a tribunal is urged to draw inference from facts - Such inference must be such as a reasonable person would draw - Having regard to the totality of the circumstances.

DAMAGES - Action - Breach of contract - Measure of damages - In an action for breach of contract - The measure of damages is the loss flowing naturally from the breach.

DAMAGES - Court - Assessment of damages - Nature of claim - Before a court can commence a meaningful assessment of damages - It must be sure of the nature of the claim.

DAMAGES - Principles - Guiding the award of damages in tort - Distinguished from those - Guiding the award of damages in contract.

DEFAMATION - Libel - Claim for - Proof - A claim for libel does not depend merely on oral evidence - But on inferences to be drawn from the established facts and the law.

DEFAMATION - Principles - Defamatory statement - Relevant principles for determining whether a statement is defamatory or not.

JUDGMENTS - Appeals - Court - Failure to State reasons for its conclusion - The judgment would not be set aside - Merely for failure of the trial court to state reasons.

JUDGMENTS - Conclusions - Reasons for the court's conclusions - A tribunal charged with the performance of judicial functions - Should normally state reasons for its conclusions.

JUDGMENTS - Evidence - Consideration of - What amounts to adequate consideration of the evidence in a case - Should depend on the nature of the issues raised.

NEGLIGENCE - Corporate body - Liability - Where an allegation of negligent act is made - Against a corporate body doing business through several branches - What is material is whether the negligent act alleged has been proved - And not whether the acts were done through one of the branches or another.

PLEADINGS - Admission - Bindingness of pleadings - What is admitted need not be proved - And parties are bound by their pleadings.

WORDS & PHRASES - "Damages" - How to define.

FACTS

In the High Court of (former) Bendel State holden at Warri (now in Delta State) the plaintiff/appellant sued the defendant/respondent claiming general and special damages for dishonoured cheque and damages for libel. The plaintiff, a businessman who was appointed a sole distributor of a biscuit manufacturing company was a customer of the defendant who were at all material times bankers carrying on business of banking throughout the Federal Republic of Nigeria. At all material times the defendant had one of its branches in Warri, where the plaintiff operated a current account in the name and style of EPACO (Nigeria) Marketing company. At the request of the plaintiff, the defendant sometime in April, 1986, issued a bank draft in favour of the manufacturers payable at the defendant's branch in Surulere. Upon presentation of the draft by the manufacturers for payment it was returned unpaid, endorsed "1st signature irregular". Claiming that these words endorsed on the draft were defamatory of him and that the draft was negligently issued, the plaintiff claimed damages.

The learned trial judge dismissed the claims in their entirety because he held that the claim for libel and for negligence were not proved. The learned trial judge did not give reasons for dismissing the claim for libel. With respect to the claim for negligence his reasons for dismissing the action were that the defendant as stated in the claim was the Union Bank of Nigeria Limited, (Warri Branch). Thus for the plaintiff to succeed he must prove that Union Bank of Nigeria Limited, Warri Branch was negligent. The plaintiff's appeal to the Court of Appeal was dismissed. He has further appealed to the Supreme Court. The appeal was determined on four issues.

ISSUES FOR DETERMINATION

Whether the words were in the circumstances of the case defamatory; (ii) whether the High Court and the court below were right in treating branches of the Union Bank of Nigeria Limited as separate entities and in regarding the Warri branch of the bank, rather than the bank itself, as the defendant in the case; (iii) whether the court below was right in determining whether the action properly constituted when no such issue arose either at the trial or on the appeal, and, (iv) whether the dismissal

by the High Court of the claim for negligence was rightly upheld by the court below.

HELD (Unanimously allowing the appeal in part per lead judgment of
B **AYOOLA JSC**)

Judgments - Evidence

1. What amounts to adequate consideration of the evidence in a case should depend on the nature of the issues raised. Where the facts are largely not
C in dispute, it cannot be regarded as essential part of a judgment to do more than take note of the evidence given. It is where there is conflict in the evidence on material issues of fact that the judge is expected to review and evaluate the evidence before making a finding. Where there are issues of
D of those issues and make pronouncements on them. His failure to do so may in some cases be indicative of failure of the adjudicatory process.
(p. 1272 H)

E ***Defamation - Libel***

2. It is clear that the judgment of the trial judge was deficient in regard to the claim for libel. That claim did not depend merely on the oral evidence but on inferences to be drawn from the established facts and the law. The
F judge did not express any opinion on the questions whether the words complained of were capable of defamatory imputation and, if they were, whether they were in fact defamatory of the plaintiff. The former is a question of law, the latter, one of fact. (p. 1273 C)

G ***Judgments - Court***

3. A tribunal charged with the performance of judicial functions should normally state reasons for its conclusions. This becomes more important where appeals lie from its decisions. Even without the likelihood of ap-
H peal, it makes for open and even-handed justice for reasons to be given. To decide without reasons leaves room for arbitrariness and leaves the parties in the dark as to how the decision of the tribunal is arrived at. In the context of the present case, merely to say that "from the evidence.... the

claim for libel has not been proved." In a case which is not solely on primary facts is grossly inadequate as reason for the conclusion.(p.1273 F)

Judgments - Appeal

4. The judgment would not be set aside merely for failure of the trial court to state reasons where the primary facts are not in dispute and the appellate court is in a good position as the trial court to draw inferences from the established facts and apply the law. In such case, the appellate court is in a position to determine whether the decision of the trial court is valid or not. (p. 1273 H) C

Defamation - Principles

5. It is an established principle of the law of defamation that the first step in the determination of the question whether a statement is defamatory or not is to consider what meaning the words would convey to the ordinary person. See Okolo v. Midwest Newspaper Corporation (infra) Having ascertained that, the next step is to consider the circumstances in which the words were published, and determine whether in those circumstances the reasonable person would be likely to understand them in a defamatory sense. Where the word used, taken in isolation, in their literal meaning are not defamatory, it is still open to the plaintiff to allege that inference of defamatory imputation should be made from the circumstances. The relevant principles have been sufficiently stated in cases such as Okolo v. Midwest Newspaper Corporation & Ors (1977) N. S. CC 11, and Okafor v. Ikeanyi (1979) Vol 12 N. S. CC 43 to mention but few. They need no restatement. (p. 1274 G) D E F

Courts - Defamation

6. When a tribunal is urged to draw inference from facts, such inference must be such as a reasonable person would draw having regard to the totality of the circumstances, including the ordinary course of conduct, both personal and corporate. In this case, the inference which the plaintiff invited the court to draw was both far-fetched and fanciful. The trial judge and the court below were both right in concluding that from the totality H

of the evidence, libel was not proved. (p. 1275 G)

Pleadings - Admission

7. It is trite law that what is admitted need not be proved and that parties
B are bound by their pleading. It was thus common ground that the defend-
dant was Union Bank of Nigeria Ltd and that it is an incorporated com-
pany. "Warri branch" was put, apparently, for the purpose of showing that
the defendant was carrying on business within the jurisdiction of the court.
C Both the trial judge and their Lordships of the Court of Appeal were in
error in the view they held that Union Bank of Nigeria Ltd was not the
defendant. (p. 1277 B)

Negligence - Corporate body

D 8. The acts of negligence alleged was against the defendant as an entity
and not against its branches which are merely outlets for transacting busi-
ness. Where an allegation of negligent act is made against a corporate
body, such as the defendant, doing business through several branches, it is
E inconsequential to the question of liability whether the acts were done
through one of the branches or another, what is material is whether the
negligent act alleged against the corporate body has been proved. There is
no doubt that the act of a branch is the act of the company, just as the act
F of an employee of the company done in the course of his employment makes
the company vicariously liable regardless of the branch from which he
operates. (p. 1277 D)

Banking - Negligence

G 9. By the evidence of its only witness, the defendant elected that there was
no negligence in the issue of the cheque. The witness acknowledged that.
"We (that is in the defendants' Warri branch) were embarrassed when the
draft was returned for the reason for which it was returned." Then, he
H went on to say under cross-examination:

*"The paying bank has a discretion to confirm from us (i.e. in the
defendants' Warri branch) whether or not the draft was issued by us.
The signature of the sub-manager was not regularly signed."*

In the face of this evidence, act of negligence was clearly established. It is evident that the defendant found itself hoisted on the horns of a dilemma. If it admitted that there was some irregularity in the issue of the draft, it would have committed a breach of duty to the plaintiff. If it denied that there was an irregularity in the issue of the draft, failure to pay it was a breach of duty owed to the plaintiff. Either way, it could not deny that an act of negligence had been committed. (p. 1278 B)

Banking - Banker and customer relationship

10. The defendant's duty to exercise reasonable care and skill in regard to its customer's affairs is undoubted. The law is stated thus:

"A bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its part with regard to operations within its contracts with its customers. The duty to exercise reasonable care and skill extends over the whole range of banking business within the contract with the customer. Thus the duty applies to interpreting, ascertaining and acting in accordance with the instructions of the customer."

(See Cresswell et al.: Encyclopaedia of Banking Law C. 21), Salanger United Rubber Estates Ltd v. Cradock (No. 3) (1968) 2 All ER 1073.) (p. 1278E)

Banking - Banker's draft

11. By its nature, a banker's draft is a draft drawn by a bank upon itself. It contains an undertaking to pay the amount on the draft. Quite apart from the banker-customer relationship, a bank has a duty to a person on whose request it has agreed to issue a draft to issue and honour such draft. In the discharge of that duty it must show care to ensure that the banker's draft is properly issued and honoured. (p. 1279 A)

Damages - Court

12. Before a court can commence a meaningful assessment of damages, it must be sure of the nature of the claim, that is to say, whether the claim is in contract or in tort, and, if in tort, the nature of the wrong alleged. (p. 1280 B)

Words & Phrases - Damages

13. I adopt the definition of the term "damages" contained in the Mc Gregor on Damages (16th Edition 1997) as follows (in paragraph 1):

B *"Damages are pecuniary compensation, obtainable by success in an action for a wrong which is either a tort or a branch of contract, the compensation being in the form of a lump sum awarded at the time, unconditionally and generally"* (p. 1280 C)

C **Damages - Action**

14. In an action for breach of contract, the measure of damages is the loss flowing naturally from the breach and is incurred in direct consequence of the violation (See Swiss-Nigeria Wood Industries Ltd v. Bogo (1970) 6 NSCC 235.) (p. 1280 E)

D

Damages - Principles

15. The principles guiding the award of damages in tort are different from those guiding the award of damages in contract. (See James v. Mid-Motors Nigeria Co. Ltd (1978) 11 & 12 SC 31, (1978) 11 NSCC 536.) The object of tort damages is to put the plaintiff in the position he would have been in if the tort had not been committed, whereas, the object of contract damages is to put the plaintiff in the position he would have been in the if contract had been satisfactorily performed. (p. 1280 E)

F

NOTABLE POINTS OF INTEREST

AYOOLA JSC

1. How to assess damages in the tort of negligence

G Even if it had been clear that the claim is in the tort of negligence, there may be need for a further inquiry, whether the tortious conduct found has occasioned only economic loss and, if so, if it is within the variety of tortious conduct for which the court will award compensation for economic loss.

H (p. 1280 G)

KARIBI-WHYTE JSC

2. How to construe the words alleged to be defamatory in an action for libel

Our defamation law is based on the English common law. We still rely on the principles of the English common law to govern liability. In the English case of Lewis v. Daily Telegraph Ltd. (1964) A.C. 234, Lord Reid stated the position of the law when he said;

"There is no doubt that in actions for libel the question is what the words would convey to the ordinary man. It is not one of construction in the legal sense."

After stating the position of the ordinary man and the truism that he can also read between the lines in the light of the general knowledge and experience. It was pointed out that the "sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of their natural and ordinary meaning." (p. 1289 H)

3. What a court should do where it raised an issue suo motu

It is relevant to observe these are issues which did not arise either at the trial Court or on appeal before them. It is conceded an issue of jurisdiction could be raised suo motu by the Court even on appeal. But the parties would be invited to argue such novel point of law before the Court would be entitled to express its views and come to its ruling. The Court below did not give parties an opportunity to argue the point of law. (p. 1291 E)

REPRESENTATION

Albert Akpomudje for Appellant

Okemute M. Odje (with A. B. Odiete) for the respondent.

CASES REFERRED TO

Okolo v. Midwest Newspaper Corporation (1977) NSCC 11

Salanger United Rubber Estates Ltd v. Cradock (No. 3) (1968) 2 All ER 1073.)

Swiss-Nigeria Wood Industries Ltd v. Bogo (1970) 6 NSCC 235.)

James v. Mid-Motors Nigeria Co. Ltd (1978) 11 & 12 SC 31, (1978) 11

1270 Agbanelo v. Union Bank (2000) 4 KLR Ayoola JSC
NSCC 536.)

Lewis v. Daily Telegraph Ltd. (1964) A.C. 234

Dumboe v. Idugboe (1983) 1 SCNLR. 29

Lewis v. Daily Telegraph Ltd. (1964) A.C. 234

B Egbuna v. Amalgamated Press (1967) 1 All NLR. 25

BOOKS REFERRED TO

Cresswell et al: Encyclopaedia of Banking law p. 21

C McGregor on Damages (16th ed 1997) para 1.

LEAD JUDGMENT BY AYoola JSC

This is an appeal from the decision of the Court of Appeal (Akintan, Nsofor and Ige, JJ. C. A.) dismissing the appellant's appeal from a decision D of the High Court of what was known as Bendel State. The appellant, Mr. Emmanuel Agbanelo, is referred to as "plaintiff" in this judgment. The respondent, Union Bank of Nigeria Limited, is also referred to as "the defendant" in this judgment.

E In the High Court of Bendel State (as it then was) holden at Warri (now in the Delta State), the plaintiff sued the defendant claiming as contained in the Further Amended Statement of claim which superseded his writ of summons "general and special damages for (the) dishonoured F cheque" and damages for libel. The plaintiff in paragraph 32 of the Further Amended Statement of Claim itemized the losses he suffered as loss of profit and loss of trade as distributor. However, these are not by themselves causes of action. Having regard to paragraph 29 of the Statement of Claim in which negligence was averred and paragraphs 16 and 17 in which G libel was averred, it would appear that the two causes of action in respect of which damages were claimed were defamation and negligence. Inelegantly drafted as the further amended statement of claim was, the High Court and the Court below both proceeded on the footing that the plaintiff's H claims were for damages for negligence and libel.

The facts which gave rise to the plaintiff's action were not much in dispute. The plaintiff, a businessman who was appointed a sole distributor of a biscuit manufacturing company was a customer of the defen-

dant who were at all material times bankers carrying on business of banking throughout the Federal Republic of Nigeria. At all material times the defendant had one of its branches in Warri at No. 8 Warri/Sapele Road, Warri where the plaintiff operated a current account in the name and style of EPACO (Nigeria) Marketing Company.

At the request of the plaintiff, the defendant sometime in April, 1986, issued a bank draft in favour of the manufacturers payable at the defendant's branch in Surulere. Upon presentation of the draft by the manufacturers for payment it was returned unpaid, endorsed "1st signature irregular". Claiming that these words endorsed on the draft were defamatory of him and that the draft was negligently issued, the plaintiff claimed damages.

Bazunu J. who heard the suit at the High Court, after merely rehearsing the evidence in the case and arguments of counsel came to the conclusions: In regard to the claim for libel, that from the evidence the claim for libel had not been proved; and, in regard to the claim for negligence, that the plaintiff's case against the defendant for negligence had not been proved.

Beyond stating that on the evidence the claim for libel has not been proved, the learned judge did not proffer any detailed reasons in law why the claim for libel should be dismissed. However, in regard to the claim for negligence his reasons for dismissing the action, put in a nutshell, were that the defendant was "the Union Bank Nigeria limited (Warri Branch)" and not "the Warri Bank Nigeria Limited (Surulere Branch) nor the Union Bank Nigeria Limited." The learned judge reasoned thus:

"Thus for the plaintiff to succeed, he must prove that the defendants stated in the claim was negligent. In other words that the act complained of was perpetrated by the Union Bank Nigeria Ltd Warri Branch and that act amounted to negligence on its part."

Having so reasoned he reverted to his earlier finding that:

"There is no evidence that the defendant, that is, Union Bank Nigeria Limited, Warri branch was negligent,"
and dismissed the claim.

The plaintiff's appeal to the Court of Appeal was dismissed on the

grounds: first, that the trial judge was right in the conclusion that libel had not been proved; and secondly, that in regard to the claim for negligence since there was no evidence that the Warri Branch of the bank had been negligent, the trial judge rightly dismissed the action.

B Nsofor, JCA, who delivered the leading judgment of the Court of Appeal went further to consider whether the action was properly constituted. He was of the view that because Union Bank of Nigeria Limited (Warri Branch was put as the name of the defendant, Union Bank of Nigeria Limited was not sued, and the defendant sued was not a legal person. C He held that the suit was not properly constituted. Nevertheless, he dismissed the suit. Akintan and Ige JJ. C. A. concurred.

On this further appeal four questions have arisen for determination, albeit with varying degrees of decisive importance, namely: whether D the words were in the circumstances of the case defamatory; (ii) whether the High Court and the court below were right in treating branches of the Union Bank of Nigeria Limited as separate entities and in regarding the Warri branch of the bank, rather than the bank itself, as the defendant in E the case; (iii) whether the court below was right in determining whether the action properly constituted when no such issue arose either at the trial or on the appeal, and, (iv) whether the dismissal by the High Court of the claim for negligence was rightly upheld by the court below.

F As earlier stated, the trial judge merely rehearsed the evidence in the case and concluded that the claim for libel was not established. The court below did a little better by setting out some principles of law relating to libel but, at the end of the day, without expressly stating how they have applied the principles to the facts of the case, merely concluded that the G trial judge's conclusion was correct.

Learned Counsel for the plaintiff criticized the judgment of both courts on the ground that they failed to demonstrate adequate consideration of the evidence or of the submission of counsel before the claim for H Libel was rejected.

What amounts to adequate consideration of the evidence in a case should depend on the nature of the issues raised. Where the facts are largely not in dispute, it cannot be regarded as essential

part of a judgment to do more than take note of the evidence given. It is where there is conflict in the evidence on material issues of fact that the judge is expected to review and evaluate the evidence before making a finding. Where there are issues of law or if mixed fact and law it is desirable that the judge should take note of those issues and make pronouncements on them. His failure to do so may in some cases be indicative of failure of the adjudicatory process. B

In this case, trial judge had said in regard to the claim for libel:

"Without any hesitation whatsoever, I have no difficulty in coming to the conclusion from the evidence before me that the claim for libel has not been proved." C

The Court of Appeal confirmed that opinion.

It is clear that the judgment of the trial judge was deficient in regard to the claim for libel. That claim did not depend merely on the oral evidence but on inferences to be drawn from the established facts and the law. The judge did not express any opinion on the questions whether the words complained of were capable of defamatory imputation and, if they were, whether they were in fact defamatory of the plaintiff. The former is a question of law, the latter, one of fact. Although the Court of Appeal (per Nsofor, JCA) discussed, extensively, principles of law applicable in matters such as this, at the end of the day they did not show what bearing those principles had on the case. D E F

A tribunal charged with the performance of judicial functions should normally state reasons for its conclusions. This becomes more important where appeals lie from its decisions. Even without the likelihood of appeal, it makes for open and even-handed justice for reasons to be given. To decide without reasons leaves room for arbitrariness and leaves the parties in the dark as to how the decision of the tribunal is arrived at. In the context of the present case, merely to say that "from the evidence.... the claim for libel has not been proved." In a case which is not solely on primary facts is grossly inadequate as reason for the conclusion. G H

However, the judgment would not be set aside merely for failure of the trial court to state reasons where the primary facts are not

in dispute and the appellate court is in a good position as the trial court to draw inferences from the established facts and apply the law. In such case, the appellate court is in a position to determine whether the decision of the trial court is valid or not.

B There was no question in this case of resolving conflict of evidence as far as the issue of liability for libel was concerned. The case turned on the question whether the words "1st signature irregular" endorsed on the draft carried a defamatory imputation in the circumstances in which it was made and published. Those circumstances were not in dispute. What was left for the judge was to draw inferences from the established facts.

D The real question, addressed by counsel on this appeal, is whether having regard to the contest in which the statement was made and published, defamatory imputation should have been found. Learned counsel for the plaintiff argued trenchantly, both in the appellant's brief and in the course of oral argument, that although the words complained of may not bear any libellous meaning, the way and manner in which they were written coupled with the conduct and subsequent acts of the defendant were facts from which imputation of libel could be made. It was argued that since the defendant was a single entity, the effect of a branch of the defendant writing on the draft that the 1st signature was irregular was similar to a situation where a person after he has signed on his cheque disowns his signature. It was further argued that from the totality of the defendant's acts, the inference to be drawn was that the draft did not emanate from its branch in Warri and that it was forged by the plaintiff and therefore dishonoured. Learned counsel for the defendant argued that from the facts no inference of forgery could be made.

H **It is an established principle of the law of defamation that the first step in the determination of the question whether a statement is defamatory or not is to consider what meaning the words would convey to the ordinary person. See Okolo v. Midwest Newspaper Corporation (infra) Having ascertained that, the next step is to consider the circumstances in which the words were published, and determine whether in those circumstances the reasonable per-**

son would be likely to understand them in a defamatory sense. Where the word used, taken in isolation, in their literal meaning are not defamatory, it is still open to the plaintiff to allege that inference of defamatory imputation should be made from the circumstances. The relevant principles have been sufficiently stated in cases such as Okolo v. Midwest Newspaper Corporation & Ors (1977) N. S. CC 11, and Okafor v. Ikeanyi (1979) Vol 12 N. S. CC 43 to mention but few. They need no restatement. B

The plaintiff's case at the trial was that in the context in which the words were published they were understood in their ordinary meaning to mean: "(1) The Bank draft did not emanated (sic) from the defendant, (2) Plaintiff forged the bank draft and the signature on it; (3) Plaintiff is a man of dubious character. (4) Plaintiff is a thief and wanted to steal the bank's money. (5) Plaintiff wanted to dupe the manufacturers by giving them a false Bank draft." D C

It is evident that all these imputations could only be the invention of an imagination that has been given free rein in an effort to found a cause of action. When it is alleged that defamatory meaning should be inferred beyond the literal meaning of words, there is no room for fanciful imagination. If the draft had not emanated from the defendant, or had been forged, or had been presented with intend to steal the Bank's money or, was a false bank draft, the defendant, rather than merely returning the draft would have set criminal investigation in motion, at least by referring the matter to the police. A reasonable person would consider it improbable that a draft on which one of the signatures, not declared, irregular, was of the bank's accountant, would have been regarded as false or forged, without the bank charging the co-signing accountant with complicity. **When a tribunal is urged to draw inference from facts, such inference must be such as a reasonable person would draw having regard to the totality of the circumstances, including the ordinary course of conduct, both personal and corporate. In this case, the inference which the plaintiff invited the court to draw was both far-fetched and fanciful. The trial judge and the court below were both right in concluding that from the totality of the evidence, libel was not proved.** F G H

I now turn to the question of negligence. The plaintiff's case at the trial was that the defendant was negligent because (a) the defendant's servant signed irregular signature on the draft and (b) the defendant returned the draft unpaid when it could have investigated the genuineness.

B It is not quite clear from the pleadings whether the plaintiff's case was one of breach of contract occasioned by negligence in the performance of a contract or one purely of negligence as a tort. Whichever it was, the trial judge proceeded on a totally erroneous footing that the defendant in this case was not the Union Bank of Nigeria Ltd but its Warri Branch. He

C found that Union Bank (Warri Branch) was not negligent because it complied with the "usual practice" of the Bank that "where the substantive manager was not available the Relief Manager, the accountant, and two officers sign the reverse side of a draft ..." He held that "there was no

D suggestion that the signature of the Relief Manager was forged nor that he ought not to have signed Exhibit E in the circumstance." It may well be added that he summarized the plaintiff's case thus:

"The grouse of the plaintiff as revealed by the evidence is against

E *the Union Bank Surulere branch for failing to act in accordance with banking practice or Central Bank directives as averred in paragraph 13 of the further amended statement of claim by endorsing Exhibit E "1st signature irregular."*

F In the result, he held that since the allegation of negligence was against Surulere branch, whereas Warri branch was sued, liability against Warri branch had not been established.

The court of Appeal endorsed this view. Nsofor JCA, who delivered the leading judgment, went out of his way to embark on an extensive

G discourse of what juridical personality consists. On an assumption that the defendant in the case was "Union Bank of Nigeria Limited (Warri Branch)", he held that Union Bank of Nigeria Limited (Warri branch)" was not a legal person and could not be sued.

H There is no need to follow their Lordships of the Court of Appeal into error by considering question of the constitution of the suit. The issues of constitution of the suit and of legal personality did not arise either at the trial or on the appeal before them. In paragraph 2 of the Amended

Statement of Claim the plaintiff averred:

"The defendant is a Company incorporated under the Companies Decree of 1968 and carries on business of banking throughout the Federal Republic of Nigeria and has one of its branches in Warri within the jurisdiction of this Honourable Court," (emphasis mine) B

This was admitted in paragraph 2 of the statement of Defence. **It is trite law that what is admitted need not be proved and that parties are bound by their pleading. It was thus common ground that the defendant was Union Bank of Nigeria Ltd and that it is an incorporated company. "Warri branch" was put, apparently, for the purpose of showing that the defendant was carrying on business within the jurisdiction of the court.** C

Both the trial judge and their Lordships of the Court of Appeal were in error in the view they held that Union Bank of Nigeria Ltd was not the defendant. D

The acts of negligence alleged was against the defendant as an entity and not against its branches which are merely outlets for transacting business. Where an allegation of negligent act is made against a corporate body, such as the defendant, doing business through several branches, it is inconsequential to the question of liability whether the acts were done through one of the branches or another, what is material is whether the negligent act alleged against the corporate body has been proved. There is no doubt that the act of a branch is the act of the company, just as the act of an employee of the company done in the course of his employment makes the company vicariously liable regardless of the branch from which he operates. E F G

Regarding a branch as a separate entity from the corporate body is a fundamental flaw in the reasoning of the trial judge and of the Court of Appeal. However, the trial judge went further to hold that there was no negligence in the steps taken by the defendant in its Warri Branch. The negligent act alleged, as was stated in paragraph 29 of the Further Amended Statement Claim, was that the defendant issued a draft with an irregular signature or that it dishonoured its own draft without taking proper steps H

to have its authenticity confirmed. It was either (i) that the defendant by the act of its officers in Warri branch was negligent in the issue of the draft or (ii) it was negligent by the act of its officers in Surulere branch by dishonouring it.

B By the evidence of its only witness, the defendant elected that there was no negligence in the issue of the cheque. The witness acknowledged that. "We (that is in the defendants' Warri branch) were embarrassed when the draft was returned for the reason for which it was returned." Then, he went on to say under cross-examination:

C *"The paying bank has a discretion to confirm from us (i.e in the defendants' Warri branch) whether or not the draft was issued by us. The signature of the sub-manager was not regularly signed."*

In the face of this evidence, act of negligence was clearly established.

D It is evident that the defendant found itself hoisted on the horns of a dilemma. If it admitted that there was some irregularity in the issue of the draft, it would have committed a breach of duty to the plaintiff. If it denied that there was an irregularity in the issue of the draft, failure to pay it was a breach of duty owed to the plaintiff. Either way, it could not deny that an act of negligence had been committed.

The defendant's duty to exercise reasonable care and skill in regard to its customer's affairs is undoubted. The law is stated thus:

F *"A bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its part with regard to operations within its contracts with its customers. The duty to exercise reasonable care and skill extends over the whole range of banking business within the contract with the customer. Thus the duty applies to interpreting, ascertaining and acting in accordance with the instructions of the customer."*

G (See Cresswell et al.: Encyclopaedia of Banking Law C. 21), Salanger United Rubber Estates Ltd v. Cradock (No. 3) (1968) 2 All ER 1073.)

H In this case, the plaintiff was a customer of the defendant. In the ordinary course of business he requests for Bank drafts with cheques drawn on the current account which he operated with the defendant. The transaction which led to this action was one such request. It is evident from these

facts, not seriously disputed, that the defendant owed a duty to the plaintiff to carry out his instructions to issue a draft which would be honoured, and to honour a draft properly issued by the defendant at his request. **By its nature, a banker's draft is a draft drawn by a bank upon itself. It contains an undertaking to pay the amount on the draft. Quite apart from the banker-customer relationship, a bank has a duty to a person on whose request it has agreed to issue a draft to issue and honour such draft. In the discharge of that duty it must show care to ensure that the banker's draft is properly issued and honoured.**

From the facts which have been narrated, it is clear that the defendant was in breach of the duty of reasonable care and skill it owed to the plaintiff. It is surprising that the defendant which was itself embarrassed by its own default, nevertheless, continued to deny that it had failed to show sufficient care and skill as would be reasonably be expected of it. The trial court should have so found. The court below was in error in affirming the decision of the trial court.

What, then, is the consequence that should follow from the finding, now made, of absence of sufficient care and skill? There is considerable confusion in this aspect of the case. The plaintiff in paragraph 29 of the Further Amended Statement of Claim averred acts of negligence whereby the defendant "breached defendant (sic) contractual duty to the plaintiff as a customer of the bank." The trial judge (at page 62 of the record) was of the view that:

"The case of the plaintiff was that the defendant (Union Bank, Warri Branch) was negligent because the Union Bank, Surulere branch returned the draft unpaid with the endorsement '1st Signature irregular.'" (Emphasis mine)

The Court of Appeal (per Nsofor. JCA) (at page 111 of the record), for their part, stated that:

"The heart and soul of the issue now being argued, is the alleged negligence of the respondent in the making of the bank draft. (Exhibit E)," (Emphasis mine)

In his appellant's brief in the court below, the learned counsel for the plaintiff referred to the claim as a "claim for breach of contract arising

for (sic: from) the negligence of the defendant." (See paragraph 39 of the record)

There was some degree of vacillation on the plaintiff's part. The plaintiff would seem to have vacillated between a claim based on breach of contract occasioned by a negligent performance of the contract and a claim in negligence as a tort. The trial court and the Court of Appeal were themselves unable to agree as to what formed the basis of the claim.

Before a court can commence a meaningful assessment of damages, it must be sure of the nature of the claim, that is to say, whether the claim is in contract or in tort, and, if in tort, the nature of the wrong alleged. I adopt the definition of the term "damages" contained in the *Mc Gregor on Damages* (16th Edition 1997) as follows (in paragraph 1):

"Damages are pecuniary compensation, obtainable by success in an action for a wrong which is either a tort or a branch of contract, the compensation being in the form of a lump sum awarded at the time, unconditionally and generally"

In an action for breach of contract, the measure of damages in the loss flowing naturally from the breach and is incurred in direct consequence of the violation (See Swiss-Nigeria Wood Industries Ltd v. Bogo (1970) 6 NSCC 235.) The principles guiding the award of damages in tort are different from those guiding the award of damages in contract. (See James v. Mid-Motors Nigeria Co. Ltd (1978) 11 & 12 SC 31, (1978) 11 NSCC 536.) The object of tort damages is to put the plaintiff in the position he would have been in if the tort had not been committed, whereas, the object of contract damages is to put the plaintiff in the position he would have been in if the contract had been satisfactorily performed.

Even if it had been clear that the claim is in the tort of negligence, there may be need for a further inquiry, whether the tortious conduct found has occasioned only economic loss and, if so, if it is within the variety of tortious conduct for which the court will award compensation for economic loss.

The upshot of what has been said is that, despite an initial incli-

nation to remit this aspect of the case to the High Court for assessment of damages, it is better to remit the issue of compensation arising from the negligent conduct found to the High Court for it to deal with the question of damages after ascertaining the nature of the claim.

In the result, for the reasons which I have given I would dismiss B the appeal in regard to the claim for libel. I would allow it in regard to the rest of the plaintiff's claim and set aside the judgment of the High Court dismissing that aspect of his claim and that of the Court of Appeal confirming it. I order, upon the finding, now made, that the defendant acted C without due care, that this case be remitted to the High Court for the issues (i) whether the damages claimed by the plaintiff is recoverable and (ii) if it is, the quantum of such damages, to be determined after ascertaining the exact nature of the plaintiff's claim.

Each party should bear his (or its) costs of the appeal. D

KARIBI-WHYTE JSC

I have read in draft the leading judgment in this appeal of my E learned brother E. O. Ayoola, JSC. I agree with his conclusion and reasoning. My contribution to the much fuller judgment is limited to the determination of the liability of the Defendant for libel and negligence in the acts of the Defendant Bank in the issuance and payment of the Bank F Draft subject matter of this action.

This action is by the Plaintiff/Appellant, against the Defendant/ Respondent in the Warri High Court, claiming general and special damages for dishonoured cheque and damages for libel. The salient aspects of the facts which resulted in Plaintiff bringing this action are not really in G dispute. Plaintiff, a businessman, and a sole distributor of a biscuit manufacturing Company. (i.e. Temitope Bakeries and Catering Services Ltd) was a Customer of the Defendant Bank. Defendant Bank was at all times material to the facts of this case, carrying on the business of banking. H They had branches at No. 8 Warri/Sapele Road, Warri, where Plaintiff opened and operated a current account in his trade name of EPACO (Nigeria) Marketing Company.

Plaintiff applied to the Defendant sometime in April, 1986 for the issuance of Bank Draft in favour of the Biscuit manufacturing Company, payable at the Defendants Branch in Suru-Lere.

The Defendant Bank in compliance with Plaintiff's instructions issued the bank draft to Temitope Bakeries and Catering Services Ltd. Upon presentation by Temitope Bakeries and Catering Services Ltd. for payment, the bank draft was returned to the Company with the endorsement "1st signature irregular." The Defendant Bank did not honour payment of the draft.

Plaintiff thereupon has brought this action claiming damages that the words endorsed on the draft were defamatory of him and that the draft was negligently issued by the Defendant. In the High Court, the trial Judge dismissed the claims in their entirety because he held the claim for libel and for negligence were not proved.

It is important to observe that the learned trial Judge did not give reasons for dismissing the claim for libel. With respect to the claim for negligence his reasoning was concisely that

"The Defendant was the Union Bank of Nigeria Limited, (Warri Branch) and not Warri Bank Nigeria Limited (Suru-Lere Branch) nor the Union Bank Nigeria Limited."

In his own words, he held;

"Thus for the Plaintiff to succeed, he must prove that the defendant as stated in the claim was negligent. In other words that the act complained of was perpetrated by the Union Bank of Nigeria Ltd. Warri Branch and that that act amounted to negligence on its part."

Plaintiff appealed to the Court of Appeal. The Court of Appeal also endorsed the dismissal of the appeal on the grounds that the trial Judge was right in his conclusion that the alleged libel had not been prove, and that the claim for negligence was rightly dismissed because there was no evidence that the Warri Branch of the Defendant bank had been negligent. In the leading judgment of the Court below, Nsofor, JCA, who wrote the judgment raised the issue whether the action was properly constituted. He held that the action was against Union Bank of Nigeria Ltd. (Warri Branch) and not Union Bank of Nigeria Limited; the latter was not sued and the

defendant sued was not a legal person. Accordingly the suit was not properly constituted. He dismissed the suit. Akintan and Ige JJCA agreed.

Plaintiff has appealed against the judgment of the Court of Appeal. The following grounds of appeal have been filed against the judgment of the Court.

B

"GROUNDS OF APPEAL

(1) The learned Justices of the Court of Appeal erred in law and on the facts in affirming the findings of the Trial Judge that Appellant did not prove the claim for libel when the Trial Judge did not state any reason for coming to that conclusion and thereby occasioned substantial mis-
carriage of justices.

C

PARTICULARS OF ERROR

(a) From the evidence before the trial Court the word written on the Bank Draft "1st signature irregular" and the subsequent act of returning the draft to a third party for onward delivery to the Appellant who has no power to correct the irregular signature by the very nature of what a Bank draft is, were all capable in law of drawing an inference that the Bank draft did not emanate from the Respondent and/or that Appellant forged the Bank draft.

D

(b) From the nature of a Bank draft being an instrument or the Respondent itself, all that is required before payment, is for the paying Bank to make sure that the draft actually emanated from the issuing Bank. By not confirming from the issuing Bank before returning the draft to the Company the only possible inference that could be drawn is that the draft was not issued from Warri Branch of the Respondent.

F

(c) The inference that the paying Bank was convinced beyond doubt that the draft did not issue from the Warri Branch of the Defendant is further strengthened by the fact despite all other additional precaution allegedly take the Warri Branch of the Defendant to ensure payment the draft was nonetheless returned unpaid even though Respondent's Branch at Surulere knew that the defect at all can only be corrected by the Warri Branch of respondent and not the Appellant.

G

H

FURTHER PARTICULARS

(a) The Justices of the Court of Appeal like the Trial Court did not prop-

erly evaluate the evidence led on the issue vis-a-vis the principle of law of libel and slandder.

(b) The Justices of the Court of Appeal accepted the Trial Judge's finding on the issue as flawless when there was no basis to come to that conclusion from the judgment of the Trial Court.

2. The Learned Justices of the Court of Appeal misdirected themselves in law in holding that the Respondent sued is not a juristic person and thereby came to a wrong decision

PARTICULARS OF ERROR

(a) This finding by the Court of Appeal was raised suo motu as the same was not covered by any of the grounds of Appeal filed before the Court.

(b) The Respondent did not Cross-Appeal to raise the issue since it is the Respondent that can raise the issue of jurisdiction to defeat the claim of Appellant.

(c) From paragraph 2 of the further amended statement of claim the Appellant pleaded that the Respondent is a Company incorporated under the Companies Decree which said paragraph was admitted by the Respondent in paragraph 2 of the statement of defence.

(d) The evidence led during the trial based on the pleadings also showed that the Respondent sued as accepted by both parties to the suit is a juristic person.

(e) The decision of the Trial Judge against which the appeal was filed did not hold that the Respondent sued is not a juristic person.

(f) Counsel to the Respondent did not also put forward argument to the effect that Respondent sued is not a juristic person both in his brief in the Court of Appeal and his argument at the trial Court.

(g) From the state of the pleadings and evidence led in support it is beyond doubt that the Respondent sued is a juristic person as accepted by Respondent to the UNION BANK NIGERIA LIMITED

(h) The word Warri Branch is only descriptive of where the transaction took place the same having been written the bracket after the legal entity that was sued.

(i) The act of the Branch of the Respondent sued binds the Respondent.

3. The Learned Trial Justices of the Court of Appeal erred in law in not

awarding damages for negligence in favour of the Appellant based on the unchallenged evidence of Appellant.

4. The Justices of the Court of Appeal erred in law in not giving any decision on the several issues raise by the Appellant arising from the grounds of Appeal filed.

B

PARTICULARS OF ERROR

(a) The Court did not resolve the issue whether or not the act of the Branches of a Bank are binding on the Bank or that the individual Branches are to be held liable for such negligent acts as contended by the Respondent in the brief of argument to support the judgment of the trial court.

C

(b) The lower Court refused to resolve the issue as to which the Branches of the Bank, Warri or Surulere could be held liable for negligence in the special circumstances of this case particularly when the commission for the transaction was paid to Warri Branch of the Bank.

D

(c) From the evidence led both the trial Court of Appeal refused to make any pronouncement on the Banking practice of confirming from the issuing Branch when a signature is irregular to be mandatory or obligatory as contended respectively by the parties during the trial.

E

5. The judgment is against the weight of evidence."

Learned Counsel to the Appellant has formulated five issues as arising from the grounds of appeal for determination in this appeal.

F

"ISSUES ARISING FOR DETERMINATION

1. Did Court of Appeal correctly look at the complaint of the Appellant from his grounds of Appeal to wit; that the learned trial Judge did give any reason in the judgment when the dismissed Appellant's claim for libel?

G

2. Having regard to peculiar fact of this case did the Appellant prove his claim for libel?

3. Was the Court of Appeal right to have decided the issue of jurisdiction suo-motu when there was no appeal on the issue and no opportunity was given to the parties to properly address the Court on same.

H

4. It is correct as found by the learned Justices of the Court of Appeal that the Defendant sued is not a juristic person having regard to the state

of the pleadings of the parties and the fact that it was not made an issue for determination at the Lower Court.

5. Did Appellant prove that Respondent was liable in damages for negligence and the Lower Court give any decision on several issues raised by Appellant which would have enable the Court come to a right decision."

On his part, Respondent formulated three issues for determination.

"ISSUES FOR DETERMINATION

The issues arising for determination of this appeal are as follows:

1. Whether from the evidence before the trial Court, the Honourable Court of Appeal was right in dismissing Plaintiff's claim for libel
2. Whether from the evidence before the trial Court, the Honourable Court of Appeal was right in dismissing Plaintiff's claim for negligence.
3. Whether the dismissal of Plaintiff's claim in its entirety by the Honourable Court of Appeal was justified or right."

The issues may be concisely formulated as follows -

- (i) Whether the words in the endorsement of the bank draft were in the circumstances of the case defamatory.
- (ii) Whether the High Court and the Court below were right in treating the branches of the Union Bank of Nigeria Ltd. as separate entities and in regarding the Warri Branch of the Bank, rather than the bank itself as the defendant in the case.
- (iii) Whether the Court below was right in determining whether the action was property constituted when no such issue arose either at the trial or on appeal.
- (iv) Whether the dismissal by the High Court of the claim for negligence was rightly upheld by the Court below."

In considering the contentions of counsel in this case, I wish to be guided by the formulation of the issues for determination. However, I think it is helpful to begin with a consideration of the criticism of the judgments of the Court below by learned Counsel to the Appellant. In his brief of argument and in his oral expatiation thereof learned Counsel contended that the two judgments failed to demonstrate adequate consideration of the evidence or of the submissions of counsel in rejecting the claim for libel.

I refer to the judgments of the courts below criticized where the trial Judge had dismissed the claim for libel. All he said before doing so was as follows -

"Without any hesitation whatsoever, I have no difficulty in coming to the conclusion from the evidence before me that the claim for libel has not been proved." (See p. 62 lines 21-23 Record of proceedings). B

This opinion was confirmed by the Court below. (See p. 95 lines 10-13). It seems to me obvious from the above dictum of the trial Judge that he did not demonstrate how easily he came to his conclusion that there was no evidence to establish the claim for libel. There is no doubt that the claim for libel being founded on issues of facts and law, did not depend merely on the oral evidence and the words alleged to be defamatory, but also on inferences which could be drawn from the facts established and the law. C D

Conspicuously absent and lacking in the judgment of the trial Judge were expressions of opinion on the questions whether the words complained of were capable of defamatory meaning and if they were whether they were defamatory of the Plaintiff or not. It is however, fair to observe that the judgment of the Court below contains extensive discussions of applicable principles of law. E

Learned Counsel to the Appellant has criticized the judgments for failing to demonstrate adequate consideration of the evidence. F

This is a sweeping generalization in terms of consideration of the facts of the case. It is well settled that what amounts to adequate consideration of the evidence in a case would necessarily depend on the facts established and the nature of the issues raised. Of course where the facts are not in dispute or substantially agreed, there will be no need for the resolution of conflicts and evaluation of facts do not arise. It is an elementary and fundamental principle of the law that what is admitted or not disputed is not subject matter of proof. It is only where there is conflicting evidence on material issues of fact is the Judge required and expected to review such facts and evaluate the evidence for their resolution before making specific findings thereto. G H

Also, where the issues involved are those of law or of mixed facts

and law, the Judge is expected to take note of such issues and make pronouncements on them. A failure to advert to these salient and pertinent principles of law is capable of resulting in a miscarriage of justice in the process of adjudication.

B The strength of the strictures against the judgments of the Courts below lie in the criticism that they have arrived at conclusions rejecting the claim without giving reasons. It is an elementary and essential ingredient of the judicial function that reasons are to be given for decisions. It is the more important where appeals lie from the decisions. In any case the reasons for decisions enable the determination on appeal whether the decision was merely intuitive and arbitrary or whether it is consistent with established applicable principles. If Judgments were to be delivered without supporting reasons, it will be an invitation to arbitrariness, a rule of merely tossing the coin and likelihood to result in juridical anarchy. However, a judgment will not be set aside merely because the reasons given were bad if the judgment itself is right.

I shall now consider the issues for determination in this appeal.

E Issue 1 is whether the words complained of in the endorsement of the bank draft were in the circumstances of the case defamatory.

The offending endorsement claimed to be defamatory of the Plaintiff are the words "1st signature irregular" which were in the circumstances made and published to Temitope Bakeries and Catering services Ltd., the beneficiary of the draft. The circumstances are not in dispute. There was no question of resolving conflicting evidence as there was none. The facts having been established the trial Judge was left to draw the appropriate inferences. The real question to which Counsel addressed us in this appeal is whether having regard to the context and circumstances in which the endorsement was made and published, the trial Judge should have found defamatory imputation?

H It was the contention of learned counsel to the Appellant that even though the words complained of may not ordinarily bear any defamatory connotation, the way and manner in which they were written, coupled with the conduct and acts of the defendant thereafter were facts from which libellous imputation could be inferred. It was argued that since the defen-

dant was a single entity the effect of one of its branches writing on the draft that the "1st signature was irregular" was similar to a situation where a person disowns his own signature after signing.

It was also submitted that from the totality of the acts of the defendant, the inference to be drawn was not that the draft did not emanate from its branch in Warri, and that it was forged by Plaintiff/Appellant and therefore dishonoured. It was the contention of the Defendant/Respondent that forgery could not be inferred from the endorsement and circumstances surrounding it.

In establishing liability in an action for defamation, it is the established principle of law that the question whether a statement is defamatory or not is to consider what the meaning of the words would convey to the ordinary person - See Okolo v. Midwest Newspaper Corporation. (1977) NSCC. 11 - See Dumboe v. Idugboe (1983) 1 SCNLR. 29.

The next consideration is the circumstances in which the words were published, and whether in those circumstances a reasonable person would be likely to understand them in a defamatory sense. Where the words or expression used are in their literal meaning are not capable of defamatory meaning, Plaintiff may still so allege that defamatory inference should be made from the circumstances. - See Okolo v. Midwest Newspaper Corporation (1977) NSCC 11; Egbuna v. Amalgamated Press (1967) 1 All NLR. 25

The Plaintiffs case before the trial Judge was that the endorsement in their ordinary meaning was capable of various defamatory interpretations. The following were suggested

- "(1) the Bank draft did not emanated (sic) from the defendant.*
- (2) Plaintiff forged the bank draft and the signature on it*
- (3) Plaintiff is a man of dubious character;*
- (4) Plaintiff is a thief and wanted to steal the bank's money*
- (5) Plaintiff wanted to dupe the manufacturers by giving them a false Bank Draft"*

The above imputations suggested by the plaintiff as inferable from the endorsement on the bank draft in the circumstances of the case hardly represent the legal position. Our defamation law is based on the English

common law. We still rely on the principles of the English common law to govern liability. In the English case of Lewis v. Daily Telegraph Ltd. (1964) A.C. 234, Lord Reid stated the position of the law when he said;

"There is no doubt that in actions for libel the question is what the words would convey to the ordinary man. It is not one of construction in the legal sense."

After stating the position of the ordinary man and the truism that he can also read between the lines in the light of the general knowledge and experience. It was pointed out that the "sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of their natural and ordinary meaning."

In our adjudicatory procedure where the judge functions both as the Judge to determine whether the words complained of are capable of defamatory meaning. He also functions as the jury in the English common law procedure to decide whether the words are defamatory of the Plaintiff. In this case the test according to the well settled authorities is whether under the circumstances in which the publication of the endorsement was made reasonable men to whom the publication was made would be likely to understand it as defamatory of the Plaintiff. - See Egbuna v. Amalgamated Press (1967) 1 All NLR. 25.

It is pertinent and important to observe that the endorsement on the bank draft questioned the authenticity of the co-signatory on the bank draft. Plaintiff is not one of the signatories of the bank draft and has no responsibility in the issuance and presentation of the bank draft before the Defendant Bank. A reasonable man in the entire scenario will be most unlikely to link the Plaintiff who has only paid for the issuance of the bank draft, with the defamatory imputations suggested by the Plaintiff. The imputation of defamatory conduct inferred by Plaintiff is not only far fetched but also unreasonable. The learned trial Judge and the Court below rightly rejected them by holding that libel was not proved. I accordingly resolve the first issue against the Appellant.

I shall consider the second and fourth issues together. These issues concern the allegation of negligence against the Defendant/Respondent. The Plaintiff/Appellant's case is that the Defendant/Respondent Bank

was negligent. The grounds relied upon are that (i) the Defendant's servant signed irregular signature on the bank draft in issue (ii) The Defendant returned the bank draft unpaid instead of investigating and correcting the irregular signature which emanated from its own sources.

In determining this issue, the learned trial Judge found that the Defendant in this case was the Warri Branch of the Union Bank of Nigeria Limited, and not the Union Bank of Nigeria Limited. He found that the Warri Branch was not negligent having complied with the usual practice of the Bank, that "where the substantive manager was not available the Relief Manager, the accountant and two officers sign the reverse side of a draft..." and held that "There was no suggestion that the signature of the Relief Manager was forged nor that he ought not to have signed Exhibit E in the circumstance." In the view of the learned trial Judge which was upheld by the Court below, since the allegation of negligence was against the Sure-Lere branch in an action against Warri Branch, liability has not been established against Warri Branch.

This erroneous view was compounded by the Court of Appeal which assumed that the Defendant in the case was Union Bank of Nigeria Limited (Warri Branch) and went on to hold that Union Bank of Nigeria Limited (Warri Branch) was not a legal person and could not be sued. The Court below also discussed the Constitution of the action. It is relevant to observe these are issues which did not arise either at the trial Court or on appeal before them. It is conceded an issue of jurisdiction could be raised suo motu by the Court even on appeal. But the parties would be invited to argue such novel point of law before the Court would be entitled to express its views and come to its ruling. The Court below did not give parties an opportunity to argue the point of law.

It is necessary to point out the well settled law of pleading that what is admitted need not be proved and that parties are bound by their pleadings. Paragraph 2 of the Amended Statement of claim of the Plaintiff averred;

"The defendant is a company incorporated under the Companies decree of 1968 and carries on business of banking throughout the Federal Republic of Nigeria and had one of its branches in Warri ...

within the jurisdiction of this Honourable Court."

It is settled law that the statement of claim supersedes the Writ and amends the endorsement on the writ of summon. Paragraph 2 of the statement of claim having been admitted, it was common ground that the Defendant was Union Bank of Nigeria Ltd. and that it is an incorporated company, with branches throughout Nigeria. There is no doubt "Warri Branch" was inserted to show where Defendant was carrying on business and for the purposes of the jurisdiction of the Court.

It appears on a reading together of the writ of summons and statement of claim that the Defendant is Union Bank of Nigeria Limited, and the act of negligence alleged is against the Defendant as an entity, and not merely against its branches. It is well settled law of the principle of corporate personality that where an allegation of negligent act is made against a corporate body doing business through several branches, the questions of liability can be determined through any one of its several branches. What is material is whether the act of negligence alleged against the corporate body has been established. A corporation is answerable on the ordinary principle of vicarious responsibility.

In Lennards Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd. [1915] A.C. 705, 713, Viscount Haldane has enunciated what has now become the locus classics of responsibility of a company. "In such a case as the present one the fault or privity of somebody who is not merely a servant or agent for whom the company is liable on the footing of respondent superior, but somebody for whom the company is liable because his action is the very action of the company itself." This doctrine has been explained by Denning L.J. (M.R.) in H.L. Bolton (Engineering) Co. Ltd. v. T.J. Graham & Sons Ltd. [1936] 3 All E.R. at p. 630.

"A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which holds the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind and will of the company and is treated by the law as such. So you will find in cases where the law re-

quires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company."

There is no doubt that on the basis of this theory, so in the instant case, the act of a branch is the act of the company. Hence the act of the employee of the company done in the course of his employment renders the company vicariously liable irrespective of the branch from which the action emanated.

The error of the learned trial judge and the court below arose from the reasoning that the branch of the defendant Bank was different and separate entity from the parent body. This is a fundamental error which permeated the entire reasoning and faulted it.

The question of Negligence:

The negligence alleged by Plaintiff against the Defendant Bank in paragraph 29 of the further amended statement of claim averred as follows

"Plaintiff avers that defendant was negligent if indeed the signature on the draft was irregular since it is their own instrument and cannot dishonour their instrument except on the bases (sic) of fraud or forgery and thereby breached defendant contractual duty to the Plaintiff as a customer of the Bank.

Particulars of Negligence

(a) Defendants servant signed irregular signature on the draft.

(b) Defendant ought not to have returned the draft unpaid but to investigate the genuineness of the draft.

(c) Irregular signature on a draft is an internal affair of the Bank and the customer should not be visited with it.

(d) The defendant felt the draft was an evil machination of the plaintiff."

Summarily stated, Defendant issued a Bank draft with an irregular signature or that it dishonoured its own draft negligently without taking proper care to confirm whether it was authentic. Accordingly, the negligence was either by (i) the act of its officers in Warri branch in the issue of the draft, or (ii) the act of its Officers in Suru-Lere branch by dishonouring it.

It is interesting to refer to the defence of the Defendant Bank of the allegation of negligence by the Plaintiff. The Defendant in paragraph 16 of the statement of defence denied the averment of negligence in paragraph 29 of the amended statement of claim. In the evidence of the only witness again it denied any negligence in the issue of the bank draft, but went unwittingly to state as follows -

We (that is in the defendant's Warri branch) were embarrassed when the draft was returned for the reason for which it was returned."

Under cross-examination, the witness said;

"The paying bank has a discretion to confirm from us (i.e. in the defendant's Warri branch) whether or not the draft was issued by us. The signature of the sub-manager was not regularly signed."

On the totality of this evidence, there is no doubt that act of negligence was clearly established against the Defendant Bank. The question of the establishment of irregularity in the issue of the draft does not lie merely on the denial of the defendant bank. The evidence of the issue of the draft itself with the irregular signature of its own officer, is self-evident. Again failure to pay the draft is breach of a duty owed to the Plaintiff with whom existed a contract to pay. The Defendant is under a duty to exercise reasonable care and skill in regard to the affairs of its customers. Plaintiff being its customer, the Defendant Bank was expected to exercise reasonable care and skill in the issue and payment of the bank draft subject-matter of this litigation. See Agbonmagbe Bank v. CFAO (1966) 1 All NLR. On the facts of this case which are not in dispute it is clear that defendant was in breach of its duty of reasonable care and skill owed to the Plaintiff. The Defendant Bank through the evidence of its only witness has admitted its embarrassment for its own error and failure to discharge its duty to the Plaintiff. Such admission was sufficient evidence of failure to exercise the requisite care and skill. See Benson v. Otubor (1975) 3 SC. 9, Ajibade v. Mayowa (1978) 9 & 10 SC. 1. The trial Judge should have inexorably so found. The Court below was therefore in error to have affirmed the decision of the trial Judge.

I therefore resolve issues 2 and 4 in favour of the Appellant. This is not the end of the matter. The confusion which has arisen in the ambiva-

lence of the claims of the plaintiff/appellant between a claim based on breach of contract arising from a negligent performance of the contract, and a claim in the tort of negligence.

It is consistent with well settled principles of law that assessment of damages in an action, must be predicated on the nature of the claim. Appellant in his brief of argument before this court has referred to the claim as one "for breach of contract arising for (sic) from the negligence of the defendant." This is consistent with the averment of the plaintiff in paragraph 29 of the further amended statement of claim already cited and reproduced supra in this judgment. It does not appear both the trial judge and the Court of Appeal were ad idem. The plaintiff would appear unsure whether his claim was based on breach of contract arising from a negligent performance of the contract, and a claim in negligence as a tort. There is no doubt that the principles for determining the measure of damages differs as to whether the claim is in contract or in tort. Whereas the measure of damages in contract is determined on the principles enunciated in the rule in Hadley v. Baxendale, 9 Exch. at 354, 156 E.R. at 451. See Jammal Engineering v. Wrought Iron [1970] N.C.L.R. 295, Omonuwa v. Wahabi [1976] 4 S.C. 37; Alraine v. Eshiett [1977] 1 S.C. 89, Taiwo v. Princewill [1961] All N.L.R. 240. This is the loss flowing from the breach and is incurred in direct consequence of the violation.

The measure of damages in an action for the tort of negligence is found on the principle of restitution in integrum which was re-echoed in Liesbosch Dredger v. S.S. Edison [1933] A.C. 449 at p. 459. In Balogun v. N.B.N. [1978] 3 S.C. 155, the Supreme Court observed that the rule in Hadley v. Baxendale (ibid) is usually difficult to apply in cases of wrongful dishonour of cheques. The principle applicable in the measure of damages in an action for negligence is that the plaintiff is only entitled to such sum as will put him in the position he would have been, if the act constituting the negligence never occurred - See Thomas Kerewi v. Bisiriyu Odugbesan (1965) 1 All NLR. 95 at p. 98; L. C. C. v. Unachukwu (1978) H 3 SC. 199.

As it is not clear whether the claim is in tort of negligence or negligent breach of contract, it becomes necessary for further inquiry

whether the conduct, complained of and found by the Court has only caused economic loss, and if it is within the category of tortious conduct for which the court will award compensation for economic loss. In the circumstance it is desirable to remit this case back to the High Court for the issue of compensation arising from the negligent conduct with a direction to deal with the question of damages after ascertaining the nature of the claim.

For the reasons given in this judgment, I dismiss the claim for libel. I allow the rest of the Plaintiff's claim, set aside the judgment of the Courts below. This is because the Defendant/Respondent acted without due care. The case is accordingly remitted to the High Court to ascertain the exact nature of Plaintiff's claim and determine the issues.

- (i) Whether the damages claimed by Plaintiff is recoverable, and
- (ii) the quantum of damages recoverable. Each party is to bear his or its costs of this appeal.

KUTIGI JSC

I read in advance the judgment just rendered by my learned brother Ayoola, J. S. C. I agree with his reasoning and conclusions and endorse the orders made in the said judgment.

MOHAMMED JSC

I agree that the claim for libel is without merit at all and for the reasons given in the lead judgment written by my learned brother, Ayoola, J. C. S., I too would dismiss that aspect of the appellant's claim before the High Court. However, it is clear from the facts that the respondents were negligent in handling the draft cheque of the appellant. The draft cheque could not be honoured when presented at Sululere branch of Union Bank due to the endorsement of an irregular signature on the draft by the respondent's Manager.

This obviously is a negligent act by the respondent. I therefore agree that the claim for damages for negligence has succeeded. I will also order for the claim for negligence to be remitted back to the High Court for

the assessment of damages after ascertaining the nature of the claim.

Consequently, I dismiss the appeal based on the claim for libel and allow the appeal on the claim for damages for the negligence of the respondent in handling the draft cheque of the appellant. I make no order as to costs.

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KATSINA-ALU JSC

I have had the advantage of reading in advance the judgment of my learned brother Ayoola, JSC, in this appeal. I agree with it. There is nothing that I can usefully add.

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