

**SUPREME COURT OF NIGERIA**  
FRIDAY 13TH DECEMBER, 2002. SC. 175/1995  
**CORAM:- S. M. A. BELGORE, I. L. KUTIGI,**  
**M. MOHAMMED, U. A. KALGO, A. O. EJIWUNMI, JJSC**

JUSTICE K. O. ANYAH ..... APPELLANT  
AND  
1. IMO CONCORDE HOTELS LTD  
2. STEPHEN AGBANYUO ..... RESPONDENTS  
3. LONGINUS NWARIE

---

TORTS - Negligence - Ingredient - Proof - To succeed plaintiff must prove that defendant owed him a duty of care - Which was breached - And that he suffered damages from the breach (H1)

TORTS - Negligence - Liability - Proof - For defendant to be liable for negligence - There must be admission by him - Or evidence adduced to support findings of negligence on his part (H2)

TORTS - Negligence - Duty of care - Mere presence of security men and policemen at a hotel - Does not create a legal duty of care on the hotel to its visitors (H3)

TORTS - Negligence - Duty of care - Principle - Donoghue v. Stevenson - A person owes duty of care to his neighbour - Who will be directly affected by his act or omission (H4)

TORTS - Negligence - Duty of care - Relevant issue - If no duty is owed - It is immaterial that a person suffered damage - By reason of another's negligence (H5)

APPEALS - Cross appeal - Issue - Determination - Since issue in cross appeal has been dealt with in main appeal - A consideration of the cross-appeal becomes irrelevant (H6)

**FACTS**

The case for plaintiff/appellant is that he lodged at 1<sup>st</sup> defendant/respondent's hotel for a night. He was issued with an identifica-

tion tag to park his Peugeot 505 saloon car within 1<sup>st</sup> respondent's premises. The next morning, appellant went to the car park to pick up his car. To his dismay, he discovered that the car has been removed from the park. When 1<sup>st</sup> respondent could not offer reasonable explanation as to the whereabouts of the car, appellant instituted this action against respondents at the High Court of Imo State, Owerri, claiming the sum of N150,000 as general and special damages for the loss of the car due to negligence/and or breach of duty of care on the part of respondents.

At the hearing, respondents denied being negligent and that they owed no duty of care to appellant. The learned trial judge found respondents negligent and awarded the sum of N95,000 general and special damages in favour of appellant. Being dissatisfied, respondents appealed to the Court of Appeal. The court allowed the appeal and dismissed the claims of appellant. Aggrieved, appellant filed appeal at Supreme Court.

### **ISSUES FOR DETERMINATION**

*i. Was the Court of Appeal right in holding that the respondent did not owe the appellant a duty of care especially in the light of the facts of this case?*

*ii. Was the Court of Appeal right in asserting that such duty of care could only be founded on contract?*

*iii. Was the Appellant entitled to the award of special and general damages?*

*“Whether the claim of N65,000.00 as the value of the cross-Respondent's car was established”.*

**HELD** (Unanimously dismissing the appeal per KALGO JSC)

*Negligence - Ingredients - Proof*

**1. The appellant alleged in his statement of claim that the respondents were negligent resulting in the loss of his 505 car. He therefore had the onus and the duty to prove that they were negligent. The general principle is that the tort of negligence arises when a legal duty owed by the defendant to the plaintiff is breached. And to succeed in an action for negli-**

**gence, the plaintiff must prove by the preponderance of evidence or the balance of probabilities that:-**

**“(a) the defendant owed him a duty of care,**

**(b) the duty of care was breached:**

**(c) the defendant suffered damages arising from the breach”.**

**The most fundamental ingredient of the tort of negligence is the breach of the duty of care, which must be actionable in law and not a moral liability. And until a plaintiff can prove by evidence the actual breach of the legal duty of care against the defendant, the action must fail. (p. 3335 A)**

*Negligence - Liability - Proof*

**2. For the defendant to be liable for negligence, there must be either an admission by him or sufficient evidence adduced to support a finding of negligence on his part. Such evidence may be direct or inferential depending on the circumstances for each particular case. There is no doubt that the appellant has pleaded in paragraphs 6 and 7 of his statement of claim particulars of negligence sufficient to support his case but the appellant cannot rely on the pleadings alone and the court cannot use pleadings as evidence unless they are supported by evidence at the trial. A blanket allegation of negligence in the pleadings is not sufficient and quite part from giving explicit evidence of negligence, for the appellant to succeed, he must also show the duty of care owed to him and its breach by the respondents.**

**By establishing the particulars of negligence or the duty of care owed, it is meant that evidence must be given in support of both, for a plaintiff to succeed in a negligence case.**

**In the instant case the appellant gave evidence of the loss of his car but gave no detailed evidence of the facts and circumstance giving rise to the loss of the car. Nor did he explain the relationship between himself and the respondents upon which the duty of care for his car would arise, and how that duty was breached. (p. 3335 E/3336 C)**

*Negligence - Duty of care*

**3. The “measures” referred to here are that the security men were employed by the hotel and in addition policemen had also been engaged and were present in the hotel at that time. This alone does not ipso facto create any legal relationship**  
**B between the appellant and the respondent as to ensure the security of the appellant’s car parked in the hotel. It must be noted that the hotel itself has its own properties to protect and unless there is an existing legal duty for it to protect the**  
**C properties of others who came into the hotel, it has no duty of care owed to them and the presence of security men and policemen in its premises alone cannot be taken to be security to protect the properties of its visitors. But where, for example, a visitor who came through the hotel gate was given a**  
**D plastic or metal disc and he parked his car in the hotel park, locked it up, gave the keys to the hotel security men and drew their attention to where he parked the car, there may arise a duty of care on the part of the security men to ensure the safety of the car. In this case the appellant merely parked his car in**  
**E the hotel park after he was allowed in and given the hotel disc. He locked his car and put the keys in his pocket; he did not show or inform the security men or any hotel staff where he parked his car and nothing was shown to be on the hotel disc as the conditions under which the car is parked in the hotel.**  
**F So in this case, the fact that the appellant was given the hotel disc to enter and park in the hotel premises, and the hotel posted its security men and policemen in and around the hotel, only gave the “impression” that the appellant’s car would**  
**G be protected from theft or damage but does not bind the respondents. (p. 3336 G)**

*Negligence - Duty of care - Principle*

**4. I now pause to consider what is meant by “duty of care” in**  
**H an action in negligence, and to whom it is owed. The generally accepted principles of negligence is that a person owes a duty of care to his “neighbour” who would be directly affected by his act or omission. In Donoghue v. Stevenson (1932) AC 562 at 580 Lord Atkin said:-**

*“You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then is your neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question”.* <sup>B</sup>

This test was adopted and followed by this court in *Abusonwan v. Merchantile Bank of Nigeria Ltd.* (1987) 3 NWLR (Pt. 60) 196 at 198 and held that the doctrine of proximity as the foundation of duty of care in tort is now firmly established as the basis of an action in negligence. <sup>C</sup>

I have carefully studied the submissions of both counsel on this issue and after considering the facts of this case and read the case cited by the respondents’ counsel, I am satisfied that the appellant is not such a “neighbour” that the respondent must or ought reasonably to have him in contemplation when directing their minds to their acts or omissions. <sup>D</sup>

There is no doubt that negligence is a specie of tort, and one man may owe a duty to another even though there is no contract between them. But a breach of contract may give rise to a proper action on negligence. In the instant case, there is no doubt that the loss of the appellant’s car cannot be attributed to any act of negligence on the respondents having regard to the way they performed their duties on the fateful day and the relationship of the parties as narrated earlier in this judgment, no duty of care can be ascribed to them. If to say the respondents left the gate unattended, and the car was driven out through the gate, there may prima facie be a duty of care to the appellant. This was not the case here. <sup>E</sup> <sup>F</sup> <sup>G</sup>

Therefore on the fact of this case, the first question asked in *Anns’* case (*supra*) will have to be answered in the negative because in my view, there is no such sufficient relationship of proximity or neighbourhood between the appellant and the respondents as contemplated in *Donoghue v. Stevenson* (*supra*). (pp. 3337 H/3338 E/3339 G) <sup>H</sup>

*Negligence - Duty of care - Relevant issue*

**5. The Court of Appeal, in its judgment on page 138 of the record had this to say:-**

B *“The main question for determination is whether the appellants (now respondents) owed a duty of care to the respondent (now appellant) in respect of the safety of the latter’s car. If no duty of care is owed, then it is immaterial that the respondent suffered damage by reason of the appellant’s negligence”.*

C *It then supported this statement by the decision in Grant v. Australia Knitting Mills Ltd. (1936) Arc. 85 at 103.*

*I have read the cases referred to by the Court of Appeal and I entirely agree with the conclusion it reached in this matter having regard to the facts and circumstances of this case.*

D (pp. 3340 D/3341 A)

*Crossappeal - Issue - Determination*

E **6. The respondents have filed a cross-appeal in this matter on one ground, and the only issue for determination was whether the claim of N65,000.00 as the value of the appellant’s car was established by evidence at the trial. For the reason which I decline to consider issue 3 of the main appeal, I do not find it necessary to consider the only issue in the cross appeal.**  
F *And although a cross-appeal is regarded as a separate and independent appeal by itself, it is my respectful view that the consideration of this issue in the circumstances of this case, will only amount to an academic exercise to which this court does not lend itself.*

G *In any case, the cross-appeal does not appear to me to be relevant or necessary. This is because the Court of Appeal even though it found no substance in the complaint against the award of the special damages of N65,000.00 finally said:-*

H *“The appeal on liability being the dominant issue and having succeeded, this appeal is allowed wholly. Accordingly, the judgment of the lower court is reversed”.*

*This means that the whole appeal of the respondents succeeded and the judgment of the trial court reversed, including of course the award of N65,000.00 as special dam-*

**ages, the subject matter of the cross-appeal. The question of cross-appealing on this award could not therefore have arisen at all in this case. Since it does not arise in this case, I will agree with the appellant/cross-respondent's submission that the cross-appeal is incompetent having regard to the final decision of the Court of Appeal.** (p. 3341 C) B

## NOTABLE POINT OF INTEREST

### **EJIWUNMI JSC**

#### ***1. Action for negligence may arise from a breach of contract*** C

With due respect, I think that it is a misconception of the reasoning of that passage of the Judgment of the Court below to argue that the Court was wrong to have considered whether a contract between two parties could not be the foundation for tortious liability between them and or even a third party. This question fell for consideration in this Court in *Abusomwan v. Merchantile Bank of Nigeria Ltd.* (1987) Vol. 18 2 NSCC 878 where Karibi-Whyte, JSC, made this pertinent observation at p. 887: D

*“The question now is whether, if it is conceded that there is no contractual relationship between the appellant and the respondent, that is the end of the matter, quaesitio cadit. The matter does not end there. Since the 1920s the trend has developed of discarding the 19th Century view that tort cannot arise from the breach of contract. It is now the law that an action in tort for negligence can arise de hors F contract of the parties. The former view was that if a person undertook a contractual obligation towards another, and his non-performance resulted in damage to a third party, the third party so injured could not sue unless he can show that the obligation of the contracting parties extended to him.”* G

However, in the case under consideration, it is clear upon the facts that there was no contract between the appellant and the respondents. For the appellant to succeed in negligence, he has the burden of establishing that the respondents owed him a duty of care and that they acted in breach of that duty. (p. 3349 B) H

### **REPRESENTATION**

Chief Mike Ozekhome with A. E. Ewoh and M. Eriofoloh, for the

Appellant

K. C. O. Njemanze with C. U. Ekomaru, for the Respondents

**CASES REFERRED TO**

- Agbonmagbe Bank Ltd. v. C.F.A.O. (1966) 1 All NLR 140  
B Benson v. Otubor (1975) 3 S.C. 9  
Okoli v. Nwagu (1960) SCNLR 48  
Nigeria Airways Ltd. v. Abe (1988) 4 NWLR (Pt. 90) 584  
Strabag Construction (Nig) Ltd. v. Ogarekpe (1991) 1 NWLR (Pt. 170) 733  
C Koya v. U.B.A (1997) 1 NWLR (Pt. 481) 251  
Tinsley v. Dudley (1951) 1 All ER 252  
Eperokun v. University of Lagos (1986) 4 NWLR (Pt. 34) 162  
Bangboye v. University of Ilorin (1999) 6 S.C (Pt. II) 72  
D Titiloye v. Olupo (1991) 7 NWLR (Pt. 205) 519  
Agbonmagbe Bank Ltd v. CFAO (1966) 1 All NLR 140  
Kala v. Jarmakani Transport Ltd. (1961) 1 All NLR 747  
Okoli v. Nwagu (1960) SCNLR 48  
Nigerian Bottling Co. Ltd. v. Ngonadi (1985) 1 NWLR (Pt. 4) 739  
E Odinaka v. Moghalu (1992) 4 NWLR (Pt. 233) 1

**BOOKS REFERRED TO**

- Charlesworth on Negligence, 4th edition, paras. 11 and 18  
F Clerk & Lindsell on Torts, 4th edition para. 859 p. 474

**LEAD JUDGMENT BY KALGO JSC**

- By a writ of summons issued at the Imo State High Court, in the Owerri Judicial Division, on the 17th of March 1987, the appellant as plaintiff claimed against the respondents jointly and severally, as defendants, the sum of N150,000.00 (One Hundred and Fifty Thousand Naira) as general and special damages in that between the 19th and 20th of December 1986, the appellant suffered the loss of his Peugeot 505 SR A/C Saloon Car registration No. IM 6582 AF  
H parked in the premises of the 1st respondent along Port Harcourt/Owerri/Road, due to the negligence and/or breach of duty of care on the part of the respondents. And by paragraph 15 of the statement of claim, particulars of claim were set out thus:-

Special damages

a. Value of plaintiff's Peugeot 505 SR/AC Saloon Car less than 12 months old at that time of loss .....	N65,000.00
b. Cost of hiring car at N20.00 for 42 days .....	N840.00
c. General damages .....	N84,160.00
	N150,000.00

Pleadings were filed and exchanged between the parties in the trial court. The appellant called one witness and gave evidence himself in proof of his claim and the respondents called four witness in their defence. Learned counsel for the parties addressed the court before the trial court adjourned for judgment. Earlier, there was a visit to the premises of the 1st respondent to see the width of the security gate through which all vehicles move in and out of the hotel. B  
C

In a considered judgment delivered on the 24th April, 1989, the learned trial Judge Nwogu, J., found that negligence was proved against the respondents. As a result he awarded the sum of D N65,000.00 being the value of the appellant's Peugeot 505 car and N30,000.00 as general damages for the inconvenience suffered as a result thereof.

The respondents were dissatisfied with the decision and they appealed against it to the Court of Appeal, Port Harcourt. The parties filed and exchanged their briefs of argument. The appeal was heard and in the judgment of the court, (Edozie, JCA., concurred by Ndoma-Egba and Omosun, JJCA.), it was held that:- E

*"The appeal on liability being the dominant issue and having succeeded, this appeal is allowed wholly. Accordingly, the judgment of the lower court is reversed. The respondent's claim is dismissed with costs..."* F

The appellant who was the respondent in the Court of Appeal was not happy with this decision and has now appealed to this court on two grounds of appeal. The respondents also cross-appealed, with the leave of this court, on one ground only. G

In this court, the parties filed and exchanged their respective briefs in accordance with the rules of court. In his brief, the appellant formulated 3 issues for the determination of this court in the main appeal. They read:- H

*i. Was the Court of Appeal right in holding that the respondent did not owe the appellant a duty of care especially in the light of the facts of this case?*

*ii. Was the Court of Appeal right in asserting that such duty of care could only be founded on contract?*

*iii. Was the Appellant entitled to the award of special and general damages?*

The respondent raised 2 issues thus:-

B i. Did the Respondent owe the Appellants a duty of care and if they did whether they were in breach of that duty

ii. Whether the Court of Appeal was right in holding that there was no basis for the award of N30,000.00 general damages, all things considered.

C In the cross-appeal, the respondents raised only one issue for determination which reads:

*“Whether the claim of N65,000.00 as the value of the cross-Respondent’s car was established”.*

D The appellant/cross-respondent in his brief set out the following 2 issues:-

1. Whether the finding of the Court of Appeal appealed against amounts to an appealable ‘Decision’ of that court.

E 2. Whether the High Court and the Court of Appeal were right in holding that the Cross-Respondent’s claim for special damages was established.

F For the main appeal and with regard to the grounds of appeal thereon, I find the issues formulated by the appellant as germane and I shall consider them in this appeal. And in the cross-appeal I also find the only issue raised by the cross-appellant as properly distilled from the only one ground of appeal filed in the cross-appeal.

G The facts which gave rise to this case are very simple and straight forward, in my respectful view. On the 19th day of December, 1986, the appellant who lived at No. 34 Hospital Road, Amaekpu-Ohafia in Arochukwu/Ohafia Local Government of Imo State, came to Owerri to attend a book launching ceremony. He drove his car, a 505 Peugeot SR/AC Salon car registration No. IM 6583 AF, into the Concord Hotel (the 1st respondent) and booked accommodation for one night. H At the gate of the Hotel, the 2nd and 3rd respondents, who were the hotel security men on duty on that day, registered the number of the appellant’s car and issued him with a plastic disc No. 102. Then they lifted the bar across the gate and the appellant drove his said car into the hotel and parked it in a parking space therein. He then locked

the car, pocketed the keys and checked into the room allocated to him where he slept for the night. The following morning the appellant checked out of the hotel, went to pick his car where he kept it but the car was nowhere to be seen. He immediately reported the matter to the hotel management who expressed dismay at what had happened and immediately ordered investigation into the matter. B They later provided a vehicle which conveyed the appellant to his home at Ohafia. Thereafter the appellant filed this action claiming a total of N150,000.00 (One Hundred and Fifty Thousand Naira) for the value of his stolen car, expenses incurred by him as a result thereof C and general damages, on the grounds that the respondents were negligent in allowing his car to be stolen on 20th December, 1986, in the hotel.

In his statement of claim, the appellant pleaded in paragraphs 6 and 7 as follows:- D

*“6. The security men at the gate at the material time were the 2nd and 3rd defendants who were servants of the 1st defendant in whose employment they were as security men. The 2nd and 3rd defendants while on security duty between the 19th and 20th of December, 1986, performed their duty so negligently that the E plaintiff’s said car was driven out of the premises of the hotel without the metal disc that was at all material time in plaintiff’s possession.*

*Particulars of Negligence*

*a. Failing to be at the security gate at the time an unauthorized F person drove the Plaintiff’s said car out of the hotel premises.*

*b. Performing the duty of passing out cars so carelessly that it was possible for an unknown person to pass through the security gate without surrendering the metal disc.*

*c. By failing to take adequate measures to ensure that all cars G passing through the gate did so in an orderly manner that makes for proper checking of metal disc and registration number of vehicles.*

*7. By allowing the plaintiff’s said car to be driven out the premises of the hotel without the metal disc being surrendered at the security gate, the defendants are in breach of duty of care which they H owed to the plaintiff and consequently are liable to the plaintiff for the loss of his said car and for transportation expenses incurred by the plaintiff”.*

The respondents in their joint statement of Defence at the trial,

admitted only paragraphs 1 and 2 of the appellant's statement of claim and made the following averments in paragraphs 1, 3, 5 and 7:-

B *“1. Save as hereinafter admitted the defendants deny each and every allegation of fact as if each were set out seriatim and specifically traversed.*

C *3. With reference to paragraph 3 of the statement of claim, the defendants admit that there is a security arrangement at the Hotel but deny that all vehicles into the hotel via the two entrances are given metal discs as a security means but aver that certain categories of cars, i.e., government vehicles, NEPA, Army, Police, Goods vehicles and certain conference cars and taxis are allowed in and out of the hotel premises without collecting or handing over any metal disc.*

D *The defendants deny that there is a guarantee of security of owners who park their cars at the hotel premises and would put the plaintiff to the strictest proof thereof. The defendants further aver that there is a conspicuous notice at the hotel familiar to users of the car park which reads as follows: “Owners park at their own risk”. The parking facility is a gratuitous service given to hotel users, and in the*  
E *absence of express agreement the onus is on them to secure their cars against theft.*

F *5. The defendants in answer to paragraph 6 of the statement of claim, aver that the duties of the 2nd and 3rd defendant are inter alia to stay at the gate of the hotel to register and give out metal discs (tally) to any car other than those stated in paragraph 3 above entering the hotel premises and to collect such metal disc from the drivers of the cars when they leave the premises. The iron bart at the gate is raised for the cars to drive out and then the numbers marked on the*  
G *register. The 2nd and 3rd defendants have always performed these duties diligently and did so on the 19th of December, 1986.*

H *7. The Defendants aver that the plaintiff's car could not have cost the amount he is claiming at the time it was bought. The defendants emphatically and totally deny paragraph 7 of the statement of claim and will rely on all legal and equitable defences, including particularly that the 1st defendant as stated in the claim is not legal person and will judge the court to hold that the claim is vexatious, grossly speculative and without merit and should be dismissed.”*

In this action, the appellant alleged that the respondents were

negligent in the performance of their duties and as such were in breach of the duty of care which they owed to him., and which resulted in the loss of his car. The respondents, on the other hand, completely denied that they were negligent in the performance of their duties and that they owed no duty of care toward the appellant in respect of his said car. B

Let me now start to consider issue 1 of the appellant which reads:

*“Was the Court of Appeal right in holding that the respondents did not owe the appellant a duty of care especially in the light of the facts of this case?”* C

At the trial, the appellant, who gave evidence on his own behalf testified that on the day in question the 2nd and 3rd respondents who were on duty at the gate of the 1st respondent after the usual gate process, allowed him to drive into the hotel and he thereafter parked his car in the hotel parking space. He said in his evidence:- D

*“I drove in and parked my car in a space provided by the defendants. I locked it, pocketed the key and booked into the hotel... I slept in the hotel. By 7.00 a.m and the following morning, I paid the bills and checked out. I went for my car but to my great horror I could not find it. I immediately reported the matter to the General Manager of the hotel”* E

He also added that-

*“The 2nd and 3rd defendants performed their duties so negligently that other person or persons removed my car from the defendants’ premises without my authority and consent”*. F

There was no other witness who gave any evidence about the loss of the said car. PW.2, the only witness called by the appellant was a sales representative of U.T.C. Aba, whose evidence was only went to the sale price of the car similar to appellant’s stolen car at the material time. G

Four witnesses gave evidence for the respondents. They included the Chief Security Officer of the 1st respondent, (DW1) the 2nd and 3rd respondents (D.W.2 and D.W.3) and another security officer (DW4). DW1 testified that the 1st respondent provides parking facilities for visitors to the hotel without any charge but that there was displayed at a specific place in the compound a notice showing H

that cars are parked at owner risk. DW1 also confirmed that the notice was displayed at the right hand side after the gate and the entrance by the right is the only entrance to two sides of the park so that any driver coming into the gate should see the notice. He also confirmed in cross-examination that the notice was there before he was employed by the 1st respondent on 1/1/84. DW1 also explained the procedure usually followed for letting cars to drive in or out of the hotel. He said:-

*“The metal discs are given to drivers at the gate. The security man announces the registration number of the car to the security man in the booth for registration: After these, the bar is lifted thereby authorising the driver to drive in. On coming out, the security man is handed over the disc, he announces the number to the security man (recorder). After that, the bar is lifted for the driver to pass”.*

He also added that:-

*“The plaintiff’s car is not one of the cars that are allowed to pass in and out without the usual formalities”.*

The 2nd and 3rd respondents who were D.Ws 2 and 3 at the trial were the security officers of the 1st respondent on duty on 20th December, 1986. Their evidence is identical to what happened at the gate on the day in question.

According to D.W.2, on the 20th of December, 1986, when he was ready to go home at 6 am., two cars, a 504 and 505 Peugeot cars were going out of the hotel through a wrong route. He directed them to take the correct route which they did and when the driver of the 504 came to the gate, D.W.2 collected the disc from him and lifted the iron barrier for him to pass. But whilst he was holding the barrier for the 504 to pass, the driver of the 505 drove through the gate with speed and both vehicles moved out of the hotel almost at the same time. In cross-examination he said:-

*“the two cars came out at the same time - 504 in front followed by the 505. Immediately I held up the barrier for the 504 to pass, the 505 driver immediately drove through without the necessary checks”*

Both DW3, and DW4 who were co-workers of the 2nd DW, on the day in question, also confirmed in substance the evidence of DW2. That was all the evidence narrated in court with regard to the loss of the appellant’s car on the 20th of December, 1986.

***The appellant alleged in his statement of claim that the respondents were negligent resulting in the loss of his 505 car. He therefore had the onus and the duty to prove that they were negligent. The general principle is that the tort of negligence arises when a legal duty owed by the defendant to the plaintiff is breached. And to succeed in an action for negligence, the plaintiff must prove by the preponderance of evidence or the balance of probabilities that:-***

***“(a) the defendant owed him a duty of care,***

***(b) the duty of care was breached:***

***(c) the defendant suffered damages arising from the breach”.***

See *Agbonmagbe Bank Ltd. v. C.F.A.O.* (1966) 1 All NLR 140 at 145.

***The most fundamental ingredient of the tort of negligence is the breach of the duty of care, which must be actionable in law and not a moral liability. And until a plaintiff can prove by evidence the actual breach of the legal duty of care against the defendant, the action must fail.*** See *Benson v. Otubor* (1975) 3 S. C. 9; *Okoli v. Nwagu* (1960) SCNLR 48; (1960) 3 FSC 16, *Nigeria Airways Ltd. v. Abe* (1988) 4 NWLR (Pt.90) 584; *Strabag Construction (Nig) Ltd. v. Ogarekpe* (1991) 1 NWLR (Pt. 170) 733.)

***For the defendant to be liable for negligence, there must be either an admission by him or sufficient evidence adduced to support a finding of negligence on his part. Such evidence may be direct or inferential depending on the circumstances for each particular case.*** See *Benson v. Otubor* (supra). ***There is no doubt that the appellant has pleaded in paragraphs 6 and 7 of his statement of claim particulars of negligence sufficient to support his case but the appellant cannot rely on the pleadings alone and the court cannot use pleadings as evidence unless they are supported by evidence at the trial. A blanket allegation of negligence in the pleadings is not sufficient and quite part from giving explicit evidence of negligence, for the appellant to succeed, he must also show the duty of care owed to him and its breach by the respondents.*** In the case of *Koya v. U.B.A* (1997) 1 NWLR (Pt. 481) 251 at 291, this court had this to say:-

*"It is not sufficient for a plaintiff to make a blanket allegation of negligence against a defendant in a claim on negligence without giving full particulars of the items of negligence relied on as well as the duty of care owed to him by the defendant, See Machine Umudje and Another v. Shell-BP Petroleum Development Company of Nigeria Ltd. (1975) 9-11 S.C. 155 at 166-167".*

It also added:-

*"Accordingly, in an action on negligence, a plaintiff, to succeed, must in addition to pleading and establishing the particulars of negligence relied on, he must also state and establish the duty of care owed to him by the defendant, the facts upon which that duty is founded and the breach of that duty by the defendant". (Underlining mine)*

**By establishing the particulars of negligence or the duty of care owed, it is meant that evidence must be given in support of both, for a plaintiff to succeed in a negligence case.**

**In the instant case the appellant gave evidence of the loss of his car but gave no detailed evidence of the facts and circumstance giving rise to the loss of the car. Nor did he explain the relationship between himself and the respondents upon which the duty of care for his car would arise, and how that duty was breached.**

The learned trial Judge before reviewing the evidence before him but after setting out the pleadings of the parties and referring particularly to paragraph 4 of the respondent's statement of defence said (on page 56 of the record):-

*"It is my view that by these measures the defendants gave the plaintiff an impression that his car was very well protected from being stolen or damaged and that he plaintiff rested on that impression by the security they provided by posting their security men in and around the hotel to take care of the cars"*

**The "measures" referred to here are that the security men were employed by the hotel and in addition policemen had also been engaged and were present in the hotel at that time. This alone does not ipso facto create any legal relationship between the appellant and the respondent as to ensure the security of the appellant's car parked in the hotel. It must be noted that the hotel itself has its own properties to protect**

**and unless there is an existing legal duty for it to protect the properties of others who came into the hotel, it has no duty of care owed to them and the presence of security men and policemen in its premises alone cannot be taken to be security to protect the properties of its visitors. But where, for example, a visitor who came through the hotel gate was given a plastic or metal disc and he parked his car in the hotel park, locked it up, gave the keys to the hotel security men and drew their attention to where he parked the car, there may arise a duty of care on the part of the security men to ensure the safety of the car. In this case the appellant merely parked his car in the hotel park after he was allowed in and given the hotel disc. He locked his car and put the keys in his pocket; he did not show or inform the security men or any hotel staff where he parked his car and nothing was shown to be on the hotel disc as the conditions under which the car is parked in the hotel. So in this case, the fact that the appellant was given the hotel disc to enter and park in the hotel premises, and the hotel posted its security men and policemen in and around the hotel, only gave the “impression” that the appellant’s car would be protected from theft or damage but does not bind the respondents.**

The respondents in denying liability also testified that the security arrangements in the hotel is not a guarantee for the security of vehicle parked in the hotel premises. The hotel disc is only to enable respondents to regulate the number of cars in the premises at any time, and if the discs are exhausted, no vehicles are allowed in as that indicates that no more parking space available. On the question of the “escape” of the 505 out of the gate, which was alleged to have been stolen, the 2nd, 3rd and 4th respondents explained in detail, the circumstances under which the “escape” happened. They no doubt did everything that was expected of them as security men at the gate and nothing was shown to the contrary. The question of negligence on their part did not therefore arise.

**I now pause to consider what is meant by “duty of care” in an action in negligence, and to whom it is owed. The generally accepted principles of negligence is that a person owes a duty of care to his “neighbour” who would be directly affected**

**by his act or omission. In *Donoghue v. Stevenson* (1932) AC 562 at 580 Lord Atkin said:-**

***“You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then is your neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question”.***

**C** And in *Anns v. Merton London Borough Council* (1977) 2 All ER 4 92 at 498, the House of Lords defines what is the duty of care and to whom it is owed when it held that:-

**D** *“Rather, the question has to be approached in two stages - first, one had to ask whether as between the wrong doer and the person who has suffered damage there is sufficient relationship of proximity or neighbourhood such that in reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter in which case a prima facie duty arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any consideration, which ought to negate, or to reduce or limit the scope of the duty or limit the class of person to whom it is owed or the damage to which a breach of it may give rise”.*

**F** ***This test was adopted and followed by this court in *Abusonwan v. Merchantile Bank of Nigeria Ltd. (1987) 3 NWLR (Pt. 60) 196 at 198 and held that the doctrine of proximity as the foundation of duty of care in tort is now firmly established as the basis of an action in negligence.****

**G** Learned counsel for the appellant submitted in his brief that the appellant has qualified to be a “neighbour of the respondents under the Lord Atkin’s definition in the case of *Donoghue v. Stevenson* (supra). He went on to say on page 6 of the brief that:-

**H** *“The question ought to be answered in the affirmative for, the appellant as guest, had paid for his accommodation. He brought his car along. The respondents provided space in the hotel premises for the appellant to park his car and in addition, not only was he given a plastic disc, the registration number of his car was entered in a register for the purpose. The function of the disc was to regulate the entry*

*and exit of cars parked in the premises, ultimately, no cars were allowed to exit without surrendering the disc. Thus, in line with Lord Atkin's formulation of the neighbour principle, it is our view that as a guest in the appellant's hotel, the appellant had come so close to become a neighbour. In the case, the appellants ought reasonably to have had him in contemplation as being so affected when directing their "minds" to the acts or omissions which are called in question".* B

The learned counsel for the respondent however submitted in his brief that the appellant had failed to lead credible evidence to the effect that the respondents did or failed to do that which a prudent and reasonable man would do or not do in the removal of the appellant's car by thieves. There was nothing to suggest that the respondents stole the car or collided with anyone to steal the car. On the contrary, the evidence of the respondents which was not challenged at the trial clearly indicated that the respondents carried out their normal duty at the gate on the date in question. Counsel also pointed out that the appellant led no evidence to prove actual or constructive delivery of the car to the respondents on his arrival in the hotel, and so they owe no duty of care towards the custody of his car. He further submitted that the relationship between the appellant and the respondents is that of invitee and invitor respectively which does not impose any duty of care of the former's properties on the latter. He cited the case of *Tinsley v. Dudley* (1951) 1 All ER 252 at 260 where Jenkins LJ., said:-

*"There is no warrant at all on the authorities so far as I know, for holding that an invitor, where the invitation extends to the goods as well as the person of the invitee, thereby by implication of law assumes a liability to protect the invitee and his goods, not merely from physical dangers arising from defects in the premises, but from the risk of the goods being stolen by some third party. That implied liability, so far as I know, is one unknown to the law".* F

***I have carefully studied the submissions of both counsel on this issue and after considering the facts of this case and read the case cited by the respondents' counsel, I am satisfied that the appellant is not such a "neighbour" that the respondent must or ought reasonably to have him in contemplation when directing their minds to their acts or omissions.*** H

***There is no doubt that negligence is a specie of tort, and***

**one man may owe a duty to another even though there is no contract between them. But a breach of contract may give rise to a proper action on negligence. In the instant case, there is no doubt that the loss of the appellant's car cannot be attributed to any act of negligence on the respondents having regard to the way they performed their duties on the fateful day and the relationship of the parties as narrated earlier in this judgment, no duty of care can be ascribed to them. If to say the respondents left the gate unattended, and the car was driven out through the gate, there may prima facie be a duty of care to the appellant. This was not the case here.**

**Therefore on the fact of this case, the first question asked in Anns' case (supra) will have to be answered in the negative because in my view, there is no such sufficient relationship of proximity or neighbourhood between the appellant and the respondents as contemplated in Donoghue v. Stevenson (supra). It is therefore immaterial to consider the second question and I say nothing about it.**

**The Court of Appeal, in its judgment on page 138 of the record had this to say:-**

***"The main question for determination is whether the appellants (now respondents) owed a duty of care to the respondent (now appellant) in respect of the safety of the latter's car. If no duty of care is owed, then it is immaterial that the respondent suffered damage by reason of the appellant's negligence".***

**It then supported this statement by the decision in Grant v. Australia Knitting Mills Ltd. (1936) Arc. 85 at 103.**

**The Court of Appeal on page 130-140 of the record said-**

***"From the facts of this case, no contract, express or implied was made between the 1st appellant and the respondent, the respondent paid no fees for parking facility provided. The respondent having parked his car still had possession of its key".***

**And on page 141 thereof proceeded to say:-**

***"Since there was no contract between the respondent and the 1st appellant stipulating that the car could not be driven out from the premises of the hotel the finding of the lower court that the appellants were in breach of the duty of care is erroneous".***

***I have read the cases referred to by the Court of Appeal and I entirely agree with the conclusion it reached in this matter having regard to the facts and circumstances of this case.***

From what I said above, I shall answer the 1st issue in the affirmative. On issue 2, I shall also straight away answer it in the negative having regard to what I said in my consideration of issue 1. Issue 3 can only arise if the answer to issue 1 is in the negative. Since I held that the respondents owed no duty of care to the appellant for the security and protection of his car from theft or damage, the question of the award of general or special damages does not therefore arise. I do not therefore consider it necessary to consider that issue in this appeal.

***The respondents have filed a cross-appeal in this matter on one ground, and the only issue for determination was whether the claim of N65,000.00 as the value of the appellant's car was established by evidence at the trial. For the reason which I decline to consider issue 3 of the main appeal, I do not find it necessary to consider the only issue in the cross appeal. And although a cross-appeal is regarded as a separate and independent appeal by itself, it is my respectful view that the consideration of this issue in the circumstances of this case, will only amount to an academic exercise to which this court does not lend itself.*** See *Eperokun v. University of Lagos* (1986) 4 NWLR (Pt. 34) 162 at 179; *Bamgboye v. University of Ilorin* (1999) 6 S.C (Pt.II) 72; (1999) 10 NWLR (Pt. 622) 290 at 330; *Titiloye v. Olupo* (1991) 7 NWLR (Pt. 205) 519 at 534.

***In any case, the cross-appeal does not appear to me to be relevant or necessary. This is because the Court of Appeal even though it found no substance in the complaint against the award of the special damages of N65,000.00 finally said:-***

***"The appeal on liability being the dominant issue and having succeeded, this appeal is allowed wholly. Accordingly, the judgment of the lower court is reversed". This means that the whole appeal of the respondents succeeded and the judgment of the trial court reversed, including of course the award of N65,000.00 as special damages, the subject matter of the cross-appeal. The question of cross-appealing on this award could not therefore have arisen at all in this case. Since it***

***does not arise in this case, I will agree with the appellant/ correspondent's submission that the cross-appeal is incompetent having regard to the final decision of the Court of Appeal.***

B For all what I have said above, I find that there is no merit in this appeal, and I hereby dismiss it. I affirm the decision of the Court of Appeal delivered on 23, January, 1992. I strike out the cross-appeal and award N10,000.00 costs in favour of the respondents.

---

C

### **BELGORE JSC**

In our civil trial procedure pleading is very dominant. Any matter pleaded, there must be evidence to support it, unless the other side admits that pleaded matter. Once a pleading is not admitted and D evidence is not led to it that matter is deemed abandoned. The appellant pleaded negligence which was duly traversed by defendants/respondents at trial court, but no evidence was led by appellant as plaintiff to prove his averment. This case is based entirely on negligence which the plaintiff failed to prove and this has rendered the E action fruitless.

I therefore agree with Kalgo, JSC., that this appeal must fail, I dismiss it as lacking in merit.

---

F

### **KUTIGI JSC**

I read before now a copy of the judgment just rendered by my learned brother, Kalgo JSC. I agree with him that both the appeal and cross-appeal have no substance and ought to fail. They are ac- G cordingly dismissed with N10,000.00 costs to the Defendants.

---

### **MOHAMMED JSC**

I entirely agree. I have read the opinion of my learned brother, H Kalgo, JSC., in the judgment just read and for the reasons disclosed therein it is crystal clear that this appeal is without merit. I dismiss it. I will also strike out the cross-appeal because the decision of the Court of Appeal reversed the judgment of the trial High Court in which that court awarded the appellant N65,000.00 as special damages. I also

award N10,000.00 costs in favour of the respondent

---

***EJIWUNMI JSC***

I was privileged to have read in advance the judgment just delivered by my learned brother, Kalgo, JSC., and I agree that this appeal lacks merit for the reasons given. This appeal has raised a question which undoubtedly should concern all motorists and other persons who visit hotels, eating houses and other places of leisure with regard to the liability, if any, of the owners and/or proprietors for cars and other personal effects brought by a visitor to such premises. The question that falls to be considered is whether the owners and/or proprietors of such facilities could be liable for the loss or thefts of cars including personal effect therein, that are packed within the precinct of the premises of such hotels, restaurant, bar and other houses.

The question was neatly raised in the instant appeal, having regard to the accepted facts in the instant appeal. The appellant drove his car, a Peugeot 505 SR A/C Saloon car into the premises of the 1st respondent, Imo Concorde Hotel Ltd, and where he took up a room for the night. It is not in dispute that when the appellant got to the gate of the hotel, he was given a plastic disc No. 102, and was thereafter allowed to drive his car into the grounds of the hotel. He subsequently found a place to park his car in one of the parking lots provided by the 1st respondent within its premises. The appellant locked his car with the keys of the car and kept them with him. He also had with him the plastic disc, which was given to him at the entrance of the 1st respondent, before he drove in the car.

However the next morning, after the appellant had got ready to leave the hotel, he went to where he had parked his car but it could not be found. As his report of the incident to the management of the hotel and the police authorities yielded no useful result, appellant commenced this action against the respondents. The 2nd and 3rd respondents were joined in the action, as they were the security men on duty at the time he was allowed to enter the hotel. The trial court subsequent to the writ of summons against the respondents ordered pleadings. It seems to me that paragraphs 6 & 7 of the appellant's pleadings, sufficiently identified the allegations of the appellant against the respondents. They are set down as follows:-

“6. The security men at the gate at the material time were the 2nd and 3rd defendant who were servants of the 1st defendant in whose employment they were as security men. The 2nd and 3rd defendant while on security duty between the 19th and 20th of December, 1996, performed their duty so negligently that the plaintiff’s  
B said car was driven out of the premises of the hotel without the metal disc that was at all material times in plaintiff’s possession.

*Particulars of Negligence*

(a) Failing to be at the security-gate at the time an unauthor-  
C rized person drove the Plaintiff’s said car out of the hotel premises.

(b) Performing the duty of passing out cars so carelessly that it was possible for an unknown person to pass through the security gate without surrendering the metal disc.

(c) By failing to take adequate measures to ensure that all cars  
D passing through the gate did so in an orderly manner that makes for proper checking of metal disc and registration number of vehicles.

7. By allowing the plaintiff’s said car to be driven out the pre-  
mises of the hotel without the metal disc being surrendered at the security gate the defendants are in breach of duty of care which they  
E owed to the plaintiff and consequently are liable to the plaintiff for the loss of his said car and for transportation expenses incurred by the plaintiff.

Whereof the plaintiff claims from the defendants jointly and  
F severally as follows:-

*Special damages -*

	(a) Value of plaintiff’s Peugeot 505 SR A/C Saloon Car less than 12 months old at the time of loss	..... N65,000.00
	(b) Cost to hiring car at N20.00	
G	for 42 days 840.00	..... N65,840.00
	(c) General damages	..... 84,160.00
	Total damages	N150,000.00

The respondents by their own Statement of Defence denied the averment variously made by the appellant in his Statement of  
H Claim. But the respondents specifically denied some of the allegations made by the appellant in paragraphs 3 and 5 of their pleadings. The relevant portion of the averments made in paragraphs 3 and 5 read thus:-

3. The defendants deny that there is a guarantee of security

for owners who park their cars at the hotel premises and would put the plaintiff to the strictest proof thereof. The defendants further aver that there is a conspicuous notice at the hotel familiar to users of the car park which reads as follows:

*“Owners park at their own risk.” The parking facility is a gratuitous service given to hotel users and in the absence of express agreement the onus is on them to secure their cars against theft. Owners park at their own risk and it is not uncommon for some car owners to deposit their car keys with the security men to ensure that their cars are under the complete surveillance of the security staff especially when, as in the instant case they park their cars at obscure sectors of the hotel premises.*

*5. The defendants in answer to paragraph 5 of the Statement of Claim, aver that the duties of the 2nd and 3rd defendant are inter alia to stay at the gate of the hotel to register and give out metal discs (tally) to any car other than those stated in paragraph 3 above entering the hotel premises and to collect such metal discs from the drivers of the cars when they leave the premises. The iron bar at the gate is raised for the cars to drive out and then the numbers marked on the register. The 2nd and 3rd defendants have always performed these duties diligently and did so on the 19th of December, 1986, but when the iron bar at the gate was raised for a Peugeot 504 car with registration number LA 140 SC to leave the premises the plaintiff's car came from behind and drove off, side by side, with the said 504 car without stopping for the metal disc to be handed over. There was no way the defendant could have stopped the thief. The giving of discs to car owners, it is averred, is also a measure of checking when the park is full as the hotel can only accommodate a certain number of vehicles at any given time as well as being device for identifying stolen vehicle.”*

The learned trial Judge then resolved that the appellant was owed a duty of care by the respondents. He accordingly entered judgment in favour of the appellant and then awarded him the sum of N65,000.00 as special damages for the value of the car and N30,000 as general damages with costs in the sum of N15,000.00.

As the respondents were dissatisfied with the judgment of the High Court, they appealed to the court below. The Court below, after due consideration of the argument urged on the Court, allowed

the appeal of the respondents save as to the award of special damages. Edozie, JCA., concluded his lead judgment inter alia, thus:-

“From all I have said above, there is no substance in the complaint on liability for negligence and the award of general damages are meritorious. The appeal on liability being the dominant issue and  
B having wholly succeeded, this appeal is allowed.”

Being dissatisfied with the judgment and orders of the Court below, the appellant has appealed to this Court on two grounds of appeal. The respondents also filed a cross-appeal. In the appellant’s  
C brief, however, three issues were raised for the determination of this appeal. They are:-

- (i). Was the Court of Appeal right in holding that the respondent (sic) did not owe the appellant a duty of care especially in the light of the facts of this case?
- D (ii). Was the Court of Appeal right in asserting that such duty of care could only be founded on contract?
- (iii). Was the Appellant entitled to the award of special and general damages?

The respondents also raised two issues for the determination  
E of this appeal. A perusal of the issues identified in the respondent’s brief however reveal that they are not dissimilar from the issues set out in the appellant’s brief. My judgment would therefore be based on the issues identified in the appellant’s brief. It must be noted that  
F the respondents in the cross-appellant’s brief filed against that part of the judgment of the Court below where the Court upheld the finding of the trial Court that the appellant’s car, bought in 1986, was properly valued in the sum of N65,000.00.

As I have said earlier in this judgment, the main question that  
G falls to be determined in this appeal is whether having regard to the facts, the appellant was owed a duty of care by the respondents. It is manifest from a careful reading of the appellant’s brief that the thrust of the argument of the appellant appears to be that the Court below, per the judgment of Edozie, JCA, wrongly introduced the concept of  
H a contract between the parties to make respondents liable for the wrong committed by a third party in respect of the stolen car. Therefore, it is argued, that in the absence of such contract, the respondents cannot be said to owe a duty of care to the appellant. It is then contended for the appellant, that it is this concept of contract in the

determination of the duty of care owed the appellant, that led the Court below to come to the wrong conclusion that the respondents owed no duty of care to the appellant. In support of the contention that a contract is not the foundation for the duty of care in the law of negligence reference was made to several cases which included *Victoria Park Racing and Recreation Grounds Co. Ltd. v. Taylor* (1937) 58<sup>B</sup> CLR 479, *Heaven v. Fender* (1833) 11 QBD 503. It is further argued for the appellant that the first thing to determine in any action for negligence is whether the defendant owes a duty of care to the plaintiff. In the view of learned counsel for the appellant, the duty of care<sup>C</sup> would be owed when it is foreseeable that if the defendant does not exercise due care, the plaintiff will be harmed. The well-known case of *Donoghue v. Stevenson* (1932) AC 562 was cited for this proposition. Reliance was also placed on the decision of this Court in *Abusomwan v. Merchantile Bank Ltd.* (1987) 3 NWLR (Pt. 60) 196<sup>D</sup> and on *Orhue v. NEPA* (1998) 5 S.C. 121; (1998) 7 NWLR (Pt. 557) 187.

For the respondents, on the other hand, their contention is that the Court below was right to have held that the respondents owed no duty of care to the appellant. In support of the contention,<sup>E</sup> it is argued for the respondents that in an action for negligence, the general principle is that in order to succeed, the plaintiff must prove by the preponderance of evidence or on the balance of probability that the defendant owed him a legal duty of care, that was breached<sup>F</sup> and that he suffered damages arising from the breach. And in support of this argument, reference was made to the following authorities. *Agbonmagbe Bank Ltd v. CFAO* (1966) 1 All NLR 140; *Kala v. Jarmakani Transport Ltd.* (1961) 1 All NLR 747; *Okoli v. Nwagu* (1960) SCNLR 48; *Charlesworth on Negligence* 4th Edition paragraphs 11 and 18; *Clerk & Lindsell on Torts* 4th Edition paragraph 859 at page 474.

It is also the argument of the respondents that in order to render a defendant liable in negligence, there must be either an admission of fault by the defendant or sufficient evidence adduced before<sup>H</sup> the Court upon which a finding of negligence can be based. See; *Benson v. Otubor* (1975) 3 S.C. 9 at 21; *Nigerian Bottling Co. Ltd. v. Ngonadi* (1985) 1 NWLR (Pt. 4) 739; *Odinaka v. Moghalu* (1992) 4 NWLR (Pt. 233) 1.

Now, there is no doubt from the pleading and the evidence led at the trial that the appellant's case is based on negligence on the part of the respondents. It is manifest that the appellant by the pleadings and the evidence given at the trial, admitted that he drove his car through the entrance of the 1st respondent after a plastic disc No. 102 was handed over to him by the two security men at the entrance of the hotel, from where he went to park his car for the night, locked it and kept the key of the car and the plastic disc No. 102 with him through the night, it is self evident that his travail started the next morning when he could not find his car where he parked it the previous night. And in order to establish the evidence in support of his claim in negligence the appellant alleged that the 2nd and 3rd defendants while on security duty between 19th and 20th of December, 1986, performed their duty so negligently that the plaintiff's said car was driven out of the premises of the hotel without the metal disc that was at all material time in plaintiff's possession."

The trial Court took the view that the protection, including the presence of security-men and the police at the gate, the appellant was entitled to expect that a reasonable watch would be kept at the gate to prevent undesirable strangers from removing the appellant's vehicle without a metal disc being surrendered at the security gate. And in view of the question raised in this issue as to whether the court below did not wrongly impart the notion of contract between the parties to raise a duty of care, I will set down what the Court below said, per Edozie, JCA., at page 139. It reads:

"It would appear.....that the learned trial Judge relied on the alleged representative of the appellants that he assumed that there was a contract between the 1st appellant and the respondent whereby the former contracted to protect the latter's car from being stolen or damaged, in other words, that there was a contract of bailment or that the relationship of the respondents and the 1st appellant was that of bailor and bailee. This view to my mind is misconceived. From the facts of the case, no contract, express or implied, was made between the 1st appellant and the respondent. The respondent paid no fees for the parking facility provided. The respondent having parked his car still had possession of its key."

A careful reading of the above passage of the judgment of Edozie, JCA., would, in my view, reveal that the learned Judge was

in that passage striving to distinguish whether upon the accepted facts, a contract could be deduced between the parties, as a basis for determining whether the appellant was owed a duty of care in the circumstances. As the learned Justice of the Court of Appeal, it must be noted having concluded that there was no contract between the parties, then considered whether in terms of the relationship between them, there is evidence to hold that the respondents were liable in negligence as pleaded by the appellant. B

With due respect, I think that it is a misconception of the reasoning of that passage of the Judgment of the Court below to argue that the Court was wrong to have considered whether a contract between two parties could not be the foundation for tortious liability between them and or even a third party. This question fell for consideration in this Court in *Abusomwan v. Merchantile Bank of Nigeria Ltd.* (1987) Vol. 18 2 NSCC 878 where *Karibi-Whyte, JSC*, made this pertinent observation at p. 887: C

*“The question now is whether, if it is conceded that there is no contractual relationship between the appellant and the respondent, that is the end of the matter, quaesitio cadit. The matter does not end there. Since the 1920s the trend has developed of discarding the 19th Century view that tort cannot arise from the breach of contract. It is now the law that an action in tort for negligence can arise de hors contract of the parties. The former view was that if a person undertook a contractual obligation towards another, and his mis-performance or non-performance resulted in damage to a third party, the third party so injured could not sue unless he can show that the obligation of the contracting parties extended to him. For Instance in Winterbottom v. Wright (1842) 10 M & W 109, 114, Lord Arbingersaid: E*

*‘Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.’ F*

The fog over remedies arising from breach of contractual obligation introduced into the law by what was conveniently regarded as the “privity of contract fallacy” was cleared by the brightness brought in the lucidity of the arguments of Lord Atkin in *Donoghue v. Stevenson* (1932) AC 562. The effect of *Donoghue v. Stevenson* (supra) is that where a person is injured from a transaction arising H

from the contract of two persons, the third party is not precluded from bringing action on the grounds that he was not a party to the contract the mis-performance or non-performance of which has resulted in the damage.

B However, in the case under consideration, it is clear upon the facts that there was no contract between the appellant and the respondents. For the appellant to succeed in negligence, he has the burden of establishing that the respondents owed him a duty of care and that they acted in breach of that duty. Having regard to the loss  
C of his car parked within the precincts of the 1st respondent, in its consideration of whether such a duty of care was owed to the appellant by the respondents, the Court below, per Edozie, JCA., said thus-

The main question for determination is whether the appellants  
D owed a duty of care to the respondent in respect of the safety of the latter's car. If no duty of care is owed, then it is immaterial that the respondent suffered damage by reason of the appellants' negligence. As Lord Wright stated in *Grant v. Australian Knitting Mills Ltd.* (1936) Arc 85, 103

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

G It is my respectful view that the Court below was undoubtedly right in its approach to that question. I also find no fault in the conclusion reached that the appellant failed to establish that the respondents owed him a duty of care as pleaded. In this context, it is to be remembered that as the case was tried on pleadings, the party has  
H the burden to establish his claim upon a preponderance of evidence, or balance of probabilities. In *J.O.O. Imana v. Madam Jarin Robinson* (1979) 3 & 4 S.C. at pp 9-10, Aniagolu, JSC., stated the position, thus:-

*"It is clear to us that once pleadings have been settled, and*

*issues joined, the duty of the Court is to proceed to the trial of the issues (see The Gold Coast and Ashanti Electric Power Development Corporation Ltd v. The Attorney-General of the Gold Coast (1937) 3 WACA 215 and if one party fails or refuses to submit the issues he has raised in his pleadings for trial by giving or calling evidence in their support, the trial Judge must, unless there are other legal reasons dictating to the contrary, resolve the case against the defaulting party.”* B

As the Court below considered that the appellant upon the evidence on record established by his pleadings his claim in negligence, that Court then overturned the decision of the trial Court on this point. I have also considered the evidence led by the appellant and I am satisfied that the Court below was right to have set aside the evidence of the trial court.” It is manifest from the authorities that have been considered in this appeal that the parking of a car or other valuable possessions do not necessarily give protection to the properties so parked from being interfered with by third parties. The proprietor of such hotels and or the provider of such facility may not necessarily be liable for any loss that may occur as a result of the user of the space so provided. See *Ashby v. Tolhurst* (1937) 2 All ER 83; *Edward v. West Harts Group Hospital Management Committee* (1957) 1 WLR 415, *Ashdown v. Samuel Williams* (1957) 1 QB 419. C D E

For the reasons I have given above and the fuller reasons given in the lead judgment of my learned brother, Kalgo, JSC., I abide with the consequential orders in the said judgment. F

G

H