

SUPREME COURT OF NIGERIA
25TH JUNE, 2004 SC. 132/2000
CORAM:- I. L. KUTIGI, A. I. IGUH, A. O. EJIWUNMI, D.
MUSDAPHER, I. C. PATS-ACHOLONU, JJSC

INTERNATIONAL

MESSENGERS NIG. LTD. DEFENDANT/APPELLANT
AND

ENGINEER DAVID

NWACHUKWU PLAINTIFF/RESPONDENT

TORTS - Negligence - Contracts - Duty of care - Can be imposed by law
- Or created by contract (H1)

CONTRACTS - Courier service - Negligence - Duty of care - Failure to
deliver mail correctly - May cause damage to the respondent recipient -
Who is a third party (H2)

TORTS - Negligence - Courier service - Given the circumstances - Ap-
pellant was not negligent - In its despatch of mail to respondent (H3)

ACTIONS - Claims - Courts - Relief that was not claimed -Should not be
granted by court (H4)

TORTS - Negligence - Damages - Must be specifically averred and proved
- In order to succeed (H5)

PLEADINGS - Courts - Damages - Assessment of - Should be based on
pleadings and evidence - Lower courts erred - In awarding what was not
claimed (H6)

TORTS - Negligence - Damages for personal injury - Is a claim for com-
pensation for loss of capacity for future earnings - Which does not avail
the respondent (H7)

DAMAGES - Courts - Nature of claim - Must be ascertained - Before a meaningful assessment of damages - And only what is claimed and proved - Should be awarded (H8)

FACTS

Before the High Court Abuja, the plaintiff/respondent filed an action against the defendant/appellant, a courier company. The plaintiff applied for job with Shell Development Company Nig. Ltd. He was invited to attend an interview vide a letter that was given by Shell to the appellant to deliver to the respondent. There was no address of respondent on the letter, rather manner of delivery as instructed by Shell was for appellant to advise respondent's post office box but as the letter arrives Abuja where respondent resides. The interview was to take place at Port Harcourt, Shell's head office.

The letter in question was delivered to the appellant's Port Harcourt office on the 26-10-1993 and the interview date was fixed for 1-11-1993, The letter arrived Abuja on Friday 29-10-1993 at about noon. As Saturday and Sunday were not working days, appellant advised respondent's post office box on 2-11-1993, a day after the interview. Respondent on his part picked up the letter on 15-11-1993. There was no indication of urgency on the envelope containing the letter.

In his action, respondent claimed the sum of one million naira as general damages for the injuries that occurred to him as a result of appellant's negligence and breach of duty. The trial court found in favour of the respondent on what was not claimed and awarded N100,000 damages for lost of valuable opportunity. Appellant's appeal to the Court of Appeal was dismissed. Being aggrieved, it has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the Court of Appeal was right in holding that the defendant/appellant was negligent in handling the said package which negligence resulted in damages to the plaintiff/respondent.

2. Whether the Court of Appeal was right to have made an award for

damages for lost opportunity having regard that the plaintiff/respondent did not claim for lost opportunity but for mental and psychological shock.”

HELD (Unanimously allowing the appeal per **MUSDAPHER JSC**)

Duty of care - Can be imposed by law

1. Now, negligence is the breach of duty to take care. A duty to take care can be imposed by law or can be created by contract or trust. The breach of the contractual duty to take care, however, has not always been regarded as an actionable tort. But it is not uncommon to speak of the negligent performance of a contract, but the law used to be “*whenever there Is a contract, and something to be done in the course of the employment which is the subject of that contract, if, there is a breach of a duty in the course of that employment the plaintiff may recover either in tort or contract.*” See *Brown v. Boorman* (1844) 11 CL & F 1. It is now well recognized that a breach of a contractual duty must be dealt with according to the law of contract, and can not be regarded as a tort of negligence, although the same facts may in some cases amount to a breach of contract and also the tort of negligence. (p. 1769 C)

Duty of care - Failure to deliver mail correctly

2. Applying the above principles, it is clear in my mind, that the way and the manner the appellant in the instant case executed the contract between Shell and himself could affect the respondent. The appellant by his contract, had accepted the responsibility to deliver the mail to the respondent, any failure to deliver the mail or to deliver it late or misdeliver it may cause damage to the respondent. It is that assumption of responsibility that imposes a duty of care. There is no doubt, the appellant is a courier company, it has special skills and expertise to deliver packages and letters sent through them with speed and accuracy. That is why their services are engaged by customers for the benefit of the customers and the third parties for whom the packages are meant for.

Negligence is the failure to use the requisite amount of care required by law in the case where duty of care exists, accordingly, it is

now necessary to examine the conduct of the appellant under the circumstances to judge whether the appellant breached its duty in accordance with its contract with Shell. (p. 1771 D)

B TORTS - Negligence - Courier service

3. Now, the learned trial Judge had found as a fact that the letter inviting the respondent, arrived Abuja on a Friday, and Saturday and Sunday were not working days. At least there was no contrary evidence led by the respondent. There was no indication that there was any urgency in the matter, as a matter of fact, the instruction the appellant had from Shell was to keep the letter and merely to send a notice of its arrival through a post office box number, these points in my view do not suggest urgency - but rather security of the letter or package. The appellant was not aware of the contents of the letter so as to ensure that the respondent was to travel to Port Harcourt and arrive there to attend an interview fixed for 1/11/1993. It had no knowledge of the facts, that the letter was an invitation to attend an interview fixed for 1/11/1993.

The appellant in any event despatched the letter to the post office on the 2/11/1993. The respondent only received the notification on the 15/11/1993. Considering all these facts I do not agree that the appellant had been careless or negligent in the performance of his contract. The arguments of the learned counsel for the respondent that the appellant agreed to deliver the package or advise within 24 hours is not pleaded and the appellant cannot rely on such piece of evidence which was given during cross-examination and which only related to a situation when an address of delivery is given. It is even clearer that the respondent (*sic, appellant*) could not be responsible for the delay, when the respondent only received the notification slip after 13 days of its placement in the postal letter box. I am of the view that on the facts, the appellant could not be said to have breached the contract or caused the delay causing the respondent any damage. I accordingly resolve issue No.2 in favour of the appellant. The appellant was not negligent in his handling of the mail despatched by Shell to the respondent. (p. 1771 H)

Relief that was not claimed

4. It is settled law that a court cannot grant to a plaintiff a remedy which has not been claimed and established by the pleading and the evidence respectively. The court has no power to do so. Thus a court cannot grant a relief which has not been specifically prayed for. (p. 1774 C)

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Damages - Must be specifically averred and proved

5. It is also obvious that negligence is only actionable if actual damage is proved. There is no right of action for nominal damages in the tort of negligence. In *Munday v. LC.C.* (1916) 2 KB 331 at 334 Lord Heading, CJ., stated:-

C

“Negligence alone does not give a cause of action; damage alone does not give a cause of action; the two must coexist.”

In negligence actions the measure of damages is that the injured party is to be placed back, so far as money can do it, in the same position as he would have been in had it not been for the defendant's negligence. This is subject to the rules of remoteness of damages and in cases of personal injuries, a reasonable sum for pain and suffering. The dominant rule of law is the principle of Restitutio In Integrum¹. In negligence cases, damages are also divided into general and special damages. General damages are those damages which the law presumes to flow from the negligence of which the plaintiff has complained. These damages must be specifically averred to have been suffered and must be proved. (p. 1774 E)

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Damages - Assessment of - Should be based on pleadings and evidence

6. As shown above, the respondent pleaded under paragraphs 13 and 14 of the Statement of Claim, that he had suffered nervous shock and mental distress and had claimed one million naira for general damages. The assessment of damages should be based on the pleadings and the evidence adduced, and where there is no evidence to support a claim for damages, the claim should be dismissed. See *W.A.E.C. v. Koroye* (1977) 3 S.C. 45. *Dumez H v. Ogboli* (1972) S.C. 196.

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The trial court as shown above assessed general damages for “lost valuable opportunity” and the Court of Appeal confirmed this. It is clear the

respondent claimed only for personal injuries of shock and mental distress and in his evidence added “*psychological shock*.” The respondent’s claims as per his pleadings and evidence were said to be for personal injuries and not for “*lost opportunity*”. Both the trial court and the Court of Appeal are accordingly wrong to have awarded the damages they did. (p. 1775 A)

Negligence - Damages for personal injury

7. A claim for damages in personal injury cases is a claim for compensation for loss of capacity for future earnings or for a diminished enjoyment of life as a result of the injury suffered and for pain and suffering. In the instant case, the respondent claimed only for personal injury - which clearly he did not suffer. See *Obere v. Eko Baptist Hospital* (1978) 6/7 S.C 15.
- D In any event, the respondent did not claim for “*lost opportunity*” as was awarded by the lower courts, the award cannot stand. (p. 1775 E)

DAMAGES - Courts - Nature of claim - Must be ascertained

- E 8. It is the law that before a court begins 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, if in tort, the nature of the wrong alleged. As mentioned above, the principles guiding the award of damages in tort are different from those guiding the award of damages in contract. See F *James v. Mid Motors Nigeria Co. Ltd* (1978) 11 and 12 S.C. 31. In this case, it is clear that the claim in tort is negligence, it is also necessary to make further inquiry whether the tortious conduct found had occasioned G those losses. See *Agbanelo v. U. B. N. LTD.* (2000) 4 S.C. (Pt. I) 233; (2000) 7 NWLR (Pt. 666) 534 at 550 - 551. The problem in this case is that H the respondent has alleged to have suffered personal injuries i.e. mental and psychological distress and shock as the result of alleged negligence of the appellant, while both the trial court and the Court of Appeal awarded damages for lost opportunity, which is not a physical injury as claimed by the respondent, but economic loss. It is very clear that the lower courts were wrong to have awarded damages on matters not pleaded and proved.

To be entitled to compensation or damages in tort, the wrong must be accompanied by loss or damage, where no loss or damage occur, or where none has been proved, there can be no liability. (p. 1775 G)

NOTABLE POINT OF INTEREST

B

PATS-ACHOLONU JSC

1. Duty of counsel to advise litigants properly to avoid frivolous suits

It is essential to emphasize that while access to court is an undeniable right of a citizen in a free society, it is the duty of a counsel to examine all facts made available to him painstakingly to avoid a ride to the court that produces failure and disillusionments. A thorough grasp of the facts of a case presented by one with the mastery of forensic advocacy is important. It is the presumption that a judge seised with a case knows the law. There is no basis for a belief that he knows the facts until they are decently and clearly marshalled out to him..

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On another point what is the evidence that the respondent would have secured an appointment. There was no evidence of any financial loss that can be said to have been directly connected or related to the failure to attend the interview. The damage claimed is in respect of hope or spes - a claim that has no determinable basis or foundation or root, and capable of being quantified or assessed. It is based on a mere fancy or imagination or expectation that is built on a quicksand which lack, sustainability. It is to my mind barren. It has never been part of our jurisprudence that damages can be claimed and granted on expectation or fanciful hope not buttressed on any tangible substance rooted on a recognized legal principle.

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To my mind the case is faulty and ought not to have found its way in our court. (p. 1780 H)

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REPRESENTATION

J. I. Nweze, for the Appellant.

E. I. Esene (kss), (with him, A. A. Williams), for the Respondent.

H

CASES REFERRED TO

Mbakwe v. Nwokor (2001) 14 NWLR (Pt. 733) 358 at 361

1764 Inter. Messengers Ltd v. Nwachukwu (2004) 6 KLR Musdapher JSC

Savannah Bank (Nig) .1 Ltd, v. S. I. O. Carpenters (2001) 1 NWLR (Pt. 693) 194 at 197

Winterbottom v. Wright (1842) 10 M & W 109

Junior Books Ltd v. Veitchi Co. Ltd. (1983) 1 AC 520

B Abusomwan v. Merchantile Bank of Nigeria Ltd. (1987) Pt. 2 Vol. 18 NSCC 878 at 887

Nigeria Housing Development Ltd and Anor. v. Mumini (1977) 2 SC 57 at 81

C University of Lagos and 8 Ors. v. Dada (1971) 1 UILR (Pt. 3) 344

Oyekanmi v. NEPA (2000) 18 SC (Pt .1) 70.

Munday v. L.C.C. (1916) 2 KB 331 at 334

W.A.E.C. v. Koroye (1977) 2 S.C. 45

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LEAD JUDGMENT BY MUSDAPHER JSC

By a Writ of Summons issued by the High Court of the Federal Capital Territory Abuja and in Suit No. FCT/HC/CV/414/93, the plaintiff, Engineer David Nwachukwu, claimed against the defendant, International Messengers Nigeria Ltd, a courier company, as per paragraph 14 of the Statement of Claim, as follows:-

F *“WHEREOF the plaintiff claims from the defendant the sum of one million naira as general damages for the injuries that occurred to him as a result of the defendant’s negligence and breach of duty of care.”*

G In its Statement of Defence, the defendant denied liability and the matter proceeded to trial where the parties led evidence. In his judgment delivered on the 24th day of September, 1997, the trial Judge found for the plaintiff but held that there was contributory negligence on the part of the plaintiff (but did not indicate the extent) and awarded the plaintiff general damages in the sum of N100,000.00. The learned trial Judge held in particular:-

H *“In assessing damages, the delay caused by the defendant in not sending the letter before the date of the interview caused loss of opportunity to the plaintiff, which is a direct natural or probable consequence of the act of the defendant. Shell, that invited the plaintiff for an interview, after examining all his papers, found him to be worthy of such invitation.*

The plaintiff has lost his valuable opportunity. After a very careful assessment, this court has awarded to the plaintiff the sum of N100,000.00 as damages only.”

The defendant felt unhappy with the judgment and appealed to the Court of Appeal. In accordance with the Notice of Appeal, the Court of Appeal considered the following issues formulated by itself for the determination of the appeal:-

“(1) Whether the lower court was right when it found the appellant liable in negligence. Subsumed in this issue is:-

Whether the lower court was right when it held that the defendant owned the plaintiff a duty of care to advise its Post Office Box before the 1st November, 1993.

(2) Whether there was any evidence to sustain the award of damages made by the lower court. Subsumed in this issue are two sub-issues as follows:-

(a) Whether the lower court was right to have made an award for damages for lost opportunity when the evidence of injury led is for mental and psychological shock.

(b) Whether the award for lost opportunity was based on mere speculation or a mere probability.

(3) Whether the lower court was right when it held there was causal connection between the act of the defendant and the plaintiff missing the interview.”

In its judgment delivered the 18/4/2000, the Court of Appeal per Oduyemi, JCA., and agreed to by Coomassie and Bulkachuwa, JJCA., found no merit in the appeal and dismissed the same. The defendant, hereinafter called the appellant, and the plaintiff, the respondent, filed a Notice of further appeal to this court. Before the consideration of the issues submitted to this court for the determination of the appeal, it shall be necessary to set out the relevant facts. The action was filed by the respondent at the trial court because he was not happy with the way and manner his mail was handled and delivered to him by the appellant, a courier company. In response to his application for employment, Shell Development Company Nigeria Ltd. (hereinafter referred to simply as Shell), the respondent was invited for inter-

view at Port Harcourt, Shell's head office. A letter was delivered to the appellant's office at Port Harcourt for delivery to the respondent at Abuja. The letter was handed over to the appellant at its office at Port Harcourt on the 26/10/1993 at 6.15pm. The letter which was written on the 20/10/1993 inviting the respondent to the interview fixed for 1/11/1993 did not contain any address for delivery. It was to be kept with the appellant at its office at Abuja for the respondent to personally come to collect. The appellant should only advise the respondent of the arrival of the letter at Abuja through a Post Office box number. The appellant claimed that the letter arrived Abuja on the 29/10/1993 at about noon and that was Friday. Saturday and Sunday were not working days and the appellant despatched the advice to the respondent on the 2/11/1993 a day after the interview was scheduled to hold at Port Harcourt. The respondent did not even receive this advice until the 15th of November, 1993. The respondent claimed that the letter arrived Abuja on the 26/10/1993 and the appellant accepted to deliver the advice to the respondent within 24 hours of the arrival, but the appellant failed to despatch the letter to the Post Office box until the 2/11/1993. Thus, the respondent missed the interview and accordingly made a claim for negligence and breach of duty of care against the appellant for non delivery of the letter on time.

Distilled from the Notice of Appeal filed against the decision of the Court of Appeal, three issues for the determination of the appeal were identified and submitted to this court. An objection against the first issue was raised by the respondent. At the hearing of the appeal before this court, the learned counsel for the appellant, rightly in my view, conceded the point and abandoned issue No.1. Issue No. 1 is accordingly struck out. The two issues remaining are:-

"2. Whether the Court of Appeal was right in holding that the defendant/appellant was negligent in handling the said package which negligence resulted in damages to the plaintiff/respondent.

3. Whether the Court of Appeal was right to have made an award for damages for lost opportunity having regard that the plaintiff/respondent did not claim for lost opportunity but for mental and psychological shock."

I shall now discuss Issue No. 2 as it appears in the appellant's brief and then Issue No. 3.

Issue No.2

This issue is concerned with whether on the facts it can be said that the appellant was liable to the respondent in the tort of negligence, simply because the appellant did not despatch the invitation letter to the interview within the time to enable the respondent to attend the interview on the 1/11/1993. To put it another way, could it be said that the appellant owed a duty of care to the respondent to despatch the letter so as to reach the respondent in time to enable him attend the interview on the 1/11/1993? In his judgment Oduyemi, JCA., observed:-

“xxxxxx I have no doubt that the respondent who was the addressee of the letter by Shell was as close in proximity to the appellant as was Shell with whom it had contract and was as such in contemplation of the appellant, carelessness or negligence on whose part, may be likely to cause damages to the addressee respondent thus making a prima facie duty of care to arise. D

I am quite satisfied with the finding of the learned trial Judge that even (if) were the 29/10/1993 to be the accepted date of the arrival of the letter in Abuja, it was an act of negligence for which the appellant would be liable that by an error of judgment it did not consider it necessary to communicate the postal box address of the respondent until the 2nd of November, 1993.” E

He went on to observe as did the trial Judge that the delay of the appellant in sending the notification on the 2/11/1993, after the date fixed for the interview “*was a natural and direct cause of the plaintiff’s loss of opportunity*” Thus, it was found as a fact that the appellant owed the respondent duty of care, the appellant was in breach of that duty of care and damages had resulted from that breach. F

It is submitted on behalf of the appellant, that duty of care owed to the respondent was to deliver the package intact and that there was no duty of care to deliver the invitation letter to enable the respondent attend the interview on the 1st of November, 1993. It is argued that the following facts must be taken into consideration in order to gauge the culpability of the appellant in negligence:- G

(1) There was no physical address to which the letter was to be delivered.

(2) The letter arrived Abuja on a Friday and two days thereafter were not working days.

(3) The letter was not marked urgent.

(4) The letter was not marked deliver as soon as possible.

B (5) The letter was not marked to be delivered by the 31st of October.

(6) Shell did not ask the appellant to deliver on or before 31st October.

(7) Appellant was not aware of the contents of the letter.

C It is thus submitted that on these facts it could not be in the contemplation of the appellant that its failure to advise the postal box on or before the 31st of October would cause damages to the respondent. And accordingly there was no duty of care to advise the box before the 31st of October. See BDC Ltd v. Hopstrand Farms Ltd. (1986) 26 Dominion Law
D Reports 4th Page 1.

It is again submitted that under the circumstances, the appellant had a duty only to deliver the message to the box within a reasonable time and it had done so. It is also submitted that no evidence was led to show any
E causal connection between the purported carelessness of the appellant and the loss of opportunity to attend the interview suffered by the respondent.

The respondent's counsel on the other hand argued that negligence was proved against the appellant in the way and manner it handled the mail
F and the negligence caused damage to the respondent. It was evident that the appellant undertook to deliver the mail within 24 hours. It is further argued that the appellant entered the contract for the respondent's benefit and Shell relying on the appellant's skill, a duty of care thus arose vide Hedley
G Bryne v. Heller (1962) AC 464 at 594. It is again submitted that a person not party to a contract can still claim damages for breach of that contract if duty of care is owed to him see Mbakwe v. Nwokor (2001) 14 NWLR (Pt. 733) 358 at 361. Savannah Bank (Nig) .1 Ltd, v. S. I. O. Carpenters (2001) 1 NWLR (Pt. 693) 194 at 197. Amadi v. Essein (1994) 7 NWLR (Pt 354) 91
H at 102 Techno Mech (Nig) Ltd v. Ogunbayo (2000) 14 NWLR (Pt. 639) 150 at 153. A. N. T. S. v. Atoleye (1993) 6 NWLR (Pt. 298) 233 at 236. It is again submitted that appellant owed the respondent a duty of care to ensure that mail is carefully and promptly delivered as it contracted to do

within the normal delivery period of 24 hours and the appellant can reasonably foresee that the respondent may be injured if the mail is not delivered within the stipulated period of 24 hours. Learned counsel further refers to I.I. T. A. v. Amrani (1994) 3 NWLR (Pt. 332) 296 at 300. UBN Plc v. Eskol Paints Ltd (1997) 8 NWLR (Pt. 515) 157 at 160; NEPA v. Akpala (1991) 2 B NWLR (Pt. 175) 536 at 540. It is further submitted, that negligence can be inferred from conduct, since it has been shown that the appellant delivers mail within 24 hours. The failure to deliver the mail in this case shifts the onus to disprove negligence on the appellant and the appellant has failed to prove no fault. See Alao v. Inaolayi Builder Ltd (1990) 7 NWLR (Pt. 160) C 36 at 39. Ohadegha v. Garba (2000) 4 NWLR (Pt. 687) 226.

Now, negligence is the breach of duty to take care. A duty to take care can be imposed by law or can be created by contract or trust. The breach of the contractual duty to take care, however, has not always been regarded as an actionable tort. But it is not uncommon to speak of the negligent performance of a contract, but the law used to be “*whenever there Is a contract, and something to be done in the course of the employment which is the subject of that contract, if, there is a breach of a duty in the course of that employment the plaintiff may recover either in tort or contract.*” See Brown v. Boorman (1844) 11 CL & F 1. It is now well recognized that a breach of a contractual duty must be dealt with according to the law of contract, and can not be regarded as a tort of negligence, although the same facts may in some cases amount to a breach of contract and also the tort of negligence. This may be illustrated in a case of the relationship of a surgeon and his patient, where the surgeon negligently performs an operation, the patient may claim either for breach of contract or in tort. Indeed in the case of death, resulting from the negligent operation, a third party may sue in tort. It had been argued before that A’s breach of contract to B should not be considered capable of giving rise to liability in tort for harm caused to C. See Winterbottom v. Wright (1842) 10 M & W 109, in which the plaintiff H was employed to drive a mail coach by one Atkinson, who had been engaged to carry mail by the Postmaster-General, the latter had hired a coach from the defendant, who had undertaken to him that it would be kept in a

fit, proper, safe and secure state. The plaintiff's claims for damages in respect of injuries suffered when the coach broke down on a journey owing to its dangerous state was rejected by the court, which accepted the defendant's contention that "*whatever wrong arises merely out of the breach of contract the party who made the contract alone can sue.*" This approach was rejected by the House of Lords in *Donoghue v. Stevenson* (1932) AC 562 as Lord Macmillan put it, "*there is no reason why the same set of facts should not give one person a right of action in contract and another person a right of action in tort.*" See also *Hedley Byrne case supra*. See also *Junior Books Ltd v. Veitchi Co. Ltd.* (1983) 1 AC 520 where the House of Lords held that a specialist flooring sub-contractor who had built a defective but not dangerous floor could owe a duty of care to the owner of the building who had to replace it as the result. Clearly, there was no privity of contract between the parties, their lordships found that there was a "*special relationship*" between them which enables the owner to sue. See also *White v. Jones* (1995) 2 AC 207. Coming home on this point, this court per Karibi-Whyte, JSC, in the case of *Abusomwan v. Merchantile Bank of Nigeria Ltd.* (1987) Pt. 2 Vol. 18 NSCC 878 at 887 observed:-

"*The fog over remedies arising from contractual obligations 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 from the contract of two persons, the third party is net 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. The duty imposed here is not because there was a contract but because the defendant had implied undertaking not to injure the plaintiff. The rationale in truth is that, even though not so expressed, the obligations towards the contracting party extended to all such persons who were likely to be injured by the acts or omissions of the defendant. They are neighbours in contemplations or ought to be in contemplation of the defendant.*"

The recent decision of the House of Lords has summed up the law

admirably in *Ann v. Merton London Borough Council* (1978) AC 728 where Lord Wilberforce stated as follows:-

"Through the trilogy in this house Donoghue v. Stevenson (1932) AC 562, Hedley Byrne v. Heller (1964) AC 465, Dorset Yacht Club v. Home Office. (1976) AC 1004. The position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care had been held to exist. First one has to ask as between the alleged wrongdoer and the person who has suffered damage if there is a sufficient relationship of proximity or neighbourhood such that in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter in which case a prima facie duty of care arises."

Applying the above principles, it is clear in my mind, that the way and the manner the appellant in the instant case executed the contract between Shell and himself could affect the respondent. The appellant by his contract, had accepted the responsibility to deliver the mail to the respondent, any failure to deliver the mail or to deliver it late or misdeliver it may cause damage to the respondent. It is that assumption of responsibility that imposes a duty of care. There is no doubt, the appellant is a courier company, it has special skills and expertise to deliver packages and letters sent through them with speed and accuracy. That is why their services are engaged by customers for the benefit of the customers and the third parties for whom the packages are meant for.

Negligence is the failure to use the requisite amount of care require by law in the case where duty of care exists, accordingly, it is now necessary to examine the conduct of the appellant under the circumstances to judge whether the appellant breached its duty in accordance with its contract with Shell.

Now, the learned trial Judge had found as a fact that the letter inviting the respondent, arrived Abuja on a Friday, and Saturday and Sunday were not working days. At least there was no contrary evidence led by the respondent. There was no indication that there

was any urgency in the matter, as a matter of fact, the instruction the appellant had from Shell was to keep the letter and merely to send a notice of its arrival through a post office box number, these points in my view do not suggest urgency - but rather security of the letter or package. The appellant was not aware of the contents of the letter so as to ensure that the respondent was to travel to Port Harcourt and arrive there to attend an interview fixed for 1/11/1993. It had no knowledge of the facts, that the letter was an invitation to attend an interview fixed for 1/11/1993.

The appellant in any event despatched the letter to the post office on the 2/11/1993. The respondent only received the notification on the 15/11/1993. Considering all these facts I do not agree that the appellant had been careless or negligent in the performance of his contract. The arguments of the learned counsel for the respondent that the appellant agreed to deliver the package or advise within 24 hours is not pleaded and the appellant cannot rely on such piece of evidence which was given during cross-examination and which only related to a situation when an address of delivery is given. It is even clearer that the respondent (*sic, appellant*) could not be responsible for the delay, when the respondent only received the notification slip after 13 days of its placement in the postal letter box. I am of the view that on the facts, the appellant could not be said to have breached the contract or caused the delay causing the respondent any damage. I accordingly resolve issue No. 2 in favour of the appellant. The appellant was not negligent in his handling of the mail despatched by Shell to the respondent.

Issue No. 3

This is concerned with whether the award of damages is sustainable having regard to the Statement of Claim and the evidence led and what was awarded by the court.

Now, by paragraphs 13 and 14 of the Statement of Claim, the respondent pleaded thus:

“13. That the plaintiff suffered nervous shock and mental distress as a result of the defendant’s conduct; and

14. *WHEREOF the plaintiff claims from the defendant the sum of One Million Naira as general damages for the injuries that occurred to him as a result of the defendant's negligence and breach of duty of care.*"

In his evidence at page 17 of the printed record, the respondent said:-

"As a result of that, I suffered mental and physiological (sic) shock for not getting the job." B

In its judgment on page 101 of the printed record, the trial court awarded damages to the respondent because the respondent *"had lost valuable opportunity"*. The Court of Appeal in its judgment confirmed the award at page 169 of the record as follows:- C

"xxxxxxx I am of the opinion that the learned trial Judge rightly held that the delay of the defendant in sending the notification before the date of the interview was a natural and direct cause of the plaintiff's loss of opportunity." D

It is submitted for the appellant that the claim made out by the respondent was for damages for nervous shock and mental distress as contained in the pleadings and for mental and psychological shock as testified by the respondent. There was no claim for *"loss of valuable opportunity"* E and the court was wrong to have so awarded the damages on that ground. Learned counsel referred and relied on the cases of *Okoya v. Santili* (1994) 4 NWLR (Pt. 338) 256 at 303 and 304, *Commissioner for Works. Benue State and Anor v. Devcom Development Consultants Ltd, and Anor.* (1988) 3 NWLR (Pt 83) 407. *N. H. D. S. Ltd v. Mumini* (1977) 2 S. C. 57 F

It is further argued that even if it was open for the court to make the award for *"lost valuable opportunity,"* the appellant still contends, the award was not based on any facts adduced by evidence but on mere speculation as there was no guarantee or certainty that the respondent would have secured any job had he attended the interview. It is submitted that the award of N 100,000.00 damages for lost opportunity was arbitrary and ought to be set aside vide *Davies v. Taylor* (1974) AC 207. G

The learned counsel for the respondent argued that by his Statement of Claim, the respondent claimed general damages for negligence and breach of duty of care and that the respondent led evidence to prove damage and the award was not speculative or arbitrary. H

Learned counsel referred to the case of Joseph v. Abubakar (2000) 56 NWLR (Pt 759) 185; Uba Ltd v. Achoru (1990) 6 NWLR (Pt. 156) 264. It is again submitted that the claims of the respondent being taken by Shell after the interview were substantial. It is argued that general damages can be
B awarded under the head of “*injuries sustained and for pains and suffering*” even where the plaintiff failed to supply details of the injuries. Learned counsel referred to the following cases. Esegbe v. Agholor (1990) 7 NWLR (Pt. 161) 234 at 238. Igbinovia v. Agboifo (2000) 12 NWLR (Pt. 681) 336 at 338. Bello v. Pategi (2000) 8 NWLR (Pt. 667) 12 at 23.

C Let me start with the obvious. **It is settled law that a court cannot grant to a plaintiff a remedy which has not been claimed and established by the pleading and the evidence respectively. The court has no power to do so.** See Ekpenyong and Ors. v. Nyong and Ors (1975) 2
D S.C.71. Kalio and Ors v. Daniel Kalio (1975) 2 S.C. 15, Nigeria Housing Development Ltd and Anor. v. Mumini (1977) 2 SC 57 at 81. University of Lagos and 2 Ors. v. Dada (1971) 1 UILR (Pt. 3) 344 and Union Beverages v. Owolabi (1988) 1 NWLR (Pt. 68) 128 at 133. **Thus a court cannot**
E **grant a relief which has not been specifically prayed for.** See Dyktrade Ltd. v. Omnia Nig Ltd. (2000) 7SC (Pt. 1) 56 at 68. Oyekanmi v. NEPA (2000) 12 SC (Pt. 1) 70.

It is also obvious that negligence is only actionable if actual
F **damage is proved. There is no right of action for nominal damages in the tort of negligence. In Munday v. LC.C. (1916) 2 KB 331 at 334 Lord Heading, CJ., stated:-**

“Negligence alone does not give a cause of action; damage alone does not give a cause of action; the two must coexist.”

G In negligence actions the measure of damages is that the injured party is to be placed back, so far as money can do it, in the same position as he would have been in had it not been for the defendant’s negligence. This is subject to the rules of remoteness of damages and
H in cases of personal injuries, a reasonable sum for pain and suffering. The dominant rule of law is the principle of Restitutio In Integrum¹. In negligence cases, damages are also divided into general and special damages. General damages are those damages which the law pre-

sumes to flow from the negligence of which the plaintiff has complained. These damages must be specifically averred to have been suffered and must be proved. See Admiralty Commissioners v. S. S. Susguehanna (1926) AC 661. Ezeani v. Ejidike (1964) 1 All NLR 402

As shown above, the respondent pleaded under paragraphs 13 B and 14 of the Statement of Claim, that he had suffered nervous shock and mental distress and had claimed one million naira for general damages. The assessment of damages should be based on the pleadings and the evidence adduced, and where there is no evidence to support a claim for damages, the claim should be dismissed. See C W.A.E.C. v. Koroye (1977) 3 S.C. 45. Dumez v. Ogboli (1972) S.C. 196.

The trial court as shown above assessed general damages for “*lost valuable opportunity*” and the Court of Appeal confirmed this. It is clear the respondent claimed only for personal injuries of shock D and mental distress and in his evidence added “psychological shock.” The respondent’s claims as per his pleadings and evidence were said to be for personal injuries and not for “*lost opportunity*”. Both the trial court and the Court of Appeal are accordingly wrong to have E awarded the damages they did. A claim for damages in personal injury cases is a claim for compensation for loss of capacity for future earnings or for a diminished enjoyment of life as a result of the injury suffered and for pain and suffering. In the instant case, the respondent F claimed only for personal injury - which clearly he did not suffer. See Obere v. Eko Baptist Hospital (1978) 6/7 S.C 15.

In any event, the respondent did not claim for “*lost opportunity*” as was awarded by the lower courts, the award cannot stand. G See Kalio v. Daniel Kalio supra.

It is the law that before a court begins 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, if in tort, the nature of the wrong alleged. As mentioned above, the principles guiding the H 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 and 12 S.C. 31. In this case, it is clear that the claim in

tort is negligence, it is also necessary to make further inquiry whether the tortious conduct found had occasioned personal injuries, economic loss or other social losses or a combination of those losses. See *Agbanelo v. U. B. N. LTD. (2000) 4 S.C. (Pt. I) 233; (2000) 7 NWLR (Pt. 666) 534* at 550-551. The problem in this case is that the respondent has alleged to have suffered personal injuries i.e. mental and psychological distress and shock as the result of alleged negligence of the appellant, while both the trial court and the Court of Appeal awarded damages for lost opportunity, which is not a physical injury as claimed by the respondent, but economic loss. It is very clear that the lower courts were wrong to have awarded damages on matters not pleaded and proved. To be entitled to compensation or damages in tort, the wrong must be accompanied by loss or damage, where no loss or damage occur, or where none has been proved, there can be no liability, I accordingly resolve the 3rd issue in favour of the appellant against the respondent.

All the remaining issues having been resolved in favour of the appellant, this appeal succeeds and is allowed. The judgments of the courts below including the orders for costs are hereby set aside. In their place I order the dismissal of the respondent's claims. The appellant is entitled to costs assessed at N3,000.00, N5,000.00 and N10,000.00 at the High Court, Court of Appeal and this court respectively.

KUTIGIJSC

I read in advance the judgment just delivered by my learned brother, Musdapher, JSC. I agree with his reasoning and conclusions. There is absolutely no merit in the plaintiff/respondent's claims before the trial High Court. The claim was simply "for general damages for injuries that occurred," and no injuries were proved. The courts below were therefore wrong to have awarded anything to the plaintiff/respondent for claims not made out. I therefore allow the appeal, set aside the judgments of the lower courts and in their place make an order dismissing plaintiff/respondent's claims. I endorse the order for costs.

IGUHJSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Musdapher, JSC., and I agree that there is merit in this appeal and that the same ought to be allowed. B

On the evidence before the court, it is clear that there was no duty of care on the part of the defendant to ensure that the plaintiff received his letter in issue before the 31st day of October, 1993. In my view, both courts below erred in law by holding that the tort of negligence was established against the defendant by the plaintiff. C

This appeal accordingly succeeds and the judgments of the courts below including the orders as to costs therein made are hereby set aside. In their place, the plaintiff's claims are hereby dismissed. D

I abide by the order as to costs made in the leading judgment.

EJIWUNMI JSC

I was privileged to have read in advance the draft of the judgment just delivered by my learned brother, Musdapher, JSC. In that judgment, as all the issues raised in this appeal have been fully considered before allowing the appeal, I do not consider it necessary to add further views of my own. This appeal is therefore also allowed by me, and I award costs as ordered in the lead judgment referred to above. F

PATS-ACHOLONU JSC

I have read the judgment of my learned brother Musdapher, JSC., and I agree with him. The main issue as I see it in this case is really whether the appellant should be liable for the fate that befell the respondent in respect of his quest for appointment to a Shell Development company job. H The facts of the case have been amply stated in the lead judgment. It cannot be over-stated that facts being the springboard of law, a proper synthesisation and meticulous scrutiny of the facts in a case is essential to find the appli-

cable law.

The respondent who had applied for a job in the Shell Development Company of Nigeria had indicated to that company how any postal mail meant for him in response to his application could be sent to his place of residence at Abuja. The letter inviting the respondent for interview for a post he applied for, was mailed to him through the somewhat mailing procedure he elected for the mail to be sent. The letter was late in arriving due to the circuitous manner it went. The respondent could not attend the interview as the letter arrived late and he sued the courier company. What is easily discernible from the case is that there was no physical address the mail could be sent; there was no mark of urgency on the part of the sender, the Shell Company, and so the letter was handled in an ordinary manner the courier company handles such messages. Could the appellant be liable for negligence for the late arrival of the letter? Does the appellant owe a duty of care to the respondent?

To begin with, in the normal course of things the appellant is expected at all times to use utmost diligence in its work and should endeavour to use methods that should not adversely affect any person whose interest may suffer by any lethargy or lackadaisical attitude in its operations. I believe that in the course of clearly understanding the nature of the duty of care in the tort of negligence, the lucid restatement of the law by Lord Wilberforce in *Ann v. Merton London Borough Council* (1978) AC 728 is worthy of mention. In that case he said:

Through the trilogy in this house in *Donoghue v. Stevenson* (1932) AC 562, *Hedley Byrne v. Hellen* (1964) AC 465, *Dorset Yacht Club v. Home Office* (1976) AC 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. First, one has to ask as between the alleged wrong doer and the person who has suffered damage if there is a relationship of proximity or neighbourhood that in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter in which case a prima facie duty of care arises.”

The question in this case is whether in the run and performance of its duties as a party that contracted with Shell to deliver a mail the appellant had unwittingly, carelessly and without due care done something which had the consequence of affecting adversely the fortune of a third party whose interest it ought to take in its stride. The contract was to deliver the mail B within a reasonable time in accordance with their nature of operation of the appellant's company.

In her evidence in court, D.W.I said;

"The Airway Bill is addressed to Mr. D. A. Nwachukwu. P. O. Box C 5453 Garki, Abuja. It is marked "advise the box on arrival." The reason is that we are given post office address. What I did when I received the package along side with so many that day I tore the packages received, what I mean is to cross check them with the packing manifest sent to us. D I could not send out this particular parcel in question that Friday because we were asked to advise the box. I did not send it to the box that day as there was no mark of urgency en the parcel. By that it was supposed to carry this inscription "please deliver as soon as possible." The mails we received with house or office addresses we delivered them that same day we received them E on the 29/10/93 and therefore with this letter in question I advised the box by typing a letter and I said in it that the person should come to our office for collection. I did not type the letter for P.W. 1 that same date as I had some urgent mails to attend to. If I had typed the letter on that 29/10/93, F the people in our office would have taken it to P.W. 1 's box that same day. I advised the box of the P.W. 1 on the 2/11/93, it was done on a Tuesday. On Monday 1/11/93 I had some urgent mails to attend to. When a person will want to send a package through our office we shall normally tell that G person the time within which we shall deliver that package. If the letter is with a full address house or office from Port-Harcourt is 48 hours. However, like this with P. O. Box number we do not give them time as we would not know the time the person will come for collection."

In the light of this evidence, it is difficult to state that the respondent H had in any way helped matters by way of easing and facilitating the business of the appellant to ensure candour, speed, urgency and diligence. The appellant's staff had stated that it is not their custom to advise customers

to use the medium of post box as that course would necessitate delays and unfortunately that was the method of delivery used in this case on the directive or instruction of the respondent to Shell. By following the method of post box delivery which does not give or afford direct and personal service or therefore prompt delivery, did the appellant make a costly mistake? In other words did it breach a duty of care? Can a reasonable person describe its method of carrying out the contract of mail delivery as having done violence to any job opportunities of the respondent. I believe that a breach of duty of care would have arisen if the appellant had not acted according to the advice given, or been guilty of inordinate and inexcusable delay. In the case of *Anya v. Imo Concorde Hotels Ltd.*(2002) 12 S.C. (Pt.II) 77, (2002) 18 NWLR (Pt. 799) p. 377 at 396, the appellant was a guest in the Hotel belonging to the respondent and parked his car having collected a pass from the security at the gate. The following morning when he went to collect his car it could not be found. He thereafter instituted an action claiming that the Hotel owed him a duty of care to protect his property which he had duly left in their custody. In the Supreme Court, Kalgoo, JSC, held as follows :-

“For the defendant to be liable for negligence, there must be either an admission by him or sufficient evidence adduced to a finding of negligence on his part. Such evidence may be direct or inferential depending on the circumstances of each particular case. See Ben son v. Otubo. (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 apart 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.”

It is essential to emphasize that while access to court is an undeniable right of a citizen in a free society, it is the duty of a counsel to examine all facts made available to him painstakingly to avoid a ride to the court that produces failure and disillusionments. A thorough grasp of the facts of a

case presented by one with the mastery of forensic advocacy is important. It is the presumption that a judge seised with a case knows the law. There is no basis for a belief that he knows the facts until they are decently and clearly marshalled out to him. (One would here recall the story by Francis Galtons (Memories of My Life 1908) of Huxley and Herbert B Spencer. “*Spencer during a pause in conversation at dinner at the Athenaeum said; ‘You would think it but I once wrote a tragedy’.* Huxley answered promptly, ‘*I know the catastrophe*’. Spencer declared it was impossible for he had never spoken about it before then. Huxley insisted. C Spencer asked what it was. Huxley replied, A beautiful theory killed by nasty little facts.

On another point what is the evidence that the respondent would have secured an appointment. There was no evidence of any financial loss that can be said to have been directly connected or related to the failure D to attend the interview. The damage claimed is in respect of hope or spes - a claim that has no determinable basis or foundation or root, and capable of being quantified or assessed. It is based on a mere fancy or imagination or expectation that is built on a quicksand which lack, sustainability. It is to E my mind barren. It has never been part of our jurisprudence that damages can be claimed and granted on expectation or fanciful hope not buttressed on any tangible substance rooted on a recognized legal principle.

To my mind the case is faulty and ought not to have found its way in F our court. In the final result, I allow the appeal and set aside the judgment of the court below.

1 In civil law, restoration or restitution to the previous condition.