

**SUPREME COURT OF NIGERIA**  
10TH MARCH, 2006. SC. 251/2001  
**CORAM:- S. U. ONU, A. I. KATSINA-ALU, N. TOBI, G. A.**  
**OGUNTADE, I. F. OGBUAGU, JJSC**

MISS FELICIA OSAGIEDE OJO ..... APPELLANT  
AND  
1. DR. GHARORO  
2. UNIVERSITY OF BENIN TEACHING  
HOSPITAL MANAGEMENT BOARD ..... RESPONDENTS  
3. DR. S. A. EJIDE

---

EVIDENCE - Hearsay - Meaning - Subramanian case - When an evidence may be hearsay - Includes where it is a statement - Made by a witness who is not called to testify (H1)

EVIDENCE - Hearsay - Parties - Medical matter - Where a party herself testified - About a witness's participation in her treatment - That witness's evidence in the matter cannot be hearsay (H2)

EVIDENCE - Hearsay - Documents - Medical matter - Where a witness headed the operation team - His testimony that is based on the medical case note - Is not hearsay (H3)

EVIDENCE - Hearsay - Documents - Where their contents do not convey hearsay evidence - Oral evidence based on them - Will not be hearsay evidence (H4)

EVIDENCE - Expert witness - Negligence - Medical matter - Allegation of negligence against respondents - Who gave expert evidence - Made it mandatory for appellant to have called expert witness (H5)

TORTS - Negligence - Medical matter - Surgery - Quality of surgical needles used - Cannot be inferred to be substandard - From 1st respondent's

general statement (H6)

EVIDENCE - Witnesses - Tainted witness - Meaning - Judicial precedents  
- Cases relied upon by appellant - Do not show 1st respondent to be a  
tainted witness (H7)

TORTS - Negligence - Medical matter - Res ipsa loquitur - Rebuttal of the  
presumption - Was clearly done by the respondents - In the absence of  
expert evidence from the appellant (H8)

TORTS - Negligence - Medical matter - Res ipsa loquitur - Burden of proof  
on plaintiff - Was not discharged - As defendants showed the event to be  
accidental - And not a breach of duty of care (H9)

TORTS - Negligence - Medical matter - A medical man should not be guilty  
of negligence - Merely because something went wrong - Save he falls short  
of usual skillful standard (H10)

### **FACTS**

The plaintiff/appellant had a growth in her fallopian tube which made pregnancy impossible for her. The defendants/respondents after due medical consultation agreed to execute a surgical/gynecological operation on the appellant to remove the growth to enable her become pregnant. The 1st respondent was the consultant in charge of the team of medical practitioners that handled the appellant's case, while 3rd respondent performed the surgical operation in December, 1993. It is the claim of the respondents that the operation was successful but appellant thought differently. She felt pains and reported to 1st respondent who asked her to do an x-ray. The x-ray confirmed that there was a broken needle in her abdomen. This resulted in a second operation which could not totally remove the broken needle. So the appellant sued, claiming the sum of N2 million as special and general damages for negligence.

Appellant relied on res ipsa loquitur maxim and did not call any expert witness to establish her claim. She sought to rely on a general

statement of the 1st respondent in asserting that respondents admitted using substandard surgical needle for the operation. At the close of hearing, the trial Judge dismissed the appellant's case on the ground that the respondents rebutted the presumption of negligence raised by the appellant. Her appeal to the Court of Appeal was dismissed. Still dissatisfied, appellant has further appealed to the Supreme Court.

**ISSUES FOR DETERMINATION**

*“1. Whether the learned Justices of the Court of Appeal were right in finding that the evidence of the 1st Respondent was that of an eye witness who can be described as a star witness and therefore attract the most probative value in view of the printed evidence on record?*

*AND*

*If the answer to the afore-mentioned issue is in the negative was there other evidence from which the Court could find that the respondent rebutted the presumption of negligence against them?*

*2. Whether the learned Justices of the Court of Appeal were right in their finding that the issue of damages was not covered by the grounds of appeal and therefore incompetent?*

*3. Whether the learned Justices of the Court were right in dismissing the case of the Appellant in view of the totality of the evidence led?*

*4. Whether the learned Justices of the Court of Appeal were right in holding that the 1st Respondent's evidence on the use of a substandard surgical needle by the Respondents during the operation of 17/12/93 was a general statement and did not connote liability or negligence by the Respondents?*

*AND*

*If the answer to the afore-mentioned issue is in the negative what is the legal consequence of such adverse admission on the defence of the Respondents.”*

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

***EVIDENCE - Hearsay - Meaning***

1. Let me first take the submission of learned counsel for the appellant that the evidence of the 1st respondent is hearsay. In the often cited case of the

common law tradition of *Subramanian v. Public Prosecutor* (1956) 1 WLR 965 at 969, the Judicial Committee of the Privy Council held that evidence of a statement made to a person by a person who is himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when  
 B the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement but the fact that it was made.

C When a third party relates a story to another as proof of contents of a statement such story is hearsay. Hearsay evidence is all evidence which does not derive its value solely from the credit given to the witness himself, but which rests also, in part, on the veracity and competence of some other person. See *Judicial Service committee v. Omo* (1990) 6  
 D NWLR (Pt. 157) 407. A piece of evidence is hearsay if it is evidence of the contents of a statement made by a witness who is himself not called to testify. See *Utteh v. The State* (1992) 2 NWLR (Pt. 223) 257.

The word “hearsay” is used in various senses. Sometimes it means  
 E whatever a person is heard to say. Sometimes it means whatever a person declares on information given by someone else.

The Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990 does not specifically use the expression “hearsay evidence” but the  
 F totality of section 77 of the Act, by interpretation of the Courts, provide for hearsay evidence.

In most cases, hearsay evidence is to the following or like effect:  
 “I was told by XYZ that; or XYZ told me that; or heard that XYZ told ABC that; or I made inquiries and I was told that” (p. 924 C)  
 G

***When witness's evidence cannot be hearsay***

2. The above is yet another evidence showing that the 1st respondent participated one way or the other in the whole clinical affair. No less a  
 H person than the appellant said that the 1st respondent examined her when she came to the hospital, an examination which resulted in the finding that she had fibroid in her fallopian tube which needed an operation. That apart, witness stated unequivocally that the second operation to remove the

needle was carried out by the 1st and 3rd respondents. Can she, in the light of her own evidence, seriously contend that the evidence of 1st respondent is hearsay? That should not lie in her mouth because she will be contradicting herself and this Court will not assist her to contradict herself.

After the operation, and following pains by the appellant, she visited the hospital and both the 1st and 2nd respondents gave her professional advice to palliate and pacify her anxieties. (p. 926 C)

***Testimony that is based on the medical case note - Is not hearsay***

3. Although 1st respondent was not physically involved in the operation, his evidence was erected basically and essentially on and from Exhibit M, what witness called “the operative notes of the Plaintiff”.

In his evidence, based on Exhibit M, the 1st respondent said under cross-examination:

*“Exhibit M does not show that the operation wound was infected afterwards. The sterile needle left in the anterior wall of the plaintiffs abdomen does not constitute an infection. I see Exhibit M, in it there is a note made on 9/2/94 by Dr. Ogah that the operation wound is inaurated by haematoma, i.e. swollen and the patient is likely to be infected. I see Exhibit M and the entry for 22/12/93. That entry does not mean that the wound is infected.”*

The above evidence is to show that the totality of the evidence of 1st respondent was based on Exhibit M, the Case Note. The question is whether evidence based on the Case Note is hearsay evidence. I think not and here section 91(1) and (2) of the Evidence Act will certainly come to the aid of the 1st respondent.

Although the 1st respondent may not be regarded at all times of the operation as an eyewitness in the sense of seeing all the details of the operation, he was the head of the Operation team and he made use of Exhibits M and P in his evidence in court. The 1st respondent was not a stranger to the operation. He headed the team of the operation, although he did not physically conduct the operation. (pp. 927 A/B & 928 E)

***Documents - Where their contents do not convey hearsay evidence***

4. Where a document, by its contents, conveys hearsay evidence then the  
 B    parol or oral evidence based on that document will definitely or invariably  
    be hearsay. The reverse position is also correct and it is that where a  
 C    document, by its contents, does not convey hearsay evidence, then the  
    parol or oral evidence based on it will not be hearsay evidence, if the  
    witness has an intimate relationship with the document and gives evidence  
    of that relationship. And so I ask, does Exhibit M convey hearsay  
 D    evidence? Has the 1st respondent intimate relationship with the exhibit? I  
    have carefully examined the contents of the exhibit and I am of the firm  
    view that it does not convey hearsay evidence. The exhibit carrying  
    Hospital Number 175119 of the appellant is the case note, narrating a full  
    story of pre-clinical, clinical and post-clinical actions of the respondents.  
 E    I come to this conclusion because I have carefully examined the contents  
    of the exhibit. And the 1st respondent's relationship with Exhibit M is not  
    only intimate but 'cordial'.

      The learned trial Judge also relied on Exhibit P. Exhibit P is entitled  
 F    "University of Benin Teaching Hospital Operation Notes". The exhibit  
    contains a diagram and the history of the operation. The 3rd respondent  
    made six findings and the procedure he adopted at the operation. In my  
    view, Exhibits M and P gave the 1st respondent enough materials to give  
 G    evidence in the way he did and the evidence he gave based on the exhibits  
    and more cannot be said to be hearsay, and I so hold. (p. 929 A)

***Expert witness - Negligence - Medical matter***

5. The only witness who gave evidence for the appellant is the appellant  
 H    herself. She did not call any expert witness to give evidence and so her  
    evidence had to struggle for the first place with the expert evidence of the  
    three witnesses for the respondents - two medical doctors and a  
    radiologist. There was real cause and need for the appellant to call expert  
 I    evidence. In her evidence in-chief, appellant said that following pains and  
    swollen tummy after the second surgical operation, she was rushed to  
    Egharevba Hospital, Benin City, where another surgical operation was  
    performed. Appellant said that she was informed in the hospital that the

operation became necessary because of the needle left in her tummy by the defendants. That is not all. Appellant said that the medical doctor, Dr. Egharevba, recommended that she should go to the University College Hospital, Ibadan, to undergo exploratory laprotomy under fluoroscopy in order to remove the surgical needle. I expected the appellant to call Dr. B Egharevba or any other competent witness to give evidence in her favour.

Appellant also gave evidence that other gynaecologists that she consulted told her that the way and manner they operated on her would not allow her to bear a child. This is clearly hearsay evidence and I expected C the appellant to call the gynaecologists to give evidence in her favour, all in her effort to strengthen the tort of negligence. (p. 932 E)

***Negligence - Surgery - Quality of surgical needles used***

6. I come to the quality of surgical needles. Learned counsel for the D appellant made so much heavy weather out of the evidence of the 1st respondent when he said:

*“With the quality of materials now available, needles get broken more often.”* E

Interpreting the above evidence, the Court of Appeal said:

*“In fact the evidence of the 1st Respondent on substandard needle is a general statement on the quality of needles which now abound in shops. He did not say substandard needles were used during the operation on the F Appellant...”*

Reacting also to the evidence of the 1st respondent, learned counsel submitted that the evidence of the 1st respondent “inferentially pointed conclusively to the use of a substandard surgical needle”. With respect, I G do not agree with him. I rather agree with the interpretation given to the evidence by the Court of Appeal. The 1st respondent made a general statement on the quality of surgical needles in shops. He did not say that the needle used for the operation on the appellant was substandard. And what is more, I do not seem to understand what counsel means by H “inferentially pointed conclusively...” I must say that the inference drawn by learned counsel is not borne out from the evidence of 1st respondent. (p. 933 E)

**Tainted witness - Meaning**

7. Learned counsel for the appellant regarded the 1st respondent as a tainted witness whose evidence should be suspect or be taken with a pinch of salt. He cited two cases. I should take them here in chronological turn. They are all Court of Appeal decisions.

The first one is Udo v. Eshiet (1994) 8 NWLR (Pt. 363) 483 at 501. It turns out to be my decision in the Court of Appeal. Counsel referred to page 501 where I said: -

*“The expression ‘tainted witness’ is not only nebulous but vague and lacking precise meaning and a’fortori legal definition. In civil matters a tainted witness could be a biased witness, that is to say a witness who, because of his prejudices and sentiments will invariably give evidence in favour of the party calling him, with little or no regard for the truth. A tainted witness could be an interested witness. And because of his interest, the witness develops a one sided inclination and it is the inclination towards the party who calls him to give evidence; no matter the obvious lies he tells in court. In determining whether a witness is an interested witness or a tainted witness, the Court must examine the relationship of the witness to the party calling him.”*

Leaving the above general principles, I dealt with specificities at page 502:

*“A court of law must be reluctant in disbelieving a witness on the ground that he is a tainted witness, because the expression is not only fluid but large and bogus... Can it be the law that a wife who gives evidence in favour of the husband should automatically be branded as a tainted witness without more? If so, why should it be so? In criminal law, a wife is a competent witness for the husband. The Evidence Act does not brand a wife as a tainted witness for all times and at all times without more.”*

How does this case support or help the case of the appellant? I do not see any. If I can hold that a wife is not a tainted witness in a case involving her husband, how can I hold that an employee is a tainted witness in a case involving his employer?

I go to the second case. It is First Bank of Nigeria Plc v. Associated



Motors Company (Nigeria) Limited (1998) 10 NWLR (Pt. 570) 441 at 474. I have examined with some care page 474 of the judgment delivered by Nsofor, JCA, which learned counsel cited, and I cannot see any mention of tainted witness. It is possible that my carelessness has deprived me of the point. But I should point out that as the judgment of Nsofor, JCA, is a dissenting judgment, I do not think I can make use of it here. The majority judgment is that of Uwaifo, JCA (as he then was) and Katsina-Alu, JCA (as he then was). My conclusion is that the two cases cited by learned counsel are not of any help to his client's case.

The submission of learned counsel, with respect, is quite strange to me. It is also new learning to me and I refuse to learn it. The word "tainted" in the context of our law of evidence, is bereft of its ordinary dictionary daily meaning of impurity, undesirability, decay, infection and what have you. On the contrary, it has and carries the element of bias for the particular reason of nearness or closeness in relationship, and deliberate and uninstigated slant qua unsolicited and undeserved expression of favour to a particular person, in our context, the employer. I am not prepared to extend the frontiers of that law, beyond its present onerous ambit. In the circumstances, I hold that the 1st respondent is not a tainted witness. (pp. 934 D / 936 A)

### ***Res ipsa loquitur - Rebuttal of the presumption***

8. The fulcrum of this appeal is whether the respondents rebutted the presumption of the tort of negligence, and particularly the doctrine of *res ipsa loquitur*, in this case. Appellant said they did not. Respondent said they did. Who is correct? I think the respondents are correct. It is on record that only the appellant gave evidence in apparent proof of negligence on the part of the respondents. In a complicated and highly professional case such as this, where she relies on the doctrine of *res ipsa loquitur*, arising from an abdominal operation, I expected her to call expert evidence and here I have in mind surgeon or surgeons. I had earlier said this. Such expert evidence should have been taken along with the evidence of the 1st respondent and DW1, all medical practitioners for purposes of determining where the pendulum tilts in the imaginary scale. As it is, the lay evidence

of the appellant, if I may say so, for lack of better expression, in an essentially professional matter, and in the professional areas, cannot match side by side with the evidence of 1st respondent, DW1 and DW2. In the circumstances, I have no difficulty in coming to the conclusion that the presumption of negligence on the part of the respondents was clearly rebutted by the evidence of the three witnesses, and I so hold.

In *Roe v. Ministry of Health* (1954) 2 QB 66; (1954) 2 All ER 131, plaintiff was operated on in defendant hospital and a spinal anaesthetic of Nupercaine was administered by defendant, Dr. Graham, an anaesthetist. After the operation, plaintiff developed spastic paraplegia resulting in paralysis from the waist down. Plaintiff brought an action against the hospital and/or Dr. Graham contending that *res ipsa loquitur* applied since the paralysis ordinarily did not follow a properly administered anaesthetic. Assuming Dr. Graham (a) to have been a servant of the hospital; (b) not a servant, but acting independently for plaintiff, does *res ipsa loquitur* apply? Finding that (a) was the true situation, the Court of Appeal held the principle applicable, but on the evidence given by defendants, exonerated them from liability.

This is the position I have taken above. With the exculpatory evidence given by the respondents, they have successfully explained away *res ipsa loquitur* and that is the rebuttal of the presumption of the liability of the tort of negligence. (pp. 936 D / 939 D)

***Res ipsa loquitur - Burden of proof on plaintiff***

9. The doctrine of *res ipsa loquitur* is premised or predicated on the mere fact of the event happening, which is based on two rebuttable presumptions and I repeat two rebuttable presumptions, viz: (1) That the event happened as a result of a duty of care somebody owes his neighbour, (b) And that somebody is the defendant.

Negligence and in the context of this case, illustrating to the specific tort of *res ipsa loquitur*, like most other torts, is a negative tort, as far as the defendant is concerned. The law therefore places a burden on the plaintiff to prove that the defendant was negligent, and in the circumstances of this case, the act of leaving the piece or pieces of needle in the

abdomen of the appellant (which qualified as the happening event) says it all. In the proof of the act, the plaintiff must satisfy the twin but alternative standards of proof: (a) balance of probability and, (b) preponderance of evidence. In either of these standards, the plaintiff must come out clearly with cogent evidence as to the specific act or acts of the defendant which resulted in the negligence and not merely an agglomeration of act or acts lacking specificity. For *res ipsa loquitur* to apply, the event which gave rise to the negligence must tell its own story and it must invariably be a clear and unambiguous story of lack of duty of care. B

From the totality of the case before the trial court, I believe the evidence of the 1st respondent that “the needle in this case got broken accidentally and proper care was taken to locate the pieces.” In any human situation, accidents are bound to happen and when they happen they must be accommodated by humanity - the quality of being humane or human. D This is because no human situation is perfect. The only perfect situation is the situation created by the Almighty God. It has no accident at all. I am satisfied from the evidence that all efforts to locate the piece or pieces of the needle proved abortive, despite the application of the best professional skills by the respondents. In my humble view, the respondents did their best, and their best in my view, was the best for the medical profession in this country in terms of case or patient management. (p. 942 F) E

### ***When a medical man should not be guilty of negligence*** F

10. Let me end this judgment with the words of that great Judge, Lord Denning, in his sub-chapter titled “Doctors at Law” in Part Six on Negligence in his book: *The Discipline of Law*, pages 237, 242 and 243:

“A medical man, for instance, should not be found guilty of negligence unless he has done something of which his colleagues would say: “He really did make a mistake there. He ought not to have done it” ... but in a hospital, when a person who is ill goes in for treatment, there is always some risk, no matter what care is used. Every surgical operation involves risks. It would be wrong, and, indeed, bad law, to say that simply a misadventure or mishap occurred, the hospital and the doctors are thereby liable. It would be disastrous to the community, if it were so. It G H

would mean that a doctor examining a patient, or a surgeon operating at a table, instead of getting on with his work, would be for ever, looking over his shoulder to see if someone was coming up with a dagger for an action for negligence against a doctor is for him like unto a dagger. His professional reputation is as dear to him as his body, perhaps more so, and an action for negligence can wound his reputation as severely as a dagger can his body. You must not therefore, find him negligent simply because something happens to go wrong... You should only find him guilty of negligence when he falls short of the standard of a reasonably skilful medical man, in short, when he is deserving of censure.”

One sees the above fairly liberal stand in some of his judgments. If Lord Denning, known for his radical activism can take such a position, then the legal position should be so, particularly in this appeal where the respondents clearly rebutted the presumption of negligence.

While I am in sympathy with the position of the appellant, my sentiments will not go far to give her judgment by allowing this appeal. After all, it is good law that sentiments have no place in the judicial process, particularly when the sentiments are against the law. (p. 943 G)

**NOTABLE POINTS OF INTEREST**

**TOBI JSC**

*Need for the medical profession to ensure that surgical needles are made strong*

Let me take the opportunity to say one last word on the quality of surgical needles. 1st respondent, a Consultant, said under cross-examination that a surgical needle is not a strong tool. It breaks or snaps easily. This worries me. It is sad that an instrument for operation of the human being is not strong enough that “it breaks or snaps easily”. It is surprising that an instrument which goes into a human body is not strong enough. I seem to be repeating myself and I have no apologies for that. I think something must be done and very urgently. The medical profession must invent surgical needles that will stand the test of time to ensure that they do not “break or snap easily”. (p. 934 B)

**OGUNTADEJSC***2. Applicability of res ipsa loquitur maxim*

The plaintiff however also relied on Res ipsa loquitur. At this juncture, it is necessary to consider briefly the maxim Res ipsa loquitur and its applicability as proof of negligence in civil cases. In *Management Enterprises Ltd. V. Otusanya* (1987) All NLR 375 at 388 this Court per Oputa JSC discussed the nature of Res Ipsa Loquitur thus:

*“This ground of appeal raises an initial question -What is ‘res ipsa’ and a secondary question - When does it apply? Res ipsa loquitur literally means ‘the thing speaks for itself. This Latin maxim is applicable to actions for injury by negligence where no proof of such negligence is required beyond the accident itself, which is such as necessary to involve negligence. Thus where a ship in motion collides with a ship at anchor the Court will hold that ordinarily such collision do not and will not occur without the negligence of the ship in motion; see Batavia (1845) 2 W. Rolf 407; The Valdis (195) 31 T.L.R. 111. ‘Res ipsa Loquitur’ is no more than a rule of evidence affecting the onus of proof. The essence of the maxim is that an event which in the ordinary course of things, was more likely than not to be caused by negligence was by itself evidence of negligence depending of course on the absence of explanation. The doctrine merely shifts the onus on the defendant. If the facts are sufficiently known or where the defendant gave an explanation, the doctrine will no longer apply; Barkwa v. South Wales Transport (1950) 1 All E.R. 392. Reliance on the doctrine of ‘res ipsa’ is thus a confession by the Plaintiff that he has no direct and affirmative evidence of the negligence complained of against the defendant but that the surrounding circumstances amply establish such negligence. (p. 950 B)*

*3. Accident - Expert witness need not be an eye witness*

It is manifest from the evidence of 1st D.W. that the circumstances in which the needle got broken were accidental. Let me also say here that the evidence of 1st D.W. was unchallenged. The process of carrying out a surgical operation which the plaintiff had and the risks involved were only within the knowledge of surgical experts. The plaintiff did not call any

evidence to show that a surgical needle could not have got broken if the surgeon involved were not negligent. It seems to me therefore that the uncontradicted evidence of 1st D.W. completely negated the inference of negligence on the part of the defendants. It seems to me also irrelevant to engage in a discussion whether or not 1st D.W. was an eye witness. The crucial evidence he gave concerned or stemmed from his evidence as an expert. Even if it is held that he was not an eye witness, that would not derogate from the credence to be accorded to his evidence as an expert. (p. 954 B)

**OGBUAGUJSC**

*4. Where allegation of negligence is not proved - Effect*

I agree with the above pronouncements and I have in other words, said so hereinabove in this Judgment. So, the Appellant having failed and/or neglected to call an independent Surgeon or Gynaecologist to controvert in any material respect, the evidence of the Respondent and having resiled from leading evidence to support her said averment on the substandard of the surgical needle, has only herself to blame. Her pursuit of this case to this Court, in my respectful but firm view, is not only an up-hill task, but an exercise in futility which in summary, amounted to “*let me take a chance and see*”. Surely, litigation, is not a game of chance. It is now firmly settled that he who asserts, must prove. Therefore, until a plaintiff discharges the onus placed on him by law and in fact practice, the burden does not shift to the defendant. As to the onus of proof in negligence, See *Seismograph Services Nig. Ltd. & 2 ors. v. Mark* (1993) 7 NWLR (Pt.304) 203 at 217 C.A. - per Uwaifo JCA (as he then was) citing *Agbonmagbe Bank Ltd. v. C.F.A.O. Ltd.* (1967) NMLR 173 @ 177. So it is in this case. The Appellant regrettably but woefully, failed to prove the weighty charge of negligence against the Respondents. The consequence, is that this appeal fails abysmally. (p. 960 C)

**REPRESENTATION**

P. O. Osewinwenkha, Esq. for Appellant.  
Chief H. O. Ogbodu, Esq. for Respondents.

### **CASES REFERRED TO**

- Common law tradition of Subramanian v. Public Prosecutor (1956) 1 WLR 965 at 969
- Judicial Service committee v. Omo (1990) 6 NWLR (Pt. 157) 407 B
- Utteh v. The State (1992) 2 NWLR (Pt. 223) 257
- Generally Armels Transport Ltd, v. Madam Martins (1970) 1 All NLR 27
- Adeka v. Vaatia (1987) 1 NWLR (Pt. 48) 134
- Management Enterprises Ltd. v. Otusanya (1987) 2 NWLR (Pt. 55) 179 C
- Jolayemi v. Alaoye (2004) 12 NWLR (Pt. 887) 322
- Udo v. Eshiet (1994) 8 NWLR (Pt. 363) 483 at 501
- First Bank of Nigeria Plc v. Associated Motors Company (Nigeria) Limited (1998) 10 NWLR (Pt. 570) 441 at 474
- Mahan v. Osborne (1939) 2 KB 14; (1939) 1 All ER 535 D
- Roe v. Ministry of Health (1954) 2 QB 66; (1954) 2 All ER 131
- Tewogbade v. Akande (1968) NMLR 404
- Ogbodu v. The State (1987) 3 S.C. 497 @ 526
- Mallam Musa & ors. v. Alhaji Kefas Yerima & anor. (1997) 53 LRCN 2549 E @ 2535
- Chukwamah Akunne v. Mathias Ekwunno (1952) 14 WACA 59 @ 60
- Lennards Carryng Co. Ltd. v. Asiastic Petroleum Co. Ltd. (1915) A.C. 713

### **STATUTE REFERRED TO**

Evidence Act ss. 76, 77, 91 and 149(d)

### **LEAD JUDGMENT BY TOBI JSC**

This appeal has to do with the management of a patient by medical practitioners. The appellant is that patient. She is Miss Felicia Ojo. I have omitted her middle name. I hope no harm is done. Although the 1st and 3rd respondents are the medical practitioners involved in this appeal, the 3rd respondent was more in it. The common and market-place name for a medical practitioner is doctor. That is the name used in identifying the 1st and 3rd respondents in the proceedings. Doctors are easy to locate or identify in hospital premises. They usually wear lab coats and stethoscopes

to match. Patients are their clientele.

Let me leave the parenthesis and come to the real matter. It was a surgical operation undertaken by the 3rd respondent, Dr. S. A. Ejide, who at the material time was a Senior Registrar. The doctors gave professional name to the operation. It is a gynaecological surgical operation. That is a big one. The 1st respondent so calls it and so be it. Let me tell the full story.

Like most, if not all Nigerian women, the appellant needed a child or children. That took her to the University of Benin Teaching Hospital, the 2nd respondent. The 1st respondent, a lecturer at the University of Benin and an Honorary Consultant in the Obstetrics and Gynaecology Department of the University of Benin Teaching Hospital, Benin City, examined her. The appellant was diagnosed as one having secondary infertility, uterine fibroid and menorrhagia. That is another big one. Putting it in a less technical language to suit my purpose, the appellant was told that she had a growth in her fallopian tube and that she needed a surgical operation to remove the growth to enable her become pregnant.

Appellant needed to be pregnant and so she consented to the operation. 17th December, 1993 was the date. She kept the appointment. Of course, she must. She needed the operation badly for a child or children. 3rd respondent performed the operation in the theatre of the 2nd respondent. It is the claim of the respondents that the operation was successful. But the appellant thought differently. She felt pains and she reported to the 1st respondent, who asked her to do an x-ray. The x-ray confirmed that there was a broken needle in her abdomen. This resulted in a second operation which could not totally or completely remove the broken needle. And so the appellant sued, claiming the sum of N2,000,000 as special and general damages for negligence.

At the trial court, the appellant gave evidence. So too the 1st respondent, and one Dr. Sylvester Ojobo and Valerie Bekederemo. After address of counsel, the learned trial Judge dismissed the appellant's case on the ground that the respondents rebutted the presumption of negligence raised by the appellant. An appeal to the Court of Appeal was dismissed. Still dissatisfied, the appellant has come to this Court. Briefs were filed and duly exchanged. Appellant formulated the following issues for determina-



tion:

*“1. Whether the learned Justices of the Court of Appeal were right in finding that the evidence of the 1st Respondent was that of an eye witness who can be described as a star witness and therefore attract the most probative value in view of the printed evidence on record?”*

B

AND

*If the answer to the afore-mentioned issue is in the negative was there other evidence from which the Court could find that the respondent rebutted the presumption of negligence against them?*

C

*2. Whether the learned Justices of the Court of Appeal were right in their finding that the issue of damages was not covered by the grounds of appeal and therefore incompetent?*

*3. Whether the learned Justices of the Court were right in dismissing the case of the Appellant in view of the totality of the evidence led?*

D

*4. Whether the learned Justices of the Court of Appeal were right in holding that the 1st Respondent’s evidence on the use of a substandard surgical needle by the Respondents during the operation of 17/12/93 was a general statement and did not connote liability or negligence by the Respondents?*

E

AND

*If the answer to the afore-mentioned issue is in the negative what is the legal consequence of such adverse admission on the defence of the Respondents.”*

F

The respondents adopted Issues Nos. 1 to 3 in the appellant’s brief and urged the Court to discountenance Issue No. 4 on the ground that it is hypothetical or academic. I must say right away that I do not see anything hypothetical or academic in Issue No. 4. Certainly an issue which is germane to the live issues in the appeal cannot be hypothetic or academic.

G

Learned counsel for the appellant, Mr. P. O. Osemwenkha, taking Issues Nos. 1 to 3 together, claimed that the evidence on record before the learned Justices of the Court of Appeal was unequivocal as regards the respective roles played by the 1st and 3rd respondents during the operation that led to their leaving a broken surgical needle in the abdomen of the

H

appellant. Recalling the evidence of 1st respondent, learned counsel submitted that the Court of Appeal was wrong in coming to the conclusion that the 1st respondent supervised the operation when as a matter of fact, he did not. To counsel, that wrong premise operated in the mind of the B Court of Appeal in arriving at the decision.

Learned counsel submitted that the evidence of 1st respondent as regards what transpired on 17th December, 1993 was clearly hearsay and consequently inadmissible, same being in violation of section 77 of the Evidence Act, Cap. 122, Laws of the Federation of Nigeria. He urged the C Court to discountenance the evidence though not objected to at the trial. He cited *Made v. Olukade* (1976) 2 SC 183 and *Kala v. Potiskum* (1998) 3 NWLR (Pt. 540) 1 at 15 to 16. Counsel submitted in the alternative that the Court of Appeal ought to have been circumspect in attaching probative D value to the evidence of the 1st respondent who was the staff of the 2nd respondent and naturally would do anything to protect its interest. Counsel came out with full force and submitted that the 1st respondent is a tainted witness whose evidence should be taken with a pinch of salt. He cited *FBN E v. Associated Motors Ltd.* (1998) 10 NWLR (Pt. 570) 441 at 474 and *Udo v. Eshiet* (1994) 8 NWLR (Pt. 363) 483 at 501.

Learned counsel argued that the Court of Appeal was wrong in holding that the respondents rebutted the presumption of negligence. To F counsel, the persons who could have provided evidence to rebut the presumption of negligence was the 3rd respondent who did the operations and nurses who witnessed or took part in the operations. He cited *Igbokwe v. UCH* (1961) WRNLR 173 at 175 and *Uzuegbu v. Progress Bank Nig. Ltd.* (1988) 4 NWLR (Pt. 87) 236 at 248. Calling in aid section 39 of the G Evidence Act, learned counsel submitted that the section does not permit hearsay evidence as regards what a public officer heard in the course of his duties which is what happened in this appeal. He said that Exhibit M. the case file, does not proffer any explanation as to why the broken surgical H needle was left inside the appellant.

Counsel urged the Court not to attach any weight or probative value to the evidence of the 1st respondent and that will mean that there will be no evidence on which to hinge the respondent's defence. He cited once

again Igbokwe v. UCH (supra). He did not agree with the Court of Appeal relying on section 91 of the Evidence Act in respect of the trial Court admitting Exhibit M. He urged the Court to invoke section 149(d) of the Evidence Act.

Learned counsel submitted that on the facts of the case, the doctrine of *res ipsa loquitur* applies since the respondents failed to give any cogent explanation of how the incident complained of happened nor were they able to show by credible evidence that they exercised all reasonable precaution to avert leaving the broken suturing needle in the appellant. He referred to the judgment of the learned trial Judge on the point and cited *Strabag Construction Co. Ltd, v. Ogarekpe* (1991) 11 NWLR (Pt. 170) 733 at 749. Relying on *Jack v. White* (2001) 6 NWLR (Pt. 709) 266 at 277 to 278, learned counsel contended that the respondents who asserted that they used reasonable skill, care and diligence in operating on the appellant, had a duty to prove same.

On the issue of damages, learned counsel submitted that in view of the fact that the appellant established that she suffered injury as a result of a breach of duty of care owed by the respondents, the Court must proceed to assess damages claimed on available facts. He cited once again *Strabag Construction Nig. Ltd, v. Ogarekpe* (supra). Counsel contended that the standard of proof required in establishing the amount of damages claimed in a case where the evidence in support is unchallenged is that the burden on the plaintiff is discharged upon minimal proof. He cited *Elf (Nig.) Limited v. Sillo* (1994) 4 NWLR (Pt. 350) 258 at 279 to 280. He urged the Court to award full and adequate damages. He cited Charlesworth on Negligence, 4th Edition, paragraph 1027 page 483.

Learned counsel said that since the 1st and 3rd respondents are not ordinary medical doctors but specialists, the standard of care expected of them is higher than that of an ordinary medical doctor. He cited Okonkwo, *Medical Negligence and Legal Implication*, p.24; B. C. Umerah (ed), *Medical Practice and the Law in Nigeria*, p.124; J. L. Taylor and Lord Richardson (ed), *Medical Malpractice*, p.30 and the case of *Aschroft v. Mersay Regional Health Authority* (1983) 2 All ER 245. He also examined Exhibit 9.

Taking the finding of the Court of Appeal that the appellant raised issues in that Court which were not raised in the High Court, learned counsel submitted that the Court of Appeal did not properly appraise the issues and facts brought before it and urged this Court to intervene in order  
B to prevent a travesty of justice. He cited *Jack v. Whyte* (2001) 6 NWLR (Pt. 709) 266 at 683; *Tsokwa Motors (Nig.) Ltd. v. UBN* (1996) 9 NWLR (Pt. 471) 129 at 145 and *Federal Commissioner for Works and Housing v. Lababedi* (1977) 1 -12 SC 15 at 24.

On Issue No. 4, learned counsel faulted the finding of the Court of  
C Appeal that the 1st respondent did not say that substandard needles were used during the operation of the appellant. He submitted that the evidence of the 1st respondent inferentially pointed conclusively to the use of a substandard surgical needle. He cited *Lawal v. Dawodu* (1972) All NLR  
D 707 at 719 and *Agbomeji v. Bakare* (1998) 9 NWLR (Pt. 564) 1 at 8.

Still on the broken needle, learned counsel submitted that the position on medical negligence is that where a doctor or a gynaecologist uses a substandard surgical needle which gets broken in course of a  
E medical operation on a patient and consequently occasions harm, he is deemed to be liable for injuries arising out of professional services attributable to such defect and it is immaterial that it was the patient who supplied the materials since a doctor ought to know and be able to identify  
F defective materials that occasion injury to his patients. He cited *Prosthetic Valve Dysfunction and the Law: A Case Presentation from Nigeria* Notable Theories of Responsibility by A. O. Obasohan and T. B. E. Ogiamien reported in *Medical Science Law* (1994) Vol. 3 No. 2 p.172 and the cases of *Shephard v. Mcgnnis* (1964) IOWA 35, 131 NW 2475 and *Philips v.*  
G *Powel* (1930) reported in *Medical Science Law* at page 441.

Council urged the Court to allow the appeal.

Learned counsel for the respondents, Chief H. O. Ogbodu, submitted that the appellant was wrong when she said that the 1st respondent was  
H not physically present when the operation was performed on her. He called the attention of the Court to paragraphs 8 and 9 of the Appellant's Further Amended Statement of Claim and her testimony in Court to the effect that "*the operation was performed by 1st and 3rd Defendants*".

On hearsay evidence, learned counsel submitted that documentary evidence is an exception to the legal principle that hearsay evidence is not admissible. He cited section 91(1) and (2) of the Evidence Act and submitted that Exhibit M was admitted under the section through 1st respondent without objection. Citing *Okulade v. Alade* (1976) All NLR 56 B at 61 and 62, counsel contended that since appellant did not object to the admissibility of Exhibit M on alleged ground of not complying with section 91 of the Evidence Act, she cannot be heard to complain in this Court.

Apparently reacting to the submission of counsel for the appellant that 1st respondent could not have given evidence in favour of his employer and that no probative value should be attached to the evidence, learned counsel argued that in law any agent or servant can give evidence to establish any transaction on behalf of the company, whether or not it is the agent or servant who actually took part in the transaction. He cited *Kate Enterprises Ltd. v. Daewoo Nig. Ltd.* (1985) 2 NWLR (Pt. 5) 116; *Anyabosi v. R. T. Briscoe Nig. Ltd.* (1987) 3 NWLR (Pt. 59) 84; *Iguabor v. Ugbede* (1976) 9-10 SC 179 and *Ishola v. SGB Nig. Ltd.* (1997) 2 NWLR (Pt. 488) 405. D E

Counsel also pointed out that the issue that this Court should not attach probative value to the evidence of 1st respondent is a new issue which needed leave of the Court. As leave was not sought, counsel urged the Court to strike out the issue. He cited *Egbunike v. ACB Ltd.* (1995) 2 F NWLR (Pt. 375) 34 at 59.

On the issue of rebuttal of negligence, learned counsel submitted that the issue was not considered by the Court of Appeal. Citing the case of *Ogundare v. Ogunlawo* (1997) 6 NWLR (Pt. 509) 360 at 368, learned counsel contended that this Court is only competent to entertain appeals G from the Court of Appeal and not from the High Court. He urged the Court to discountenance the argument of rebuttal of negligence. Counsel submitted in the alternative that the learned trial Judge was right when he held that the respondents rebutted the presumption of negligence placed H on them by the doctrine of *res ipsa loquitur*. Referring to *Kalla v. Jarmakani Transport Ltd.* (1961) All NLR 747; *Ebba v. Ogodo* 1 SCNLR 372 and *Major v. Stocco* (1969) NMLR 372, learned counsel submitted that the

findings of fact by the learned trial Judge are supported by the evidence before the Court and urged the Court not to interfere with them. Learned counsel distinguished the case of *Igbokwe v. UCH*, *supra*, from the facts of this case.

B On Issue No. 4, learned counsel submitted that the 1st respondent did not say in evidence that substandard needles were used during the operation. He said that it was the appellant who pleaded it in her 2nd Further Amended Statement of Claim but failed to lead evidence in support of same. He urged the Court not to interfere with the concurrent findings of  
C the two Courts as they are not perverse. He cited *Ojomo v. Ajao* (1983) 2 SC 156 at 168 and *Nigerian Bottling Co. Ltd, v. Constance O. Ngonadi* (1985) 5 SC 317 and 319. He urged the Court to dismiss the appeal.

**Let me first take the submission of learned counsel for the  
D appellant that the evidence of the 1st respondent is hearsay. In the often cited case of the common law tradition of *Subramanian v. Public Prosecutor* (1956) 1 WLR 965 at 969, the Judicial Committee of the Privy Council held that evidence of a statement made to a  
E person by a person who is himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to  
F establish by the evidence not the truth of the statement but the fact that it was made.**

**When a third party relates a story to another as proof of contents of a statement such story is hearsay. Hearsay evidence is all evidence which does not derive its value solely from the credit  
G given to the witness himself, but which rests also, in part, on the veracity and competence of some other person. See *Judicial Service committee v. Omo* (1990) 6 NWLR (Pt. 157) 407. A piece of evidence is hearsay if it is evidence of the contents of a statement made by  
H a witness who is himself not called to testify. See *Utteh v. The State* (1992) 2 NWLR (Pt. 223) 257.**

The word “hearsay” is used in various senses. Sometimes it means whatever a person is heard to say. Sometimes it means

whatever a person declares on information given by someone else.

The Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990 does not specifically use the expression “hearsay evidence” but the totality of section 77 of the Act, by interpretation of the Courts, provide for hearsay evidence. B

In most cases, hearsay evidence is to the following or like effect: “I was told by XYZ that; or XYZ told me that; or heard that XYZ told ABC that; or I made inquiries and I was told that”. See generally *Armels Transport Ltd, v. Madam Martins* (1970) 1 All NLR 27; *Adeka v. Vaatia* (1987) 1 NWLR (Pt. 48) 134; *Management Enterprises Ltd. v. Otusanya* (1987) 2 NWLR (Pt. 55) 179; *Jolayemi v. Alaoye* (2004) 12 NWLR (Pt. 887) 322. C

What makes the evidence of 1st respondent hearsay? Did the 1st respondent not play any role in the operation story? If he played any role, was it a passing or passive role which makes or turns his evidence to that of hearsay? Let me dig into the role 1st respondent played in this matter, including the source of his evidence to determine whether the evidence is tantamount to hearsay. D

Learned counsel for the appellant himself clearly recognized a role the 1st respondent played when he opened his brief as follows: E

*“1.00. The Plaintiff/Appellant after being medically examined by the 1st Defendant/Respondent, a Consultant/Gynaecologist in the course of his duties with the 2nd Respondent/Hospital was informed that she had a fibroid growth in her fallopian tube which had to be removed by a surgical/gynaecological operation. This she acceded to.”* F

By the above, counsel agrees that the first person who came in contact with the appellant in terms of examining her was the 1st respondent. He carried out the examination of the appellant’s fallopian tube and found that there was a fibroid growth. G

In her evidence in-chief, appellant said at page 26, 27 and 31 of the Record: H

*“I was examined by 1st Defendant and he said I had a growth in my fallopian tube. He said I needed an operation, i.e. medical operation to remove the growth before I could be pregnant... After the 1st and 3rd*

*Defendants examined the X-ray film, they told me that because of the fresh wound I had from the operation, they cannot open me up now. But that I should go home and come back in January, 1994 for them to remove the broken needle. Prior to the X-ray report, the 1st and 3rd Defendants did not tell me that they had left anything in my stomach. In fact, they told me nothing. The 1st and 3rd Defendants carried out the operation. The operation was to remove the said broken needle from my stomach. This was the second time my stomach was being cut open in a surgical operation... In fact, it was the 1st Defendant who told me that the second operation was necessary as he gave me a date."*

**The above is yet another evidence showing that the 1st respondent participated one way or the other in the whole clinical affair. No less a person than the appellant said that the 1st respondent examined her when she came to the hospital, an examination which resulted in the finding that she had fibroid in her fallopian tube which needed an operation. That apart, witness stated unequivocally that the second operation to remove the needle was carried out by the 1st and 3rd respondents. Can she, in the light of her own evidence, seriously contend that the evidence of 1st respondent is hearsay? That should not lie in her mouth because she will be contradicting herself and this Court will not assist her to contradict herself.**

**After the operation, and following pains by the appellant, she visited the hospital and both the 1st and 2nd respondents gave her professional advice to palliate and pacify her anxieties. The 1st respondent said at page 348 of the Record**

*"Within 5 days of the operation, an x-ray was done. The consultant reviewed the x-ray and explained to Plaintiff that the missing broken piece of needle were still in the skin. He also told her that that piece will not constitute any danger to her, as it is sterile. I told her that the needle may work its way to the surface where it could be easily removed. And that if ever she may wish to pass through the international airport, a letter will be given to her to explain why there is a needle in her abdomen in view of the electronic scanning machines."*



**Although 1st respondent was not physically involved in the operation, his evidence was erected basically and essentially on and from Exhibit M, what witness called “the operative notes of the Plaintiff”.** It is possible that the notes are called “operation notes” as ‘operative notes’ may not make much meaning in the context. It is a mere speculation. I may be wrong. But that is not important. Perhaps, a more acceptable expression is “Case Note”, an expression the Court used at page 34C of the Record. I prefer that. B

**In his evidence, based on Exhibit M, the 1st respondent said under cross-examination:** C

*“Exhibit M does not show that the operation wound was infected afterwards. The sterile needle left in the anterior wall of the plaintiffs abdomen does not constitute an infection. I see Exhibit M, in it there is a note made on 9/2/94 by Dr. Ogah that the operation wound is inaurated by haematoma, i.e. swollen and the patient is likely to be infected. I see Exhibit M and the entry for 22/12/93. That entry does not mean that the wound is infected.”* D

**The above evidence is to show that the totality of the evidence of 1st respondent was based on Exhibit M, the Case Note. The question is whether evidence based on the Case Note is hearsay evidence. I think not and here section 91(1) and (2) of the Evidence Act will certainly come to the aid of the 1st respondent.** E

What did the learned Judge say? I will quote him in extenso: F

*“Before I conclude the examination of the explanation offered by the Defendants, I intend to examine the issue raised by learned counsel for Plaintiff about the fact that 3rd Defendant did not ; testify at this trial. He had argued that the testimony of 1st Defendant is hearsay as he did not take part in the operation... In his testimony 1st Defendant said he was testifying for and on behalf of all the Defendants. He also said that as he was the Consultant in-charge of the team, he was regularly briefed especially when there were problems... In the course of performing the operations, 3rd Defendant made notes in Exh. M, particularly Ex. P dated 17/12/93 and another one dated 28/1/94. 3rd Defendant is an employee of 2nd Defendant... This fact was admitted by Defendants... By the* G H

combined effect of the evidence of 1st Defendant 3rd DW and Exhibits M and P, I am satisfied that the evidence given by the 1st Defendant about what 3rd Defendant did was not hearsay evidence. As a public servant 3rd Defendant made notes or entries in Exhibits M and P in the course of his official duties. Such evidence is admissible.”

Dealing with the same issue of hearsay evidence, the Court of Appeal said:

“It is more lucidly put in a similar issue formulated by the respondents. It is that on the totality of the evidence, the evidence of the 1st respondent is hearsay and therefore inadmissible... In fact the status of the 1st respondent vis-a-vis the operation that took place on the 17th of December 1993 was that of an eye witness who can equally be described as a star witness. The evidence of an eye witness is the best evidence and it attracts the most probative value. Such evidence which is direct is relevant and admissible and it towers high above hearsay evidence. Sections 76 and 77 of the Evidence Act Cap. 112 of the Laws of the Federation 1990 positively give statutory credence to the foregoing principles and they read...”

The above are concurrent findings of fact by the High Court and the Court of Appeal and I do not see any reason for departing from them, as they are materially borne out from the evidence before the court. **Although the 1st respondent may not be regarded at all times of the operation as an eyewitness in the sense of seeing all the details of the operation, he was the head of the Operation team and he made use of Exhibits M and P in his evidence in court. The 1st respondent was not a stranger to the operation. He headed the team of the operation, although he did not physically conduct the operation.** He said under cross-examination:

“... The first operation was not performed by me. 3rd Defendant performed that operation. I am the Consultant who headed the team and the operation was done under my care... A Consultant is a specialist or the expert in charge of a team of doctors caring for a patient. Under him there are specialists - the Senior Registrars, Senior House Officers, Registrars and House Officers. That makes up the team.”

**Where a document, by its contents, conveys hearsay evidence then the parol or oral evidence based on that document will definitely or invariably be hearsay. The reverse position is also correct and it is that where a document, by its contents, does not convey hearsay evidence, then the parol or oral evidence based on it will not be hearsay evidence, if the witness has an intimate relationship with the document and gives evidence of that relationship. And so I ask, does Exhibit M convey hearsay evidence? Has the 1st respondent intimate relationship with the exhibit? I have carefully examined the contents of the exhibit and I am of the firm view that it does not convey hearsay evidence. The exhibit carrying Hospital Number 175119 of the appellant is the case note, narrating a full story of pre-clinical, clinical and post-clinical actions of the respondents. I come to this conclusion because I have carefully examined the contents of the exhibit. And the 1st respondent's relationship with Exhibit M is not only intimate but 'cordial'.**

**The learned trial Judge also relied on Exhibit P. Exhibit P is entitled "University of Benin Teaching Hospital Operation Notes". The exhibit contains a diagram and the history of the operation. The 3rd respondent made six findings and the procedure he adopted at the operation. In my view, Exhibits M and P gave the 1st respondent enough materials to give evidence in the way he did and the evidence he gave based on the exhibits and more cannot be said to be hearsay, and I so hold.**

And that takes me to the issue whether the respondents rebutted the presumption of negligence as decided by the learned trial Judge and upheld by the Court of Appeal. As the adjectival law of rebuttal requires the examination of the probative strengths of the evidence of the parties with a view to determining where the pendulum tilts, I will now take the evidence of the witnesses in the trial court. The appellant in her evidence in-chief said:

*"After the first X-ray, I complained to 1st and 3rd Defendants when they were on ward round. The X-ray confirmed that there is a broken needle in my tummy. The broken needle was not there before I went in for*

*the operation. It was left there by the Defendants, i.e. 1st and 3rd Defendants.”*

Under cross-examination, witness said:

B *“Yes, it is true that I consented to have the first operation performed by 1st and 3rd Defendants. At the time of the 1st operation by the 1st and 3rd Defendants, I saw 1st and 3rd Defendants and two other Doctors before I was given an injection that sent me to sleep.”*

C While the evidence the appellant gave under examination in-chief vindicates the tort of negligence, illustrating to the particular tort of res ipsa loquitur, the evidence the witness gave under cross-examination is yet another evidence that 1st respondent did not give hearsay evidence. But I am not there again and I will not be there any more. I just mentioned that in passing, I am on the issue of negligence.

D In his evidence in-chief, 1st respondent said on the first operation:

E *“The operation was successfully performed by 3rd Defendant. The fibroids were dealt with and removed. The left fallopian tube was noted to be absent as was shown on the x-ray of 1986. The right fallopian tube was blocked. This was opened up at the finbrial end, i.e. terminal end. The operation was judged to be successful at that stage and at the end she was being closed up.”*

In his evidence in-chief on the broken needle, witness said:

F *“However, when the skin layer was being closed, the surgical needle got broken at the layer of the skin. This was noted by the gynaecological surgeon who documented it and took the necessary step to remove the broken pieces. One piece was found. The other could not be located. The normal procedure for reporting such incidents was followed.*  
 G *After this, the Plaintiff was then closed up. The next thing to do was a post operative X-ray to locate the missing piece. 3rd Defendant, noticing the problem, informed the Consultant immediately, who then requested for an X-ray. Within 5 days of the operation, an X-ray was done. The Consultant*  
 H *reviewed the X-ray and explained to Plaintiff that the missing broken piece of needle was still in the skin... I told her that the needle may work its way to the surface where it could be easily removed.”*

As stated by the 1st respondent, the gynaecological surgeon

documented that the surgical needle got broken. The record is in Exhibit P at the left side with an asterisk in red. Can I decipher the typical medical practitioner's writing? Let me try:

*"Tip on needle broken and not found on closing the subcut layer."*

In continuation of his evidence in-chief on the efforts to remove the remaining piece of the broken needle, 1st respondent said:

*"Subsequently the patient was reviewed on the out patient clinic in January 1994, she now requested 3rd defendant that she would like a procedure to remove the needle - i.e. an operation. She was then brought in for the 2nd operation in January, 1994. The surgical team was not involved in the management of Plaintiff. The second operation was carried by a combined team of 3rd Defendant and a surgical team. The needle was not found. They requested for another x-ray to locate the needle. The second x-ray was ordered. The x-ray result showed that the needle was still in position i.e. the anterior abdominal wall. Plaintiff was informed that the operation was not successful. She recovered from surgery and was discharged home when the wound healed... It is not true that the needle used in the first operation with Plaintiff got broken negligently. Needles get broken from time to time in operations. With the quality of materials now available, needles get broken more often. No Doctor breaks a needle negligently or intentionally. When needles get broken, the pieces are searched for and retrieved. In this case one piece was found. The needle in this case got broken accidentally and proper care was taken to locate the pieces. There is always communication between the Doctor and the Patient. In this case, Plaintiff was at all times communicated with in respect of the problems, hence she consented to the second operation. It is not true that it was when the Plaintiff was experiencing excruciating pains and she complained before I discovered the broken needle. The Plaintiff was informed of the problem and she paid for the x-ray which was done soon after she recovered from the first operation... I have all the time told Plaintiff that a sterile needle piece in her anterior abdominal wall will constitute no danger to her, and that the needle will eventually work its way to the surface where removal will be easy. This needle will not interfere with her reproductive career or sporting career..."*

*I am not liable to the Plaintiff in the sum of N2m. I have rendered her service and I do not see why she should claim money from me for that. All the information about Plaintiff in the two operations are in Exhibit M. It is her case note.”*

B Under cross-examination, witness said:

*“Accidents do happen in operations. When a needle is broken, the halves are retrieved. Where they cannot be retrieved, the patient is informed and the necessary things are done later to retrieve the halves.*

C *Needles do break during operations. It is only when the halves are not found that there is a problem. A surgical needle is not a strong tool. It breaks or snaps easily. In the course of my career, when a needle is broken, I made efforts to remove the halves. In this case, we made efforts to remove the halves.”*

D In his evidence in-chief, DW1, Dr. Sylvester Ogobo, gave evidence as to the chances of the appellant becoming or getting pregnant:

*“A needle left behind in the soft skin tissue of a woman in no way affects the ability of the woman to get pregnant as the structures that affect or deal with pregnancy are kept inside the body of the woman. A needle underneath the skin is in no way related to getting pregnant.”*

**The only witness who gave evidence for the appellant is the appellant herself. She did not call any expert witness to give evidence and so her evidence had to struggle for the first place with the expert evidence of the three witnesses for the respondents - two medical doctors and a radiologist. There was real cause and need for the appellant to call expert evidence. In her evidence in-chief, appellant said that following pains and swollen tummy after the second surgical operation, she was rushed to Egharevba Hospital, Benin City, where another surgical operation was performed. Appellant said that she was informed in the hospital that the operation became necessary because of the needle left in her tummy by the defendants. That is not all. Appellant said that the medical doctor, Dr. Egharevba, recommended that she should go to the University College Hospital, Ibadan, to undergo exploratory laprotomy under fluoroscopy in order to remove the surgical needle. I expected the**

appellant to call Dr. Egharevba or any other competent witness to give evidence in her favour.

Appellant also gave evidence that other gynaecologists that she consulted told her that the way and manner they operated on her would not allow her to bear a child. This is clearly hearsay evidence B and I expected the appellant to call the gynaecologists to give evidence in her favour, all in her effort to strengthen the tort of negligence.

One other aspect that should have determined the level of negli- C gence on the part of the respondents was evidence on the size of the piece of the needle left in the abdomen. No evidence was led on that and the party who ought to have led evidence on that was the appellant, if she felt that such evidence would be in her favour. The above apart, I expected the appellant to tender a complete surgical needle and call an expert witness D to demonstrate to the Court the piece or pieces that remained in the abdomen of the appellant, again if she thought that such evidence would be in her favour. Again, she did not deem it proper to call such evidence. I am tempted to invoke section 149(d) of the Evidence Act against the E appellant in the light of the above relevant evidence in this case. I will not however fall into the temptation.

**I come to the quality of surgical needles. Learned counsel for the appellant made so much heavy weather out of the evidence of the F 1st respondent when he said:**

*“With the quality of materials now available, needles get broken more often.”*

Interpreting the above evidence, the Court of Appeal said:

*“In fact the evidence of the 1st Respondent on substandard needle G is a general statement on the quality of needles which now abound in shops. He did not say substandard needles were used during the operation on the Appellant...”*

Reacting also to the evidence of the 1st respondent, learned H counsel submitted that the evidence of the 1st respondent “inferentially pointed conclusively to the use of a substandard surgical needle”. With respect, I do not agree with him. I rather agree with

the interpretation given to the evidence by the Court of Appeal. The 1st respondent made a general statement on the quality of surgical needles in shops. He did not say that the needle used for the operation on the appellant was substandard. And what is more, I do not seem to understand what counsel means by “*inferentially pointed conclusively...*” I must say that the inference drawn by learned counsel is not borne out from the evidence of 1st respondent.

Let me take the opportunity to say one last word on the quality of surgical needles. 1st respondent, a Consultant, said under cross-examination that a surgical needle is not a strong tool. It breaks or snaps easily. This worries me. It is sad that an instrument for operation of the human being is not strong enough that “it breaks or snaps easily”. It is surprising that an instrument which goes into a human body is not strong enough. I seem to be repeating myself and I have no apologies for that. I think something must be done and very urgently. The medical profession must invent surgical needles that will stand the test of time to ensure that they do not “break or snap easily”.

Learned counsel for the appellant regarded the 1st respondent as a tainted witness whose evidence should be suspect or be taken with a pinch of salt. He cited two cases. I should take them here in chronological turn. They are all Court of Appeal decisions.

The first one is Udo v. Eshiet (1994) 8 NWLR (Pt. 363) 483 at 501. It turns out to be my decision in the Court of Appeal. Counsel referred to page 501 where I said: -

*“The expression ‘tainted witness’ is not only nebulous but vague and lacking precise meaning and a’fortori legal definition. In civil matters a tainted witness could be a biased witness, that is to say a witness who, because of his prejudices and sentiments will invariably give evidence in favour of the party calling him, with little or no regard for the truth. A tainted witness could be an interested witness. And because of his interest, the witness develops a one sided inclination and it is the inclination towards the party who calls him to give evidence; no matter the obvious lies he tells in court. In determining whether a witness is an interested witness or a tainted witness, the Court must examine the*



*relationship of the witness to the party calling him.”*

Leaving the above general principles, I dealt with specificities at page 502:

*“A court of law must be reluctant in disbelieving a witness on the ground that he is a tainted witness, because the expression is not only fluid but large and bogus... Can it be the law that a wife who gives evidence in favour of the husband should automatically be branded as a tainted witness without more? If so, why should it be so? In criminal law, a wife is a competent witness for the husband. The Evidence Act does not brand a wife as a tainted witness for all times and at all times without more.”*

How does this case support or help the case of the appellant? I do not see any. If I can hold that a wife is not a tainted witness in a case involving her husband, how can I hold that an employee is a tainted witness in a case involving his employer?

I go to the second case. It is *First Bank of Nigeria Plc v. Associated Motors Company (Nigeria) Limited* (1998) 10 NWLR (Pt. 570) 441 at 474. I have examined with some care page 474 of the judgment delivered by Nsofor, JCA, which learned counsel cited, and I cannot see any mention of tainted witness. It is possible that my carelessness has deprived me of the point. But I should point out that as the judgment of Nsofor, JCA, is a dissenting judgment, I do not think I can make use of it here. The majority judgment is that of Uwaifo, JCA (as he then was) and Katsina-Alu, JCA (as he then was). My conclusion is that the two cases cited by learned counsel are not of any help to his client’s case.

Is it the intention of our adjectival law on tainted witness to police and stop an employee from giving evidence in favour of an employer? Can it be said with any seriousness that the principle of tainted witness is aimed at an employee not giving evidence in a case in favour of an employer? Has the principle the strength to perpetuate enmity between an employee and an employer in the area of the former giving evidence in a case involving the latter? What will be the legal basis of the enmity? Why should an employee not give evidence in favour of his employer? What makes the

employee a tainted witness? I still have questions galore but I can stop here, hoping that I have made the point.

The submission of learned counsel, with respect, is quite strange to me. It is also new learning to me and I refuse to learn it.

B The word “tainted” in the context of our law of evidence, is bereft of its ordinary dictionary daily meaning of impurity, undesirability, decay, infection and what have you. On the contrary, it has and carries the element of bias for the particular reason of nearness or closeness in relationship, and deliberate and uninstigated slant qua  
C unsolicited and undeserved expression of favour to a particular person, in our context, the employer. I am not prepared to extend the frontiers of that law, beyond its present onerous ambit. In the circumstances, I hold that the 1st respondent is not a tainted  
D witness.

The fulcrum of this appeal is whether the respondents rebutted the presumption of the tort of negligence, and particularly the doctrine of *res ipsa loquitur*, in this case. Appellant said they did not.  
E Respondent said they did. Who is correct? I think the respondents are correct. It is on record that only the appellant gave evidence in apparent proof of negligence on the part of the respondents. In a complicated and highly professional case such as this, where she  
F relies on the doctrine of *res ipsa loquitur*, arising from an abdominal operation, I expected her to call expert evidence and here I have in mind surgeon or surgeons. I had earlier said this. Such expert evidence should have been taken along with the evidence of the 1st respondent and DW1, all medical practitioners for purposes of  
G determining where the pendulum tilts in the imaginary scale. As it is, the lay evidence of the appellant, if I may say so, for lack of better expression, in an essentially professional matter, and in the professional areas, cannot match side by side with the evidence of 1st  
H respondent, DW1 and DW2. In the circumstances, I have no difficulty in coming to the conclusion that the presumption of negligence on the part of the respondents was clearly rebutted by the evidence of the three witnesses, and I so hold.

And that takes me to the case law. Perhaps I should start with the case of Mahan v. Osborne (1939) 2 KB 14; (1939) 1 All ER 535. The defendant performed an emergency abdominal operation on one Thomas Mahan. During the operation, swabs were used to pack off adjacent organs from the area of the operation. About three months after the operation the patient became seriously ill, and when operated on, it was found that a swab had been left in his abdomen at the first operation. The patient died, and action was brought under the relevant English statutes claiming damages against the defendant for negligence in the conduct of the first operation. The plaintiff obtained a verdict and judgment at the trial before Atkinson, J, with a jury. The Court of Appeal allowed the appeal.

I will quote the ipsissima verba of Scott, LJ in extenso because of the factual relevance of the case to the facts of this case. The law Lord said:

*“... It is difficult to see how the principle of res ipsa loquitur can apply generally to actions of negligence against a surgeon for leaving a swab in a patient, even if in certain circumstances the presumption may arise. If it applied generally, plaintiff’s counsel, having by a couple of answers to interrogatories proved that the defendant performed the operation and that a swab was left in, would be entitled to ask for judgment, unless evidence describing the operation was given by the defendant. Some positive evidence of neglect of duty is surely needed. It may be that a full description of the actual operation will disclose facts sufficiently indicative of want of skill or care to entitle a jury to find neglect of duty to the patient. It may be that expert evidence in addition will be requisite. But to treat the maxim as applying in every case where a swab is left in the patient seems to me an error of law. The very essence of the rule when applied to an action for negligence is that on the mere fact of the event happening, for example, an injury to the plaintiff, there arise two presumptions of fact: (1) that the event was caused by a breach by somebody of the duty of care towards the plaintiff, and (2) that the defendant was that somebody. The presumption of fact only arises because it is an inference which the reasonable man knowing the facts would naturally draw, and that is in most cases for two reasons: (1) because the control over the happening of such an event rested solely with the*

defendant, and (2) that in the ordinary experience of mankind such an event does not happen unless the person in control has failed to exercise due care. The nature even of abdominal operations varies widely, and many considerations enter it - the degree of urgency, the condition of his heart, the effects of the anaesthetic, the degree and kind of help which the surgeon has (for example, whether he is assisted by another surgeon), the efficiency of the theatre team of nurses, the extent of the surgeon's experience, the limits of wise discretion in the particular circumstances (for example, the complications arising out of the operation itself, and the fear of the patient's collapse). In the present case, all the above considerations combined together to present a state of things of which the ordinary experience of mankind knows nothing, and therefore to make it unsafe to beg the question of proof. I cannot see how it can be said that the first essentials of the rule, if it can be called a rule, apply."

The facts of Mahan are more serious and more pathetic than those of this case on appeal and yet the English Court of Appeal did not find the defendant liable in the tort of negligence. Like in this case, it was an abdominal operation, but unlike in this case, the person died. He was Thomas Mahan. Fortunately the appellant in this appeal did not die. There is also the evidence that she has chances of giving birth to children, although that aspect, I must say, only goes to the issue of damages and not of any relevance to liability on the tort of negligence.

The second aspect is the material left in the abdomen in Mahan. It was a swab. While I do not pretend to know the medical meaning of swab, I know the dictionary meaning of the word. And it is/ a small piece of material used for holding liquid to be tested for infection, for cleaning wounds, etc., a test using such a piece of material. It also means a cleaning cloth, especially as used on the floors of a ship. I opt for the two first meanings as covering the situation in the case of Mahan.

And that takes me to an area that I want to dabble in and in the course, I am likely to embark on a journey which the law may frown upon. It is speculation or conjecture. In view of the fact that it will do no harm to the merits of the appeal, I may embark upon that. I have the feeling that swabs are larger materials than the piece of surgical needle left in the

abdomen of the appellant. In Mahan, there was a swab. I have the feeling that one swab is larger than the piece of needle left in the abdomen of the appellant. And yet the English Court of Appeal did not find the defendant liable in negligence. Those are my speculations. I do hope I have not turned the law hay-wire. B

In *Marris v. Winsbury-Whyte* (1937) 4 All ER 494, the defendant had operated on the plaintiff. The post-operative treatment involved the insertion into his body of tubes and their frequent replacement. The tubes were originally inserted by the defendant during the operation but replacements were made subsequently by resident doctors and nurses. Sometime after his discharge from hospital a portion of a tube was found in plaintiff's bladder. In an action for negligence against defendant, Tucker, J, held that *res ipsa loquitur* did not apply because, while at the hospital, he was treated by numerous doctors and nurses, and was not in the control or charge of the defendant for the whole period. I must concede that this case is of not much use, if it is of any use at all. C  
D

**In *Roe v. Ministry of Health* (1954) 2 QB 66; (1954) 2 All ER 131, plaintiff was operated on in defendant hospital and a spinal anaesthetic of Nupercaine was administered by defendant, Dr. Graham, an anaesthetist. After the operation, plaintiff developed spastic paraplegia resulting in paralysis from the waist down. Plaintiff brought an action against the hospital and/or Dr. Graham contending that *res ipsa loquitur* applied since the paralysis ordinarily did not follow a properly administered anaesthetic. Assuming Dr. Graham (a) to have been a servant of the hospital; (b) not a servant, but acting independently for plaintiff, does *res ipsa loquitur* apply? Finding that (a) was the true situation, the Court of Appeal held the principle applicable, but on the evidence given by defendants, exonerated them from liability.** E  
F  
G

**This is the position I have taken above. With the exculpatory evidence given by the respondents, they have successfully explained away *res ipsa loquitur* and that is the rebuttal of the presumption of the liability of the tort of negligence. I need not repeat myself.** H

In *Hughston v. Jost* (1943) 1 DLR 402, where sodium pentathol

was injected intravenously and leaking into surrounding tissue, the Court held that *res ipsa loquitur* did not apply. Similarly in *Fish v. Kapur* (1948) 2 All ER 176, where a dentist extracted a wisdom tooth, leaving part of root in jaw and fracturing jaw, the Court held that *res ipsa loquitur* did not apply.

I do not want to give the impression by the above cases that *res ipsa loquitur* does not apply in medical operations. It applies in relevant cases, and the case law is in great proliferation. Learned counsel for the appellant cited one of such cases. It is the case of *Igbokwe v. University College Hospital Board of Management*, *supra*. The action was brought under the Torts Law, Cap. 122 for damages by the children and the alleged husband of the deceased. The deceased who was an in-patient in one of the maternity wards of the defendant Hospital Board was found missing from her bed. She had just given birth to a child following which her case was diagnosed as a suspected case of psychosis. The deceased was given sedative treatment, and the doctor on duty on the day she disappeared instructed a staff nurse to keep an eye on her. But the deceased met her death as a result of injuries received after a fall from the fourth floor of the Hospital. In his evidence, the House Governor of the Hospital agreed that if someone had been specially assigned to watch the deceased, it was probable that the incident would not have occurred. For the plaintiff it was submitted that the circumstances pointed to negligence on the part of the defendant and that the maxim, *res ipsa loquitur* applied. It was held (1) that as the hospital authority was responsible for the acts or omissions of the whole of its staff, the Hospital Board of Management must give an explanation of the event and to show that it had not been caused by its negligence and that the court noted that the doctor and the staff nurse who appeared to have been principally concerned had not been called as witnesses; (2) that the doctor could presumably have spoken as to the nature of the deceased's mental disturbance and as to the degree of the risk that was involved in leaving her without being more closely watched; that although the doctor was said to be in the United Kingdom, it was open to the defendant to have applied to have had his evidence taken on commission; that in the absence of that doctor no medical expert had been called

by the defendant to say that given the case history all reasonable precautions had, in his opinion, been taken to prevent the occurrence; (3) that the court would conclude that the Board of Management had failed to rebut the inference of negligence which was raised by the case for the plaintiff and that it was consequently liable in damages. B

Learned counsel for the appellant sees and takes the decision as a complete answer to this appeal. He submitted that the facts are in *pari materia* with those of this case. Is counsel correct? Are the facts of the case the same as the facts of this case on appeal? I agree that the facts relating to the inability of Dr. Addy and Nurse Muraukinyo to give evidence in that case on the ground that the doctor was in the United Kingdom are similar to the facts of this case that 3rd respondent, who was involved in the operation of the appellant, was in the United Kingdom and so could not give evidence. Perhaps apart from this single similarity, the facts of the cases are diametrically different. C D

In Igboke, no medical expert was called to give evidence but in this case on appeal, the 1st respondent, and DW1, who are medical experts gave evidence before the learned trial Judge. In Igboke, the learned trial Judge rightly held that the defendant failed to rebut the inference of negligence which was raised for the plaintiff and that it was consequently liable to damages. That is not the situation or position here. The learned trial Judge held that the evidence of the defendants rebutted the presumption of negligence. This was upheld by the Court of Appeal and I am upholding that in this Court. E F

Learned counsel for the appellant also cited the English case of *Ashcroft v. Mersey Regional Health Authority*, *supra*. “On 20 January 1978 the plaintiff submitted herself to an operation on her left ear. It was performed by Mr Joseph Siegler, a surgeon of long experience, great skill and the highest reputation. The operation proved to be disastrous, for the plaintiff was left with a partial paralysis of the left side of the face, an inquiry for which she claims damages alleging that the operation was carried out negligently. The paralysis was caused by damage to the facial nerve. Now, the operation in question was for the removal of granulated tissue adhering to part of the eardrum and is regarded as routine and G H

perfectly safe. Mr Siegler himself has performed this operation hundreds of times and in his experience and in his study of the relevant literature it has never before resulted in damage to the facial nerve. Mr Smith, the eminent surgeon called as a witness for the defence, has come across only  
 B two cases where damage has been caused to the facial nerve and agreed that this operation must have been performed many hundred thousand times. Plainly, therefore, something must have gone wrong. But was Mr. Siegler negligent?"

C The learned trial Judge did not find the defendant liable. The Judge held that in an action for negligence against a professional person in connection with his calling, the question for consideration by the court is whether on a balance of probabilities it has been established that the defendant failed to exercise the care required of a man possessing and  
 D professing special skill in circumstances which require the exercise of that special skill. If there is an added burden of proof, that burden does not rest on the person alleging negligence; on the contrary, the more skilled a person is the more the care which is expected of him. The test should  
 E however be applied without gloss either way.

Exonerating Mr Siegler, Kilner Brown, J. said at page 248:

*"However, Mr Siegler was, as one would expect from a man of his calibre, careful, moderate and convincing. He was quite satisfied that he  
 F was using the forceps as he always did and certainly did not use excessive force. The injury was an unforeseeable accident."*

Again that case is of no assistance to the appellant. I ask: why was the case cited in the first place?

**The doctrine of res ipsa loquitur is premised or predicated on  
 G the mere fact of the event happening, which is based on two rebuttable presumptions and I repeat two rebuttable presumptions, viz: (1) That the event happened as a result of a duty of care somebody owes his neighbour, (b) And that somebody is the defen-  
 H dant.**

Negligence and in the context of this case, illustrating to the specific tort of res ipsa loquitur, like most other torts, is a negative tort, as far as the defendant is concerned. The law therefore places



a burden on the plaintiff to prove that the defendant was negligent, and in the circumstances of this case, the act of leaving the piece or pieces of needle in the abdomen of the appellant (which qualified as the happening event) says it all. In the proof of the act, the plaintiff must satisfy the twin but alternative standards of proof: (a) balance B of probability and, (b) preponderance of evidence. In either of these standards, the plaintiff must come out clearly with cogent evidence as to the specific act or acts of the defendant which resulted in the negligence and not merely an agglomeration of act or acts lacking C specificity. For *res ipsa loquitur* to apply, the event which gave rise to the negligence must tell its own story and it must invariably be a clear and unambiguous story of lack of duty of care.

From the totality of the case before the trial court, I believe the evidence of the 1st respondent that “the needle in this case got D broken accidentally and proper care was taken to locate the pieces.” In any human situation, accidents are bound to happen and when they happen they must be accommodated by humanity - the quality of being humane or human. This is because no human situation is E perfect. The only perfect situation is the situation created by the Almighty God. It has no accident at all. I am satisfied from the evidence that all efforts to locate the piece or pieces of the needle proved abortive, despite the application of the best professional F skills by the respondents. In my humble view, the respondents did their best, and their best in my view, was the best for the medical profession in this country in terms of case or patient management.

I see in this case a situation where the appellant dumped on the trial G court the plea of *res ipsa loquitur* qua tort of negligence, without more, to harass the respondents who made available to her all their professional skills to cure her.

**Let me** end this judgment with the words of that great Judge, Lord Denning, in his sub-chapter titled “Doctors at Law” in Part Six H on Negligence in his book: *The Discipline of Law*, pages 237, 242 and 243:

*“A medical man, for instance, should not be found guilty of*

*negligence unless he has done something of which his colleagues would say: "He really did make a mistake there. He ought not to have done it' ... but in a hospital, when a person who is ill goes in for treatment, there is always some risk, no matter what care is used. Every surgical operation involves risks. It would be wrong, and, indeed, bad law, to say that simply a misadventure or mishap occurred, the hospital and the doctors are thereby liable. It would be disastrous to the community, if it were so. It would mean that a doctor examining a patient, or a surgeon operating at a table, instead of getting on with his work, would be for ever, looking over his shoulder to see if someone was coming up with a dagger for an action for negligence against a doctor is for him like unto a dagger. His professional reputation is as dear to him as his body, perhaps more so, and an action for negligence can wound his reputation as severely as a dagger can his body. You must not therefore, find him negligent simply because something happens to go wrong... You should only find him guilty of negligence when he falls short of the standard of a reasonably skilful medical man, in short, when he is deserving of censure."*

One sees the above fairly liberal stand in some of his judgments. If Lord Denning, known for his radical activism can take such a position, then the legal position should be so, particularly in this appeal where the respondents clearly rebutted the presumption of negligence.

While I am in sympathy with the position of the appellant, my sentiments will not go far to give her judgment by allowing this appeal. After all, it is good law that sentiments have no place in the judicial process, particularly when the sentiments are against the law. The Judge that I am, I must bow to the law, and I so bow.

In sum, the appeal is dismissed. I make no order as to costs.

---

H

### ONUJSC

Having had the opportunity to read in draft the leading judgment of my learned brother Niki Tobi, JSC before now, I am in entire agreement

with him that the appeal lacks merit. I too dismiss the appeal with no orders as to costs.

### KATSINA-ALU JSC

B

I have had the privilege to read in draft the judgment delivered by my learned brother Niki Tobi, JSC. I agree with his reasoning and conclusion. There is nothing I can usefully add.

In the result, I also dismiss the appeal. I make no order as to costs.

C

### OGUNTADE JSC

The Appellant was the plaintiff at the Benin High Court of Edo State. On 17/12/93, she had a surgical operation for the removal of a growth in her fallopian tube. She had been unable to get pregnant. It was medically ascertained that the removal of the growth might make it possible for her to have a pregnancy. The surgical procedure was done by 1st respondent who was assisted by the 3rd respondent. It was done in a hospital owned by the 2nd respondent under whom the 1st and 3rd respondents worked as employees. The case of the plaintiff before the trial court was that in the course of the operation, 1st and 3rd respondents negligently left in her womb a broken needle as a result of which she experienced great pains. She issued her writ of summons claiming against the respondents as the defendants special and general damages totalling two million Naira for negligence in the manner the surgical procedure was carried out.

Parties filed and exchanged pleadings after which the case was heard by Idahosa J. On 14-05-97, the trial judge in his judgment dismissed plaintiffs suit.

Dissatisfied, the plaintiff brought an appeal against the judgment before the Court of Appeal, Benin Division (hereinafter referred to as the court below). On 20-4-99, the court in its unanimous judgment dismissed the appeal and affirmed the judgment of the trial court. The plaintiff has come before this Court on a final appeal. In the appellant's brief filed, the issues for determination in the appeal were identified as the following:

*“1. Whether the learned Justices of the Court of Appeal were right in finding that the evidence of the 1st Respondent was that of an eye witness who can be described as a star witness and therefore attract the most probative value in view of the printed evidence on record?”*

B AND

*If the answer to the afore-mentioned issue is the negative (sic) was there other evidence from which the Court should find that the respondent rebutted the presumption of negligence against them?*

C 2. *Whether the learned Justices of the Court of Appeal were right in their finding that the issue of damages was not covered by the grounds of appeal and therefore incompetent?*

D 3. *Whether the learned Justices of the Court of Appeal were right in dismissing the case of the Appellant in view of the totality of the evidence led?*

E 4. *Whether the learned Justices of the Court of Appeal were right in holding that the 1st Respondent’s evidence on the use of a sub-standard surgical needle by the Respondents during the operation of 17/12/93 was a general statement and did not connote liability or negligence by the Respondents?*

AND

F *If the answer to the afore-mentioned issue is in the negative what is the legal consequence of such adverse admission on the defence of the Respondents.”*

I intend to consider together appellants issues 1, 3 and 4. The plaintiff in paragraphs 15, 17, 18 and 19 of her second further amended statement of claim pleaded thus:

G *“16. The plaintiff avers that she had to seek medical advise of other Gynaecologists who examined her and treated her with the expert opinion that the said broken suturing needle negligently left in her womb by the Defendants had to be removed since same had already caused an infection*  
H *of the said region. The Plaintiff shall found on medical report of the various medical operations performed during the trial of this suit.*

*17. That her Gynaecologist told her that as a result of the afore-said operation which was done negligently and the infection caused by the*

*foreign object in her abdominal region she would not be able to give birth to any issue.*

18. *The plaintiff states that she will have to undergo a medical operation called exploratory laprotomy under fluoroscopy in order to remove the broken surgical needle left in the Plaintiff body.* B

19. *WHEREOF the plaintiff claims against the Defendants jointly and severally is for the sum of N2,000,000.00 (Two million Naira) only being special and general damages for NEGLIGENCE as a result of the way and manner the Defendants performed the medical operation on the Plaintiff and leaving a surgical needle in her body as a result of which she suffered great pains, trauma, hardship, loss, damages, emotional and psychological depression, patent and latent disfigurement, inability to give birth to a child and heavy financial expenses.* C

PARTICULARS OF NEGLIGENCE D

(a) *Leaving a broken surgical needle in the abdomen of the Plaintiff.*

(b) *Failing to take proper care in ensuring that items used (including the surgical needle left in Plaintiff's abdomen) during the medical operation of 17/12/93 were complete and not left inside the patient/ plaintiff before suturing the Plaintiff up.* E

(c) *Failing to take any proper or effective measure by way of examination or otherwise to ensure that the said surgical needle or any foreign matter was not left in the abdomen of the Plaintiff.* F

(d) *Failing to remove the aforesaid foreign matter during the second surgical operation after the Pathology Report and the Radiological Report and confirmed unequivocally the existence of the said surgical needle in the abdomen of the Plaintiff.* G

(e) *Using during the said surgical/gynaecological operation a sub-standard surgical needle."*

The defendants in paragraphs 18-21 of their Joint Further Amended Statement of defence pleaded thus: H

*"18. The matters complained of were caused without negligence or default on the part of the Defendants and the particulars of facts and*

*circumstances of non negligence on the part of the Defendants are as follows:*

*(a) The needle got broken by accident.*

*(b) Proper care was taken to ensure that the surgical needles used B in the operation were accounted for.*

*(c) Proper measures were taken to recover the broken needles when it was discovered missing.*

*(d) The plaintiff was informed about the broken needle immediately she recovered from Anaesthesia she did not find it out on her own by C chance.*

*(e) The best professional measures were taken to remove the broken needle in the second operation but this was not successful not because of negligence.*

*(f) In further answer to paragraph 19(a), (b), (c), (d), (e), (i), (ii), D (iii), (iv), (v), (vi) and (vii) of the Second Further Amended Statement of Claim, the Defendants aver that the Plaintiff's chances of getting pregnant was already slim as a result of previous operation before coming to UBTH.*

*E i. There was a scar on her body as a result of the said previous operation.*

*ii. The Plaintiff was already married before the 1st operation according to the information she supplied to the Hospital*

*F iii. The operation done on the Plaintiff does not occasion excruciating pains for life.*

*iv. The broken needle will not cause any infection as the same was sterilized before operation.*

*G v. The broken needle will not in any way affect the Plaintiffs ability to get pregnant or sporting activities and expert evidence shall be founded upon.*

*H (g) In further answer to paragraph 19(a) of the Second Further Amended Statement of Claim the Defendants aver that it was the Plaintiff that bought the surgical needles and other materials that were used for the operation. The Plaintiff only paid for operation fees and for days she spent in the Hospital. All the drugs that were administered on her throughout her stay in the Hospital were bought by her. The various receipts shall be*

founded upon.

20. *The Defendant shall at the trial rely on all equitable and legal defences open to them at the trial and more especially shall rely on all documents and materials relevant to this case. Also the Defendants shall rely on expert evidence of a Radiologist to the affect that the broken needle is on the soft skin area of the Plaintiffs body and not the abdomen as alleged in paragraph 12 of her Second Further Amended Statement of claim.*”

A comparison of the extracts reproduced above from the pleadings of the parties reveals with clarity the issues which went to trial before the trial court. The plaintiff had pleaded direct negligence and in addition relied on the maxim *Res Ipsa Loquitur*. The defendants on the other hand had pleaded that the occurrence was an accident, which happened in spite of the skill, prudence and professionalism with which the operation on the plaintiff was performed.

At the trial, only the plaintiff testified in support of her case. In her evidence-in-chief, the plaintiff at pages 26-27 of the record, testified thus:

*“On 15/12/93, I was admitted into the U.B.T.H. On 17/12/93, I was taken into the theatre for an operation. The operation was performed by 1st and 3rd Defendants. The operation was performed at the 2nd Defendant’s theatre. After the operation, I have serious pains, my tummy got swollen as well as my private part. I had serious pains in my tummy and my private part.*

*I complained to 1st Defendant and he said it was because of the stitches on the operation wound. Four days later, the pains continued and I complained to 1st Defendant who now asked me to do an x-ray. I went for the x-ray examination. I can identify the ex-ray report or negatives if I see them. I had two x-ray examinations. I was given the x-ray films. I see these x-ray films they are the ones I was given.*

*Osemwenkha: I seek to tender the x-ray films.*

*Ogbodu: No objection.*

*Court: X-ray films or negatives dated 21/12/93 and 8/2/94 are admitted and marked Exhibits B, Bl, B2 and B3.*

*Witness continues: After the first x-ray, I complained to 1st and 3rd*

Defendants when they were on ward round. The x-ray confirmed that there is a broken needle in my tummy. The broken needle was not there before I went in for the operation. It was left there by the Defendants i.e. 1st and 3rd Defendants. Before I was admitted I was given a letter. This is the letter.”

The above evidence certainly could not per se amount to proof of negligence against the defendants. Certainly therefore, there was no direct evidence of negligence. The plaintiff however also relied on Res ipsa loquitur. At this juncture, it is necessary to consider briefly the maxim Res ipsa loquitur and its applicability as proof of negligence in civil cases. In Management Enterprises Ltd. V. Otusanya (1987) All NLR 375 at 388 this Court per Oputa JSC discussed the nature of Res Ipsa Loquitur thus:

“This ground of appeal raises an initial question - What is ‘res ipsa’ and a secondary question - When does it apply? Res ipsa loquitur literally means ‘the thing speaks for itself. This Latin maxim is applicable to actions for injury by negligence where no proof of such negligence is required beyond the accident itself, which is such as necessary to involve negligence. Thus where a ship in motion collides with a ship at anchor the Court will hold that ordinarily such collision do not and will not occur without the negligence of the ship in motion; see *Batavia* (1845) 2 W. Rolf 407; *The Valdis* (195) 31 T.L.R. 111. ‘Res ipsa Loquitur’ is no more than a rule of evidence affecting the onus of proof. The essence of the maxim is that an event which in the ordinary course of things, was more likely than not to be caused by negligence was by itself evidence of negligence depending of course on the absence of explanation. The doctrine merely shifts the onus on the defendant. If the facts are sufficiently known or where the defendant gave an explanation, the doctrine will no longer apply; *Barkwa v. South Wales Transport* (1950) 1 All E.R. 392. Reliance on the doctrine of ‘res ipsa’ is thus a confession by the Plaintiff that he has no direct and affirmative evidence of the negligence complained of against the defendant but that the surrounding circumstances amply establish such negligence.

In relying on res ipsa loquitur, a plaintiff merely proves the resultant accident and injury and then asks the Court to infer therefrom



*negligence on the part of the defendant. The doctrine will not apply where:*

*i. the facts proved are equally consistent with accident as with negligence;*

*ii There is evidence of how the accident happened and the difficulty (as in this case) arise merely from an inability to apportion blame between two negligent drivers. If these two drivers are servants of the same master the position may be different: Skinner v. L.B. & S.C. Ry (1850) 5 Exch. 787.*

*If there is evidence of how the occurrence took place Then an appeal to res ipsa loquitur is misconceived and inappropriate. There again the question of the Defendant's negligence must be determined on the available evidence. In other words the doctrine of 'res ipsa loquitur' is not meant to supplement inconclusive evidence of negligence on the part of a Plaintiff. Rather it is meant to apply where there is no other proof of negligence than the accident itself."*

The learned authors of Clerk and Lindsell on torts, 13th Edition, paragraphs 966 and 967 at pp. 568 and 569 also discuss the nature of Res Ipsa Loquitur thus:

Doctrine of res ipsa loquitur. The onus of proof, which lies on a party alleging negligence, is, as pointed out, that he should establish his case by a preponderance of probabilities. This he will normally have to do by proving that the other party acted carelessly. Such evidence is not always forthcoming. It is possible, however, in certain cases for him to rely on the mere fact that something happened as affording prima facie evidence of want of due care on the other's part: 'res ipsa loquitur is a principle which helps him to do so.' The classic statement of the circumstances in which he is able to do so is by Erie C.J.: 'There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.' It is no more than a rule of evidence and states no principle of law. 'This convenient and succinct formula,' said / Morris L.J.,

‘possesses no magic qualities: nor has it any added virtue, other than that of brevity, merely / because it is expressed in Latin.’ It is only a convenient label to apply to a set of circumstances in which a plaintiff proves a case so as to call for a rebuttal from the defendant, without having to allege and  
 B prove any specific act or omission on the part of the defendant. He merely proves a result, not any particular act or omission producing the result. If the result, in the circumstances in which he proves it, makes it more probable than not that it was caused by the negligence of the defendant, the doctrine *res ipsa loquitur* is said to apply, and the plaintiff will be entitled  
 C to succeed unless the defendant by evidence rebuts that probability.

Application of the doctrine. In its very nature the doctrine can only apply to negligence liability. In so far as nuisance rests on negligence, it can apply to nuisance also. The doctrine applies (1) when the thing that  
 D inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control; (2) the occurrence is such that it would not have happened without negligence. If these two conditions are satisfied it follows, on a  
 E balance of probability, that the defendant, or the person for whom he is responsible, must have been negligent. There is, however, a further negative condition: (3) there must be no evidence as to why or how the occurrence took place. If there is, then appeal to *res ipsa loquitur* is  
 F inappropriate, for the question of the defendant’s negligence must be determined on that evidence.”

The crucial element is that *Res Ipsa loquitur* will not apply when there is evidence as to how the occurrence took place.  
 Did the plaintiff succeed in moving her case forward by the reliance placed  
 G on *Res Ipsa loquitur*? Plaintiffs evidence, an extract of which was reproduced here only showed that a broken needle was left inside her following the operation she had. There was nothing to show that it was the result of negligence on the part of the defendants. The 1st defence witness  
 H was Dr. Etadafe Gharoro. He testified as an expert and a consultant. At page 34E of the record, 1st D.W. gave evidence as to his qualification thus:

*“My qualifications are: Bachelor of Surgery -University of London. A fellow of the West African College of Surgeons. A Fellow of the*

*Nigerian College of Obstetricians and Gynaecologists. I am at the moment a Lecturer at the University of Benin and a Honourary Consultant at the University of Benin Teaching Hospital, Benin City. A Consultant is a specialist or the expert in charge of a team of Doctors caring for a patient. Under him, there are other specialists - the Senior Registrars, Senior House Officers, Registrar and House Officers. That makes up the team."* B

At page 34B, he testified as to the how the needle got broken thus:

*"After Exhibit L was signed, an operation was performed on her on 17/12/93. The operations was successfully performed by 3rd Defendant. The fibroids were dealt with and removed. The left fallopian tube was noted to be absent as was shown on the X-ray of 1986. The right fallopian tube was blocked. This was opened up at the fimbrial end i.e. terminal end. The operation was judged to be successful at that stage and at the end she was being closed up. However, when the skin layer was being closed, the surgical needle got broken at the layer of the skin. This was noted by the gynecological surgeon who documented it and took the necessary step to remove the broken pieces. One piece was found. The other could not be located. The normal procedure for reporting such incidents was followed. After this, the Plaintiff then closed up. (sic)* C D E

*The next thing to do was a post operative X-ray to locate the missing piece. 3rd Defendant, noticing the problem, informed the Consultant immediately, who then requested for an x-ray. Within 5 days of the operation, an x-ray was done. The Consultant reviewed the ex-ray and explained to Plaintiff that the missing broken piece of needle was still in the skin. He also told her that that piece will not constitute any danger to her as it is sterile. I told her that the needle may work its way to the surface where it could be easily removed. And that if ever she may wish to pass through the international airport, a letter will be given to her to explain why there is a needle in her abdomen in view of the electronic scanning machines.* F G

*Plaintiff was discharged home after the first operation without any complications. I see the documents now shown to it. It is the operative notes of the Plaintiff."* H

As to whether needles got broken during surgical operations 1st

D.W. said at page 34D:

*“It is not true that the needle used in the first operation with Plaintiff got broken negligently. Needles get broken from time to time in operations. With the quality of materials now available, needles get broken more often. No Doctor breaks a needle negligently or intentionally. When needles get broken, the pieces are searched for and retrieved. In this case, one piece was found. The needle in this case got broken accidentally and proper care was taken to locate the pieces.”*

It is manifest from the evidence of 1st D.W. that the circumstances in which the needle got broken were accidental. Let me also say here that the evidence of 1st D.W. was unchallenged. The process of carrying out a surgical operation which the plaintiff had and the risks involved were only within the knowledge of surgical experts. The plaintiff did not call any evidence to show that a surgical needle could not have got broken if the surgeon involved were not negligent. It seems to me therefore that the uncontradicted evidence of 1st D.W. completely negated the inference of negligence on the part of the defendants. It seems to me also irrelevant to engage in a discussion whether or not 1st D.W. was an eye witness. The crucial evidence he gave concerned or stemmed from his evidence as an expert. Even if it is held that he was not an eye witness, that would not derogate from the credence to be accorded to his evidence as an expert.

Finally is the 2nd issue raised by the appellant in relation to damages. Since the finding of the trial court and the court below was that no negligence was established against the defendants, it is unnecessary for me to delve into the question whether or not the court below was right in their finding that the grounds of appeal did not cover the issue of damages. I refrain from considering on an issue which in the event is now irrelevant.

In the final conclusion, I would also dismiss this appeal as unmeritorious as in the judgment of my learned brother Niki Tobi JSC and I abide by the order on costs made by my leaned brother.

H

---

**OGBUAGUJSC**

I have had the advantage of a preview of the Judgment of my

learned brother, Tobi, JSC, just read out and delivered. I entirely agree with his reasoning and conclusion as he has thoroughly dealt with all the issues raised in this appeal. I also dismiss the appeal. I wish however, to make my own contribution if only for purposes of emphasis.

After painstakingly reviewing and evaluating the evidence before him, Exhibits, and considering also the addresses of the learned counsel for the parties, the learned trial Judge, at pages 93 and 94 of the records stated inter alia, as follows:

*“I am satisfied that the evidence given by the Defendant about what 3rd defendant did was not hearsay evidence. As a public servant 3rd defendant made notes or entries in exhibits M & P in the course of the official duties. Such evidence is admissible”.*

( the underlining mine)

But , if I may ask, where is the hearsay when the Appellant herself, swore, among other things, that the 1st and 3rd defendants, carried out the operation?. I wonder. Afterwards the Writ of Summons, shows that defendants/Respondents, were sued jointly and severally. The 1st Respondent, testified for himself and on behalf of the other Respondents. He was, so to say, and as noted by the court below, an eye-witness who was involved throughout the history of the said operation. He was the head of the operation team. His evidence, was the Best evidence. I so hold. See Sections 76 and 77 of the Evidence Act.

The learned trial Judge in respect of the provisions of Section 149 (d) of the Evidence Act, held inter alia, as follows:

*“..... ..since the Defendants have by other means produced the evidence 3rd Defendant may have given, it follows that S.149(d) of the Evidence Act cannot be invoked against them i.e. the defendants.*

*It therefore follows that in the absence of direct oral evidence from the 3rd Defendant the Defendants have by other means provided their explanation as to why the broken needle was left inside the plaintiffs body”.*

[the underlining mine]

As rightly stated by the learned trial Judge, Section 149(d) of the Evidence Act, relates to evidence that is withheld and not to the fact that

a particular witness had not been called. See the case of Ezemba v. Ibeneme & anor. (2004) 7 SCNJ. 136 ; (2004) 7 S.C. (Pts. I- II) 45 @ 56 citing the cases of Tewogbade v. Akande (1968) NMLR 404; Ogbodu v. The State (1987) 3 S.C. 497 @ 526; and Mallam Musa & ors. v. Alhaji Kefas Yerima & anor. (1997) 53 LRCN 2549 @ 2535; (1997) 7 SCNJ. 109; (1997) 7 NWLR (pt.511) 27 @ 48 - 49

There is the uncontroverted evidence of the DW3, that the 3rd Respondent, was outside the Country at the time of the trial on sabbatical leave (see page 59 of the Records). What is more, Exhibit M, was the “res” or the “thing” in the custody of the 2nd defendant/Respondent and was a relevant document which was admitted without any objection. It was not a document that is strictly inadmissible in any event. See the observation of Cotton, L.J. in the case of Gilbert v. Endean (1978) 9 Ch. D. 259 @ 269. See also Chukwamah Akunne v. Mathias Ekwunno (1952) 14 WACA 59 @ 60 and Chief Bruno Etim & ors. v. Chief Okon Udo Ekpe &. anor. (1983) 3 S.C. 12 @ 36 - 37. So, the Appellant’s learned counsel, on the authorities, with respect, cannot be heard to complain on appeal. Of course, he is not entitled to do so.

As to the reasons advanced by the Respondents in his consideration whether or not, they sufficiently “disclose” the issue of negligence placed on them by the application of the doctrine of res ipsa loquitur, the learned trial Judge, had this to say inter alia:

*“The reason given by the Defendants is that the surgical needles got broken and all efforts to locate one of the broken pieces, in order to remove it failed. The second operation conducted to extract the broken piece, after an x-tray examination located the position of needle (sic) also failed to recover same (sic). 1st Defendant added that the incident of needles getting broken during operations do occur. He also said that the quality of needles now available make this incident happen more frequently”.*

His Lordship, then held, inter alia, as follows:

*“In my assessment, the explanation as to why the broken surgical needle came to be left inside the plaintiffs body is sufficient to dislodge the presumption of negligence created by the application of the doctrine of res ipsa loquitur. It is agreed by both sides that what was left inside the*

*Plaintiff is a broken surgical needle, and not a whole unbroken surgical needle. If it was a whole needle, the act of leaving such an item would have called for more explanation.*

*As it is, the needle got broken, while in use. One of the pieces could not be found, after a search. In my view, this is not enough to ground a finding of negligence on the part of the Defendants”.*

[the underlining mine]

I will pause here, to comment on the submission of the learned counsel for the Appellant that the court below ought to have been circumspect in attaching probative value to the evidence of the 1st Respondent who was the staff of the 2nd Respondent and naturally, would do anything to protect its interest. He asserted that the 1st Respondent, is a tainted witness and that his evidence, should be taken with a pinch of salt.

If I may ask, how could the 1st Respondent be a tainted witness just because he is a staff of the 2nd Respondent? Firstly, he is a party in the suit. He was sued as the 1st Defendant. He testified as such. So, he was a competent witness. Secondly, he was a servant of the 2nd Respondent as admitted by Osemwenkha, Esq. The 2nd Respondent, just like a company, does its business so to speak, through human beings and not robots. See Lennards Carryng Co. Ltd. v. Asiastic Petroleum Co. Ltd. (1915) A.C. 713; Bolton (Engineering) Co. Ltd. v. Graham & Sons (1957) Q. B. 159 and Nwobosi v. A.C.B. Ltd. (1995) 7 SCNJ. 92 @ 111. Thirdly, I observe that throughout the cross-examination that span from pages 34 E to 34 I or J., there was no suggestion from the learned counsel for the Appellant, that the 1st Respondent, v/as either a liar or a person that is unreliable or untruthful or that he was biased in any manner whatsoever or any suggestion that will amount to impugning his integrity. Counsel, I believe, ought to be consistent in the presentation of his argument. Even in the issues and submissions of the learned counsel for the Appellant in the two lower courts, there was no suggestion that the 1st Respondent was a tainted witness. I say no more on this point. I will however, ignore and discountenance the said submission as it amounts to raising on appeal, an issue or point, not canvassed in the lower courts, without the leave of this Court. See Kalu Mark & anor. v. Gabriel Eke (2004) 1 SCNJ. 245 @ 267

- 268 and recently, Chief Elugbe v. Chief Omokhafa & 2 ors. v. The Military Administrator Edo State of Nigeria & 2 ors. (2004) 12 SCNJ. 106 @ 115; (2004)11-12 S.C. 60; (2004) 20 NSCC 355 just to mention but a few. The said issue together with all the arguments is/are accordingly struck out by me.

It is noted by me, that the Appellant, effected a second amendment, ostensibly, based on the evidence of the 1st Respondent that the quality of presently available needles, increases the number of broken needle incidents during operations. In paragraph 19 of the second Further Amended Statement of Claim, “Particulars of Negligence” (e) it is stated thus:

*“using during the said surgical/Gynecological operation a sub-standard surgical needle”.*

In spite of the Appellant’s averments in paragraphs 16, 17, 17a, of the said second Further Amended Statement of Claim, she never called any expert or any Medical Doctor in support of the said averments. That is to say, after the said amendment, she did not call any evidence in support of the said averments. She and her learned counsel, relied on the said evidence of the 1st Respondent as to the needle used being sub-standard. She never called any qualified Surgeon or Gynaecologist from another Hospital or in Private Medical Practice, to support the averments and her evidence at the trial. The learned trial Judge was therefore, right, when he held at page 95 of the Records, inter alia, as follows:

*“In my view, this piece of evidence (i.e. of the 1st defendant/1st Respondent) does not support the averment that Defendants used a substandard surgical needle and thus were negligent. The piece of evidence is a general statement which was made to show why the cases of broken needles are on the increase”.*

He concluded as follows:

*“Having found that the explanation by the Defendants as to how a broken piece of surgical needle came to be left inside Plaintiff’s body has dislodged the presumption of negligence raised by the application of the doctrine of res ipsa loquitur, it therefore follows that the Plaintiff has been unable to prove that the Defendants were negligent”.*



[the underlining mine]

He had held earlier, that as it stands, that the said averment in the second Further Amended Statement of Claim, had not been supported by any piece of evidence and that it therefore, goes to no issue. He cited and relied on the case of Federal Capital Development Authority v. Alhaji Naibi B (1990) All NLR 475 (Reprint) (It is also reported in (1990) 3 NWLR Pt 138) 270 and (1990) 5 SCNJ. 186 @ 195 - 196). I will add that this view, is supported by decided authorities to the effect that pleadings, do not constitute evidence. See Magnusson v. Koiki & 2 ors. (1993) 12 SCNJ. C 114 @ 124; Broadline Enterprises Ltd, v. Monterey Maritime Corporation & anor. (1995) 10 SCNJ. 1 @ 25 and Ngileri v. Mothercat Ltd. (1999) 13 NWLR (Pt 625) 626; (1999) 12 SCNJ. 101 @ 120 just to mention but a few.

Now, the court below - per Ibiyeye, JCA, stated at page 229 lines D 27 to 34 and page 230 lines 1 - 23 as follows:

*“I entirely agree with the submissions of the learned counsel for the respondents that the learned counsel for the appellant misconstrued the purport of the evidence of the 1st respondent which prompted the appellant E to effect an amendment to her Statement of Claim. It is apparent from the ruling that the Sole purpose of the exercise was to amend the Statement of Claim so as to avail herself of the seemingly advantageous evidence adduced by the 1st respondent. In fact the evidences of the 1st respondent F on substandard needles is a general statement on the quality of such needles which now abound in shops. He did not say that substandard needles were used during the operation on the appellant and that even if such needles were used, it was the appellant who bought them. It should G be pointed out that the appellant resiled from leading evidence to back up the averment on substandard needles after effecting an amendment. She therefore left the averment bare. Moreso, in the prevailing circumstances where the evidence of the 1st respondent on substandard needle does not connote any liability or negligence by the respondents. The appellant H ought to have done more than inserting the mere averment which did not go beyond the confines of pleading because it was not oxygenated by evidence. It is trite to say that the effect of a failure of the party to call*

evidence in support of his own averment which is denied by the adverse party in the adverse party's pleadings is that such averment is deemed abandoned notwithstanding evidence supporting it being produced by the adverse party. See *SUARA YUSUF v. OLADEPO OYETUNDE & ORS.* B (1998) 10 SCNJ. 1 at 19 and *OMOBORIOWO v. AJASIN* (1984) 1 S.C. 205. It is not sufficient to make an allegation in a pleading, as was done by the plaintiff/appellant in this case. Credible evidence must be led in proof of it. ....The evidence of the 1st respondent on the use of a substandard surgical needle is not indicative of negligence''.

C I agree with the above pronouncements and I have in other words, said so hereinabove in this Judgment. So, the Appellant having failed and/or neglected to call an independent Surgeon or Gynaecologist to controvert in any material respect, the evidence of the Respondent and having resiled D from leading evidence to support her said averment on the substandard of the surgical needle, has only herself to blame. Her pursuit of this case to this Court, in my respectful but firm view, is not only an up-hill task, but an exercise in futility which in summary, amounted to "let me take a E chance and see". Surely, litigation, is not a game of chance. It is now firmly settled that he who asserts, must prove. Therefore, until a plaintiff discharges the onus placed on him by law and in fact practice, the burden does not shift to the defendant. As to the onus of proof in negligence, See F *Seismograph Services Nig. Ltd. & 2 ors. v. Mark* (1993) 7 NWLR (Pt.304) 203 at 217 C.A. - per Uwaifo JCA (as he then was) citing *Agbonmagbe Bank Ltd. v. C.F.A.O. Ltd.* (1967) NMLR 173 @ 177. So it is in this case. The Appellant regrettably but woefully, failed to prove the weighty charge of negligence against the Respondents. The consequence, G is that this appeal fails abysmally.

However, but before concluding this Judgment, let me deal, even briefly, with the question of negligence and the doctrine of Res Ipsa H liquitur. It is now well and firmly established, that for a claim in negligence to succeed, the plaintiff must prove that the defendant owes or owed him a duty of care and was in breach of that duty. See *Oyidiobu v. Okechukwu* (1972) 5 S.C. 191. Negligence, is a question of fact, not of law. Therefore, each case, must be decided in the light of its own facts. See *Morris v. Luton*

Corporation (1946) 1 K.B. 114 and Kalla v. Jermakani Transport Ltd. (1961) All NLR 747 - the later, also cited and relied on by the learned counsel for the Respondents. In all cases, the burden to prove negligence, rests with the plaintiff. However, the exception, is when the facts and circumstances, permit or allow a plaintiff to plead and rely on the doctrine B of *res ipsa loquitur*. In such cases, the defendant is required to offer an explanation that will show or prove, that he was not negligent. Generally, negligence is said to be the omission or failure to do something which a reasonable man, under similar circumstances, would do or doing of C something which a reasonable and prudent man would not do. See *Odinaka & anor. v. Moghalu* (1992) 4 NWLR (Pt 233) 1 @ 15; (1992) 4 SCNJ. 43 - per Akpata, JSC, (though on Bailment).

As a matter of fact, negligence can be said to be the failure to exercise that care which the circumstances demand - i.e. the absence of D care according to the circumstances. See *Heaven v. Fender* (1883) 11 OBD 503 @ 507 C.A; and *Glasgow Corporation v. Muir* (1943) A.C. 448 @ 456\ (1943) 2 All E.R. 44 @ 48 (H/L) - per Lord Macmillan. Negligence has been described, as a fluid principle, which has to be applied to the most E diverse conditions and problems of human life. See *Hay (or Bourhill) v. Young* (1943) A.C 92 @ 107; (1942) 2 All E.R. 396 @ 404 (H/L) - per Lord Wright. In the case of *Blyth v. Birmingham Waterworks Co.* (1856) 11 Exch. 78 @ 784. Alderson, B stated that “*negligence is the omission to do F something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable men would not do*”. See also *Halsburys Laws of England* 4th Edt. (Reissue) Vol. 33 - General G Principles of the Law of Negligence page 601.

It is important to note, that the doctrine of *res ipsa loquitur*, can be pleaded in the alternative. See the lucid and incisive Judgment of Uwaifo, JCA (as he then was) in the case of *Starbag Construction (Nig.) Ltd. v. Ogharekpe* (1991) NWLR (Pt. 170) 732 @ 747 - 748 C.A. It must also be H stressed that in negligence cases, a plaintiff must not only plead particulars of the negligence, he must lead evidence of the negligence. See *Nigerian Bottling Co. Ltd. v. Ngonadi* (1983) 1 NWLR (Pt. 4) 739 and *United Bank*

for African Ltd. & anor. v. Achoru (Mrs.) (1990) 6 NWLR (Pt 156) 254 @ 275; (1990) 10 SCNJ. 17. It is after the plaintiff has led evidence of the negligence complained about as I have stated hereinabove in this Judgment, that the burden shifts and it is thrown on the defendant, to give an adequate explanation to show that he was not negligent See Woods v. Pecan (1946) A.C. 401 @ 439.

In concluding this Judgment, let me refer to the English case of Patrick Daniels & Philomena Daniels v. Edmond Heskin (1954) The Irish Reports 73 in which the 2nd plaintiff, gave birth to a child at her home on 17th June, 1951, being attended by the local midwife. On the following day, she was attended by the defendant, a Medical Doctor, for the purpose of inserting stitches in her perineum. While the defendant was inserting the stitches, the needle broke. The defendant failed to find the broken portion of the needle and proceeded and completed the stitching, leaving the broken portion in the patient's body. He did not inform either the patient or her husband of this fact. The patient was however, left in the care of the midwife, who had received instructions from the defendant that he was to be informed in the event of anything unusual occurring to the patient, and if the needle was not found within a period of six weeks, the patient was to be X-rayed. Some six weeks later, the midwife had the patient examined and X-rayed by another Doctor who performed an operation on the patient for the removal of the broken portion of the needle. The plaintiffs brought an action for damages in the High Court. On the trial of the action, the trial Judge, at the conclusion of the case, withdrew the case from the jury and gave a direction in favour of the defendant. On appeal by the plaintiffs, the Supreme Court by a majority of 5: 1 (Maguire C.J. dissenting), affirmed the decision of the trial Judge that there was no evidence to support a finding that the breaking of the needle was caused by negligence. It was also held that the defendant in deciding to complete the stitching and to defer the operation for the removal of the broken portion of the needle, acted reasonably and without negligence. Thirdly, that the non-disclosure to the patient or her husband of the fact that the broken portion of the needle, remained in the patient's perineum or body did not cause damage, was reasonable in the circumstances and did not

amount to negligence.’

The facts and circumstances of the above case, it could be discerned or seen, were worse than in the instant case, leading to this appeal. The appellant in her evidence, admitted or said that after the 1st and 3rd Respondents examined the x-ray film, they gave a reason and asked her to come back in January, 1994, for them to remove the piece of the said broken needle. It was perhaps, a new approach or position from the principle of law for many years - i.e. that it is not unusual that during a surgical operation for a foreign object or a broken surgical needle or say swab, to be left inside the body of a patient. That so long as the patient is notified or is made to be aware of this fact, there will be no case of negligence. See the case of *Gerber v. Pines* 79 Sol. Jo. 13 referred to and discussed in *Daniels v. Heskin*’s case (*supra*). In other words, where the leaving of the needle or part of it in the body of the patient was not negligent, there would be no case of negligence.

In the instant case, from the evidence of the defendants and in all the surrounding circumstances, there is no how, in my respectful view, any court, will find the Respondents liable for negligence, because there was none. (A tiny tip of a needle to be compared with a swab?). “A surgical needle, is not a strong tool”, said the 1st Respondent under cross-examination. This assertion, was not challenged by the Appellant’s learned counsel. The Appellant failed to bring an expert or any other knowledgeable Doctor(s) -Surgeon and/or Gynaecologist(s) to come and testify to the contrary of what the 1st Respondent or the Respondent’s other witnesses stated on oath.

Finally, there is again here, the concurrent findings of the two lower courts. This Court has stated it umpteen times in a number of decided cases, that it will not interfere with such findings except in clear shown circumstances. I myself, see no such circumstances in this case. See the cases of *Dr. Bamgboye v. University of Ilorin & anor.* (1999) 10 NWLR (pt 622) 290; (1999) 6 SCNJ. 295 and *Calabar East Co-operative Thrift & Credit Society Ltd. & ors, v. Ikot* (1999) 14 NWLR (Pt 638) 223; (1999) 12 SCNJ. 121 and many others.

It is from the foregoing and the fuller details in the said lead

Judgment of my learned brother, Tobi, JSC, that I too find no merit or substance in this appeal. I too dismiss it. I hereby and accordingly affirm the decision of the court below affirming the judgment of Idohosa, J. delivered on 14th May, 1997. No order as to costs.

B

C

D

E

F

G

H