

SUPREME COURT OF NIGERIA
25TH JANUARY, 2008, SC.67/2002
CORAM:-A. I. KATSINA-ALU, G. A. OGUNTADE, W. S. N.
ONNOGHEN, F. F. TABAI, I. T. MUHAMMAD, JJSC

EDWARD OKWEJIMINOR APPELLANT
AND
1. G. GBAKEJI
2. NIGERIAN BOTTLING CO. PLC. RESPONDENTS

APPEALS - Issues - Formulation of - Is based on the grounds of appeal - Which represent the questions in controversy - They are not framed in the abstract (H1)

CROSS EXAMINATION - Pleadings - Evidence elicited under cross examination - Based on facts not pleaded - Is inadmissible and goes to no issue (H2)

TORTS - Negligence - Pleadings - Findings of trial court - That contaminated bottled drink - Caused injury to appellant - Are supported by evidence - They were wrongfully disturbed by Court of Appeal (H3)

MANUFACTURERS - Negligence - Duty of care - Implied warranty - Exists between consumer and manufacturer - As to safety of bottled drink - Established injury from taking the drink - Entitles appellant to compensation (H4)

DAMAGES - Discretion - Award of general damages by trial court - Will not be disturbed by appellate court - Save where the guiding principles are breached - They are not breached in this case (H5)

FACTS

Before the Ughelli High Court of Delta State, the plaintiff/appellant commenced an action against defendants/respondents about the 18-3-1991. Appellant claimed several items of costs and damages totalling N2 million. Appellant bought a crate of soft drinks manu-

factured by the 1st respondent through the 2nd respondent who was a dealer. He drank a bottle containing dead cockroach and other sediments midway before discovering it. As a result, he took ill, was taken to two hospitals where he received treatment and incurred some costs. The create was tendered as an exhibit with another unopened fanta orange containing a dead fly.

The trial court dismissed some of the items of claim and found for the appellant in respect of other items. The claim against 1st respondent was dismissed and only 2nd respondent was found liable to appellant in the sum of N551.00, N27.00 and N950,000 damages. Respondents appealed to the Court of Appeal while the appellant cross appealed in respect of the quantum of damages. The lower court wrongfully considered evidence elicited during cross examination on an issue that was not pleaded and found for the respondents while the cross appeal was dismissed. Being aggrieved appellant has now appealed to the Supreme Court.

ISSUE FOR DETERMINATION

Whether on the totality of the case as borne out by the records of appeal, the learned Justices of the Court of Appeal were justified in reversing the judgment of the trial court and in coming to their judgment in dismissing the plaintiff/appellant's case.

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

Issues - Formulation of

1. First of all, let me react to what appears to be a novel submission of learned counsel for the 1st respondent. The submission is that "in order to identify the correct issues for determination one has to consider not only the grounds of appeal and the decisions of the lower courts, but also the basic principles laid down, in Donoghue's case. The settled principle of law is that issues for determination in an appeal must relate to the grounds of appeal filed and the judgment appealed against. Such issues should not be framed in the abstract but must relate to the grounds of appeal which represent the questions in controversy in the particular appeal. Since the appellant insists by this appeal that the respondents are liable in negligence for damages, the principles of Donoghue v. Stevenson (1932) AC 562, may be called into play on the question of causation. I do not think

that the principles in *Donoghue v. Stevenson* (supra) falls for consideration on the formulation of issues for determination. (p. 619 B)

Evidence elicited under cross examination

2. The Court of Appeal carried out some re-evaluation of the evidence for the appellant, particularly the evidence of the appellant himself, the PW2, PW3 and PW4 under cross-examination.

In the first place the evidence elicited under cross-examination on which the Court of Appeal based its findings quoted above was not founded on issues raised in the pleadings. I am therefore persuaded by the submission of learned counsel for the Appellant that they go to no issues for it is settled that evidence obtained in cross-examination but on facts not pleaded is inadmissible. (p. 624 C)

Pleadings - Findings of trial court

3. On this issue of whether the bread and tea taken by the appellant in the morning of 13/2/91, could be a possible cause of the appellant's ailment and eventual hospitalisation the learned trial judge at page 81 of the record reacted as follows:

"With the greatest respect to the learned counsel to the 2nd defendant this submission is unfounded and without merit if considered with the established facts of this case. Firstly, the 2nd defendant never pleaded the fact that the plaintiff injury was caused by bread and tea taken at breakfast. No bread was tendered before me, nor is there any report showing that the plaintiff suffered injury from any bread tendered before me. Counsel submission was based on unpleaded and speculative evidence and hence goes to no issue ..."

I agree entirely with the above opinion of the learned trial judge. It embodies the true state of the law on pleadings and evidence.

Continuing, the learned trial Judge stated as follows:

"I believe the evidence of the plaintiff that the Fanta orange Exhibit "H" was taken from the crate of minerals Exhibit "G" bought from the 1st defendant who is the retailer of the mineral produced and bottled by the 2nd defendant. I found as a fact that the 2nd defendant bottler of the contaminated Fanta orange Exhibit "H" which the plaintiff bought and consumed on the 13/2/92 and which caused plaintiff stomach pain, vomiting and stooling and led to the plaintiff

admission in hospital. I also held that the 2nd defendant is the manufacturer of Exhibit "G" including Exhibit "H" and "J" "

The above findings and beliefs are all supported by evidence on record including evidence from the 1st respondent. There was in the circumstances, no basis for any interference with the findings as they were amply supported by the evidence on record. (p. 625 A/626 B)

MANUFACTURERS - Negligence - Duty of care

4. In this case it is not contested that the Fanta orange drink exhibit "H" was manufactured and bottled by the 2nd defendant. It was sealed in such a manner as to exclude interference with or examination by an intermediate handler like the 1st respondent. And the appellant received it in the form in which it was bottled and sealed by the 2nd respondent. In such a situation there is an implied warranty by the 2nd respondent to the ultimate consumer that the contents of Exhibit "H" are safe for human consumption. In such a circumstance, the manufacturer, which in this case is the 2nd respondent owes a duty of care to the appellant. And once it is established that the appellant was injured by the contents of Exhibit "H" that duty is breached entitling the appellant to reparation from the 2nd respondent.

On that issue the learned trial Judge at page 87 of the said judgment remarked:

"The plaintiff is the final consumer of the Fanta orange drink Exhibit "H", manufactured and bottled by the 2nd defendant. Plaintiff is a person closely and directly affected by the act of the 2nd defendant and he owes the consumers including the plaintiff the duty of care or that the drinks manufactured by them should not do damaged to the consumers."

I have no cause to fault this reasoning. The consequence therefore is that there was equally no basis for the conclusion of the Court of Appeal at page 241 of the record to the effect that causation was not established. (p. 627 D)

H Award of general damages by trial court

5. With respect to the special damages awarded, there is practically no challenge. The only area of some complaint is with respect to the award of N950,000.00 which is in the form of general damages. The

guiding principle is that an appellate court would not ordinarily interfere with the decision of a trial court as to the amount of damages awarded unless it is satisfied that:

(a) the trial court proceeded on a wrong principle of law; or

(b) the amount awarded is so high or so low as to make it an entirely erroneous estimate of damages to which the claim is entitled. It is also settled that the award of general damages is essentially that of the trial court's exercise of discretion and being a discretion an appellate court must ordinarily be circumspect in an invitation to interfere with the amount awarded. In the award of general damages therefore it is not for the appellate court to interfere on the promise that on a balance of opinion that a higher or low amount of award would have been preferred.

In this case the Court of Appeal formed his opinion on the propriety or otherwise of the amount of N950,000.00 awarded because of its erroneous finding that the claim was not sustainable. I have examined the award made by the learned trial judge and I do not find any strong reason to interfere with the exercise of his discretion in the award. The result is that I would not disturb the award made by the learned trial judge. (p. 628 H)

NOTABLE POINTS OF INTEREST

OGUNTADE JSC

1. Ascription of probative value to evidence - Is trial court's duty

It cannot escape notice that the defendant as stated in the passage above did not call any evidence in rebuttal of the evidence called by the plaintiff. The trial court accepted the plaintiff's evidence and that of his witnesses. It was not open to the court below to disparage settled issues of fact based on the evidence accepted by the trial court. The ascription of probative value to the evidence called by parties is the exclusive function of the trial court and the appellate court has no business interfering with and dismantling the solemn findings of facts made by the trial court. (p. 631 D)

ONNOGHEN JSC

2. Evaluation of evidence - When appellate court may interfere

It is settled law that where evaluation of evidence does not involve

the credibility of the witness who testified at the trial an appellate court is in as good a position as the trial court to evaluate the evidence on record and where necessary reverse the findings of the trial court particularly where the same are demonstrated to be perverse. (p. 639 B)

B

3. *Cross examination - Limitation to use of elicited evidence*

It has been argued very forcefully, as usually is the case, that under cross examination the sky is the limit and that evidence elicited there from can be used in the proceedings. While that proposition remains good law and of general application, it is, like every general principles of law, subject to exceptions. Since the principle fall within the domain of the Law of Evidence, it follows that the principle of relevance in admissibility of evidence in any proceeding is crucial and the fact that any fact which the said evidence is intended to prove or establish must have been pleaded, otherwise it grounds to no issue must equally be taken into consideration; it does not matter whether the said evidence came through evidence in chief or under cross examination the fact must be pleaded. It therefore follows that there is really a limit to cross examination which is designed to ensure that only relevant and pleaded facts are admissible and can be made use of in the proceedings. (p. 641 A)

E

MUHAMMAD JSC

F

4. *Absence of privity of contract - Does not exclude manufacturer's duty of care to consumer*

I think the English case of *Donoghue v. Stevenson* (1932) AC 562, appears to be the locus classicus on the issue of duty of care in the realm of law of negligence. There was an attempt in that case by the House of Lords in 1932, to formulate some general criterion for the existence of the proximity which would give rise to duty of care. In that case, the pursuer averred that she had suffered injury as a result of seeing and drinking the contaminated contents of a bottle of ginger beer manufactured by the respondent and bought from him by the owner of a cafe, from whom in turn it had been bought by a friend of the pursuer. The House of Lords, by a fare majority, held that if the pursuer could prove that which she averred she would

G

H

have a good cause of action. Thus, this case is an authority to say that even where there is absence of privity of contract between plaintiff and defendant that per se, does not preclude liability in tort. It also gives the proposition that manufacturers of products owe a duty of care to the ultimate consumer or user. (p. 650 F)

B

5. Brilliant address - Can never become pleadings or evidence

Now, whether the issue of tea and bread were the cause of appellant's stomach upset. This Issue is not pleaded by the parties at all. It was an issue surreptitiously introduced by the learned counsel for the respondents at the court below in his issue No 6. So no issue was joined on it. There was no appeal to court below on it. It is no need wasting time and energy on this issue. The law is well pronounced upon that no matter how brilliant the address of counsel is it cannot be a substitute for pleadings or evidence. Courts are only enjoined to limit and restrict themselves to pleaded and proved facts.

The court below had no business considering that issue as it was not properly brought before it. And, as a general rule, no court is permitted to make a case not made by the parties. (p. 651 A)

E

REPRESENTATION

O. J. Oghenejakpor, (with him P. E. Emefiele S. G. Edigbonuvie), for the Appellant.

Oluyele Delano, (with him Adeola Ademoyega), for the 1st Respondent.

Oluseye Opasanya, for the 2nd Respondent.

CASES REFERRED TO

Akinloye v. Eyilola (1968) NMLR 92 at 95

Akilu v. Fawehinmi (No.2) (1989) 2 NWLR (Part 102) 122 at 161

Balogun v. Labiran (1988) 3 NWLR (Part 80) 66

Ebba v. Ogoto (1984) 4 SC 84

Okonkwo v. Okolo (1988) 2 N.W.L.R. (Part 179) 632

Olowosago v. Adebajo (1988) 4 N.W.L.R. (Part 88) 275

Okpala v. Ibeme (1989) 2 NWLR (Part 102) 208 at 220

Sha v. Kwan (2000) 5 SC 178 at 194

G

H

Lion Building Ltd v. Shadipe (1976) 12 SC 135 at 152

Mogaji v. Odofin (1978) 4 SC 91 at 93

Woluchem v. Gudi (1981) 5 SC 291 at 326-330

Shell BP Dev. Co. Nig Ltd v. His Highness Pere Cole & Ors (1978) 3 SC 183 at 194

B Imana v. Robinson [1974] 4-4 SC 1 at 8

Gbolade v. Oladejo (1994) 8 NWLR (Pt.362) 281

Umar v. Ahunqwa (1997) 1 NWLR (Pt.483) 601

C ***BOOKS REFERRED TO***

Black's Law Dictionary, 6th edition; page 1315

Clerk & Lindsell on Tort 16th Edition at page 691

Stroud's Judicial Dictionary of Words & Phrases, (6th edition), vol.1, page 82

D

LEAD JUDGMENT BY TABAI JSC

E The suit was commenced at the Ughelli Judicial Division of the High Court of then of Bendel State but now of Delta State on or about the 18/3/91. The Plaintiff therein is the Appellant herein while the Defendants are the Respondents herein. The Appellant claimed against the Respondents jointly and severally as follows:

F (a) The sum of N551.00 being medical expenses borne by the plaintiff as a result of the negligent acts of the defendants in bottling and selling a contaminated and poisonous Fanta orange drink to the plaintiff.

(b) The sum of N27.00 being costs of the crate of mineral purchased from the 1st defendant.

G (c) The sum of N299,000.00 being loss of business expectation profits or income for the period of the plaintiffs treatment and time for recuperation.

(d) The sum of N700,422.00 being general damages for loss of life expectancy.

H (e) The sum of N1,000,000.00 being damages for shock, pain, agony and discomfort suffered by the plaintiff as a result of the contaminated Fanta drink bottled and sold by the defendant.

Total sum claimed N2, 000,000.00.

Pleadings were settled and exchanged. The actual trial itself

involved the testimony of five witnesses for the plaintiff and two for the defence. The parties through their counsel addressed the court. By its judgment dated the 23/3/1994 the learned trial Judge, W.A.O. Onoriobe. J. allowed the claim of the appellant against the 2nd respondent with costs which he assessed at N2,500.00. He however dismissed the claim against the 1st respondent with N1000.00 costs. Dissatisfied with the said judgment the respondents appealed to the court below. The appellant was also dissatisfied with the award of damages and filed a cross-appeal in respect thereof to the court below. By its judgment on the 23/4/98, the appeal was allowed and cross-appeal dismissed.

Dissatisfied, the appellant has come on appeal to this court. The original notice of appeal dated the 22nd of June 1998 contained 11 (eleven) grounds of appeal. With the leave of this court the appellant was granted the leave of this Court to file and argue four additional grounds of appeal. And the parties through their counsel filed and exchanged their briefs of argument. The appellant's brief was prepared by O.J. Oghenejakpor. He also prepared the appellant's reply brief. They were filed on the 2/8/04 and 11/12/06 respectively. Mr Oluyele Delano prepared the 1st respondent's brief and it was filed on the 7/3/06. The 2nd respondent's amended brief was prepared by Oluseye Opasanya and same was filed on the 9/3/06.

In his brief, the appellant submitted six issues for determination which are formulated as follows:

1. Whether in the circumstances of this case the Justices of the Court of Appeal were justified in reversing the firm findings of fact of the trial court that contaminated Fanta orange drink containing a cockroach and a germ called Shigema tendered as Exhibit H in this proceeding caused the plaintiff ailment of stomach ache resulting in vomiting and stooling which led to his hospitalisation?

2. Whether the Justices of the Court of Appeal were justified in reversing the findings of the trial court that the Fanta orange Exhibit H which caused the plaintiff ailment was manufactured and bottled by the 2nd defendant who sold same to the plaintiff through the 1st defendant their retailer?

3. Whether the Justices of the Court of Appeal were justified in reversing the findings of the trial court that the 2nd defendant was in

breach of duty of care owed to the plaintiff and liable for damages for negligence?

4. Whether the learned Justices of the Court of Appeal were right in holding that the 1st defendant who is the retailer that sold the contaminated Fanta orange Exhibit "H" which caused plaintiffs ailment is a mere conduit pipe and hence not liable in negligence for the sale of the defective and contaminated Fanta orange Exhibit "H".

5. Whether the learned Justices of the Court of Appeal were right in holding that there was no modicum of evidence on record to support the claim for damages for pain, shock, agony and discomfort and reversing the award of N950,000.00 made by the trial court,

6 Whether on the totality of the case as borne out by the records of appeal, the learned Justices of the Court of Appeal were justified in reversing the judgment of the trial court and in coming to their judgment in dismissing the plaintiff/appellant's case.

For the first respondent the following four issues were submitted for determination.

1. Whether the Court of Appeal was right by holding that the plaintiff failed to prove that his illness was caused by drinking contaminated Fanta orange drink produced by the defendant?

2. Whether the contamination was occasioned by the carelessness of the 2nd defendant in breach of its duty of care to the plaintiff?

3. Whether the 1st defendant was in breach of any duty of care to the Plaintiff?

4. Whether the Court of Appeal was right to set aside the award of N950, 000.00 as damages to the plaintiff against the 1st and 2nd defendants.

And on behalf of the 2nd respondent, the following four issues for determination were also proposed:

1. Whether the evidence adduced by the plaintiff proves that the alleged contaminated Fanta drink was manufactured by the 2nd defendant?

2. If the answer to issue 1 is in the affirmative, whether the Court of Appeal was right in holding that there was no evidence showing that the drink in question was the cause of the plaintiff's ailment.

3. Whether the Justices of the Court of Appeal were justified in

deciding that the evidence before the court did not support the claim in negligence?

4. Whether the Court of Appeal was right that there is no modicum of evidence on record to support the award by the Court of N950, 000.00 damages for pain, shock, agony and discomfort?

First of all, let me react to what appears to be a novel submission of learned counsel for the 1st respondent. The submission is that in order to identify the correct issues for determination one has to consider not only the grounds of appeal and the decisions of the lower courts, but also the basic principles laid down, in Donoghue's case. The settled principle of law is that issues for determination in an appeal must relate to the grounds of appeal filed and the judgment appealed against. Such issues should not be framed in the abstract but must relate to the grounds of appeal which represent the questions in controversy in the particular appeal. See *Western Steel Works Ltd v. Iron 7 Steel Workers Union of Nigeria* (1987) 1 N.W.L.R. (Part 49) 284 at 304; *Okonkwo v. Okolo* (1988) 2 N.W.L.R. (Part 179) 632; *Olowosago v. Adebajo* (1988) 4 N.W.L.R. (Part 88) 275; *Okpala v. Ibeme* (1989) 2 NWLR (Part 102) 208 at 220; *Akilu v. Fawehinmi* (No.2) (1989) 2 NWLR (Part 102) 122 at 161. ***Since the appellant insists by this appeal that the respondents are liable in negligence for damages, the principles of Donoghue v. Stevenson (1932) AC 562 may be called into play on the question of causation. I do not think that the principles in Donoghue v. Stevenson (supra) falls for consideration on the formulation of issues for determination.***

With respect to the issues for determination proposed by counsel for the parties, the appellant's 6th issue seems to encompass all other issues both of the appellant and the respondents. It is whether on the totality of the case as borne out by the evidence on record the Court of Appeal was justified in reversing the judgment of the trial court and in coming to their judgment dismissing the appellant's claim. I would therefore adopt the said issue as the main issue for determination. In the course of this judgment, however I shall restate the substance of the arguments of the parties as they are set out in their respective briefs.

Under the appellant's issue 1, references were made to the trial court's findings on Exhibit "H" and the reversal of same by the Court of Appeal and submitted that there was no legal basis for the interference since the findings of the trial court were supported by the evidence and therefore not perverse. Reliance was placed on *Sha v. Kwan* (2000) 5 SC 178 at 194; *Akinloye v. Eyilola* (1968) NMLR 92 at 95; *Lion Building Ltd v. Shadipe* (1976) 12 SC 135 at 152; *Mogaji v. Odofin* (1978) 4 SC 91 at 93; *Woluchem v. Gudi* (1981) 5 SC 291 at 326-330; *Ebba v. Ogodo* (1984) 4 SC 84; *Balogun v. Labiran* (1988) 3 NWLR (Part 80) 66; *Shell BP Dev. Co. Nig Ltd v. His Highness Pere Cole & Ors* (1978) 3 SC 183 at 194. Learned counsel for the appellant referred to the finding of the trial court at page 82 of the record and submitted that the finding is supported by the pleadings and evidence. He also made reference to the reliance of the Court of Appeal on the issue of bread and tea and contended that the question of the appellant's breakfast of bread and tea was not made an issue in the pleading, submitting that the court must restrict itself to the pleadings. The appellant relied on *Niger Construction v. Okugbeni* (1987) 4 NWLR (Part 67) 787 at 792; *Lewis & Peat Ltd v. Akhimien* (1976) 7 SC 157 at 160-162; *Nig. Engineering Works Ltd v. Denlap Ltd & Ors* (1997) 10 NWLR (Part 525) 481 at 591; *Igwe v. AICS* (1994) 8 NWLR Part 363, 459 at 481.

Learned counsel for the appellant pointed out that the issue of bread and tea came up only in cross-examination and submitted that evidence in cross-examination on matters not pleaded goes to no issue. He relied on *Nsirim v. Onuma Construction Co. Ltd* (2001) FWLR (Part 44) 405 at 416 and the reaction of the learned trial judge at pages 81-82 of the record when the issue was raised. Counsel further referred to the question of how well equipped the laboratory at 24 Post Office Road Ughelli was and submitted that the question was not an issue raised in the pleadings and therefore goes to no issue. It was the submission of the Appellant that the court below reversed the judgment of the trial court on issue not canvassed by the parties.

Under its issue two learned counsel for the appellant referred to the pleadings of the parties including admissions, the evidence of the parties particularly that of the 1st respondent, Exhibits G, H, J

and K. and argued that the trial courts finding about the 2nd respondent being the manufacturer and bottler of the contaminated Fanta orange drink Exhibit "H" is unassailable.

Arguing the 3rd issue learned counsel for the appellant referred again to the pleadings and the evidence and submitted that the 2nd respondent owed the appellant a duty of care which duty it breached and therefore liable in negligence to the appellant and the trial court correctly so found. He argued therefore that the Court of Appeal was wrong in disturbing the finding. B

Under his issue 4 the appellant raised the question of the 1st respondent's liability. Both courts below found her not liable. According to the trial court she was a mere "carrier". And the Court of Appeal described her as a conduit pipe. It was argued that the 1st respondent having admitted the sale of Exhibit "H" to the appellant for N27.00 and having regard to the established fact that she was one of the sources through which the 2nd respondent marketed her products there was an implied warranty on her part that the said Exhibit "H" was safe for human consumption. Exhibit "J" which had not been opened also contained a fly and same was also sold by the 1st respondent, it was pointed out. It was submitted that as retailer of a defective product she also owed the final consumer including the appellant the duty of care and therefore also liable. Reliance was placed on *Nigerian Bottling Co. Ltd v. Ngonadi* (1985) 5 SC 317; *Ifeanyi Chukwu Ltd v. Soreh Boneh Ltd* (2000) FWLR (Part 27 2046 at 2070-2071, *Makwe v. Nwokor* (2001) FWLR (Part 63) 1 at 16. It was appellant's submission on this issue that both respondents are jointly liable. C D E F

With respect to the 6th issue it was submitted that there was no appeal against the quantum of N950, 000.00 damages. Learned counsel referred to the portions of the evidence of the appellant himself the PW2 and PW3 and argued that in view of the stomach pain, vomiting and stooling which resulted in his hospitalization the appellant is entitled to the damages awarded. In conclusion it was urged that the appeal be allowed and the judgment of the Court below set aside. G H

Next is the argument of learned counsel for the 1st respondent in her brief. He concedes some submissions of the appellant which I

shall highlight later. Apart from that his submissions centered on the principles of causation as espoused in *Donoghue v. Stevenson* (1932) AC 562. He pointed out what he regarded as lapses in the evidence of the Appellant and his witnesses. He pointed to the evidence of the PW2 under cross-examination to the effect that the stooling and vomiting could have been caused by cholera or typhoid fever or indeed over eating and submitted that the appellant did not exclude by evidence the possibility of his illness having been caused otherwise than by the Fanta orange drink. It was submitted therefore that the finding of the Court of Appeal cannot be faulted. It was further argued that the appellant had to prove that the cockroach was present in the bottle at the time the drink left the 2nd respondent's factory. Counsel referred to *Daniel's and Daniel's v. White (R) & Sons Ltd* (1938) KBD 258 and *Clerk and Lindsell on Tort* 16th Edition at page 691 and submitted that where a defendant is able to show that he has taken all reasonable care in his production process he would have successfully rebutted negligence. He argued that although the presence of the cockroach in the Fanta orange drink gives rise to the inference of the 2nd respondent's negligence, it was sufficiently rebutted by the evidence of the DW2 about its reasonable care.

With respect to the 1st respondent, it was argued that she incurred no liability for negligence as she was only an innocent retailer. The 1st Respondent was just in as good a position as the Appellant to detect defect in the Fanta orange just by visual examination of the bottle.

On the issue of the N950, 000.00 damages award learned counsel for the 1st respondent supported the Court of Appeal about there being no modicum of evidence in support of the claim that the Appellant suffered any shock pain agony and discomfort as a result of the consumption of the contaminated Fanta orange drink. It was his contention that the most persuasive evidence on the point is that of the PW2. He described the ipsit dixit evidence of the appellant and his wife as self serving and of little probative value. And the PW2 gave no evidence of shock pain or agony as claimed by the appellant. In conclusion, he urged that the appeal be dismissed.

On behalf of the 2nd respondent the following represent the substance of the submissions of learned counsel. It was the submis-

sion that where the medical evidence fail to conclusively link the contaminated Fanta orange Exhibit "H" to the ailment complained of, then the manufacturing company cannot be liable in negligence. He referred to portion of the evidence of the PW2 and PW4 under cross-examination and submitted that there was a total failure to link the 2nd respondent's Fanta orange to the ailment suffered by the appellant. He argued that the possibility of ailment having been caused by factors other than Exhibit "H" was not excluded. Reliance was placed on Nathaniel Ebenalu v Guinness Nig Ltd (1979) 7-9 CCHJ Vol. 1. He argued therefore that the court was right in reversing the judgment of the trial court. The appellant, he argued, failed to prove that the 2nd respondent breach its duty of care to the appellant.

With respect to the 1st respondent learned counsel argued that there was no evidence on record against the 1st respondent, she being only an agent to a disclosed principal and who performed within the scope of her agency. For this submission he relied on M.S.L. (Nig) Ltd v. N.M.A. (2000) 9 NWLR (Part 672) 391; Niger Progress Ltd. v. NEL Corp (1989) 3 NWLR (Part 107) 68; Orji v. Anyaso (2000) 2 NWLR (Part 643) 1; Ezeluwa v. Ekong (1999) 11 N.W.L.R. (Part 635)55.

By way of conclusion learned counsel submitted that in order to succeed the plaintiff/appellant must prove:

1. Duty of care
2. Breach of duty of care and
3. Damage resulting from the breach of duty of care.

He relied on Donoghue v. Stevenson (supra) Merchantile Bank v. Abusomwan (1986) 2 NWLR (Part 22),

In the appellant's reply brief of argument, learned counsel for the appellant referred to the concessions at page 5 of the 1st respondent's brief and submitted that in the light of those concessions, the lower courts reversal of the decision of the trial court cannot be sustained. He reproduced the entire evidence of the PW2 and PW4 and contended that the respondent's statement of the evidence of these witnesses contained distortions. It was his farther submission that the evidence of the PW2 and PW4 under cross-examination on possible other causes of stooling and vomiting was evidence in respect of which there was no pleading and which was therefore inad-

missible and cannot therefore be relied upon. Learned counsel referred to the statement of Lord Macmillan in *Donoghue v. Stevenson* at page 622-623 and described same as a sweeping obiter and urged this court not to be bound by it and that there should be a presumption of negligence and that there should be justification of the maxim *res ipsa loquitur*.

Let me now deliberate on the case by examining the pleadings, the evidence of the parties, the judgment of the trial court and the judgment of the Court of Appeal to see if the reversal of the trial court's judgment by the Court of Appeal is justifiable. First is the issue of causation. Was there on the balance of probability, such evidence that linked the 2nd respondent to the ailment and eventual hospitalisation of the plaintiff/appellant? ***The Court of Appeal carried out some re-evaluation of the evidence for the appellant, particularly the evidence of the appellant himself, the PW2, PW3 and PW4 under cross-examination*** and at pages 239-240 had this to say:

*"The above answers to cross-examination of the PW2, PW3, PW4 and the plaintiff/respondent/cross-appellant have greatly punctured the case for the plaintiff/respondent that the Fanta orange drink complained of caused injuries or any injury to the plaintiff/respondent/cross-appellant. These answers do not rule out the possibility that other agents not from the alleged Fanta caused the infection the plaintiff/respondent suffered from. There was no evidence from the PW2 and PW4 at the trial that the plaintiff/respondent by taking the alleged contaminated Fanta orange drink caused the injury pleaded or complained or caused any injury or illness revealed by both the medical practitioner or the laboratory tests. It seems to me that there was a total failure to link the 2nd defendant/appellant's company with the alleged Fanta orange drink in question nor the inference of duty of care. See *Ogbimi v. Guinness (Nig) Ltd (1981) 1 FNL 67 at 69-70.*"*

In the first place the evidence elicited under cross-examination on which the Court of Appeal based its findings quoted above was not founded on issues raised in the pleadings. I am therefore persuaded by the submission of learned counsel for the Appellant that they go to no issues for it is

settled that evidence obtained in cross-examination but on facts not pleaded is inadmissible. See *Dina v. New Nigerian Newspapers Ltd* (1986) 2 NWLR (Part 22) 353, *Agnocha v. Agnocha* (1986) 4 NWLR (Part 37) 366. **On this issue of whether the bread and tea taken by the appellant in the morning of 13/2/91, could be a possible cause of the appellant's ailment and eventual hospitalisation the learned trial judge at page 81 of the record reacted as follows:** B

"With the greatest respect to the learned counsel to the 2nd defendant this submission is unfounded and without merit if considered with the established facts of this case. Firstly, the 2nd defendant never pleaded the fact that the plaintiff injury was caused by bread and tea taken at breakfast. No bread was tendered before me, nor is there any report showing that the plaintiff suffered injury from any bread tendered before me. Counsel submission was based on unpleaded and speculative evidence and hence goes to no issue" C

I agree entirely with the above opinion of the learned trial judge. It embodies the true state of the law on pleadings and evidence. D

Still on this issue of causation the learned trial judge embarked upon a reasonably extensive evaluation of the evidence adduced before the court in the light of the facts pleaded. Specifically, at pages 84-85 he examined paragraphs 12 and 13 of the 2nd respondent's statement of defence and paragraphs 3 and 7 of the 1st respondent's statement of defence the testimony of the plaintiff as to the source of Exhibits "G" "H" and "K", the evidence of the 1st respondent and made crucial findings. And after remarking that the 2nd respondent failed to tender any evidence in proof of paragraphs 12 and 13 he made the following findings: E

"On the whole I accept the 1st defendant evidence given in support of her pleadings that it was the crate supplied to her by the 2nd defendant that she sold to the plaintiff on the 13/2/91. I also accept that the 2nd defendant made the supply of Exhibit "G" to the 1st defendant on the 9/2/91 as reflected in Exhibit "K", the Route Card. The plaintiffs case is that the contaminated Fanta drink Exhibit "H" is taken from the crate Exhibit "G". There is no contrary evidence F

to this averment *The crate was tendered before me as Exhibit "G". I saw and examined the crate. The contaminated Fanta taken half-way by the plaintiff was also tendered before me as Exhibit "H". I saw the cockroach and other sediments in it I also saw another unopened Fanta orange containing a fly in the same crate (Exhibit "G") tendered as Exhibit "J" in this proceeding"*

Continuing, the learned trial Judge stated as follows:

"I believe the evidence of the plaintiff that the Fanta orange Exhibit "H," was taken from the crate of minerals Exhibit "G" bought from the 1st defendant who is the retailer of the mineral produced and bottled by the 2nd defendant I found as a fact that the 2nd defendant bottler of the contaminated Fanta orange Exhibit "H," which the plaintiff bought and consumed on the 13/2/92 and which caused plaintiff stomach pain, vomiting and stooling and led to the plaintiff admission in hospital I also held that the 2nd defendant is the manufacturer of Exhibit "G" including Exhibit "H" and "J""

(See pages 85-86 of the record)

The above findings and beliefs are all supported by evidence on record including evidence from the 1st respondent. There was in the circumstances, no basis for any interference with the findings as they were amply supported by the evidence on record.

Still on this issue of causation, while both learned counsel for the respondents placed reliance on the principle in *Donoghue v. Stevenson* (supra), learned counsel for the appellant advocated a shift from the burden of proof on the injured party as stated in the obiter by Lord Macmillan. Stating the duty of care owed to the ultimate consumer of a product by the manufacturer Lord Atkin at page 599 of the report said:

"By the Scots and English Law alike an manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property owes a duty to the consumer to take reasonable care."

On his part., Lord Thankerton at page 603 of the report stated the legal relationship between the manufacturer of some type of products and the ultimate consumer in the following terms:-

"That the respondent (manufacturer), in placing his manufactured article of drink upon the market has intentionally so excluded interference with, or examination of the article by any intermediate handler of the goods between himself and the consumer, with the result that the consumer is entitled to rely upon the exercise of diligence by the manufacturer to secure that the article shall not be harmful to the consumer. If that contention be sound, the consumer, on her showing that the article has reached her intact and that she has been injured by the harmful nature of the article, owing to the failure of the manufacturer to take reasonable care on its preparation prior to its enclosure in the stated vessel, will be entitled to reparation from the manufacturer."

Lord Macmillan spoke in the same vein at page 622 of the report.

In this case it is not contested that the Fanta orange drink exhibit "H" was manufactured and bottled by the 2nd defendant. It was sealed in such a manner as to exclude interference with or examination by an intermediate handler like the 1st respondent. And the appellant received it in the form in which it was bottled and sealed by the 2nd respondent. In such a situation there is an implied warranty by the 2nd respondent to the ultimate consumer that the contents of Exhibit "H" are safe for human consumption. In such a circumstance, the manufacturer, which in this case is the 2nd respondent owes a duty of care to the appellant. And once it is established that the appellant was injured by the contents of Exhibit "H" that duty is breached entitling the appellant to reparation from the 2nd respondent.

On that issue the learned trial Judge at page 87 of the said judgment remarked:

"The plaintiff is the final consumer of the Fanta orange drink Exhibit "H" manufactured and bottled by the 2nd defendant. Plaintiff is a person closely and directly affected by the act of the 2nd defendant and he owes the consumers including the plaintiff the duty of care or that the drinks manufactured

by them should not do damaged to the consumers."

I have no cause to fault this reasoning. The consequence therefore is that there was equally no basis for the conclusion of the Court of Appeal at page 241 of the record to the effect that causation was not established.

B Next is the question of the damages awarded. At page 244 of the record, the Court of Appeal found in respect of the damages awarded by the learned trial judge. The court said:-

C *"I must say that there is no modicum of evidence to support the claim that the plaintiff/respondent/cross appellant suffered any shock pain agony and discomfort as a result of the consumption of the contaminated Fanta orange drink manufactured and bottled by the 2nd defendant/appellant. Thus the above findings of the learned trial judge are not borne out of the evidence adduced before the*
D *court by the respondent/cross-appellant. "*

It is clear from the judgment of the Court of Appeal that it was produced into the above erroneous conclusion because of its heavy reliance on the evidence extracted under cross-examination but which was not in support of any of the issues raised in the pleading. On the
E issue of the damages awarded the learned trial judge stated at page 91 of the record thus:

"The plaintiff also claimed the sum of N1000,000.00 being damages for shock, pain, agony and discomfort he suffered as a result of the consumption of the contaminated Fanta orange drink manufactured and bottled by the 2nd defendant. From the pleading and the evidence, in this case and in view of my finding, I hold that the 2nd defendant is liable under this head of claim. I have considered carefully the circumstances and the facts of this case and I come
F *to the conclusion that the plaintiff is entitled to the sum of N950,000.00 (Nine hundred and fifty thousand naira) as damages for the injury suffered by the plaintiff as a result of the consumption of the contaminated Fanta orange drink against the 2nd Defendant"*

Earlier, the learned trial judge had allowed some other heads of claim
H and dismissed some. ***With respect to the special damages awarded there is practically no challenge. The only area of some complaint is with respect to the award of N950,000.00 which is in the form of general damages. The guiding principle***

is that an appellate court would not ordinarily interfere with the decision of a trial court as to the amount of damages awarded unless it is satisfied that:

(a) the trial court proceeded on a wrong principle of law; or

(b) the amount awarded is so high or so low as to make it an entirely erroneous estimate of damages to which the claim is entitled.

See Ogunkoya v. Peters (1954) 14 WACA 504; Soleh Boneh Overseas (Nig) Ltd v. Ayodele (1989) 1 NWLR (Part 199) 549. **It is also settled that the award of general damages is essentially that of the trial court's exercise of discretion and being a discretion an appellate court must ordinarily be circumspect in an invitation to interfere with the amount awarded. In the award of general damages therefore it is not for the appellate court to interfere on the promise that on a balance of opinion that a higher or low amount of award would have been preferred.** See His Highness Uyo I v. Egware (1974) 1 AH NLR 293 at 295; Nwachukwu v. Egbuchu (1990) 3 NWLR (Part 139) 435; Bello v. Ringim (1991) 7 NWLR (Part 206) 668.

In this case the Court of Appeal formed his opinion on the propriety or otherwise of the amount of N950,000.00 awarded because of its erroneous finding that the claim was not sustainable. I have examined the award made by the learned trial judge and I do not find any strong reason to interfere with the exercise of his discretion in the award. The result is that I would not disturb the award made by the learned trial judge.

On the whole, it is my view that the Court of Appeal was in grave error to interfere with the very reasoned judgment of the learned trial judge. And in view of all I have been saying above I hold that there is merit in the appeal which ought to be and is hereby allowed. The judgment of the Court of Appeal be and is hereby set aside and that of the trial court restored in its entirety. I assess the costs of this appeal at N10,000.00 in favour of the appellant against the 2nd respondent.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother Tabai J.S.C. I agree with it and, for the reasons he has given I too, allow the to costs.

B

OGUNTADE JSC

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Tabai J.S.C. I agree with him that this appeal ought to be allowed. It is necessary for me to say here that the court below would appear to have put an unreasonably heavy and unnecessary burden on the plaintiff by its insistence on the need for the plaintiff/respondent to prove how well equipped the laboratory at 24 Post Office Road is, to enable P.W.4 carry out accurately the sensitive tests he said he did as per exhibits 'B' and 'D'. There was no issue joined at the trial as to whether or not the laboratory of P.W.4 was well equipped.

The pleading of the plaintiff/appellant was that he drank the Fanta Orange from the bottle purchased from the 1st defendant on 13-2-91. Hearing in the case did not commence until 24-3-92 which was about a year after the plaintiff/appellant drank the Fanta orange said to be contaminated. But strangely, the court below at page 240-241 of its judgment reasoned thus:

"Furthermore the cockroach and fly said to be found in Exhibits H and J (Fanta bottles) were not tendered before the trial court by anyone. It is not just sufficient as was said at page 53 line 34 of the evidence of the plaintiff that the content of the Fanta is exhibit 'D'"

The trial court in its judgment at pages 81-82 of the record in accepting the evidence called by the plaintiff in support of his case said:

"Plaintiff testified to the fact that he bought Exhibit H, drank (sic) he had stomach pain and was rushed to hospital where he was admitted and treated. He tendered Exhibit 'A' which supports that plaintiff was 1st examined at the Mariere Memorial Hospital also called in these proceedings as General Hospital and thereafter he was admitted at Galeo Clinic Ughelli. P.W. 2 is the Medical Director of Galeo

Clinic. He testified as to the details of the treatment he gave to plaintiff and the result of the laboratory test of plaintiff stool and the sample of the Fanta drink Exhibit H. He tendered Exhibits B, C and D, P.W.4 is the laboratory scientist who examined these samples and issued Exhibits B & D and identified his signature before me. P.W.3 is the wife of the plaintiff she gave detailed and vivid evidence of all the events leading to her husband's hospitalization and treatment. The evidence of the plaintiff and his witnesses were cogent, convincing and reliable. I watched their demeanour and they appeal to me as witnesses of truth. I believe them. The defence on their part led no evidence in rebuttal to the evidence adduced by the plaintiff and their general traverse as in paragraphs 2 and 11 of their statement of defence will not tilt the scale of justice in their favour. In Imana v. Robinson [1974] 4-4 SC 1 at 8, per Anioagolu J.S.C (as he then was) said 'Not having given evidence either in support of her pleading or in challenge of the evidence of the accepted the facts adduced by the plaintiff not withstanding her general traverse...'"

It cannot escape notice that the defendant as stated in the passage above did not call any evidence in rebuttal of the evidence called by the plaintiff. The trial court accepted the plaintiff's evidence and that of his witnesses. It was not open to the court below to disparage settled issues of fact based on the evidence accepted by the trial court. The ascription of probative value to the evidence called by parties is the exclusive function of the trial court and the appellate court has no business interfering with and dismantling the solemn findings of facts made by the trial court. See *Fatoyinbo v. Williams* (1956) 1 FSC 87; *Akinloye v. Eyiola* (1968) NML.R. 92:

I would therefore allow this appeal as in the lead judgment of my learned brother Tabai J.S.C. I abide by the order on costs.

ONNOGNEN JSC

This is an appeal against the judgment of the Court of Appeal holden at Benin City in appeal No CA/B/160/95, delivered on the 23rd day of April 1998 in which it allowed the appeal of the 2nd defendant/appellant and dismissed the cross appeal of the present appellant and the entire suit.

The appellant as plaintiff in suit No UHC/45/91 claimed the following reliefs against the defendants therein and respondents in the -instant appeal:

1. The sum of N551.00 medical expenses borne by the plaintiff as a result of the negligent acts of the defendants in bottling and
B selling a contaminated Fanta orange drink.
2. N427.00 being cost of the crate of mineral purchased from the 1st defendant.
3. The sum of N 299,000.00 being loss of business expectation profit or income for the period of plaintiff treatment and time for
C recuperation.
4. The sum of N700, 422.00 being general damages for loss of life expectancy
5. N1,000,000.00 being damages for shock, pain, agony
D and discomfort suffered by the plaintiff as a result of the contaminated Fanta Orange Drink bottled and sold by the defendants to the plaintiff. The total claim is therefore N 2,000,000.00.

The case of the appellant is that on the 13th day of February, 1991 he returned from his place of work feeling very hungry and thirsty and as there was no food, he reached out for a bottle of Fanta orange drink from a crate of mineral he purchased from the 1st defendant earlier that day.

While drinking the Fanta orange he allegedly felt some sediments and rubbish down his throat and stopped half way to take a closer look at the contents of the bottle only to discover that the bottle contained a dead cockroach. Appellant contends that the quantity he had consumed gave him much discomfort which led to incessant spitting and loss of appetite resulting in his going to bed that night without dinner, that at midnight the plaintiff/appellant developed stomach pain which attracted the attention of his neighbours including the 1st defendant/respondent who lived in the same compound with the appellant; that the 1st respondent was informed that
H the Fanta orange purchased from her was the cause of the problem.

The appellant was subsequently rushed to the government general hospital known as Mariere Hospital but was eventually further rushed to a private hospital as the service at the general hospital

was too slow. The private hospital is Galeo clinic managed by Dr. Alfred Emasoga who testified as PW.2 in the suit. It is the case of the appellant that PW.2 found, as a result of his investigations or diagnosis that the appellant was suffering from food poisoning after sending a sample from the half consumed Fanta orange and stool of the appellant for laboratory analysis. PW.4 is the medical laboratory scientist who performed the lab tests on the appellant's stool and Fanta orange drink and produced exhibits B & D in which he found that the stool and fanta orange drink both had a common germ known as Shigella and that this caused the stomach pain and accordingly prescribed the appropriate remedy which PW.2 applied and the appellant had a relief. The crate of mineral in question was tendered and admitted as exhibit G while the half consumed bottle of Fanta orange drink was admitted as exhibit H. Apart from exhibit H, there was another bottle of Fanta orange which was unopened but contained a fly in the same crate of minerals which bottle was admitted as exhibit J.

The 1st respondent admitted selling the crate, exhibit G. to the appellant and that she knew of the appellant's ailment. The 1st respondent however insisted that she did not tamper with or adulterate the bottled drinks supplied to her by the 2nd respondent on 9/2/91 and tendered the route card issued to her by the 2nd respondent as exhibit K.

The 2nd respondent testified as DW1 on the manufacturing process of the products of the 2nd respondent and denied liability for the ailment of the appellant.

On the 23rd day of March, 1994, the High Court of Delta State, holden at Effurum and presided over by W.A.O. Onoriobe. J. delivered a judgment in which he held that the particulars of negligence pleaded by the appellant were proved and entered judgment in favour of the appellant finding therein that:

1. the plaintiff suffered damages from the consumption of the Fanta orange which caused the plaintiff's ailment.
2. the 2nd defendant is the manufacturer of the contaminated Fanta orange drink - exhibit H, which caused the ailment of the plaintiff.
3. the 2nd defendant is negligent in the manufacturing of the Fanta orange drink exhibit H as they bottled impurities in the said Fanta orange which caused the plaintiff the ailment.

4. the 1st defendant as a retailer of the Fanta orange drink was a mere courier therefore not liable in negligence.

5. the 2nd defendant is liable to the plaintiff in the sum of:

(a) N551.00 being cost of medical treatment incurred by the plaintiff.

B (b) N27.00 being the cost of the crate of mineral, exhibit G. containing exhibit H & J which are un merchantable product

(c) N950,000.00 being damages for the injuries suffered by the plaintiff for pain, shock resulting from the consumption of the contaminated Fanta orange exhibit H, while dismissing the plaintiffs claim for loss of business expectation and loss of life expectances.

C The above judgment resulted in an appeal by the 2nd defendant and a cross appeal by the plaintiff. As stated earlier in the judgment, the appeal was allowed while the cross appeal was dismissed, D giving rise to the instant appeal, the issues for the determination of which have been identified by the learned counsel for the appellant, O.J. Oghenejakpor Esq. in the amended appellant's brief of argument filed on 2/8/04 as follows:-

E *"1. Whether in the circumstances of this case, the Justices of the Court of Appeal were justified in reversing the firm findings of fact of the trial court that the contaminated Fanta orange drink containing a cockroach and a germ called shigella tendered as Exhibit H in this proceedings caused the plaintiff ailment of stomach ache resulting in vomiting, stooling which led to his hospitalization? (original grounds 1,2,3,4,5,7 & 8);*

F *2. Whether the Justices of the Court of Appeal were justified in reversing the findings of the trial court that the fanta orange Exhibit H which caused the plaintiff ailment was manufactured and bottled by the 2nd defendant who sold same to the plaintiff through the 1st defendant their retailer? (Original Grounds 6);*

G *3. Whether the Justices of the Court of Appeal were justified in reversing the findings of the trail court that the 2nd defendant was in breach of duty of care owed to the plaintiff and liable for damages for negligence? (Additional Ground 1);*

H *4. Whether the Justices of the Court of Appeal were right in holding that the 1st defendant who is the retailer that sold the contaminated Fanta orange Exhibit H which caused the ailment is a mere*

conduct pipe and hence not liable in negligence for the sale of the defective and contaminated Fanta orange Exhibit H (original ground 10).

5. Whether the Learned Justices of the Court of Appeal were right in holding that there was no modicum of evidence on record to support the claim for damages for pain, shock, agony and discomfort and reserving the award of N950, 000.00 (Nine Hundred and Fifty Thousand Naira) made by the trial court, (Original Grounds 9, and Additional Grounds 2 & 4); B

6. Whether on the totality of the case as borne out by the records of appeal, the Learned Justices of Court of Appeal were justified in reversing the judgment of the trial court and in coming to their judgment in dismissing the plaintiff/appellant case (additional grounds 3)" C

On the other hand, learned counsel for the 1st respondent Oluyele Delano Esq, in the 1st respondent's brief of argument filed on 7/3/06 identified the following four issues for the determination of the appeal:

"1. Whether the Court of Appeal was right by holding that the plaintiff failed to prove that his illness was caused by drinking contaminated Fanta orange drink produced by the defendant?" E

2. Whether the contamination was occasioned by the carelessness of the 2nd defendant in breach of its duty of care to the plaintiff?"

3. Whether the 1st defendant was in breach of any duty of care to the plaintiff?" F

4. Whether the Court of Appeal was right to set aside the award of N 950,000 as damages to the plaintiff against the 1st and 2nd defendants?" G

The learned counsel for the 2nd respondent Oluseye Opasanya Esq, also identified four issues for determination of the appeal in the 2nd respondent's brief of argument filed on 9/3/06. These are as follows:-

"1. Whether the evidence adduced by the plaintiff proves that the alleged contaminated Fanta drink was manufactured by the 2nd defendant." H

2. If the answer to issue is in the affirmative, whether the Court

of Appeal was right in holding that there was no evidence showing that the drink in question was the cause of the plaintiff's ailment.

3. Whether the Justices of the Court of Appeal were justified in deciding that the evidence before the court did not support the claim in negligence.

B 4. Whether the Court of Appeal was right that there is no modicum of evidence on record to support the award by the trial court at N950, 000.00k damages for pain, shock, agony and discomfort."

C However, the learned counsel for the appellant in the reply brief filed on 11/2/06 has contended that the issues formulated by learned counsel for the respondents as reproduced above do not arise from the grounds of appeal filed, neither do they arise from the judgment of the Court of Appeal which is judgment being appealed against and thirdly that the issue of contributory negligence and the D like raised by the 2nd respondent in this Court were not raised in their statement of defence nor formed part of the case decided by the courts nor formed part of the grounds of appeal of the appellant and consequently incompetent.

E It is settled law that both the parties and the court are bound by the pleadings filed in the suit and are not allowed to go outside the pleadings either in introducing evidence or in deciding the issues in controversy. At page 16 of the 2nd respondent's amended brief of argument, learned counsel for the 2nd respondent raised the issue of F contributory negligence which he discussed at length but there is nothing in the pleadings of the parties to ground that issue. That being the case it is obvious that the issue as to whether the appellant was contributorily negligent by not looking at the contents of the Fanta orange drink before consuming same when there is no plead- G ing in support of same, grounds to no issue.

H It is the submission of learned counsel for the appellant that the learned Justices of the Court of Appeal were not justified when they overturned the findings of fact of the trial court that the Fanta orange drink admitted as exhibit H, caused the plaintiff/appellant ailment/stomach ache, vomiting and stooling which led to the plaintiff's hospitalization; that the lower court was not justified in setting aside the finding of the trial court that the 2nd defendant is the manufacturer and bottler of the contaminated Fanta orange drink, exhibit H,

which was sold to the plaintiff through the 1st defendant; that the lower court was also wrong in holding that the plaintiff did not prove a case of negligence against the 2nd defendant that the lower court was in error in coming to the conclusion that the 1st defendant is a mere courier or conduit pipe and therefore bears no responsibility to the plaintiff; and that the lower court was in error in setting aside the award of N950,000.00 damages for shock, pain, agony and discomfort suffered by the plaintiff and urged the court to allow the appeal. B

On his part, it is the submission of learned counsel for the 1st respondent that the plaintiff failed to prove, on the balance of probability that the defendant's product to wit Fanta caused him injury; that the 2nd defendant on the other hand was able to establish that it took reasonable care in its production process and as such was not in breach of its duty of care to the plaintiff; that the 1st defendant took no additional responsibility for the Fanta and as such was not in breach of her duty of care to the plaintiff and that there was no reliable proof that the plaintiff suffered shock and pain as to entitle him to damages awarded by the trial court, and urged the court to dismiss the appeal. C D

On his part, learned counsel for the 2nd respondent submitted that the plaintiff failed to produce evidence to prove that the Fanta orange drink in question was manufactured by the 2nd respondent and that it is not enough for the 1st respondent to have testified to the fact that the crate from which the said drink was taken was one of those supplied to her by the 2nd respondent; that the appellant did not prove that his ailment was caused by the alleged contaminated drink; that where there is more than one probable cause of the ailment or injury complained of the plaintiff must establish that the defendant's action is the substantial or material cause of the injury alleged, relying on *Mcghee v. National Coal Board*, (1971) 1 WLR 1; that PW2 admitted that the symptoms observed in the plaintiff could be the result of food poisoning arising from the consumption of "any other kind of food" and that when the case is viewed in the light of the evidence of PW3 that the plaintiff ate bread and drank tea on the fateful day, it becomes evident that the food poisoning could have been caused by anything other than the Fanta allegedly drunk by the plaintiff; that the plaintiff did not prove that E F G H

the damage he allegedly suffered resulted from the failure of the 2nd defendant to take reasonable care and that where there is a failure to so establish the link, an action in negligence must fail; that the plaintiff did not establish any breach of the duty of care neither has he proved any damage resulting from the alleged breach and finally that there is no evidence or enough evidence support of the claim for damages for pain, shock etc and urged the court to dismiss the appeal.

It is settled law that the evaluation of evidence and ascription of probative value thereto is the domain of the trial court and that an appellate court is always reluctant to interfere with the findings of fact by the trial court except when the same was made without regard to the evidence adduced or is perverse or not supported by the evidence or contrary to substantive law, or that of procedure, etc, etc. It is therefore clear that in appeals against the finding of facts the issue of credibility of the witnesses who testified at the trial cannot be taken before the appellate court.

In the instant case, the trial court heard the evidence and made findings of fact and believed the evidence of PW2, and PW4 and found as, a fact that the Fanta orange consumed by the appellant caused the ailment, and entered judgment for the appellant as plaintiff. Now the findings of fact by the trial court were reversed by the lower court resulting in the instant appeal. The trial court had made the following specific finding of facts based on the pleadings and evidence before the court, at page 83:

"I therefore found as a fact that the plaintiff took the Fanta orange drink Exhibit "H" which gave him stomach pain and led to vomiting and stooling and was treated in the hospital by PW2. I accept that plaintiff stool was tested along with the sample of the Fanta orange Exhibit "H" and that plaintiff ailment was caused by the Fanta orange drink which is contaminated and contained a bacterium called "Shigella". I therefore hold that the plaintiff suffered damage as a result of the consumption of Exhibit "H".

The above findings were set aside by the lower court when it held, at pages 239 - 240 of the record as follows:

"Those answers do not rule out the possibility of other agents not from the alleged Fanta caused the infection, the plaintiff/respondent suffered from. There was no evidence from PW2 and PW4 at

the trial that the plaintiff/respondent by taking the alleged contaminated Fanta orange drink caused the injury pleaded or complained of or caused any injury or illness revealed by both medical practitioner or laboratory test"

The question is whether the lower court was right in reversing the findings of the trial court on the issues involved or whether the findings of the trial court is not supported by the evidence on record. It is settled law that where evaluation of evidence does not involve the credibility of the witness who testified at the trial an appellate court is in as good a position as the trial court to evaluate the evidence on record and where necessary reverse the findings of the trial court particularly where the same are demonstrated to be perverse. See Akinloye v. Eyiola (1968) NMLR 92 at 95; Mogaji v. Odofin (1978) 45.C 91 at 93; Ebba v. Ogodo (1984) 4 S.C 84; Wolichern v. Gudi (1981) 5.S.C 291 at 326 - 330 etc, etc.

In this case, the trial court had found at page 82 of the record thus:-

"The evidence of the plaintiff and his witnesses were cogent, convincing and reliable. I watched their demeanour and they appear to me as witnesses of truth. I believe them. The defence on their part led no evidence in rebuttal to the evidence adduced by the plaintiff and their general traverse as in paragraphs 2 and 11 of their Statement of Defence will not tilt the scale of justice in their favour"

In reversing the findings the lower court held that Exhibits "H & J" were not tendered contrary to the evidence on record. That the plaintiff/appellant ought to have sent bread and tea for laboratory tests to prove that they did not cause the ailment; that bread and tea was taken along with the Fanta orange by the appellant whereas such facts were never pleaded nor evidence given in support of same; that there is no evidence of the adequacy of the laboratory firm that conducted the tests on the appellant's stool and the remnant of the consumed Fanta orange drink and that it is the duty of the plaintiff/appellant to prove that the bread and tea did not cause his ailment. From the record the entire crate of mineral purchased by the appellant was tendered and admitted at page 53 of the record as Exhibit "G" without objection while the Fanta orange drink with the cockroach partially consumed by the plaintiff was admitted as Exhibit "H"

also at page 53. Also tendered and admitted at the same page 53 of the record as Exhibit "J" is the unopened Fanta orange drink with a dead fly therein and the Learned Trial Judge made use of the Exhibits in his judgment at page 86 of the record when he stated thus:-

B *"That the crate was tendered before me as Exhibit "G" I saw and examined the crate. The contaminated Fanta taken half way by the plaintiff is also tendered before me as Exhibit "H". I saw the cockroach and other sediments in it. I also saw another unopened Fanta orange containing a fly in the same crate (Exhibit "G") tendered as Exhibit "J" in his proceeding"*

C From the above, it is very clear that the lower court was obviously in error when it held that the said items were not tendered or before the trial court and that error is very grave.

D On the taking of bread and tea by the plaintiff along with the Fanta there is nothing like that on record and the fact that bread and tea was taken by the plaintiff along with the Fanta orange drink was never pleaded and therefore ground to no issue at all. On the issue of the onus to send any bread and tea for laboratory test or to prove that the bread and tea did not cause the ailment of the appellant, it has been held that the matter was never pleaded by either party and therefore not relevant and the lower court was in error when it held at page 240 of the record that

E *"it is the plaintiff/respondent who should have produced the bread and tea he admitted he took in the morning for laboratory test to show that it was not contaminated"*

F When a fact is not pleaded, it cannot be relevant to the determination of a case. In the instant case, none of the parties pleaded that the ailment of the appellant was caused by the bread and tea taken at breakfast. The case of the plaintiff, both on the pleading and evidence, however, remains that it was the contaminated Fanta orange drink, Exhibit "H" that caused his ailment and he proved, to the satisfaction of the trial court that this was so - there is laboratory test to confirm that the same bacteria found in the half consumed Fanta orange drink was also found in the appellant's stool and that the bacteria or germ so found caused the stomach ache, vomiting and stooling suffered by the appellant. What else does the lower court want having regard to the state of the pleadings of the parties and the

evidence on record?

It should, however, be noted that the question whether or not appellant consumed bread and tea for breakfast on the day in question arose from the cross examination of PW3, the wife of the appellant. It has been argued very forcefully, as usually is the case, that under cross examination the sky is the limit and that evidence elicited there from can be used in the proceedings. While that proposition remains good law and of general application, it is, like every general principles of law, subject to exceptions. Since the principle fall within the domain of the Law of Evidence, it follows that the principle of relevance in admissibility of evidence in any proceeding is crucial and the fact that any fact which the said evidence is intended to prove or establish must have been pleaded, otherwise it grounds to no issue must equally be taken into consideration; it does not matter whether the said evidence came through evidence in chief or under cross examination the fact must be pleaded. It therefore follows that there is really a limit to cross examination which is designed to ensure that only relevant and pleaded facts are admissible and can be made use of in the proceedings.

From the above, it is very clear that the lower court did not reverse the findings of fact by the trial court under known legal principles relevant thereto which renders the reversal erroneous and liable to be set aside as the same has resulted in a miscarriage of justice, I therefore restore the findings of fact made by the trial court.

It is for the above reasons and the more detailed ones contained in the-lead judgment of my learned brother Tabai, J.S.C that I agree that the appeal be allowed. I order accordingly and abide by the order as to costs contained in the said Lead Judgment.

Appeal allowed.

MUHAMMAD JSC

The plaintiff at the Ugheili Judicial Division of the High Court of Justice of the then Bendel State made the following claim against the defendants:

"1. The sum of N551.00 medical expenses borne by the plaintiff as result of the negligent acts of the defendants in bottling and

selling a contaminated Fanta orange drink.

2. N27.00 being cost of the crate of mineral purchased from the defendant

3. The sum of N229, 000.00 being loss on business Expectation profit or income for the period of Plaintiff treatment and time for recuperation.

4. The sum of N700, 422.00 be general damages for loss of life expectancy

5. N1, 000,000.00 being damages for shock paid agony and discomfort suffered by the plaintiff as a result of the contaminated Fanta orange drink bottled and sold by the defendants to the plaintiff. Total claim N2, 000,000.00."

Pleadings were filed and exchanged. Trial commenced on 24th March, 1992. Four witnesses were called by the plaintiff. The 1st defendant called no witness but testified on his own behalf. 2nd defendant called one witness who testified in his favour. Parties addressed the trial court, at the conclusion of the trial, the learned trial judge delivered his judgment on 23rd March, 1994. He found that the particulars of negligence pleaded by the plaintiff were proved. He consequently granted most of plaintiffs reliefs.

Dissatisfied the 2nd defendant appealed to the Court of Appeal, Benin Division. The plaintiff also cross-appealed challenging the dismissal of the case against the 1st defendant and the refusal of the trial court to award some of the heads of damages. At the end of hearing, the court below reversed the findings of the trial court.

Dissatisfied further, the plaintiff appealed to this court on ten original and four additional grounds of appeal.

The following six issues were distilled by the appellant in his brief of argument. They are as follows:

"1. Whether in the circumstances of this case, the Justices of the Court of Appeal were justified in reversing the firm findings of fact of the Trial Court that the contaminated Fanta orange drink containing a cockroach and a germ called shigelia tendered as Exhibit H in this proceedings caused the plaintiff ailment of stomach ache resulting in vomiting, stooling which led to his hospitalization? (Original grounds 1, 2, 3, 4, 5, 7

2. Whether the Justices of the Court of Appeal were justified In

reversing the findings of the Trial Court that the Fanta orange Exhibit H which cause the Plaintiff ailment was manufactured and bottled by the 2nd defendant who sold same to the Plaintiff through the 1st defendant their retailer? (Original grounds 6)

3. *Whether the Justices of the Court of Appeal were justified in reversing the findings of the Trial Court that the 2nd defendant was in breach of duty of care owed to the plaintiff and liable for damages' for negligence? (Additional grounds 1)*

4. *Whether the Learned Justices of the Court of Appeal were right in holding that the 1st defendant who is the retailer that sold the contaminated Fanta orange. Exhibit H which caused plaintiff ailment is a mere conduit pipe and hence not liable in negligence for the sale of the defective and contaminated Fanta orange Exhibit H. (Original grounds 10)*

5. *Whether the Learned Justices of the Court of Appeal were right in holding 'that there was no modicum of evidence on record to support the claim for damages for pain, shock, agony and discomfort and in reversing the award of N950,000.00 made by the Trial Court. (Original grounds 9, and Additional grounds 2&4)*

6. *Whether on the totality of the case as borne out by the records of appeal, the Learned Justices of Court of Appeal were justified in reversing the judgment of the Trial court and in coming to their judgment in dismissing the plaintiff/appellant case. (Additional Grounds 3)."*

The 1st respondent on his part formulated four issues. They are as follows:

"1. *Whether the court of appeal was right by holding that the plaintiff failed to prove that his illness was caused by drinking contaminated Fanta orange drink produced by the defendant?*

2. *Whether the contamination was occasioned by the carelessness of the 2nd defendant in breach of its duty of care to the plaintiff?*

3. *Whether the 1st defendant was in breach of any duty of care to the plaintiff?*

4. *Whether the court of appeal was right to set aside the "award of N950, 000.00 as damages to the plaintiff against the 1st and 2nd defendants?"*

The 2nd respondent formulated four issues as well. They are as follows:

"1. Whether the evidence adduced by the plaintiff proves that the alleged contaminated Fanta drink was manufactured by the 2nd defendant

B *2. If the answer to issue 1 is in the affirmative, whether the Court of Appeal was right In holding that there was no evidence showing that the drink in question was the cause of the plaintiff's ailment.*

C *3. Whether the Justices of the Court of Appeal were justified in deciding that the evidence before the court did not support the claim in negligence.?*

D *4. Whether the Court of Appeal was right that there is no modicum of evidence on record to support the award by the trial court of N950, 000.00k damages for pain, shock, agony and discomfort?"*

E The fact giving rise to this appeal as per the plaintiff/appellant's version is that on the 13th of February, 1991 the plaintiff returned from work very hungry and thirsty and as the food was not ready he reached out for a bottle of Fanta orange drink contained in the crate of mineral purchased from the 1st defendant earlier that day. As he was going the Fanta orange drink he felt some sediments and rub-bish down his throat and he stopped the drink half way. On a closer look he discovered that the bottle contained a dead cockroach. The F plaintiff had taken enough of the mineral and this gave him discomfort leading to his incessant spitting and loss of appetite. Plaintiff went to bed without his dinner. At the midnight, which is the early hours of 14/2/1991, plaintiff started to develop stomach pain and later found himself groaning in pain. This attracted neighbours including the 1st G defendant who was sharing the same compound with the plaintiff. She was informed that the Fanta orange drink bought from her was the problem.

H Early in the morning the plaintiff was rushed to the Government general hospital, which is known as Mariere hospital but as the treatment at general hospital was becoming sluggish he was rushed to a private hospital known as Galeo clinic managed by Dr. Alred Emasoga PW2. PW2 preliminary examination gave a symptom of food poisoning and on his inquiries it was disclosed that the plaintiff

took a Fanta orange drink which he took half way. He sent for the Fanta orange drink taken half way and PW3 the wife of the plaintiff went and fetched the Fanta orange drink. The doctor took the sample of the Fanta orange drink and the stool of the plaintiff for laboratory test.

PW4, a medical laboratory scientist is the owner of the laboratory who performed the test on plaintiffs stool and the Fanta orange sent by PW2. He produced Exhibits B & D in which he found from his scientific analysis that the stool and the Fanta orange had a common germ called shigella, which caused the stomach pain and prescribed the medical solution to the ailment, which PW2 applied and succeeded. The crate of mineral bought from the 1st defendant was tendered as Exhibit G while the Fanta orange taken half way by the plaintiff was tendered as EXHIBIT H. There was another unopened Fanta orange bottle containing a fly in the same crate and was tendered as EXHIBIT J.

1st defendant admitted selling crate Exhibit G to the plaintiff and confirmed that she knew plaintiff's ailment. She however insisted that she did not adulterate the drinks supplied her by the 2nd defendant. She maintained that Exhibit G was supplied to her by the 2nd defendant on 9/2/1991 and tendered the route card issued to her by the 2nd defendant showing the supply as Exhibit K.

2nd defendant did not give evidence to rebut the case of the plaintiff as to the cause of plaintiff's ailment nor led evidence as to the source of the Fanta orange. They led no evidence in support of paragraphs 12 and 13 of their statement of defence, which was the main thrust of their defence. Their evidence through DW1 superficially torched on their manufacturing process and never answered the life issues involved at the trial.

At the end of hearing, the learned trial judge held that it was the Fanta orange drink Exhibit 'H' that caused the plaintiffs ailment. The court below overturned the trial court's finding as above on the ground that the plaintiff failed to prove that the Fanta orange caused his ailment and hospitalization and that the defendants were not liable in negligence to the plaintiff.

In agreeing with my learned brother Tabal, J.S.C in allowing the appeal., I think, I should stress the point that this case is purely on

the torts of negligence. Alderson B, in the old case of *Blyth v. Birmingham Waterworks Co.* (1856) 11 EXCH. 781 at 784, defined negligence as follows:

"Negligence is the omission to do 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 man would not do."

Seventy eight years thereafter, Lord Wright had this to say in defining negligence:

"In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission. It properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing."

(underlining supplied for emphasis)

See the case of *Lochgelly Iron and Coal Co. v. M'Mullan* (1934) A 1 at p. 25.

The latter definition spells out for us the three basic components of the torts of negligence:

(a) duty of care

(b) breach of the duty of care

(c) damage caused by the breach.

My sole aim of laying this foundation is in order to afford me appreciate

the findings made by the two courts below vis-a-vis the legal principles involved in the law of negligence with reference to the three basic components stated above. For instance, courts of law are concerned in a case of negligence with the actual relations which come before them in actual litigation and it is sufficient to say whether

the duty exists in those circumstances. If it exists, the question that follows then is: was the defendant under any duty of care at all, and if so, did he observe the standard required in the circumstances of the case? In the present appeal, it was found by the trial court that it was the Fanta orange drink containing cockroach and a germ "shigella", Exh. 'H', bought from the 1st defendant that caused the appellant's ailment of stomach ache resulting in vomiting and stooling which led to his hospitalization.

Permit me my Lords, to quote the exact holdings of the learned trial

judge on same:

"In this case defendants offered no evidence whether expert or otherwise to challenge the plaintiff and his witnesses nor were they discredited under cross-examination. I therefore found as a fact that the plaintiff took the Fanta orange drink Exhibit "H" which gave him stomach pain and led to vomiting and stooling and was treated in the hospital by PW2.

I accept that plaintiff ailment was caused by the Fanta orange drink, which is contaminated and contained a bacteria called "Shigelia". I therefore hold that the plaintiff suffered damage as a result of the consumption of Exhibit 'H'."

While concluding his summing up of the evidence before him, the learned trial judge stated:

"On the whole, I accept 1st defendant evidence given in support of her pleadings that it was the crate supplied to her by the 2nd defendant that she sold to the plaintiff on 13/2/1991 ... I also accept that the 2nd defendant made the supply of EXHIBIT G to the 1st Defendant on 9/2/91 as reflected in Exhibit K, the route card. The plaintiff case is that the contaminated Fanta drink Exhibit H is taken from the crate Exhibit G. There is no contrary evidence to this averment. That crate was tendered before me as Exhibit G. I saw and examined the crate. The contaminated Fanta taken half way by Plaintiff is also tendered before me as Exhibit H. I saw the cockroach and other sediments in it. I also saw another unopened Fanta orange containing a fly in the same crate (Exhibit G) tendered as Exhibit J in this proceeding.

I believe the evidence of the Plaintiff that the Fanta orange Exhibit H was taken from the crate of minerals Exhibit G, bought from the 1st defendant who is the retailer of the mineral produced and bottled by the 2nd defendant I found as a fact that the 2nd defendant bottler of the contaminated Fanta orange Exhibit H, which the plaintiff bought and consumed on 13/2/91 and which caused plaintiff stomach pain in vomiting and stooling and led to plaintiff admission in the hospital. I also hold that the 2nd defendant is the manufacturer of Exhibit G H including Exhibit H and J."

Earlier on, the 1st respondent averred in her statement of defence admitting that she sold the Fanta drink to the appellant and that the

Fanta drink was supplied to her by the 2nd respondent. Below are the averments:

B *"3. The defendant admits paragraph 5 only to the extent that plaintiff bought a crate of minerals containing Fanta orange, Fanta tonic and coca cola from the defendant on or about 13th February, 1991.*

C *4. In answer to paragraphs 6 and 7 of the statement of claim the defendant avers that it was plaintiff's wife who came to her that one of the bottles of Fanta she sold to plaintiff which the plaintiff drank was found to contain some sediments.*

5. Further that the next day defendant later heard that the plaintiff had taken ill and was in hospital but defendant is not in a position to know what caused plaintiff's illness as the extent.

D *6. The defendant further denies paragraphs 8 and 9 of the statement of claim and in further answer to the said paragraphs stated that she was not careless in selling any drinks to the plaintiff.*

E *7. The defendant will contend at the trial, that (I) she neither the manufacturer (sic) nor the bottler of the alleged drinks or any drink (II) All the mineral drinks that is, Fanta tonic and orange, cocacola and sprite she sells are supplied by the 2nd defendant [i] The crate of mineral drinks mentioned in paragraph 3 above was among the crates supplied by the 2nd defendant on or about 9/02/91.*

F *8. In further traverse the defendant aver (sic) that she sells (sic) her drinks in the same condition as they are supplied and has never doctored or in any way tempered with the drinks she sells.*

9. The defendant will contend at the trial that the plaintiff has no claim against her in law or equity.

G *10. The defendant shall further contend at the trial that she was neither negligent nor liable for damages as claimed in paragraph of the statement of claim and shall urge the court to dismiss the claim with costs."*

In her evidence-in-chief, the 1st defendant admitted that she sold the Fanta drink to the appellant. This is what she said:

H *"I am a trader. I trade provisions, cosmetics and soft drinks. I know the plaintiff. He is my customer. I also know 1st (sic) defendant. They are my customers. They supply me soft drinks, on 13th February, plaintiff's wife bought a crate of Coca-cola Fanta orange.*

Later plaintiff's (sic) drink Fanta and found something inside and showed it to me. Later about 12 midnight, she came to inform me that her husband has been ill and that he has been taken to the hospital. She informed me that the cause was due to the drinks he took. The crate of minerals was supplied by 2nd defendant. The 2nd (sic) supplied the drinks on 9th February, 1991." B

While being cross-examined, 1st defendant told the trial court that she was the agent of 2nd defendant and that the crate of mineral she sold to the appellant was manufactured and bottled by the 2nd defendant. C

Basically, therefore, there existed a duty of care imposed by the law on the defendants to the plaintiff. And in the preparation, production and supply of their products, the defendants/respondents were required by the law to have reasonable foresight and have in contemplation the effect of their products on the ultimate consumer. D Where the required care has not been taken, as in this appeal, where foreign elements found their way into the product, the law can hardly exonerate the defendants as the law presumes them to foresee the kind of harm that occurred. The learned counsel for the 2nd respondent argued strenuously that; E

"For an action in negligence to succeed, the plaintiff must be able to link the breach of duty of care, which occasioned the injury to the defendant. Where there is a failure to establish a connection, an action in negligence will not lie for negligence is a matter of facts and not law and each case ought to be approached on its particular facts. F See Anfi v. New Concord Hotel Ltd, (202) 18 NWLR (Pt. 799) 377 at 411; Gbolade v. Oladejo (1994) 8 NWLR (Pt. 362) 281; Umar v. Ahunqwa (1997) 1 NWLR (Pt. 483) 601.

As indicated above, the evidence of PW2, PW3 and PW4 operate to G negative any exclusive link between the purported breach of duty of care and the harm suffered by the plaintiff."

Yes! that is the correct position of the law. I must point out however that the learned counsel in view of what I have reproduced above, has not been fair to the trial court. It was not the trial court that H manufactured all the evidence especially that of PW 1 and DW1 which properly linked the ailment suffered by the plaintiff which was as a result of the Fanta drink he took, which undeniably, was manufac-

tured and bottled by the 2nd respondent. 1st respondent who had been a seasoned "agent" to the 2nd respondent gave full evidence in support of the link between the plaintiff and the 2nd respondent. The learned trial judge who heard and watched all the witnesses and their demeanours accepted their testimonies and made a finding that there was a breach of that duty by the 2nd respondent. The settled principle of the law is that it is within the province of the trial judge who heard the evidence and watched the demeanour of witnesses to assign probative value to their evidence and make finding of facts on the issues in contention between the parties. Of course that is what makes him a "trial" Judge because he tries all the issues and satisfies his conscience on the merit of the case of each party and weighs one side against the other to find where the scale of justice tilts. See: *Nwankwo v. Nwankwo* (1995) 5 NWLR (Pt.394) 153; *Mogaji v. Odafin* (1978) 4 SC; A court of appeal is primarily concerned with the appeal brought before it and is circumscribed by it. It seldom goes into assigning probative value to a matter on appeal before it unless where that was never done by the trial court or done improperly. Any of the parties can ask the appeal court to exercise powers conferred upon it as a trial court to evaluate the evidence. See: *Akinloye v. Eyiola* (1968) NWLR 92 at p.95; *Lion Building Ltd v. Shadipe* (1976) 12 SC 135 at p.152; *Mogaji v. Odofin* (1978) 4 SC 91 at p.93, *Wolucheni v. Gudi* (1981) 5 SC 291 at pp 326 - 330; *Sha v. Kwan* (2000) 5 SC 178 at p.194.

I think the English case of *Donoghue v. Stevenson* (1932) AC 562, appears to be the locus classicus on the issue of duty of care in the realm of law of negligence. There was an attempt in that case by the House of Lords in 1932, to formulate some general criterion for the existence of the proximity which would give rise to duty of care. In that case, the pursuer averred that she had suffered injury as a result of seeing and drinking the contaminated contents of a bottle of ginger beer manufactured by the respondent and bought from him by the owner of a cafe, from whom in turn it had been bought by a friend of the pursuer. The House of Lords, by a bare majority, held that if the pursuer could prove that which she averred she would have a good cause of action. Thus, this case is an authority to say that even where there is absence of privity of contract between plaintiff

and defendant that per se, does not preclude liability in tort. It also gives the proposition that manufacturers of products owe a duty of care to the ultimate consumer or user.

Now, whether the issue of tea and bread were the cause of appellant's stomach upset. This Issue is not pleaded by the parties at all. It was an issue surreptitiously introduced by the learned counsel for the respondents at the court below in his issue No 6. So no issue was joined on it. There was no appeal to court below on it. It is no need wasting time and energy on this issue. The law is well pronounced upon that no matter how brilliant the address of counsel is it cannot be a substitute for pleadings or evidence. Courts are only enjoined to limit and restrict themselves to pleaded and proved facts. See: Lewis & Peat Ltd v. Akheimen (1976) 7 SC 157 at page 160; Niger Construction v. Okugbeni (1987) 4 NWLR (Pt.67) 787 at p.792; Igwe v. AICS (1994) 8 NWLR (Pt.363) 459 at p.481.

The court below had no business considering that issue as it was not properly brought before it. And, as a general rule, no court is permitted to make a case not made by the parties. See the cases of Incar Nig. Ltd. v. Benson Transport Ltd. (1975) 3 SC 117; African Continental Seaways Ltd v. Nigerian Dredging Roads and General Works Ltd (1977) 5 SC; 235 at pp. 245-250; Unical v. Essien (1996) 12 SC; 304 at p. 326.

Thus, by looking at the way the learned trial judge tackled the evidence led on the facts pleaded, I have no option than to agree with him that the 2nd defendant/respondent is liable in negligence to the plaintiff/appellant, I affirm his holdings in that respect.

I have noted that there is an invitation by learned counsel for the appellant to make a pronouncement on the principles of law relating to liability of an agent/retailer in a business transaction with a third party as was the position of the 1st respondent who was exonerated by the two lower courts.

The appellant, in paragraph 2 of his statement of claim averred that 1st respondent was an agent to the 2nd respondent. The 1st respondent herself admitted that fact, (see paragraph 2 of her statement of defence). The 2nd defendant, admitted that fact as well. (see paragraph 3 of its statement of defence). An agent may be of different kinds. The general law relating to agency, however, may be de-

finned as the relationship which exists or arises where one person has the authority or capacity to create legal relations, i.e. the "agent" who acts on behalf of another called the "principal", whereby the latter undertakes to be answerable for the lawful acts of the former with a third party, provided it was done within the scope of his authority or ratified later by the latter. See: James v. Midmotors Nig. Co. Ltd. (1978) 11 - 12 SC 31 at page 67; Olufosoye v. Fakorede Ass. Nig. Ltd. & Ors v. Aswani Textile Ind. Ltd. (1991) 12 NWLR (Pt.176) 639 at p. 667. In the English case of Kennedy v. De Trafford (1897) A. C. 180, at page 188, Lord Herschell, stated that:

"No word is more commonly and constantly abused than the word "agent". A person may be spoken of an "agent"., and no doubt in the popular sense of the word may properly be said to be an "agent", although when it is attempted to suggest that he is an "agent" under such circumstances as create the legal obligations attaching to agency that use of the word is only misleading,"

In the Stroud's Judicial Dictionary of words and phrases. (6th edition), vol.1, page 82 an agent is sometimes referred to as "one who has no principal, but who on his own account, sells some particular article having a special name (Wheeler & Wilson v. Shakespear, 39 LJ Ch. 36) That was perhaps why, in this appeal, the learned counsel for the 1st respondent in his brief of argument decided to name 1st respondent as "retailer" or "distributor." A "retailer" is defined as "a person engaged in making sales to ultimate consumers. One who sells personal or household goods for use or consumption." (Blair's Law Dictionary, sixth edition; page 1315).

"Distributor" on the other hand, is defined as:

"Any individual, partnership, corporation, association, or other legal relationship which stands between the manufacturer and the retail seller in purchases, consignments, or contracts for sale of consumer goods. A Wholesaler, jobber or other merchant middleman authorized by a manufacturer or supplier to sell chiefly to retailers and commercial users."

H See: Blacks Law Dictionary (supra) page 476. It is clear from the nature of the transactions between the appellant and the respondents, there was no middleman in between. Thus, the description given to the 1st respondent by her learned counsel that she was a

distributor can hardly find any place in this appeal.

On the role of 1st respondent whether she was an "agent" to the 2nd respondent, the trial court held as follows:

"It will appear however, that in a claim for liability for negligence the issue whether the agent has a disclosed principal is neither here nor there. An agent can be held liable if on her own she did something that injure (sic) the plaintiff. In such case both agent and principal can be sued jointly and severally. But on the facts of their case has the plaintiff proved any act or omission committed by the 1st defendant? I think not. 1st defendant admitted she is a retailer of the 2nd defendant's product she has been selling for them for the past 8 years or so she was supplied with the crate Exhibit G and she sold same to plaintiff. Plaintiff has not shown what in particulars 1st defendant was in breach of his duty and I cannot see in what respect that the 1st defendant is liable, she is to me like a carrier and I hold that 1st defendant tendered her route card to show the source of Exhibit G, H and J she is not liable to the plaintiff in negligence."

(underlining supplied by me)

The court below agreed with the above finding and holding of the trial court. It went on to add that:

"The first defendant is an innocent conduit pipe and she did nothing whatsoever from the evidence of this case to make her liable in negligence to the plaintiff/respondent/cross-appellant.

Surely from the totality of the evidence adduced by the respondent/cross-appellant before the trial court it would amount to a serious miscarriage of justice to hold the 1st defendant liable in negligence to the plaintiff/respondent/cross-appellant. "

(underlining supplied by me)

I think the law on the circumstances in which an agent of a disclosed principle will be liable for damages in never a recondite area. I need not go into that. The totality of the findings of the trial court and the court below on the status of the 1st respondent is that she was a "carrier" or a "conduit pipe." Whatever these expressions may connote, I feel more comfortable to accept that 1st respondent was a retailer to the 2nd respondent. Thus, whatever expression the 1st respondent may have used calling herself an agent, and however true and applicable they may have been in a popular sense, in point

of law and in their legal sense they are meaningless. 1st respondent was not the agent of the 2nd respondent. If that be so, there is an end of the fiduciary relationship between 1st respondent and the appellant. Unless there was evidence to establish any breach by 1st respondent, I cannot see how, as a retailer, she can suffer damages which she wasn't the cause.

For these and the more detailed reasons of my learned brother, tabai, J.S.C, I too allow this appeal. I abide by all orders made in the lead judgment including order as to costs.

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