

**SUPREME COURT OF NIGERIA**  
6TH JUNE, 2008 SC. 10/2002  
**CORAM:- S. U. ONU, N. TOBI, G. A. OGUNTADE, M. A.**  
**MUKHTAR, I. F. OGBUAGU, JJSC**

1. ALHAJI KABIRU ABUBAKAR  
2. DAHIRU ADAMU ..... APPELLANTS  
AND  
1. JOHN JOSEPH  
2. IMPRESIT BAKOLORI PLC ..... RESPONDENTS

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APPEALS - Grounds - Validity - Ground of appeal not arising from the judgment appealed against - Is invalid and liable to be struck out - As is the fate of 5th ground herein and 3rd issue arising therefrom (H1)

PLEADINGS - Statement of claim - Binding effect - Parties are bound by their pleadings - Any evidence not supported by pleadings should be ignored - So also facts pleaded but not canvassed at hearing - Like the fact of excess speed herein (H2)

ACCIDENTS - Speed - Pleadings - Binding effect - Parties are bound by their pleadings - Any evidence not supported by pleadings should be ignored - So also facts pleaded but not canvassed at hearing - Like the fact of excess speed herein (H2)

APPEALS - Appellate court - Findings of fact - Power to make - Under Court of Appeal Act s. 16 - Though the Court may make findings of fact based on evidence on record - It is not at liberty to reconstruct a party's case (H3)

ORDERS OF COURT - Dismissal - Propriety of - Where a Plaintiff fails to prove his case as postulated on his pleadings - The proper order to make is an order of dismissal - As rightly made by the Court of Appeal (H4)

### **FACTS**

Plaintiffs/Appellants sued the defendants/respondents claiming special and general damages for sundry injuries purportedly suffered by appellants as a result of 1st respondent having negligently driven 2nd respondent's lorry in such a manner as to collide with 2nd Appellant's lorry being driven by 1st appellant, thereby damaging 2nd Appellant's lorry. Respondents denied the negligence ascribed to the 1st Respondent. They counter-claimed against the appellants alleging that it was the negligence of the 1st appellant that caused the accident rather. Appellants had in their pleading averred excessive speed as the particulars of the negligence of the 1st Respondent.

However, during trial, they led no evidence to establish that fact rather their evidence was to the effect that the 1st respondent had veered off his lane thereby causing the accident. Nevertheless, the learned trial judge in his judgment found as a fact that 1st Respondent was on excessive speed and that that was the cause of the accident. Consequently, he gave judgment to appellants and dismissed respondents' counter-claim. Respondents appealed to the Court of Appeal and the court set aside the judgment of the trial court in favour of the appellants. Dismissing the case of the appellants, that court made an order remitting the respondents' counter-claim back for hearing. Appellants have brought this appeal against the judgment of the Court of Appeal.

### **ISSUES FOR DETERMINATION**

*“(1) Was the Court of Appeal right in finding that the trial Judge made a finding on issues that were not pleaded but did not make findings as to acts of negligence pleaded by the parties?”*

*“(2) Whether the Court of Appeal was right in dismissing plaintiffs' claims in toto?”*

**HELD** (Unanimously dismissing the appeal per **OGUNTADE JSC**)  
**APPEALS - Grounds - Validity**

*1. A combined reading of the 5th ground of appeal and issue 3 formulated thereon conveys that the court below had in its judgment come to the conclusion that the defendants/respondents had established a case of negligence against the plaintiffs/appellants on the*

*counter-claim raised; and that the case was being remitted to the court below only for an assessment of damages. But this was not the case. The court below in the last paragraph of its judgment at page 195 of the record had only said;-*

*“Accordingly in the end, I allow this appeal, set aside in toto the decision of the trial court and in its place, I order that the respondents’ claims be and are hereby dismissed. I order also that the claims of the appellants as contained in the counter- claim be remitted back to the High Court of Niger State and there to be decided de novo by another Judge.”*

*(Underlining mine)*

It is apparent from the extract of the judgment of the court below reproduced above that what was remitted to the trial court for trial do novo was “*the claims of the appellants as contained in the counter-claim*” not just the damages claimed. The claims of the defendants/respondents included a determination of the question whether or not the plaintiffs/appellants were liable in negligence as asserted by the defendants/respondents in their counter-claim. The result is that the 5th ground of appeal and the 3rd issue for determination by the plaintiffs/appellants could not have arisen from the judgment of the court below. Both are accordingly struck out. (p. 2460 A)

### ***ACCIDENTS - Speed - Pleadings - Binding effect***

2. It is to be observed here that whereas the main plank of the negligence alleged against the defendants/respondents in 1st plaintiff’s/appellant’s Statement of Claim was excessive speeding and failure to keep a proper look-out, the evidence of P.W.3, who was the only witness called to show how the accident happened, was to the effect that the defendants/respondents’ vehicle veered off its lane of the road to collide with the plaintiff’s/appellant’s vehicle. So what were the findings of the trial court as to the cause of the accident? At page 60 of the Record of Proceedings, the trial court in its judgment said:-

*“The evidence of P.W.2 and P.W.3 alleged negligence on the part of the 1st defendant. This is further corroborated by the sketch map of the scene of the accident. The points of impact to which the 1st defendant was part of the making never favoured him. From the*

point of impact to where his vehicle finally fell down is 160 ft.

*This clearly shows that he was on an excessive speed which made it not possible for which (sic) to have proper control of the vehicle resulting to the accident.*

B                      *These (sic) finding, I believe worked on the mind of the trial court to find the 1st defendant guilty of dangerous driving. By the 1st defendant's negligence, he breached the duty of care "he owe (sic) other road users."*

*(Underlining mine)*

C                      In the passage underlined above, the trial court made a finding that the cause of the accident was excessive speeding by the 1st defendant/respondent. This finding was in tune with the averment pleaded by the 1st plaintiff/appellant in the particulars of negligence pleaded. On the other hand, the only evidence called by the plaintiffs/appellants in proof of the negligence ascribed to the 1st defendant/respondent was that the vehicle driven by him (1st defendant/respondent) veered off his lane of the road and came to collide with 1st plaintiff/appellant's vehicle. The result is that there was no evidence before the trial court in support of the averments pleaded by  
E the 1st plaintiff/appellant as to how the collision occurred.

In *Shell B.P. v. Abedi* (1974) 1 S.C. 23 at 45; (1974) 1 S.C. (Reprint) 16, this court said:-

F                      *"It is now settled that in any action in the High Court, the parties are bound by their pleadings. Their case stands or falls by the averments in those pleadings and the evidence adduced in support of these averments. Any evidence not supported by the pleadings should be ignored as it goes to no issue. .... The corollary to this principle is that judgment should not be given in favour of a party on  
G facts which were not pleaded; it is the same with facts which are pleaded but not canvassed at the hearing."* (p. 2461 F/2463 E)

***Appellate court - Findings of fact***

H                      3. The plaintiffs/appellants counsel at page 9 of his Brief argued thus:-  
                    *"Even assuming without conceding, that trial court failed to make any findings to acts of negligence, since the appeal before the lower court was by way of rehearing based on the evidence in the Record of Proceedings and because the complaint before the lower*

*court was not based on credibility of the witnesses, the Court of Appeal in exercise of its power under Section 16 of the Court of Appeal Act, could have proceeded to make findings of fact based on the evidence adduced.*

I think, with respect to learned counsel, that he did not sufficiently appreciate the limits of the power of rehearing granted to the Court of Appeal under Section 16 of the Court of Appeal Act. That power does not extend to enable the court reconstruct a party's case or to redesign the evidence called by parties to make sure that evidence called agrees with the averments pleaded by the parties. The fundamental lacunae with the plaintiffs/appellants case was that the facts pleaded by them were not in accord with the averments led at the trial as to the cause of the accident. Section 16 of the Court of Appeal Act, was therefore irrelevant in the circumstances. (p. 2464 E)

### ***Dismissal - Propriety of***

4. The 2nd issue for determination is whether or not the court below was correct to have dismissed the plaintiffs/appellants' suit in toto following the finding that the evidence called by them was not in accord with the pleadings. This does not seem to me a reasonable issue for determination in this appeal. The plaintiffs/appellants' claim for damages which was in negligence, postulated that the trial court would find a case in negligence established against the defendants/respondents. But as it turned out, the case in negligence was not made out arising from the fact that the evidence called by the plaintiffs/appellants was contrary to the pleadings filed. Since a case of negligence was not established, the inevitable consequence was a dismissal of plaintiffs/appellants' case. It is therefore unreasonable to raise an issue querying the correctness of the dismissal of plaintiffs/appellants' suit. (p. 2465 D)

### ***NOTABLE POINTS OF INTEREST TOBIJSC***

*Evidence of parties must be equally assessed*

1. In the assessment of the evidence, the learned trial Judge was only involved in the evidence of P.W.1, P.W.2 and P.W.3. I ask, what of the evidence of D.W.1, D.W.2 and D.W.3? It is our law, that a trial

judge is bound to consider equally in his assessment and evaluation, the evidence of both the plaintiff and the defendant. And that is the role he plays like an umpire of a game. I have the impression that because the learned trial Judge parochially assessed only the evidence of the plaintiffs that he was carried away by it and failed to examine the detailed counter-claim of the defendants. That was the point made in the Court of Appeal and I agree entirely with the court. I will not call the action of the learned trial Judge as a bias. No, it is not. It is just a slip, a genuine one for that matter. And he is entitled to slip. That is why he is a trial Judge. (p. 2473 C)

## 2. *Particulars of negligence should be detailed*

Facts are important in every case before the court as they are the fountain head of the law. If there is any case in which facts are of great importance it is the case of negligence. In a case of negligence the facts which gave rise to the negligence must be comprehensively and delicately pleaded. The facts must be pleaded in minute details almost to the letters of the alphabet. Nothing should be left unpleaded. The Statement of Claim should give a very clear picture of what was the cause of the accident and the action and conduct of the drivers in the accident. The plan sketch (which is Exhibit C in this appeal) should, as far as if it is possible, be an accurate report of the events leading to the accident and it must convey that accuracy to the trial Judge. (p. 2473 F)

## **OGBUAGU JSC**

### 3. *High speed not same as excessive speed*

Speed being a relative term, there is no evidence by the 2nd defendant who testified as PW.3, of or as to what speed, the 1st defendant/respondent, was driving before the collision. Although the 1st respondent testified on oath unchallenged, that he was driving at 45 K.M.P.H. before the collision, the 2nd appellant did not say or state at what speed he himself was driving or what speed, the 1st respondent, was driving before the collision. *It is settled that high speed is not necessarily, excessive speed. This is why, whether speed was excessive, must be determined not by the number of meter per hour or by the statutory prohibitions, but by evidence of all the relevant*

*circumstances.* (p. 2481 E)

*4. Record of criminal proceedings is inadmissible evidence*

I will pause here to state on the decided authorities, that the admission of the said (Exhibit D) - the criminal proceedings in a civil trial or proceeding, was wrong. Such proceedings, was certainly inadmissible in any event. In other words, Record of Proceedings in a criminal proceeding, should not be admitted in evidence in a civil proceeding. That exhibit D was admitted in evidence without objection is/was of no moment. This is because and this also settled in a line of decided authorities, that where inadmissible evidence has been admitted, it is the duty of the court, not to act upon it. It is immaterial that its admission, was as a result of consent of the opposite party or that party's default in failing to take an objection at the proper time. An appellate court, has the power to reject such evidence and decide the case, on legal evidence. (p. 2484 D)

**REPRESENTATION**

Ibrahim, M.N., (with him; Moses E. Agwulonu), for the Appellants.  
Y.C. Maikyau, (with him; P.Y. Tuktur and S, I. Adamu), for the Respondents.

**CASES REFERRED TO**

Saraki v. Kotoye (1992) 9 NWLR (Pt.254) 156 at 164  
Madueke v. Madueke (2000) 3 NWLR (Pt.655) 3 at 135  
Idahosa v. Oronsaye (1959) 4 FSC 166 at p. 171  
Bunyan v. Akingboye (1999) 5 S.C. (Pt. II) 91  
Buckley Ltd. V. Akura (1986) 5 NWLR (Pt. 44) 752 at 760  
Confidence Insurance Ltd. v. Trustees of S.O.C.E. (1999) 2 NWLR (Pt.591) 373  
Egbe v. Alhaji (1990) 3 S.C. (Pt.1) 63; (1990) NWLR (Pt.128) 546  
Akanbi v. Raji (1998) 12 NWLR (Pt.578) 360  
Ajide v. Kelani (1985) 3 NWLR (Pt.12) 248  
Shehu v. Afere (1998) 7 NWLR (Pt.556) 115  
Esigbe v. Asholor (1990) 7 NWLR (Pt.161) 234  
Audu v. Ahmed (1990) 5 NWLR (Pt.156) 287  
Eze v. Atasie (2000) 6 S.C. (Pt.I) 214

**STATUTES REFERRED TO**

Court of Appeal Act, s. 16

Evidence Act, s. 14 (d)

**B                    LEAD JUDGMENT BY OGUNTADE JSC**

The 1st appellant in this appeal commenced his suit at the Minna High Court of Niger State claiming against the respondents special and general damages the breakdown of which is as stated hereunder:-

- C                    *“(a) Cost of replacing the plaintiff’s now completely cannibalized vehicle.                    N 1,500.000.00*
- D                    *(b) Loss of use of vehicle from date of accident to date of filing this suit.                    N 1,008.000.00*
- E                    *(c) Cost of hiring another vehicle to convey goods from point of accident.                    N15,000.00*
- F                    *(d) 9 months payment of watchmen guarding plaintiff’s vehicle at per day each.                    N75.00*
- F                    *Total Special Damages                    N2,563, 500.00*
- F                    *(e) General Damages                    N7.500.000.00*
- F                    *(f) Interest on the judgment sum at 28% from ‘9/1 2/91 to date of judgment. .*
- G                    *(g) Interest on the unpaid judgment sum at the court rate of 10% (0.40rr7) from the date of judgment until the judgment debt is fully and finally paid.*
- H                    *(h) Such further or other order(s) as the court may deem fit and just to make in the circumstances of this case.”*

The suit was founded on the negligence of the 1st respondent, the driver of the 2nd respondent. It was pleaded, that on 9/12/91, the 1st respondent negligently drove Fiat trailer Registration No. LA 3906, belonging to the 2nd respondent and caused same to collide with the 1st appellant's Fiat T3 trailer, Registration No. LA 6086 MA.

The respondents filed their Further Amended Statement of Defence. They denied the negligence ascribed by the 1st appellant to the 1st respondent. They averred that the accident was caused by 1st appellant's driver who was alleged to have negligently driven his vehicle in the course of overtaking another vehicle and in the process collided with, the 2nd respondent's vehicle. The respondents raised a counter-claim of Four Million, Two Thousand, Three Hundred and Fourteen Naira, (N4,002,34.00) being general and special damages, jointly against 1st appellant and his driver the 2nd appellant. It is relevant to say here that it was the counter-claim by the respondents that brought in the 2nd appellant as a party to the dispute.

The case was heard by Evuti, J. At the trial, the plaintiff/appellant called three witnesses in support of their case. The defendants/respondents also called three witnesses. On 19-10-95, the trial Judge in his judgment concluded as follows:-

*"I give judgment in favour of the 1st plaintiff as follows: the sum of N500,000.00 for damages caused to his vehicle, a Fiat T3 trailer.*

*(2) The sum of N6.500.00 being refund for the payment made for hiring a vehicle to convey the goods from the scene of accident to Kaduna.*

*(3) Another sum of N40,000.00 for payments made to the 2 watchmen who looked after the vehicle at the scene of accident for a period of 9 months.*

*In addition to the above, I award to the plaintiff against the defendants, the sum of N1,000.000 as general damages plus 10% interest p.a. thereon the total sum until the whole amount is fully paid with effect from today."*

The respondents were dissatisfied with the judgment of the trial court. They appealed against it before the Court of Appeal, Abuja (hereinafter referred to as 'the court below'). On 16-07-02, the court below set aside the judgment given by the trial court in favour of the

plaintiffs/appellants. Their case was dismissed. The plaintiffs have come before this court on appeal against the judgment of the court below. They raised five grounds of appeal. The respondents, who won before the court below, have raised a cross-appeal on two grounds of appeal. In the appellant's Brief filed by the plaintiffs counsel, the issues for determination in the appeal were identified as the following:-

*"(1) Was the Court of Appeal right in finding that the trial Judge made a finding on issues that in were not pleaded but did not make findings as to acts of negligence pleaded by the parties?"*

*(2) Whether the Court of Appeal was right in dismissing plaintiffs' claims in toto?"*

*(3) Was the Court of Appeal right in remitting back to the High Court for determination the amount of damages counter-claimed by the defendants when there was no prior finding that the defendants had, on the evidence adduced, proved negligence against the plaintiffs?"*

The respondents adopted the appellants' 1st issue and in addition formulated an additional issue. The additional issue reads:-

*"2. Whether in the absence of any finding of negligence against the respondents the appellants are entitled to damages arising from the same acts or omissions constituting the negligence complained of?"*

The respondents/cross-appellants raised a Preliminary Objection against the plaintiffs/appellants' 5th ground of appeal and their issue No. 3 formulated upon it. It is appropriate that I first consider the Notice of Preliminary Objection. The contention of the respondents/cross appellants is that the matter complained of by the plaintiffs/appellants in their 5th ground of appeal did not arise from the judgment of the court below being appealed against. Respondents' counsel submitted that a ground of appeal and issue formulated thereupon must arise "from the judgment appealed against. He referred to Republic Bank Ltd. v. C.B.N. ( 1998) 13 NWLR (Pt.581) 300 at 327 and Saraki v. Kotoye (1992) 9 NWLR (Pt.254) 156 at 164 and Madueke v. Madueke (2000) 3 NWLR (Pt.655) 3 at 135. Counsel relied on a passage from the judgment of the court in Saraki v. Kotoye (supra), where the court said:-

*"It is well settled proposition of law in respect of which there*

can hardly be a departure that the grounds of appeal must relate to the decision and should constitute a challenge to the ratio of the decision. See *Egbe v. Alhaji* (1990) 3 S.C. (Pt.1) 63; (1990) NWLR (Pt.128) 566 at 590. Grounds of appeal are not formulated in nubibus they must be in firma terra, namely arise from the judgment. However meritorious the ground of appeal based on point of critical constitutional importance or general public interest, it must be connected with controversy between parties."

The plaintiffs/appellants did not file a Reply Brief. I am left to approach the matter without the advantage of an input from the plaintiff/appellants. The 5th ground of appeal raised by the appellant at pages 202-203 of the record reads:-

"(5) The court below erred in law when it remitted the damages of defendants back to the High Court to be determined de novo when that was no prior finding by it that the defendants had established negligence on the part of the plaintiffs and proved their counter-claim for damages .

#### PARTICULARS

(a) The court below held that:-

'It is also significant that the learned trial Judge did not discuss the question of damages raised by the appellants. It is now trite law, that trial court should discuss the issue of damages in case they are found to be wrong on the question of liability. An appeal court may at times under and by virtue of Section 16 of the Court of Appeal Act, deal with the question of liability and the issue of damages, but in this case, the issue of credibility of the witnesses is important, that is why I shall remit the claims for the appellants back to the High Court and there to be tried de novo by another Judge.'

(b) The trial High Court had found the 1st defendant negligent and therefore dismissed the counter-claim thus:-

'On the other hand, I find the 1st defendant negligent. His action gave rise to the present suit being filed against him and his employer. Consequently, all heads of claims filed by the defendants are each dismissed as lacking basis.'

(c ) Nowhere in its judgment did the Court of Appeal make a finding that negligence was proved against the plaintiffs. "

I reproduced earlier the 3rd issue for determination in the ap-

peal raised by the plaintiffs/appellants. ***A combined reading of the 5th ground of appeal and issue 3 formulated thereon conveys that the court below had in its judgment come to the conclusion that the defendants/ respondents had established a case of negligence against the plaintiffs/appellants on the counter-claim raised; and that the case was being remitted to the court below only for an assessment of damages. But this was not the case. The court below in the last paragraph of its judgment at page 195 of the record had only said:-***

***“Accordingly in the end, I allow this appeal, set aside in toto the decision of the trial court and in its place, I order that the respondents’ claims be and are hereby dismissed. I order also that the claims of the appellants as contained in the counter- claim be remitted back to the High Court of Niger State and there to be decided de novo by another Judge.”***  
***(Underlining mine)***

It is apparent from the extract of the judgment of the court below reproduced above that what was remitted to the trial court for trial do novo was ***“the claims of the appellants as contained in the counter-claim”*** not just the damages claimed. The claims of the defendants/respondents included a determination of the question whether or not the plaintiffs/appellants were liable in negligence as asserted by the defendants/respondents in their counter-claim. The result is that the ***5th ground of appeal and the 3rd issue for determination by the plaintiffs/appellants could not have arisen from the judgment of the court below. Both are accordingly struck out.***

Issues 1 and 2 raised by the plaintiffs/appellants will be taken together. The court below allowed the appeal brought to it by the defendants/respondents mainly on the ground that the plaintiffs/appellants’ evidence at the hearing was not in conformity with their pleadings as to the nature of the negligence upon which their claims were hinged. In his Statement of Claim, the 1st plaintiff/appellant pleaded in paragraph 3 thus:-

***“The said trailer No. LA 3906 BF, was so negligently driven, managed and controlled by the 1st defendant that he caused or permitted the same to violently hit the said vehicle No. LA 6086 MA.”***

*Particulars of Negligence*

*“(i) the said vehicle No. LA 3906 BF was driven at a speed which was excessive in the circumstance:*

*(ii) 1st defendant failed to keep any or any proper look-out on (sic) to have any or any sufficient regard for other traffic and in the process hitting the said LA 6086 MA:*

*(iii) 1st defendant failed to keep any or any proper control of the vehicle No. LA 3906 BF driven by him and failed to swerve or in any other way so to manage or control his vehicle as to avoid hitting plaintiffs vehicle:*

*(iv) The weather (condition) was bright and the road (a Federal Highway) straight;*

*(v) The plaintiff will in the alternative rely on the doctrine of res ipsa loquitur.”*

*(Underlining mine)*

Now at the hearing, P.W.3 who was the driver of vehicle No. LA 6086 MA at the time the collision occurred testified thus:-

*“On the 9/12/91, I was driving my vehicle loaded with plates to Kaduna from Lagos. On my way at Maikujeri after Kagara, I was driving when the 1st defendant’s vehicle was coming down a slope, left his lane and came into mine. I thought he could not go back to his lane and I was parking my vehicle. He ran into my vehicle and his vehicle went further and fell down. My vehicle did not fall down but the head got condemned.”*

*(Underlining mine)*

***It is to be observed here that whereas the main plank of the negligence alleged against the defendants/respondents in 1st plaintiff’s/appellant’s Statement of Claim was excessive speeding and failure to keep a proper look-out, the evidence of P.W.3, who was the only witness called to show how the accident happened, was to the effect that the defendants/respondents’ vehicle veered off its lane of the road to collide with the plaintiff’s/appellant’s vehicle. So what were the findings of the trial court as to the cause of the accident? At page 60 of the Record of Proceedings, the trial court in its judgment said:-***

***“The evidence of P.W.2 and P.W.3 alleged negligence on***

*the part of the 1st defendant. This is further corroborated by the sketch map of the scene of the accident. The points of impact to which the 1st defendant was part of the making never favoured him. From the point of impact to where his vehicle finally fell down is 160 ft.*

**This clearly shows that he was on an excessive speed which made it not possible for which (sic) to have proper control of the vehicle resulting to the accident.**

**These (sic) finding, I believe worked on the mind of the trial court to find the 1st defendant guilty of dangerous driving. By the 1st defendant's negligence, he breached the duty of care "he owe (sic) other road users."**

**(Underlining mine)**

**In the passage underlined above, the trial court made a finding that the cause of the accident was excessive speeding by the 1st defendant/respondent. This finding was in tune with the averment pleaded by the 1st plaintiff/appellant in the particulars of negligence pleaded. On the other hand, the only evidence called by the plaintiffs/appellants In proof of the negligence ascribed to the 1st defendant/respondent was that the vehicle driven by him (1st defendant/respondent) veered off his lane of the road and came to collide with 1st plaintiff/appellant's vehicle. The result is that there was no evidence before the trial court in support of the averments pleaded by the 1st plaintiff/appellant as to how the collision occurred.**

In *Njoku v. Eme* (1973)5 S.C. 293 at 300-302; (1973) 5 S.C. (Reprint) 211, this court observed;-

**"In National Investment & Properties Ltd. v. Thompson Organisation Ltd. & Ors. (1969) NMLR 99 at page 104, we again observed as follows;-**

**"A plaintiff must call evidence to support his pleadings and evidence which is in fact adduced which is contrary to his pleadings, and evidence which is in fact contrary to us pleadings should never be admitted. It makes no difference, as Chief Akin-Olugbade suggested, that the other side did not object to the evidence or that the Judge did not reject it.**

*It is of course the duty of counsel to object to inadmissible*

evidence and the duty of the court anyway to refuse to admit inadmissible evidence, but if notwithstanding this, evidence is still, through an oversight or otherwise admitted, it is the duty of the court when it comes to give judgment to treat the inadmissible evidence as if it had never been admitted. Other views along the same lines were expressed in *Idahosa v. Oronsaye* (1959) 4 FSC 166 at p. 171, *Bada v. The Chairman L.E.D.B.* SC.501/65 of 23rd June, 1967, *Erinle v. Adelaja* SC.332/1966 of 6th June, 1979 and *Chief Sule Jimbo & Ors. v. Aminu Sanni & Ors.* SC. 373/67 of 13th March, 1970. Another recent case on the point is *Ferdinand George v. The United Bank for Africa Ltd.* (1979) 8-9 S.C. 264; (1972) 8-9 S.C. (Reprint) 158, in which we referred with approval our decision in *Ogboda v. Adulugba* SC. 370 of 12th February, 1971, where we emphasized the same point as follows.

"We have pointed out numbers of time that the evidence in respect of matters not pleaded really goes to no issue at the trial and the court should not have allowed such evidence to be given (See *Chief Sule v. Jimbo & Ors. v. Aminu Sannai & Ors.* SC 373/67 dated the 13th March, 1970). Even when such evidence had been wrongly allowed, the trial court should disregard it as irrelevant to be issues properly raised by the pleadings.

Similarly in *Shell B.P. v. Abedi* (1974) 1 S.C. 23 at 45; (1974) 1 S.C. (Reprint) 16, this court said:-

**"It is now settled that in any action in the High Court, the parties are bound by their pleadings. Their case stands or falls by the averments in those pleadings and the evidence adduced in support of these averments. Any evidence not supported by the pleadings should be ignored as it goes to no issue. .... The corollary to this principle is that judgment should not be given in favour of a party on facts which were not pleaded; it is the same with facts which are pleaded but not canvassed at the hearing."**

The court below adopted the proper approach to the case when in its judgment at page 158 of the record, it said:-

"This piece of evidence was not pleaded and in view of the authorities cited above, that evidence must be expunged from the record. The respondents relied upon specific acts of negligence on

the part of the 1st appellant, no evidence was given to prove those facts, the evidence that was led, the 1st appellant leaving his lane went to no issue joined by the parties at the pleadings. See *Obmiami Brick and Stone (Nig.) Ltd. v. A.C.D. (supra)*, (Pt.229) 260; *Olarewaju v. Bamigboye (1987) 3 NWIR (Pt.60) 353*. See Also *Adeosun v. Adisa* (supra).

On the strength of the above authorities, I have no doubt that the evidence given by the respondent's only eyewitness to the accident that the cause of the accident was that the 1st appellant left his lane and collided with the 2nd respondent was not pleaded and ought to be expunged. And in the absence of such an evidence there was nothing on the record, to support the respondent's claims of negligence against the appellants. There is no doubt that there was an accident or collusion between the vehicles of the parties along the highway, but mere occurrence of an accident is not sufficient proof of negligence, and does not establish by credible evidence, the acts of negligence against the appellants. The learned trial judge was in error to have made a case for the respondents different from the one contained in their pleadings. I must therefore resolve this issue in favour of the appellants, that is, from the nature of the pleadings and the evidence, the respondents did not establish a case of negligence against the appellants."

**The plaintiffs/appellants counsel at page 9 of his Brief argued thus:-**

**"Even assuming without conceding, that trial court failed to make any findings to acts of negligence, since the appeal before the lower court was by way of rehearing based on the evidence in the Record of Proceedings and because the complaint before the lower court was not based on credibility of the witnesses, the Court of Appeal in exercise of its power under Section 16 of the Court of Appeal Act, could have proceeded to make findings of fact based on the evidence adduced. *Bunyan v. Akingboye (1999) 5 S.C. (Pt. II) 91; (2001) FWLR (Pt. 41) 1977 at 1996 B-G*. See also the court of Appeal decision (which we urge the court to approve) in: *Buckley Ltd. V. Akura (1986) 5 NWLR (Pt. 44) 752 at 760 G-H*."**

**I think, with respect to learned counsel, that he did not**

**sufficiently appreciate the limits of the power of rehearing granted to the Court of Appeal under Section 16 of the Court of Appeal Act. That power does not extend to enable the court reconstruct a party's case or to redesign the evidence called by parties to make sure that evidence called agrees with the averments pleaded by the parties. The fundamental lacunae with the plaintiffs/appellants case was that the facts pleaded by them were not in accord with the averments led at the trial as to the cause of the accident. Section 16 of the Court of Appeal Act, was therefore irrelevant in the circumstances.**

Again, it was argued that the court below should have looked at the sketch of the scene of accident tendered as Exhibit 'C' and to have drawn the inference of negligence on 1st defendant's/respondent's part from the resultant positions of the two vehicles. But with respect, such an approach would not cure the fact that the plaintiffs/appellants' evidence as to how the accident occurred was not in line with their pleadings.

**The 2nd issue for determination is whether or not the court below was correct to have dismissed the plaintiffs/appellants' suit in toto following the finding that the evidence called by them was not in accord with the pleadings. This does not seem to me a reasonable issue for determination in this appeal. The plaintiffs/ appellants' claim for damages which was in negligence, postulated that the trial court would find a case in negligence established against the defendants/respondents. But as it turned out, the case in negligence was not made out arising from the fact that the evidence called by the plaintiffs/ appellants was contrary to the pleadings filed. Since a case of negligence was not established, the inevitable consequence was a dismissal of plaintiffs/appellants' case. It is therefore unreasonable to raise an issue querying the correctness of the dismissal of plaintiffs/appellants suit.**

In the final conclusion, this appeal must be dismissed as unmeritorious. I affirm the judgment of the court below and award N50,000.00 costs against the plaintiffs/appellants in favour of the defendants/respondents.

**ONU JSC**

Having had the privilege to read before now the judgment of my learned brother, Oguntade, JSC., just delivered, I am in entire agreement therewith that the appeal must be dismissed as unmeritorious. I too affirm the judgment of the court below and award N50, 000 costs against the plaintiffs/appellants.

C

**TOBI JSC**

This is a case of negligence with its usual apportionment of blame by one party to the other. The blames are between the plaintiff and the defendant. None of the parties usually accepts fault. The plaintiff will say that the defendant was at fault. The reverse situation is also canvassed and that makes the dispute. There are however, certain cases where the defendant accepts some blame but says that the plaintiff contributed to the accident. That deals with the law of contributory negligence. That is not the case here. What is the case here?

It was on 9th December, 1991. An accident occurred between two vehicles. They are trailer bearing Registration No. LA.6086 MA and Fiat TS trailer bearing Registration No. LA 3906 BF. It is the case of the appellants that the Fiat TS No. LA 3906 BF trailer was driven by 1st respondent at an excessive speed and failed to keep any proper look out or have any efficient regard for other traffic and in the process hit trailer No. LA 6086 MA. It is the case of the respondents that the accident was not as a result of the fault of the 1st respondent but as a result of the fault of the 2nd appellant, who at the time of the accident, left his lane to collide with the trailer No. LA 3906 BF, driven by the 1st respondent. They claimed that the 2nd appellant was attempting to overtake a third vehicle while ascending a hill, and in the process collided with the 2nd respondent's vehicle.

The appellants filed an action in the High Court. They claimed special and general damages. The respondents counter-claimed for special damages. The learned trial Judge gave judgment to the appellants in the following terms:-

*"I give judgment in favour of the 1st plaintiff as follows, the sum of N500,000.00 for damages caused to his vehicle, a Fiat TS trailer.*

*(2) The sum of N6,500.00 being refund for the payment made for hiring a vehicle to convey -the goods from the scene of accident to Kaduna.*

*(3) Another sum of N40,000.00 for payments made to the 2 watchmen who looked after the vehicle at the scene of accident for a period of 9 months.*

*In addition to the above, I award to the plaintiffs against the defendants, the sum of N1,000,000.00 as general damages plus 10% interest p.a. there (sic) on the total sum until the whole amount is fully paid with effect from today."*

On appeal, the Court of Appeal reversed the judgment of the High Court. The court blamed the learned trial Judge for not discussing "the issue of damages in case they are found to be wrong on the question of liability." In the concluding paragraph of the judgment, the Court of Appeal said:-

*"Accordingly in the end, I allow this appeal, set aside in toto the decision of the trial court and in its place. I order that the respondents' claims be and are hereby dismissed. I order also that the claims of the appellants as contained in the counter-claim be remitted back to the High Court of niger State and there to be decided de novo by another Judg."*

The appellants have appealed to the Supreme Court. Briefs were filed and exchanged. They formulated three issues for determination: -

*"(1) Was the Court of Appeal right in holding that the trial Judge made a finding on issues that were not pleaded but did not make findings as to acts of negligence pleaded by the parties?*

*(2) Whether the Court of Appeal was right in dismissing plaintiffs' claims in toto?*

*(3) Was the Court of Appeal right in remitting back to the High Court for determination the amount of damages counter-claimed by the defendants when there was no prior finding that the defendants had on the evidence adduced, proved negligence against the plaintiffs?*

The respondents formulated two issues for determination:-

*“(1) Was the Court of Appeal right in holding that the trial Judge made a finding on issues that or were not pleaded but did not make findings of negligence pleaded by the parties?”*

B *“(2) Whether in the absence of any finding of negligence against the respondents, the appellants are entitled to damages arising from the same acts or omissions constituting the negligence complained of?”*

C Learned counsel for the appellants, Ibrahim Isiyaku, Esq., relying on the evidence of P.W.3 and the findings of the learned trial Judge, submitted that the Court of Appeal was wrong to have held that the trial court did not make any specific finding as to acts of negligence as pleaded by the parties but made a finding on issues that were not pleaded. Even assuming, without conceding that the D trial court failed to make any further findings of acts of negligence, learned counsel argued that since the appeal before the court was by way of rehearing based on the evidence in the Record of Proceedings and because the complaint before the court was not based on credibility of the witnesses, the Court of Appeal, in the exercise of its E powers vide Section 16 of the Court of Appeal Act, could have proceeded to make findings of fact based on the evidence adduced. He cited Bunyan v. Akingboye (1999) 5 S.C. (Pt.II) 91; (2001) FWLR (Pt.41) 1977; Buckley Ltd. v. Akura (1986) 5 NWLR (Pt.44) 752. F Criticising the evidence of D.W.I and commending the evidence of P.W.3 to the court, learned counsel submitted that the Court of Appeal could very well have considered the evidence in the record and made a finding of negligence against D.W.I.

G On issue No. 2 learned counsel called in aid the evidence of P.W.I and the findings of the trial Judge and submitted that the award of N1 Million out of a total of N7.5 Million damages is not out of tone with the nature of the damages suffered by the appellants.

H On issue No. 3, learned counsel submitted that as the Court of Appeal did not make any finding as to the negligence of the appellants or that the respondents had proved that the 2nd appellant 1 caused the accident by attempting to overtake another vehicle as pleaded by the respondents, the Court of Appeal was wrong to revert the counter-claim back to the High Court for a trial de novo,

counsel argued. He urged the court to allow the appeal.

Learned counsel for the respondents, Yakubu Maikyau, Esq., raised a Preliminary Objection on ground 5. He submitted that the ground does not emanate from the judgment of the Court of Appeal. He cited Republic Bank Limited v CBN (1998) 13 NWLR (Pt.581) 306, Saraki v Kotoye (1992) 9 NWLR (Pt.254) 156, Madueke v. Madueke (2000) 5 NWLR (Pt.655) 3, Confidence Insurance Ltd. v. Trustees of S.O.C.E. (1999) 2 NWLR (Pt.591) 373 and Egbe v. Alhaji (1990) 3 S.C. (Pt.1) 63; (1990) NWLR (Pt.128) 546. B

Taking issue No.1, learned counsel cited some paragraphs of the Amended Statement of Claim, the evidence of P.W.3, D.W.3 and submitted that the Court of Appeal was right in holding that the trial Judge made a finding on issues that were not pleaded. He relied on Adeoshun v. Adisa (1986) 5 NWLR (Pt.40) 255. C

Learned counsel pointed out that the appellants did not state D or describe what the 1st respondent was doing or the particular manner of driving adopted by him which amounted to a breach of the duty of care on his part to the appellants rather the pleadings of the appellants seem to impose a duty on the 1st respondent to control his vehicle at all cost and to avoid hitting the appellants' vehicle. It is E nowhere suggested in the pleadings that the 1st respondent did leave his lane and went into the lane of the 2nd appellant thereby causing the collision and the only time this evidence came about in the case of the appellants was at the trial, learned counsel contended. Citing F Akanbi v. Raji (1998) 12 NWLR (Pt.578) 360, Ajide v. Kelani (1985) 3 NWLR (Pt.12) 248, Shehu v. Afere (1998) 7 NWLR (Pt.556) 115, Esigbe v. Asholor (1990) 7 NWLR (Pt.161) 234, Audu v. Ahmed (1990) 5 NWLR (Pt.156) 287, counsel submitted that in a case of road accidents the pleadings must state all material facts of the accident, describing as clearly as possible what each party did. He contended that the Court of Appeal was right when it held that the trial court did not make any specific finding as to the acts of negligence as pleaded by the parties, but merely summarised the evidence and made issues that were not pleaded. G H

On the exercise of the power under Section 16 of the Court of Appeal Act, by the Court of Appeal, learned counsel argued that the attempt by the appellants to heap the blame on the Court of Appeal

for not invoking its powers under the section is of no assistance to the appellants whatsoever because the exercise of the power is not done in vacuum as the manner of driving, a material fact, was not pleaded. He referred to Exhibit 1.

On issue No.2, learned counsel argued that the claim for damages against the respondents can only be sustained where there is a finding of negligence against them unless the injuries allegedly suffered by the appellants are the result of the respondents negligent conduct, they cannot be held liable in damages. Since the Court of Appeal found that the appellants did not prove negligence against the respondents, the Court of Appeal was entitled to dismiss the entire claim of the appellants for damages, counsel further submitted. He cited Akanbi v. Alatede Ltd. (2000)1 NWLR (Pt.639) 135, UBN Plc. v. Emole (2001) 12 S.C. (Pt.I) 106; (2002) FWLR (Pt. 88) 845.

Referring to paragraphs 1, 2, 3 and 4 of the Amended Statement of Claim, counsel submitted that special damages must be specifically pleaded and strictly proved. He cited Usman v. Abubakar (2001) 12 NWLR (Pt.728) 689 and Odulaja v. Haddad (1972) 1 All NLR 191. He argued that the evidence led by the appellants in support of the claims for the sum of N1, 500.000 as cost of replacing the plaintiffs now completely cannibalized vehicle did not meet the standard laid down in the case of Usman v. Abubakar, (supra). He submitted that failure on the part of the appellants to produce the inspection report of their vehicle at the trial was fatal to their case. He cited Section 149(d) of the Evidence Act and the cases of Ochin v. Ekpechi (2002) 5 NWLR (Pt.656) 225, Lawson v. Mani Construction Co. Ltd. (2002) 2 NWLR (Pt.752) 585 and Elias v. Omobare (1982) 5 S.C. (Reprint) 13; (1982) All NLR 75.

On the expenses incurred on the hire of a vehicle and the compensation paid on the alleged damaged plates, learned counsel submitted that in the absence of any damage to the goods being transported by the appellants, the claims for N6,800 and N8,500 cannot succeed, more so when the appellants did not discharge the burden of proving that their vehicle was conveying the goods of the description given by them.

On the claim for N40,500 payment to watchmen, counsel submitted that in addition to the fact that this head of claim cannot suc-

ceed on the ground of the failure by the appellants to prove negligence, the absence of credible evidence in support of the claim disentitles them to the award under the head. Counsel also agreed with the Court of Appeal for refusing to award general damages. He urged the court to dismiss the appeal.

There is a Preliminary Objection. Let me take it here. Counsel B for the respondents objected to ground 5 on the ground that it did not emanate from the judgment of the Court of Appeal. Ground 5 reads:-

*“The court below erred in law when it remitted the damage of C the defendants back to the High Court to be determined de novo when there was no prior finding by it that the defendants had established negligence on the part of the plaintiffs and proved their counter-claim for damages. “*

Counsel quoted the following passage from the judgment of D the Court of Appeal:-

*“It is also significant that the learned trial Judge did not discuss the question of damages raised by the appellants. It is now trite law, that trial court should discuss the issue of damages hi case they on are found to be wrong on the question of liability. An appeal court may E at times under and by virtue of Section 16 of the Court of Appeal Act, deal with the question of liability and the issue of damages, but in this case, the issue of credibility of the witnesses is important, that is why I shall remit the claims for the appellants back to the High Court F and there to be tried de novo by another Judge.”*

In the final paragraph of the judgment, the Court of Appeal said at page 195 of the record:-

*“Accordingly, in the end, I allow this appeal, set aside in toto the decision of the trial court and in its place, I order that the respon- G dents’ claims be and are hereby dismissed. I order also that the claims of the appellants as contained in the counter-claim be remitted back to the High Court of Niger State and there to be decided de novo by another Judge. I award the appellants costs of N7,500.00 including H out of pocket expenses.”*

It is clear from the above that the Court of Appeal was concerned, using its exact words “with the claims of the appellants as contained in the counter-claim” and not “with the damages of the

defendants.” The Preliminary Objection therefore fails.

In an action for negligence, the plaintiff must prove the following essential elements: (a) The existence of a duty of care owed to the plaintiff by the defendant, (b) Breach of that duty of care by the defendant, (c) Damages suffered by the plaintiff as a result of the breach by the defendant of that duty of care. See *Edok Eter Mandilas Ltd. v. Ale* (1985) 3 NWLR (Pt.11) 43, *Okeowo v Chief Sanyaolu* (1986) 2 NWLR (Pt.23) 471, *Agbomagbe Bank v C.F.A.O* (1961) 1 All NLR 140, *Mercantile Bank of Nigeria Ltd. v. Abusomwan* (1986) 12 NWLR (Pt. 22) 270.

In order to establish negligence, one pertinent question arises for consideration and it is whether as between the alleged wrong doer and the person who has suffered damage, there is a sufficient relationship of proximity or neighbourhood such that in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter?

The burden of proof of negligence falls on the plaintiff who alleges negligence. This is because negligence is a question of fact, and it is the duty of he who asserts to prove it. Failure to prove particulars of negligence pleaded will be fatal to the case of the plaintiff. In cases of motor accidents the test to be applied in determining who was negligent is to look for the person whose negligence substantially caused the accident by determining whether or not that person could have avoided the collision by the exercise of reasonable care. See *Alhaji Otaru and Sons Limited v. Idris* (1999) 4 S.C. (Pt.II) 87; (1999) 6 NWLR (Pt.606) 330.

Let me take issue No. 1 in the appellants’ Brief: The issue is in respect of the following finding of the Court of Appeal at page 188 of the record:-

*“I have very carefully read the judgment in the instant case and I agree with the appellants’ counsel that the learned trial Judge had failed to properly assess the evidence adduced and pleaded. He did not make any specific finding as to the acts of negligence as pleaded by the parties. He merely summarized the evidence and made a finding on issues that were not pleaded. I accordingly resolve issue No.3 in favour of the appellants.”*

I entirely agree with the Court of Appeal. The learned trial

Judge in his judgment of six pages, devoted about two pages for stating the facts of the case and the reliefs sought by the parties; and about another two and half pages for summarizing the evidence of the witnesses; less than half a page for assessing the evidence of the witnesses and about a page for his conclusion and order.

It is important to note that the Court of Appeal held that the learned trial Judge “failed to properly assess the evidence adduced and pleaded.” The operative and telling word is “properly”. The Court of Appeal did not say that the learned trial Judge did not assess the evidence adduced and pleaded at all. Again, I entirely agree with the court. In a case where the pleadings took pages 7 to 16 of the record, involving a detailed counter-claim of eighteen paragraphs, and evidence of six witnesses taking some large assess the evidence adduced and pleaded. In the assessment of the evidence, the learned trial Judge was only involved in the evidence of P.W.1, P.W.2 and P.W.3. I ask, what of the evidence of D. W. 1, D. W. 2 and D.W.3? It is our law, that a trial judge is bound to consider equally in his assessment and evaluation, the evidence of both the plaintiff and the defendant. And that is the role he plays like an umpire of a game. I have the impression that because the learned trial Judge parochially assessed only the evidence of the plaintiffs that he was carried away by it and failed to examine the detailed counter-claim of the defendants. That was the point made in the Court of Appeal and I agree entirely with the court. I will not call the action of the learned trial Judge as a bias. No, it is not. It is just a slip, a genuine one for that matter. And he is entitled to slip. That is why he is a trial Judge.

Facts are important in every case before the court as they are the fountain head of the law. If there is any case in which facts are of great importance it is the case of negligence. In a case of negligence the facts which gave rise to the negligence must be comprehensively and delicately pleaded. The facts must be pleaded in minute details almost to the letters of the alphabet. Nothing should be left unpleaded. The Statement of Claim should give a very clear picture of what was the cause of the accident and the action and conduct of the drivers in the accident. The plan sketch (which is Exhibit C in this appeal) should, as far as it is possible, be an accurate report of the events leading to the accident and it must convey that accuracy to the trial Judge.

In cases of motor accidents arising from negligence of drivers,

there is the tendency, (I think it is probably beyond tendency to reality) that the driver, if alive, shifts blame to his colleague Even if one of them dies or two of them die, the shifting process does not stop. After all, nobody wants to accept responsibility for an accident. In such a case, the learned trial Judge has to properly assess and evaluate the evidence before him. In the assessment and evaluation exercise the learned trial Judge should not introduce any sentiments. He should not involve himself in the emotions arising from the death of person or persons in the assessment and evaluation of the evidence. He can consider that aspect when he is doing a case of fatal accident and claim of damages. It is my view that a trial Judge who gets himself worked up by the death of person or persons will certainly be a blind-fold in giving judgment in favour of the dead or victims. That is not the law and the Judge that he is, must choose the path of law; not the path of sentiment.

I think I can stop here. It is for the above reasons and the more detailed reasons given by my learned brother, Oguntade, JSC, in his judgment that I too dismiss the appeal. I abide by my learned brother's order as to costs.

### **MUKHTAR JSC**

In the court below the appellants' claims were dismissed as the respondents' appeal was allowed as follows:-

*"Accordingly, in the end, I allow this appeal, get 3 aside in toto the decision of the trial court and in its place, I order that the respondents' claims be 3 and are hereby dismissed. I order also that the claims of the appellants as contained in the counter-claim be remitted back to the High Court of Niger State and there to be decided de novo by another Judge."*

Unhappy with the decision, the plaintiffs have appealed to this court on five grounds of appeal from which three issues for determination were distilled in the appellants' Brief of Argument. The issues are:-

*"(1) Was the Court of Appeal right in holding that 5 the trial Judge made a finding on issues that were not pleaded but did not make findings as to acts of negligence pleaded by the parties?"*

*(2) Whether the Court of Appeal was right in dismissing plaintiffs' claims in toto?*

*(3) Was the Court of Appeal right in remitting back to the High Court for determination the amount of damages counter-claimed by the defendants when there was no prior finding that the defendants had, on the evidence adduced, proved negligence against the plaintiffs?"* B

The issues raised for determination, in the respondents' Brief of Argument are:-

*"(1) Was the Court of Appeal right in holding that the trial Judge made a finding on issues that were not pleaded but did not make findings of negligence pleaded by the parties?"* C

*(2) Whether in the absence of any finding of negligence against the respondents the appellants are entitled to damages arising from the same acts or omissions constituting the negligence complained of?"* D

The remedy sought by the appellants in the trial court was damages against the respondents for damaging their vehicle through the negligent driving of the 2nd respondent who is an employee of the 1st respondent. The particulars of negligence as pleaded in the Amended Statement of Claim are as follows:- E

*"The said trailer No. LA 3906 BF was so negligently driven, managed and controlled by the 1st defendant that he caused or permitted the same to violently hit the said vehicle No. LA 6086 MA."* F

*'(i) the said vehicle No. LA 3906 BF was driven at a speed which was excessive in the circumstances;*

*(ii) 1st defendant failed to keep any or any proper look-out on to have any or any sufficient regard for other traffic and in the process hitting the said LA 6086;* G

*(iii) 1st defendant failed to keep any or any proper control of the vehicle No. LA 3986 BF, driven" by him and failed to swerve or in any other way so to manage or control his vehicle as to avoid hitting plaintiff's vehicle;*

*(iv) The weather (condition) was bright and the road ( a Federal Highway) straight;* H

*(v) the plaintiff will, in the alternative, rely on the doctrine of regips a louitur."*

The evidence given in support of the averment reads as follows:-

*"PW2....."*

*I drew a sketch map. It was drawn four days after the accident. There were two points of impact on the sketch. The essence of point of impact is to show where the vehicles collided, One of the point of impact was on Dahiru Adamu's lane while the other at the centre of the road."*

The above clearly shows that the 1st defendant/respondent left his own lane to hit the 2nd plaintiff/appellant on his lane, and negligence on the 1st respondent could be inferred but then it is not in consonance with the pleadings. Then the evidence of P.W.3 which reads thus:-

*"I was driving when the 1st defendant's vehicle was coming down a slope, left his lane and came into mine, I thought he could not go back to his lane and as I was parking my vehicle he ran into my vehicle and his vehicle went further and fell down."*

This piece of evidence reinforces the P.W.2's evidence but again it is outside the pleadings, as it was not pleaded. It is elementary law that parties are bound by their pleadings and whatever evidence adduced in the course of a trial that is not in conformity with the pleading becomes a non-issue and must be ignored by a trial Judge. In other words, evidence must be within pleadings, and not outside. See Egbue v. Araka (1988) 7 S.C. (Pt. III) 98; (1988) 3 NWLR (Pt.84) page 598, Eze v. Atasi (2000) 6 S.C. (Pt.I) 214; (2000) 10 NWLR (Pt.676) page 470 and Olohunde v. Adeyoku (2000) 6 S.C. (Pt. III) 118; (2000) 10 NWUR (Pt.676) page 563.

The resultant position is that the above pieces of evidence are not admissible and ought not to have been relied upon by the learned trial Judge, in the determination of the case before him. In this vein, the lower court as per Musdapher, JCA., (as he then was), was right when he held thus:-

*"This piece of evidence was not pleaded and in view of the authorities cited above that evidence must be expunged from the record."*

This being the position, it knocks the bottom off the plaintiffs/appellants' case, and the issue of damages does not arise, as no neg-

ligence has been established. I am not however unmindful of the position of the law that a party is not required to plead evidence. See Shogo v. Adebayo (2000) 14 NWLR (Pt.686) page 121 and Thanni v. Saibu (1977) 2 S.C. 89; (1977) 2 S.C. (Reprint) 46.

In the light of the above highlights and the fuller reasonings in the leading judgment of my learned brother, Oguntade, JSC., I also find the appeal unmeritorious and dismiss it. I abide by the consequential orders made in the leading judgment.

### OGBUAGU JSC

This is an appeal against the judgment of the Court of Appeal, Abuja Division (hereinafter called “the court below”), delivered on 16th July, 2002, allowing the appeal of the defendants/respondents to it and setting aside the judgment of the High Court of Niger State holder at Minna Judicial Division presided over by Evuti, J., and delivered on 19th October, 1995.

Dissatisfied with the said judgment, the appellants have appealed to this court on five grounds of appeal. The appellants have formulated three issues for determination namely:

*“(1) Was the Court of Appeal right in holding that the trial Judge made a finding on issues that were not pleaded but did not make findings as to acts of negligence pleaded by the parties?”*

*“(2) Whether the Court of Appeal was right in dismissing plaintiffs’ claims in toto?”*

*“(3) Was the Court of Appeal right in remitting back to the High Court for determination the amount of damages conerter aimed by the defendants when there was no prior finding that the defendants had, on the evidence adduced, proved negligence against the plaintiffs?”*

The respondents, while adopting the 1st issue of the appellants, have formulated two other issues for determination, namely:-

*“(1) Was the Court of Appeal right ding that the trial Judge made a finding on issues that were not pleaded but did not make findings of negligence pleaded by the parties?”*

*“(2) Whether in the absence of any finding of negligence, against the respondents the appellants are entitled to damages arising from*

*the same acts or omissions constituting the negligence complained of?"*

When this appeal came up for hearing on 11th March, 2008, both learned counsel for the parties, adopted their respective Briefs. While Ibrahim, Esqr., for the appellants with Agwulonu, Esqr., urged the court to allow the appeal and set aside the judgment of the court below, Markyau, Esqr., for the respondents with Ms. Tuktur and Adamu, urged the court to dismiss the appeal. Thereafter, judgment was reserved till to - day.

I will deal firstly with the Preliminary Objection taken/raised by the respondents in their Brief in respect of ground 5 in the Notice of Appeal of the appellants which without its particulars, reads as follows:-

*"The court below erred in law when it remitted the damages of defendants back to the High Court to be determined de novo when there was no prior finding by it that the defendants had established negligence on the part of the plaintiffs and proved their counter-claim for damages."*

I note that the appellants, never filed a Reply in reaction to the said objection. The consequence, in my respectful view, is that they conceded to the merit thereof. In the circumstance, the objection is sustained or upheld by me because and this is also settled, that the purpose of giving a Notice of Preliminary Objection, is to give the advisory, an opportunity of reacting to the objection and to avoid any surprise. See the cases of Chief Agbaka & 3 Ors. v. Chief Amadi & Anor. (1998) 7 S.C. (Pt.II) 18; (1998) 11 NWLR (Pt.572) 16 at 25; (1998) 7 SCNJ 367 at 370 and Ogidi (Deceased) & 7 Ors. v. Chief Igba & 5 Ors. (1999) 6 SCNJ 157. It need be borne in mind that where no objection is raised by a respondent, the court, can suo motu, draw the attention of an appellant's learned counsel to an incompetent ground of appeal. See the cases of Okoro & Ors. v. Udom & Ors. (1960) 5 FSC 162 at 164, Nta & Ors. v. Anigbo & Ors. (1972) 5 S.C. 156 at 160; (1972) 5 S.C. (Reprint) 101, Amadi v. Okoli & Ors. (1977) 7 S.C. 57 at 63, Osawaru v. Ezeruka (1978) 6-7 S.C. 135; (1978) 6-7 (Reprint) 91, Chief Agbaka v. Chief Amadi (supra) and Pfeiffor v. The Midland Railway Co. (1887) 18 QBD143, just to mention but a few.

I note however, that the respondents at the said hearing, never said a word about their objection, before the hearing of the substantive appeal. See the cases of Tiza & Anor. v. Begha (2005) 5 S.C. (Pt.II) 1; (2005) 5 SCNJ 168 at 178; (2005) 5 SCNJ 168 at 178 and Oforkire & Anor. v. Maduiké & Ors. (2003) 1 S.C. (Pt.III) 74; (2003) 5 NWLR (Pt.812) 166 at 178-179; (2003) 1 SCNJ 440, as to the duty of a respondent, to move the motion or notice, before the hearing of an appeal. But I have noted that the appellants' learned counsel, did not react to the said objection and so, in the circumstance, it is of no moment that the learned counsel for the respondents, never moved the motion or notice before the hearing of the appeal, since there is notice of it in the respondent's Brief. The result, is that the said ground 5, is accordingly struck out together with all the arguments in respect thereof notwithstanding that in the appellants' Brief, the said issues, were/are not even related specifically, to any of the grounds of appeal. Instead, there is a general or an omnibus reference to the grounds of appeal in these words:-

*"3.1. Arising from the grounds of appeal at pp. 196 -202 are the following issues."*

If I must deal with the said objection, it could be seen that the ground, refers to the court below, remitting;

*"the damages of the defendants to the High Court to be determined de novo when there was no prior finding by it, that the defendants had established negligence on the part of the plaintiffs and proved their counter-claims."*

With profound respect to the learned counsel for the appellants, this is a gross misconception of the decision of the court below and the reason for the said decision. This is because, on a calm and proper reading of the holding of that court, it shows that what it remitted to be tried de novo are the claims of the respondents in their counter-claim. Period! It must be stressed that the trial court, had found the 1st defendant/respondent, negligent and proceeded on that basis, to dismiss outright, the counter-claim of the defendants/respondents in these words, inter alia:-

*".....Consequently, all heads of claims filed by the defendants are each dismissed as lacking so basis." (sic)*

As will be shown in this judgment, before finding the respon-

dents to be negligent and therefore, dismissing their counter-claim, the learned trial Judge never evaluated the counterclaim and the evidence of the defence. In fact, he also based his decision, on the conviction of the 1st defendant/respondent in the Magistrate's Court.

B Now, coming to the merits of this appeal, it is now firmly established that in negligence cases arising from a motor accident, the burden of proof falls on the plaintiff who alleges negligence. This is because, negligence is a question of fact and not on of law and it is the duty on he who asserts it, to prove it. Failure to prove particulars of  
C negligence pleaded, is fatal to the plaintiff's case. See the cases of Alhaji Oturu & Sons Ltd. v. Idirs & Anor. (1999) 4 S.C. (Pt.II) 87; (1999) 6 NWLR (Pt.606) 330 at 342, 354-356; (1999) 4 SCNJ 156 and Ngilari v. Mothercat Ltd. (1999) 12 S.C. (Pt. II) 1; (1999) 13 NWLR (Pt.636) 626; (1999) 12 SCNJ 101. In other words, since  
D negligence, is a question of fact, each case, must be decided in the light of the facts pleaded and proved. See the case of Kalla (not Kallay) v. Jarmakaru Transport Ltd. (1961) AII NLR 747 at 783. This is why it is settled that no one case, is exactly to the other.

E In civil cases, the burden of proof, is on a party who asserts a fact, to prove the same, because and this is also settled, he who asserts, must prove. See the cases of Are v. Adisa (1967) NMLR 359, Atama v. Amu (1970) 1 S.C. 237, Obimiami Brick & Sons Nig. Ltd. v. African Continental Bank Ltd. (1992) 3 NWLR (Pt.229) 260 at  
F 309; (1992) 3 SCNJ and recently, Ibrahim v. Ojomo & 3 Ors. (2004) 1 S.C. (Pt. II) 136; (2004) 4 NWLR (Pt.862) 89; (2004) 1 SCNJ 309 at 323, International Messengers (Nig.) Ltd. v. Pegafor Industries Ltd. (2005) 5 S.C. (Pt.I) 38; (2005) 5 SCNJ 120, and many many others.

G It needs to be emphasized and this is also settled, that the mere occurrence of an accident, is not proof of negligence. Thus, in order to succeed in a claim of negligence, it is not enough to prove that there was an accident (as the appellant's case shows or portrays). The plaintiff must prove that the accident, was as a result of the  
H negligence of the defendant. Therefore, the circumstances, nature and extent of the accident, must be pleaded and evidence adduced thereon. Then, the court would be able to determine whether partially or wholly, either the plaintiff or the defendant, caused the acci-

dent. See the cases of *R. v. Tatimu* (1952) 20 NLR 60, referred to by Onu, JSC, in the *Ngilari's case* (supra) at 643 and per /gun, JSC., at P661 of the NWLR. In other words, evidence of collision, is not necessarily, proof of negligence. See also the cases of *R. v. Gorsney* (1971) 2 QB 674 CA and *Adesanya v. The State* (1978) 3 FCA 185 at 189. B

On the meaning of “burden of proof of negligence, is settled that negligence is the omission or failure to do something which a reasonable man under similar circumstances would do, or the doing of something which a reasonable man would not do. As stated above C in this judgment, generally, the onus is on the plaintiff to establish negligence. See the cases of *Odinaka & Anor. v. Moghalu* (1992) 4 NWLR (Pt.333) 1; (1992) 4 SCNJ 43 and *Nigeria Bank Plc. v. Aihaji M. Abubakar & Sons* (2004) 17 NWLR (Pt.901) 66 at 81 CA.

*“Having stated some of the principles about the requirements of proving negligence and on who lies the onus of proof, a perusal by me of the pleadings of the appellants, the evidence in respect of the pleadings and the judgment of the trial court, the inevitable conclusion by me with respect, is that they amount to a “disaster”. Firstly, in No.(i) of the Particulars of Negligence, it is pleaded in the Amended Statement of Claim that:- “the said vehicle No. LA 3906 BF was driven at speed which was excessive in the circumstances:”* D E

Speed being a relative term, there is no evidence by the 2nd defendant who testified as PW.3, of or as to what speed, the 1st F defendant/respondent, was driving before the collision. Although the 1st respondent testified on oath unchallenged, that he was driving at 45 K.M.P.H. before the collision, the 2nd appellant did not say or state at what speed he himself was driving or what speed, the 1st respondent, was driving before the collision. It is settled that high speed is not necessarily, excessive speed. This is why, whether speed was excessive, must be determined not by the number of meter per hour or by the statutory prohibitions, but by evidence of all the relevant circumstances. G

However, in his evidence at page 29 of the record, the 1st - H appellant testified inter alia, as follows:-

*“.....On my way to Maikujeri after Kagara, I was driving when the 1st defendant's vehicle was coming down a slope, Left his*

*lane and came into mine. I thought he could not go back to his lane and as I was parking my vehicle he ran into my vehicle and his vehicle went further and fell down, my vehicle did not fall down but the head got condemned.....”*

*(the underlining mine)*

B I will pause here to state that it is settled that driving on the wrong side, is not proof of negligence. See the case of Bernard Anabogu v. The State (1965) NMLR 167.

C Under cross-examination at page 30 thereof, he admitted that he was also arraigned before the Magistrate’s Court, Kagara Said he inter alia:-

*“The allegation (i.e. by the Police/prosecution) was that I refused to give way for the 1st defendant’s vehicle. I paved way for the 1st defendant, he ran into my vehicle.”*

D So, it could be seen that both in his evidence-in-chief and under cross-examination, there was no word about the 1st respondent, driving in an excessive speed. Secondly, the P.W.I - the owner of the vehicle/trailer driven by the 2nd appellant testified inter alia, as follows at page 24 of the records:-

E *“The following morning I came to Kagara and was taken to the scene of the accident. At the scene of the accident I found all the goods (i.e. his own goods) scattered on the ground and damaged. The vehicle was damaged. I proceeded to Kaduna to charter another vehicle for N6,500.00. The damaged goods I paid to their owner as compensation the sum of N8,500.00.”*

*(the underlining mine)*

At page 8 of the record, the claim of the 2nd plaintiff/appellant - P.W.I under (c) read as follows:-

G *“(c) Cost of hiring another vehicle to convey the goods from point of accident; N15,000.00.”*

H I have already noted that in his evidence in court, the cost of chartering or hiring another vehicle, is stated to be N6,500.00. More importantly, I note that in the appellant’s Brief, their learned counsel from the trial court to the court below and up to this court, has commended to this court, the evidence of the P.W.3 the 2nd appellant. I note firstly, that at page 25 of the records, the P.W.1 under cross-examination, swore inter alia, as follows:-

*"..... I paid for the damaged goods to the owners. They were Yorubas. I do not have anything to show that chartered vehicle to convey the goods to Kaduna..... The owners of the damaged plates (dishes) did not give me any receipt for the payment I made to them."*

He had earlier still under cross-examination, testified inter alia, B as follows:-

*"there was load in the vehicle at the time of the accident. I loaded it myself and found the load there, some damaged and I arranged for the conveyance of the rest to its destination."*

*(the underlining mine)* C

I have noted that the P.W.1 testified that he found all the goods were scattered on the ground and damaged and that he conveyed the remains of the goods to Kaduna. Now, at page 29 thereof, P.W.3 swore and testified inter alia, as follows:-

*"..... My vehicle did not fall down but the head got damaged. I reported the matter to the Kagara Police. The Police came to the scene, the goods which were scattered on the highway were removed from the road. The goods' were from the defendant's vehicle.....The goods in the defendant's vehicle were of variety including Egusi, Tomatoes, Onion, Maize and passengers."*

*(the underlining mine)* E

The P.W.2 - the Police, in his evidence-in-chief at page 28 of the records, testified inter alia, as follows:-

*"On the 9/12/91, I saw goods scattered they were the goods carried be defendant's vehicle. I saw the passengers of the vehicle personally.....There were also goods in Dahiru Adamu's vehicle."*

*(the underlining mine)* F

In effect, the claim of the P.W.1 of his goods being scattered G on the road and damaged, was rubbish and contradicted by his own driver - the P.W.3 who their learned counsel, commended his evidence to this court. The P.W.2 also, testified that all the said goods of the P.W.1, were and remained intact in his vehicle which never fell down. Again or rather, it was the respondents, who proved the damage to their own goods. The claim for hiring or chartering another vehicle and conveying the remaining of the goods by the P.W.1, was H not proved. The said evidence or claim, was false and bogus.

In spite of all these overwhelming evidence, the learned trial Judge, found in favour of the appellants. In summary, His Lordship's reasons for so finding, included that the 2nd appellant first reported to the Police and so, he became the complainant and yet, no statement was ever obtained from him or from any of the said passengers, the P.W.2 said he saw and who from all indications, were not injured in the respondents' vehicle said to be speeding down a slop. Again, because the 1st respondent, was convicted in the Magistrate's Court, and the 2nd appellant discharged, so the respondents must be liable. The Record of the Proceedings in the said Magistrate's Court, was tendered as Exhibit D. - See page 27 of the records. I have no doubt in my mind, that this affected and influenced the learned trial Judge's mind in out rightly dismissing the counter-claim of the respondents and also finding in favour of the appellants.

I will pause here to state on the decided authorities, that the admission of the said (Exhibit D) - the criminal proceedings in a civil trial or proceeding, was wrong. Such proceedings, was certainly inadmissible in any event. In other words. Record of Proceedings in a criminal proceeding, should not be admitted in evidence in a civil proceeding. See the cases of *Oyowole v. Kelani* 12 WACA 327, *Okunoren v. U.A.C Ltd.* 20 NLR 25 at 27, *Nwachukwu v. Egbuchu* (1990) 3 NWLR (Pt.139) 435 at 443 CA., *Gabriel Agu v. Nwakanma Atuegwu* 21 NLR 83 at 84 and *Hollington v. Newthorn & Co. Ltd.* (1943) 1 KB 587; (1943) 2 AER 35, just to mention but a few.

That exhibit D was admitted in evidence without objection is/was of no moment. This is because and this also settled in a line of decided authorities, that where inadmissible evidence has been admitted, it is the duty of the court, not to act upon it. It Is immaterial that its admission, was as a result of consent of the opposite party or that party's default in failing to take an objection at the proper time. An appellate court, has the power to reject such evidence and decide the case, on legal evidence. See the cases of *Owodoyin v. Omotosho* (1961) 1 ANLR (Pt. II) 304 at 305, *Alashe & Ors. v. Olori Ilu & Ors.* (1965) NMLR 66 at 67, *Yassin v. Barclays Bank DCO* (1968) 1 ANLR 171, 177, *Olukade v. Alade* (1976) 2 S.C. 183 at 188-189; (1976) 1 S.C (Reprint) 83; (1976) 1 ANLR 67, *Jahanmi v. Saibu* (1977) 2 S.C. 89 at 112 -1 13 and *Ikenye v. Ofunne* (1985) 2 NWLR (Pt.5) 1,

just to mention but a few.

I note that D.W.3, was not cross-examined. The reason appears at page 36 of the records - i.e. both the plaintiffs and their counsel, were absent without any reason and the trial court, permitted the continuation of the defence to proceed. The effect is that the evidence of the said D.W.3, remained unchallenged. Yet, in spite of this fact, the learned trial Judge, preemptorily, dismissed the counter-claim of the respondents. It can be seen or appreciated, why I used the word “disaster” in describing the pleadings, the evidence of the plaintiffs, and their Police witness and the said judgment of the trial court.

Finally, I note that the learned trial Judge, also relied heavily on Exhibit C - the sketch. The said exhibit, was drawn or made after four days of the said accident. See page 28 of the records. The P.W.2 stated that there were two points of impact on the sketch. No explanation is given by him of how this fact, came to be, having regard to the evidence of the 2nd appellant about the 1st respondent's vehicle running into his vehicle and falling thereafter. The P.W.2 stated that “The essence of point of impact is to show where the vehicles collided.” This evidence raises some doubts in my mind and the unanswered question by the P.W.3 and the learned trial Judge, in the sense that if there was one impact - i.e. the said collision, how come the evidence of the P.W.2, showing in the sketch, two points of impact and his further testimony that the essence of the point of impact, was to show where the vehicles collided. The P.W.2 testified that one of the point of impact, was on the P.W.3's lane, while the other, was at the centre of the road. This in my view, means that if one of the collisions took place at the centre of the road (he did not say which collision came first), the two vehicles, were therefore, at the centre of the road where they collided. The whole thing or scenario, looks or appears to me to be very absurd. The learned counsel for the appellants, can now see, the confusion and unreliability of the pleadings of his clients and the evidence in respect of the said accident. There is no wonder or surprise to me, when I read at page 153 or 185 of the records where it is stated that it was submitted by the learned counsel for the respondents/appellants in their Brief at the court below:-

*“that both parties predicated their respective case on the neg-*

*ligence of the other. The learned counsel referred to the parties pleadings and the evidence given by each of the parties, it is submitted that the cause of the accident could possibly be determined when the point of collusion as contained in Exhibit C is tested against the evidence of P.W.3 and D.W.I.....”*

B Regrettably, the learned trial Judge, even without evaluating the pleadings and the evidence of the defence witnesses, was ironically, also influenced by the said Exhibit “C” and the evidence of the P.W.2 which is most unreliable. It is significant to note that Exhibit C,  
C did not show how the accident and/or collision occurred. Indeed, the answer of the P.W.2 under “re-examination” compounded his evidence that one of the points of impact, was at the middle of the road. For said he on oath:-

*“The width of the road is 25 fit. (sic) from the point of impact  
D the centre of the road to the defendant’s side is 15 fit. (sic).”*

Apart from giving evidence to add to, vary the contents of a document which in law, is not acceptable or allowed or tolerated, this evidence is very contradictory. In any case, since there were two points of impact, so the collision, did not afterwards occur on the 2nd  
E defendant’s lane. Again, as rightly submitted in the respondents’ paragraphs 6, 18 and 6. 19 of their Brief, the pleading of the appellants is that:-

*“Sketch of the scene of the accident indicating the manner the  
F accident happened, was made statements taken and the vehicle were inspected. All shall be relied upon at the trial and are hereby pleaded.”*  
*(the underlining mine)*

As I have noted, Exhibit C did not show how the accident happened. P.W.3, an eye witness, gave evidence at variance with their  
G pleadings as I have also noted. That the distance of 160 ft from the alleged point of impact to the resultant position of the 2nd respondent’s vehicle, is stated and accepted by the learned trial Judge, as evidence of excessive speed, with respect, is grossly misconceived. This is because, the evidence of the 1st respondent as D.W.I that he  
H drove his vehicle at the speed of 45 KMPH, was not challenged by the appellants and their learned counsel. So, having regard to the P.W.2’s evidence of two points of impact, the confusion becomes more complex in my respectful view. I note that there is no evidence of any

VIO's (Vehicle Inspection Officer) inspecting any of the two vehicles and -producing a report. As I have stated, there is no statements said to be taken and/or the report of any vehicle inspection by a VIO or anybody else, produced or tendered. So, the provision of Section 149(d) of the Evidence Act, can be invoked by me in the circumstance. See the cases of *Bello v. Kassim* (1969) NMLR 148 and *Onuwaje v. Ogbeide* (1991) 3 NWLR (Pt.178) 147. B

I will now deal even briefly, with the settled law on pleadings and the evidence either in support or not given at all. It is firmly established that the essence of pleadings, is to compel the parties to define accurately and precisely, the issue upon which the case is to be contested. This is in order to avoid any element of surprise by either party. It is not to adduce evidence which goes outside the facts pleaded. See the cases of *George v. Dominion flour Mills Ltd.* (1963 ) 1 SCNLR 177, *Emegokwue v. Okadigbo* (1973) 4 S.C. 113;(1973) 4 S.C (Re- D print) 78, *Orizu v. Anyaegbunam* (1978) 5 S.C. 21, *Total (Nig.) Ltd. v. Nwako* (1978) 5 S.C. 1; (1978) 5 S.C. (Reprint) 1 and *Chief Ibanga & Ors. v. Chief Usanga & Ors.* (1982) 5 S.C. 103 at 124 & 125; (1982) 5 S.C. (Reprint) 49; (1982) 1 ANLR 88 at 99, and many E others.

One of the objects of pleadings, is to shorten proceedings by ascertaining what facts are agreed to, so that evidence need not be led to prove them. See the case of *Okparaeke Egbonu* 7 WACA 53. This is why it is also settled that a party or parties, is or are bound by F his or their pleadings. See the cases of *Adenuga v. Lagos Town Council* 13 WACA 125, *Oyediran & family v. Amoo & Family* (1970) (3) NMLR 47, *Ekpenyong & 3 Ors. v. Chief Ayi & Anor.* (1973) 5 S.C. 169; (1973) 5 S.C., (Reprint) 122, citing the case of *Property Development Ltd. v. Attorney-General of Lagos State* (1976) 7 S.C. 15 G and *National Investment and Properties Co. Ltd. v. The Thompson Organization Ltd. & Ors.* (1969) NMLR 99, just to mention but a few. Thus, a trial court, will adjudicate on an issue or issues, not H pleaded. See the cases of *Northern Brewery Ltd. v. Mohammed* (1973) (1) NMLR 19, *Okagbue & Ors. v. Janet Romaine* (1982) 5 S.C. 133 at 150-158; (1982) 5 S.C. (Reprint) 66, *Njoku & Ors. v. Eme & Ors.* (1973) 5 S.C (Reprint) 211; (1973) 3 ECSLR 253. Thus, evidence contrary to pleadings, should not be admitted, but if

the opposing party fails to object and it is admitted, the court, should not use such evidence in the judgment. See the case of Phil-Ebosie & Ors. v. Ebosie (1974) 4 ECSLR 139; Ugo v. Obiekwe (1989) 2 S.C. (Pt.11) 41; (1989) 2 SCNJ 95 at 106 and Conway v. Wimpey (1951) 2 QB 266 at 274. It need be stressed that averments in pleadings and on which no evidence is adduced, are deemed abandoned. This is because, pleadings do not constitute or amount to evidence. See , the case of Chief Uwegbe & 4 Ors. v. Attorney-General, Bendel State, Nigeria & 3 Ors. (1986) 1 NWLR (Pt.16) 303 at 31 7 CA.

In summary, a party who alleges negligence, should not only plead the act or acts of negligence but should also give specific particulars. See the case of Aku Nmecha Transport Services (Nig.) Ltd. & Anor. v. Atoloye (1993) 6 NWLR (Pt.298 233 at 248 CA. And so, in the instant case, since the evidence differed materially from the averments in the appellants' pleadings, the claim should and ought to have been dismissed by the trial court. See the cases of Kalu Njoku & Ors. v. Ukwu Eme & Ors. (1973) 5 S.C. 293; (1973) 5 S.C. (Reprint) 211, African Continental Bank Ltd. v. Northern Nigeria (1967) NMLR 231 and Gwani v. Ebule 1990) 5 NWLR (Pt. 149) 201 CA.

In fact, in the case of Dr.Ochin & 15 Ors. v. Prof. Ekpechi (2002) 5 NWLR (Pt.656) 225 at 240 CA - Tobi, JCA., (as he then was) with respect, stated humorously, inter alia, as follows:-

*"It is elementary law that parties are bound by their pleadings. This means that they must follow their pleadings blindly in the same way the blind follows his leader or lead man.....Pleadings not admitted are as good as dead unless proved in court.....Since. pleadings have neither brain or mouth to think or talk, it is the duty of the party to lead evidence on his pleadings....."*

See also the case of Lawson v. Afani Continental Co. Nig. Ltd. & Anor. (2002) 2 NWLR (Pt.252) 585 at 625 CA. This is why it is settled that facts not pleaded, go to no issue. See the case of Abdullahi v. Elayo (1993) 1 NWLR (Pt.479) 62. Again, as to the bindingness of pleadings and the failure of a trial court to evaluate evidence, see also the case of Chief Imeh & Anor v. Chief Okogba & Anor. (1993) 9 NWLR (Pt.316) 159 at 178; (1993) 12 SCNJ 57. Once the rules of pleadings are infringed or not complied with, the trial, cannot be said to be free and fair. Consequently, there will be no Fair Hearing. See

per Olatawura, *JSC.*, in the case of Ugbodume & 2 Ors. v. Rev. Abiegbe & 3 Ors. (1991) 11-12 S.C. 37; (and vice versa) (1991) 8 NWLR (Pt.209) 261 at 272; (1991) 8 NWLR (Pt.209) 261 at 272; (1991) 11 SCNJ 1.

Now, as to the said judgment of the trial court, it cannot be over emphasized and this is firmly settled, that where a trial court, has failed to evaluate or properly evaluate, the evidence before it as a result of a decision which is perverse (as in the instant case leading to this appeal), the Court of Appeal, has a duty by way of a re-hearing, to evaluate as it were, the evidence that has been adduced. See the cases of *Lions Building v. Shodipo* (1976) 12 S.C 135; (1976) 19 S.C (Reprint) 88, *Tsokwa Motors Nigeria Ltd. & Anor. v. UBN Ltd.* (1996) 3 NWLR (Pt.471) 129 at 145; (1996) 10 SCNJ 294 - per Iguh, JSC., and *Adegoke v. Adidi* (1997) 5 NWLR (Pt.242) 410 CA, just to mention but a few.

It need be borne in mind that the law is trite that for a Judge to produce a judgment which is fair and just verdict on a case put up by two or more contending parties, he must fully consider the evidence proffered by all the parties, before him, ascribe probative value to it, make definite findings of fact, apply the relevant law and come to some conclusion on the case before him. See the cases of *Woluchem v. Gudi* (1981) 5 S.C. 291; (1981) 5 S.C. (Reprint) 178, *Olufosoye v. Olorunfemi* (1989) 1 S.C. (Pt.I) 29; (1989) 1 NWLR (Pt.95) 26 at 37 and *Alhaji Leke v. Alhaji Soda & 2 Ors.* (1995) 2 NWLR (Pt.378) 432 at 44 - CA, per Umaru Abdullahi, JCA., (as he then was, now President) citing the case of *Duru & Anor. v. Nwosu & Ors.* (1989) 7 S.C. (Pt.I) 1; (1989) 4 NWLR (Pt.113) 24 at 35, 39; (1989) 7 SCNJ 154.

But what is the case here? I or one may ask. The learned trial Judge at page 60 of the records, after stating rightly, in my view inter alia, that:-

*"I find that the whole suit of claim (sic) by the plaintiff's (sic) and the counter- claims by the defendants rest on which party was negligent.*

*It is a matter of fact and law that all road users" are duly (sic) resulting to damages to the other that gives rise to an action."*  
(the underlining mine)

His Lordship proceeded in three sentences, to refer to the evidence of the P.W.2 and P.W.3 who he said alleged negligence on the part of the 1st defendant and that their evidence was corroborated by the sketch map. That this:-

B *“clearly shows that he (the 1st defendant/ respondent) was on an excessive speed which made it not possible for which to have proper control of the vehicle (sic) resulting to the accident.*  
*(the underlining mine)*

C I have noted in this judgment, that speed (or call it excessive speed) is a relative term. There is no evidence in the record, of the speed either of the drivers was driving before the collision by the appellants and P.W.2. But there is evidence by the 1st respondent, of what speed he himself, was driving and this, was not challenged. The court below, in my respectful view, was definitely right, when it held D that the appellants did not establish a case of negligence against the 1st appellant/respondent.

Worse still, the learned trial Judge continued at the same page, thus:-

E *“These finding, I believe worked on the mind of the trial court (i.e. the said Magistrate’s Court in the criminal proceedings) to find the 1st defendant guilty of dangerous driving. By the 1st defendant’s negligence he breached the duty of care he owe (sic) other road users.”*

F You see to that. It could be seen why I said that the judgment of the trial court, with respect, was/is a “disaster”. He proceeded finally to make the various awards at page 61 of the records and did not consider it necessary, fair or just, to evaluate the counterclaim and the evidence in support thereof before he concluded at once G thus:-

*“On the other hand, I find the 1st defendant to be negligent. His action gave rise to the present suit been (sic) filed against him and his employer; consequently all heads of claims filed by the defendants are each dismissed as lacking basis.” (sic).*  
H *(the underlining mine)*

It is now firmly settled that a summary or re-statement of evidence, is not the same exercise as the evaluation and findings of a trial Judge on those evidence. See the case of Chief Uwegbe & Ors.

v. The Attorney- General, Bendel State & Ors. (supra), at page 323 of the NWLR. A careful and dispassionate reading of the said judgment of the learned trial Judge, reveals and confirms that at no stage, did he ever or even properly evaluate the pleadings and/or evidence in support of the counter-claim of the respondents or even make an attempt to make some findings on any of the said claims and evidence in respect of the said counter-claim. This was/is with respect, unfair and unjust in the extreme to the respondents. B

I should have been obliged to deal with the issue of res ipsa loquitor which however or in any case, was pleaded in the alternative by the appellants. But suffice to say that this doctrine, does not arise or apply, where the cause of an accident is known. C

Finally, on the various said awards by the trial court which again are among “the disasters” having regard to the said pleadings and evidence of the appellants and their P.W.2, the power of an appellate court to assess damages, is not in doubt as there are a plethora of decided authorities in this regard. I will not go into this because, the judgment of the trial court, as regards the alleged negligence, has rightly in my respectful view, been faulted materially, by the court below. D E

In conclusion, it is from the foregoing and the reasoning and conclusion of my learned brother, Oguntade, JSC., in his leading judgment which I had, had the privilege of reading before now and I also agree with, that I too, find no merit in this appeal. I too, dismiss the appeal. I abide by the consequential order in respect of costs. F

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