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THE LEGAL IMPLICATIONS OF DUTY OF CARE

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ABSTRACT: *It is not for every careless act that a man may be held responsible in law, nor even for every careless act that causes damage. He will only be liable in negligence if he is under a legal duty to take care. It may be objected that "duty" is not confined to the law of negligence and that it is an element in every tort, because there is a legal duty not to commit assault or battery, not to commit nuisance and so forth. But all that "duty" signifies in these other torts is that you must not commit them. It throws no light on their essential ingredients. Thus it will not tell us what the plaintiff must prove in assault in order to be successful. Breach of it is not one of the internal factors which constitute these other torts. But in the tort of negligence breach of "duty" is the chief ingredient of the tort; in fact there is no other except damage to the plaintiff.*

KEYWORDS: Duty Care, Plaintiff, Law, Damage, Careless, Legal Duty, Negligence

INTRODUCTION

It is not for every careless act that a man may be held responsible in law, nor even for every careless act that causes damage. He will only be liable in negligence if he is under a legal duty to take care. It may be objected that "duty" is not confined to the law of negligence and that it is an element in every tort, because there is a legal duty not to commit assault or battery, not to commit nuisance and so forth. But all that "duty" signifies in these other torts is that you must not commit them. It throws no light on their essential ingredients. Thus it will not tell us what the plaintiff must prove in assault in order to be successful. Breach of it is not one of the internal factors which constitute these other torts. But in the tort of negligence breach of "duty" is the chief ingredient of the tort; in fact there is no other except damage to the plaintiff.

The concept of the duty of care performs two distinct functions. If the plaintiff is to succeed it must be established first that the circumstances in which his damage was caused were capable of giving rise to a duty of care and secondly, that the defendant actually owed him a duty on the particular facts of the case.

There are a number of common situations in which it is well established that a duty of care exist, for example;

> The driver of a vehicle on the road owes a duty of care to other road users, pedestrians and occupiers of premises abutting the highway to drive carefully.

The occupiers of premises owe a duty of care to lawful visitors to ensure that the premises are reasonably safe.

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The employer of a workman in a factory owes a duty of care to providing adequate equipment and a safe system of work.

A manufacturer of goods owes a duty of care to consumers to ensure that the goods are free from harmful defects.

A bailer of goods owes a duty of care to the bailor to take care of the goods entrusted to him. There is no closed list of duty-situations, and those enumerated above are merely examples and are the most commonly encountered of circumstances in which a duty of care will be held to arise. As Lord Macmillan emphasised in **Donoghue v Stevenson**[1] "The categories of negligence are never closed".

What then is negligence and duty of care

The tort of negligence may therefore be defined broadly as the breach of a legal duty to take care which results in damage undesired by the defendants to the plaintiff. There are three elements to the tort:

1. A duty of care owed by the defendant to the plaintiff.
2. Breach of that duty by the defendant ;
3. Damage to the plaintiff resulting from the breach.[2]

The first question to be determined in any action for negligence is whether the defendant owed a duty of care to the plaintiff. In general, a duty of care will be owed wherever in the circumstances it is foreseeable that if the defendant does not exercise due care, the plaintiff will be harmed. This foreseeability test was laid down by Lord Atkin in the celebrated case of **Donoghue v Stevenson**[3] and is known as "the neighbour principle"

The rule that you are to love your neighbour become in law, you must not injure your neighbour, and the lawyer's question, who is my neighbour receives a restricted reply.

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then in law is my neighbour? The answer seems to be persons who are so closely and directly

affected by my acts that I ought reasonably to have them in contemplations as being so affected when I am directing my mind to the acts or omissions which are called in question.

It is well settled that "the categories of negligence are never closed" and so it would be neither practicable nor desirable to attempt to draw up a complete list of situations in which one person owes a duty of care to another. However, there are some duty situations which are governed by special rules or which have assumed a particular prominence in the courts and in legal writings, and it is proposed at this point to examine these briefly.

[1] [1932] A.CC.562 at p619
[2] Onasanya v Western Nigeria Marketing Board [1975]5CCHCJ825 PER Gomes J; Adewale v Solawe [1972]6 CCHCJ 70 at p.73 per Adesanya J
[3] Supra

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Drivers Liability

A driver of a vehicle on the road is under a duty to take proper care not to cause damage to other road-users[4] including drivers and passengers on other vehicles, cyclists and pedestrians, and to the property of others. In order to fulfill this duty he should, for example, keep a proper look out,[5] observe traffic rules and signals avoid excessive speed[6] and avoid driving under the influence of alcohol[7] or drugs. It is a question of fact in each case as to whether the defendant has observed the standard of care required of him in the particular circumstances.[8]

In **Osuji v Nigerian Breweries Ltd[9]** negligence was presumed where the defendant's moving vehicle collided with the plaintiff's stationary one in broad daylight.

Also in **Bankole v United American Co Ltd[10]** the defendant's lorry was parked on the road at night without rear lights in consequence was held liable in negligence.

Also in **Sanyalu v Farinbe[11]** the defendant's vehicle came suddenly from a side road and collided with the Plaintiff's vehicle which was proceeding along a main road.The defendants was liable to negligence.

It is to be noted that in all these cases the defendants owed a duty of care to the plaintiff.

Occupiers Liability

The occupiers of premises owe a duty of care to lawful visitors to ensure that the premises are reasonably safe. An occupier may be defined as a person having control or possession of a premise to put him under a duty of care towards who came lawfully upon the premises. He is usually the defendant. He does not have to be the owner of the property.

In the case of **Wheat v Lacon Co Ltd[12]**, Lord Denning said that if a person has any degree of control of premises he is therefore an occupier. He went further to say that "the foundation of occupiers" liability is occupational control, that is to say control associated with and arising from presence in and use of activity in the premises.

It is to be noted that the owner of a property if in possession will be deemed to be the occupier, but if he is out of possession, the tenant and not the owner will be the occupier.

Premises is defined very widely to include not only land and buildings thereon but also "any fixed or movable structure including any vessel, vehicle or aircraft".[13]

[4] Bouhill v Young[1943]A.C.92
[5] Opakunte v Idowu [1975]2 CCHCJ 291
[6] Laniyi v Abidogun [1972] 2 U.I.L.R. 284 at p. 285
[7] Owens v Brammell [1971] Q.B.859
[8] Tidy v Battman [1934] 1 K.B.319 AT P.322; Morris v Luton Corporation[1946]K.B 144 at p. 155
[9] [1972]3 E.C.S.L.R. 768; Okuneye v Lagos City Council [1973] 2 CCH38;Onasanya v Western Nigeria Marketing Board
[10] [1939]15NL.R.41;Adams v Ibadan District Council[1961]W.N.L.R.67
[11] [1978]1 L.R.N.327
[12] [1966]A.C.522at P. 589 PER Lord Pearson
[13] Section 7 930 (a) Law Reform (Torts) Law

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The next question is: who is a visitor?

Section 7 (2) Law Reform (Torts) Law 1961[14] provides that "visitors" are those persons who would, at common law, have been treated as invitees or licensees. Thus, in effect, any person who enters lawfully, i.e. not as a trespasser, will be a visitor for the purpose of the statute.

It is to be noted that where the plaintiff enters under the express permission or invitation of the occupier there is no difficulty in holding that he is a visitor. Problems sometimes arise, however in determining whether a plaintiff had implied permission to enter. It is well established that any person who enters the premises in order to communicate with the occupier will be regarded as having implied permission to enter, unless he knows or ought to know that his entry is forbidden.[15]

Duty Owned to Visitors

The duty of care owed to all visitors is defined by Section 8(2) of the Law Reform Torts Law 1961 as "a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there". It is a question of fact in each case as to whether the occupier had taken reasonable safety precautions.

As we have noted a person with express permission or invitation to enter is clearly a visitor and also a person can also have an implied permission to enter.

In **Robson v Hallelt[16]** three police officers making enquiries regarding an offence which had been committed came to the house where the defendant D and T live. Two of the officers knocked on the door and shortly after Sergeant N was permitted to enter the house but not the other two officers who remained outside. When the father of the defendants saw Sergeant N, he ordered him to leave the premises but before he could do so, T jumped upon him and

beat him up mercilessly. The other two officers came to the aid of Sergeant N and a big fight developed. D who was at the back of the house at the time saw the fighting, came and joined in and kicked P and N while D and T punched F. D was convicted of assaulting N, P and F in the execution of their duty. T was also convicted for assaulting P in the execution of his duty. On appeal it was held that an occupier of a dwelling house gave an implied licence to any member of the public coming on lawful business to come through the gate, knock on the door and be admitted and so the police officers were entitled to do what they did. Secondly that the police officer who was lawfully allowed entry into the premises and whose implied licence has not been revoked was acting in the execution of his duty. Thirdly, that when a licence was revoked as a result of which something has to be done by the licencee, a reasonable time must be implied in which he could do it.

It is to be noted that the burden of proving implied permission rests on the plaintiff. He must prove that the defendant's conduct showed that he permitted entry.

An occupier is entitled to expect that a person in the exercise of his calling will appreciate and guard against any special risks ordinarily incident to that calling[17]. Thus where there is a

[14] Robson v. Hallet [1967]Q.B.939
[15] Law Reform 9Torts) Law
[16] [1967] Q.B.939
[17] Glasgow Corporation v Tylor [1922] 1 A.C.44

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danger on the premises which is known or ought to have been known to the occupier, the occupier must warn the visitor of the danger by putting up sufficient warning terms and notices where necessary. Such a warning must be sufficient to enable visitors to be reasonably safe in the sense that it must be apparent for anybody coming to the land.

Duty to Independent Contractors

The occupier is entitled to assume that a skilled professional worker doing a job in the premises such as a window cleaner or an electrician will exercise sufficient care for his own safety when carrying out his work and will guard against dangers normally associated with such work.

In the case of **Roles v Nathan**[18] two chimney sweeps were killed by carbon monoxide while attempting to seal up a sweep hole in the chimney of a coldfire boiler. They sued the occupiers for failing to warn them of the danger but it was held that the occupier was not liable for their death because this was one of the danger which arise in the profession of chimney sweeps and the sweeps ought to have known it and guard against it. It was also held that the result might have been different if for example the stairs leading to the chimney were defective and the sweeps were injured when it gave way.

In **General Cleaning Contractors v Christmas**[19] a window cleaner was employed and injured by a window while he was cleaning it. He brought an action claiming that the occupier was liable for not taken care to see that his premises did not cause injury to him. It was held that the cleaner as a trained workman should have exercised reasonable care against the hazard of his profession.

Duty to Child Visitors

Note that when we talk of visitors we mean both adult and child visitors.

Sections 8(3) (a) of the Law Reforms (Torts) Law 1961 says that an occupier must be prepared for children to be less careful than adults so that what is not a danger to an adult may be so to a child.

Occupiers should therefore not leave unguarded dangerous things or objects which may constitute a temptation or an allurement to a child upon which a child may injure himself.

In the case of **Glassgow Corporation v Taylor**[20] a child of seven years allegedly died from eating poisonous brightly coloured berries which he picked from a public garden under the control of the corporation. The corporation knew of the poisonous nature of these fruits but did not fence it up or put warning notices in spite of its obvious attraction to children. It was held that these facts disclosed a good cause of action.[21]

Liability to Trespassers

The liability of an occupier to trespassers on his land falls outside the Law Reform (Torts) Act and remains governed by common law principles. Until 1972, the rule was that an

[18] [1963] 1 W.L.R.117
[19] [1953] A.C. 180
[20] [1922] 1 A.C.44
[21] Herrington v British Railway [1972] A.C.877

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occupier owed no duty to trespassers other than a duty to refrain from deliberately or recklessly causing harm to them.[22]

A trespasser is a person who goes on land without permission or invitation and his presence is unknown to the occupier and if known would be objected to.

In the case of **Addie v Dumbreck**[23] the House of Lords stated that the relationship of the occupier to the trespasser is with regard to activities being carried on the land. It was stated that an occupier who is carrying on dangerous activities on the land as opposed to the static condition of the land owed to the trespasser a duty not to act in reckless disregard of the trespasser's safety and also not to inflict damage intentionally on the trespasser known to be present.

In **Bird v Hallbrook**[24] the Defendant (occupier) kept spring guns in his garden to protect it from trespassers, the plaintiff in ignorance of the danger existing trespassed in the garden to capture his fowl and was injured by the discharge of the gun. He was held to have a good cause of action. If the trespasser is aware of the danger he may be excluded from a cause of action.

A new development and change in attitude to trespassers by the court really came with the decision in **Herrington v British Railway Board.**[25] Here the defendant owned an electric railway line which was fenced off from a field where

where children roughly played. The defendant knew that the fence was broken and dilapidated and that children played on the field but did not repair the fence. The plaintiff a six year old walked over the broken fence trespassed on the railway track and was severely burnt by the life line. The House of Lords held that the defendant was liable and laid down that, whereas an occupier does not owe a duty of care to trespasser, he does owe a duty of "common humanity" or a duty to act "in accordance with common standard of civilized behaviour". This, according to Lord Pearson, means that "if the presence of the trespasser is known to or reasonably to be anticipated by the occupier, then the occupier has a duty to the trespasser, but it is a lower and less onerous duty than the one which the occupier owes a lawful visitor….. It is normally sufficient for the occupier to make reasonable endeavours to keep out or chase off the potential or actual intruder who is likely to be or who is in a dangerous situation. The erection and maintenance of suitable notice boards or fencing, or both, or the giving of suitable oral warnings, or the practice of chasing away trespassing children, will usually constitute reasonable endeavours to deter him, insists on trespassing or continuing his trespass, he must take the condition of the land and the operations on the land as he finds them, and cannot normally hold the occupier of the land or anyone but himself responsible for injuries resulting from the trespass, which is his own wrong doing."[26]

Duty to Child Trespasser

As was said earlier, child trespassers are not covered by the Act. Before the Herrington's case, the only duty owed to a child trespasser was not to intentionally inflict injury/harm on

[22] Addie v Drum breck [1929]A.C.358
[23] [1828] 4 Bing 628
[24] [1828]4 Bing 628
[25] [1972]A.C.877
[26] See A.C. Billings & Sons Ltd v Riden [1958]A.C.240

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him or act in reckless disregard of his safety. To mitigate the harshness of the rule, the court tried to imply an invitation to the child whenever there is an object in the land which may be considered to be an allurement. This means that where such an invitation is implied, such a child becomes a visitor and not a trespasser. So before the Herrington's case child trespasser received the same harsh rules as adult trespassers apart from the above implied invitation. But since the decision in the Herrington's case the duty owed to both the child and adult trespassers is that of common humanity. But the case recognized that the precaution sufficient to protect an adult may not be sufficient to protect a child. Therefore when the presence of children is extremely likely, the occupier who is engaged on dangerous activities on his land or on whose land there are dangerous objects or hidden dangers may be required to provide an effective obstacles to the approach of children or to give adequate warning which will be understood by even the youngest unaccompanied child but every case will depend on its facts.

In **Pannett v P. McGuinnes & Co Ltd**[27] Lord Denning M.R. said that "A wandering child or straying adults stand in a different position from a poacher or a burglar. You may expect a child when you may not expect a burglar."

Employer's liability

The liability of employers for injury sustained by their employees derives from both the common law and statutory provisions. The employers duty at common law was summed up in the case of **Wilsons & Clyde Coal Co Ltd v English**[28] an employee brought an action against his employer in respect of personal injuries suffered as a result of an allegedly unsafe system of work. The court held that damages could be recovered. Lord Wright, stated thus "this obligation is fulfilled by the exercise of due care and skill. But it is not fulfilled by entrusting its fulfillment to employees, even though selected with due care and skill. The obligation is threefold – the provision of a competent staff of men, adequate material and a proper system and effective supervision. It is however, important to note that this duty to provide safety at the work place is a "personal" duty on the employer and therefore not to be delegated".

I. Competent Staff: an employer has an obligation to ensure that the people he employs are reasonably competent. Otherwise, if an injury is suffered by an employee as a consequence of incompetence of another employee, the employer may be held liable, and this apart from any question of vicarious liability.

In **Hudson v Ridge Manufacturing Co. Ltd**[29] an employee was injured by the joke of a fellow worker who had indulged for four years at the expense of the plaintiff and other workers. The employers knew about the worker's conduct and had frequently rebuked and warned the offending worker that someone might get hurt one day. In an action by the injured employee for damages against the company, the company/employers were held liable for the breach of their common law duty to provide competent workmen. The court clearly stated thus, "if the system of working is found, in practice to beset with dangers, it is the duty of the employers to evolve a reasonable safe system of working so as to obviate those dangers, and upon principle it seems that if, in fact, a fellow workman is not merely incompetent but by

[27] [1972]2 QB 599 at p. 601
[28] [1938]A.C.57
[29] [1957] 2 Q.B 348

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his habitual conduct, is likely to prove a source of danger to his fellow employees, a duty lies fairly and squarely on the employers to remove that source of danger".[30]

II. Safe And Suitable Place And Tools Of Work: In addition to the provision of a competent staff the employer is also under a duty to the employee to supply proper tools, maintain good plant and premise. The question of liability will depend, however, on the facts of each particular case. At common law, an employer will be taken to have discharged his duty in this regard if he buys his tools from reputable suppliers or where unknowingly the tools are not made to his specifications.

In **Davie v New Merton Board Mills Ltd[31]** a drift ordered from a reputable firm broke as a result of wrong heating and injured the Plaintiff's eye and this fault in the devise was unknown to the buyers. In reversing the judgement of the Court of Appeal which had earlier upheld the judgement of the High Court as per Ashworth J, to the effect that the company was liable, the House of Lords held the view that once it was established that the employers purchased from standard tool dealers, they had discharged their duty and could not be held accountable for any defect in the tools without further evidence of negligence.

However, even when it is established that the tools were purchased from a reputable dealer, once the employer has knowledge of the dangerous character of the tools or plants he will be liable to his servant/employee.

In **Taylor v Rover Co Ltd[32]** the plaintiff lost his eye when the top of a chisel flew off. Four weeks before this, a piece of the top of the same chisel had broken off and slightly injured another employee. The court held that the company was liable for breach of its duty and took the view that the company had notice of the danger because of the previous accident.[33]

III. Supervision Of The Management Or System Of Work:- It is good and necessary for the employer to provide a competent staff and to supply proper tools, maintain good plant and good premises. But these are not sufficient. The employer is also under the management or system of work. Having employed a "competent" worker the employer must ensure that the

subsequent conduct of the worker does not cause injury to his fellow workmen. An employer will not have discharged his duty to provide a safe system of work unless he gives his workers proper instructions and reasonable supervision.

In **Western Nigeria Trading Company Ltd v Busari Ajao[34]**, Fatai-Williams J (as he then was) held that an employer is under an obligation not only to provide safety devices but also to give strict instructions followed by reasonable supervision.

Manufacturers Liability

A manufacturer of goods owes a duty of care to consumers to ensure that the goods are free from harmful defects.

[30] Vemess v Dyson Bell & Co [1965] C.L.Y.2691; Butle v Fife Coal Co [1912] A.C.14
[31] [1959]A.C.604
[32] [1966] 1 W.L.R.149
[33] Pearce v Round Oak Stell Works Ltd [1969] 1 W.L.R.595; Dave v New Merton Board Mills [1959] A.C.743
[34] [1965]N.M.L.R.178

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It was established in the leading case of **Donoghue v Stevenson**[35] that a manufacturer of chattel owes a duty of care to the ultimate consumer thereof, and that he will be liable in negligence if the consumer is harmed by some defect in the chattel. The full rule was expressed thus[36]

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

In **Donoghue v Stevenson**[37] it was held that the defendants, who were manufacturers of soft drinks, owed a duty of care to the plaintiff, who allegedly suffered illness after drinking the contents of a bottle of their ginger beer which contained the decomposed remains of a snail. Before this case was decided, it had been thought that the absence of any contractual relationship between manufacturer and consumer was fatal to a claim in negligence, but Donoghue's case corrected this error.

A remarkably similar case which came before Kassim J in the High Court of Lagos State is **Osemobor v Niger Biscuit Co. Ltd**[38]. Here, the plaintiff purchased at a supermarket a packet of biscuit manufactured and packed by the defendants. In the course of chewing a biscuit she felt something hard in her mouth, which turned out to be a decayed tooth. As a result she become ill and required medical attention. Holding the defendants liable in negligence, the learned judge said:

> I am satisfied that there was no probability of an intermediate examination of the biscuits before they reached the plaintiff, and I find myself unable to uphold the submission of the learned counsel for the defendants that she was bound to look at the biscuits before she put them in her mouth…. As person who manufactures goods, which he intends to be used or consumed by others, he is under a duty to take reasonable care in their manufacture, so that they can be used or consumed in the manner intended, without causing physical damages to person or property.

In the case of **Grant v Australian Knitting Mills Ltd**[39] the privy council held that the defendant manufacturers were liable to the purchaser of the underwear which they had manufactured and which contained a chemical that gave the plaintiff a skin disease when she wore them.[40]

[35] Supra
[36] Ibid at P. 599
[37] Ibid
[38] [1973] 7C.C.H.C.J.71
[39] [1936] a.c.85, 101-102
[40] Greene v Chelsea B.C. [1954] 2 Q.B. 127,138,per Dernning l.j.;A.C. Billings & Sons Ltd v Riden [1958]

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Bailee's Liability

A bailee of goods owes a duty of care to the bailor to take proper care of the goods entrusted to his charge, whether, the bailment is for reward or gratuitous[41], whether for the benefit of the bailor or the bailee and irrespective of any contract between the parties.

The most significant aspect of the duty of care in cases of bailment is that, contrary to the normal rule, the onus is on the bailee to prove that any loss or damage to the goods bailed was not due to his negligence. This rule is said to be based on the notions (a) that the bailee should have superior knowledge of what happened to the goods whilst in his care; (b) that it is most probable that the bailee was responsible for the loss or damage and (c) that the judicial policy is to encourage the utmost care on the bailee's part under threat of the strictest liability.

The rule was comprehensively explained by the Supreme Court in **Panalpina World Transport Nigeria Ltd v Wariboko[42]**. The plaintiff agreed to carry

four packages containing defendant's personal effects from Zaria to Port Harcourt. The packages were handed over to the plaintiff at Zaria and carriage charge paid, but they were lost in transit and were never delivered to the defendant. The trial court found the plaintiff liable in negligence and the Supreme Court upheld that finding.

CONCLUSION

We have seen that in all these cases mentioned above a duty of care exists. It is impossible therefore always to keep separate from one another questions of the existence of a duty and questions of the breach of that duty. The foresight of the reasonable man is of critical importance to both questions. In other words, once the act in question is foreseeable by a reasonable man and the person in question fails to avert it, he will be liable for any consequences that might arise. It is to be noted that there are certain circumstances where an individual is liable in tort even though he could not foresee the consequences of his act. It is to be noted

that there are also circumstances where although a defendant would have foreseen the consequences nevertheless he is not liable because there is no duty of care. It is suggested that adequate legislation should be brought in place to streamline the above situations for the good of the society because there is no day that passes without the existence of duty of care.

[41] Holts Transport Ltd v Chellarams & Sons (Nigeria) Ltd [1973] 3 E.C.S.I.R.352 at p 358
[42] [1975 5 E.C.S.L.R.460; Oghogho v Karunwi [1957]L.I.R.22;Ebagbe v Palm Line [1958] L.L.R.29;Intercontra Ltd v Co-operative Supply Association Ltd [1969] 1 All N.L.R.112;Ogugua v Armel's Transport Ltd. [1974] 3 S.C.139 at p.144

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