

SUPREME COURT OF NIGERIA
7TH APRIL, 2000. SC. 104/1994
CORAM:- S. M. A. BELGORE, M. E. OGUNDARE, U.
MOHAMMED, A. I. IGUH, S. O. UWAIFO, JJSC

1. BENJAMIN OBASUYI	.....	APPELLANTS
2. NIGER CONSTRUCTION LTD		
AND		
BUSINESS VENTURES LTD	.....	RESPONDENT

DAMAGES - Special damages - Mitigation of loss - Suffered due to the negligence of the defendant - It is always expected of the plaintiff to mitigate the loss.

DAMAGES - Special damages - Unjustified award - Claim for 262 days for loss of use - Is most unreasonable - And the award of damages for that is unjustified.

FACTS

The plaintiff/respondent sued the defendant/appellants claiming a total sum of N1,500,000.00 being special and general damages for negligence and interest. The plaintiff's Mercedes Benz trailer tanker was being driven on the right hand side of Benin - Auchi Express Road by a driver of the plaintiff when the first defendant who is the servant of the second defendant in the course of his employment so negligently drove the second defendant's Mercedes Benz trailer tipper that the said vehicle, left its side of the road and collided with the plaintiffs vehicle. The Police visited the scene of the accident to investigate the accident. Thereafter the plaintiff's vehicle was towed to the Police post at Auchi. The vehicle was subsequently towed to the garage of the Leventis Motors, Benin City for repairs where it remained until the trial of the action.

The plaintiff had at that time 16 other tankers in its fleet being used for the supply of kerosene. He claimed N372,778.06 special damages for cost of repairs and loss of use of vehicle for 439 days at N2,000

per day amounting to N878,000.00. The action proceeded to trial at the conclusion of which the learned trial judge found the defendants liable in negligence and awarded the plaintiff damages for cost of spare parts and labours and loss of use of vehicle as claimed. The defendants appealed unsuccessfully to the Court of Appeal, Benin Division. They have now further appealed to the Supreme Court.

ISSUE FOR DETERMINATION

"Whether the Respondent could have mitigated her loss by taking steps herself much earlier than 31/5/90 or date of judgment to send the vehicle for repairs."

HELD (Unanimously allowing the appeal in part per lead judgment of **BELGORE JSC**)

Special damages - Mitigation of loss

1. In cases of this nature it is always expected of Plaintiff to mitigate the loss suffered due to negligence of the defendant. It is incumbent upon him to get such damaged vehicles repaired at the earliest opportunity. This is the requirement of the law all over the world. (p. 1182 B)

Special damages - Unjustified award

2. The claim for 262 days of loss of use is most unreasonable and the award of damages for that is unjustified. (See for persuasive effect the cases of British Westinghouse Electric Company Ltd. vs Underground Railways Company of London Ltd. (1912) AC. 673. (p. 1182 E)

NOTABLE POINTS OF INTEREST

OGUNDARE JSC

1. How to prove special damages

The law on the award of special damages is clear. And that is, that the onus is on the Plaintiff to prove special damages strictly - Faber v. Basma, 14 WACA 140; Agunwa v. Onukwe (1962) 1 All NLR 537, (1962) ANLR. 531 In order to discharge this burden the plaintiff must show by credible evidence that he is indeed entitled to the award of special damages - Oladehin v. C. T. M. L (1978) 2 SC 23. That is, the evidence adduced by

the plaintiff must show the same particularity as is necessary to its pleading - Imana v. Robinson (1979) 3-4 SC1 at p. 23 where Aniagolu JSC delivering the judgment of this Court said:

"It should therefore normally consist of evidence of particular losses which are exactly known or accurately measured before the trial. Strict proof does not mean unusual proof, as the play of appellant's counsel on those words tended to suggest, but simply implies that 'a plaintiff who has the advantage of being able to base his claim upon a precise calculation must give the defendant access to the facts which make such calculation possible.'"

See also Kurubo v. Zach Motion Nig. Ltd. (1992) 5 NWLR 102. Unchallenged evidence, without more, can constitute sufficient proof of special damage - Adel Boshali v. Allied Commercial Exporters Ltd. (1961) All NLR 917. (p. 1185 E)

2. Duty to mitigate damages

It is settled that a plaintiff is under a duty to mitigate his damages and any neglect by him in this respect is a bar to a claim. The question what is reasonable for a plaintiff to do in mitigation of his damages is however a question of fact, and not of law, in the circumstances of each case and the burden is on the defendant to show that the plaintiff failed to mitigate his loss - Sowole v. Nigersol Construction (1970) NCLR 435. See also Onwuka v. Omogui (supra) and the cases cited therein. (p. 1186 F)

3. Explanation by counsel is not evidence

In my respectful view, their Lordships of the Court below, with respect to them, were wrong to have given consideration to the explanation given by Chief Ihensekhien for the failure of the Plaintiff to mitigate its loss. That explanation was no evidence and should not have been acted upon - see Salawu Yoye v. Lawani Olubode (1974) 10 SC. 209 at 215-216. (p. 1191 D)

IGUHJSC

4. Characteristics of special damages

It is elementary that special damages are such that the law will not presume to flow or infer from the nature of the act or breach of duty complained of by the plaintiff as a matter of course. They are exceptional in their character and connote specific items of loss which the plaintiff alleges are the result of the defendant's act or breach of duty complained of. Unlike general damages, special damages must be claimed specially and strictly proved and the court is not entitled to make its own estimate of the same. See Abdul Jaber v. Mohammed Basma (1952) 14 W.A.C.A. 140. (p. 1196 C)

5. Distinction between special damages and general damages

On the broad distinction between a claim in special damages as against one in general damages, Lord Macnaghten in the English case of Stroms Bruks Aktie Bolag v. Hutchinson (1905) A. C. 515 (H. L.) commented thus:-

"General damages, as I understand the term, are such as the law will presume to be the direct, natural or probable consequence of the act complained of. Special damages on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character and, therefore, they must be claimed specially and proved strictly."

I respectfully agree with the above view of Lord Macnaghten and fully endorse the same. (p. 1196 F)

6. The evidential value of a spurious document

I have given a most careful consideration to the evidence of P.W.7 and Exhibit D on which the plaintiff based its claim for loss of use and must confess that it is certainly unclear how the said P.W.7 arrived at the figure of N2000.00 he testified to as representing the plaintiff's loss of use in respect of its Trailer. But more importantly is the fact that a close examination of Exhibit D leaves one in no doubt that the document, in the face of the evidence surrounding it, cannot by any means be said to be

credit worthy or reliable. The reasons for arriving at this conclusion are fully contained in the judgments of my learned brothers, Belgore, Ogundare and Uwaifo, JJ.S.C. and with which I completely agree. The document, Exhibit D, in the face of those reasons can hardly be said to be reliable or authentic. It is a matter of great regret that both courts below were B unable to advert their minds to these grave discrepancies surrounding Exhibits D and the evidence on its preparation. I entertain no doubt that had they adverted their minds to these, they would have discovered that the said Exhibit D was spurious and would have disallowed the plaintiff's C claim of N2000.00 per diem as loss of use in respect of the Mercedes Benz Trailer. I feel bound to state that I regard the sum of N2000.00 per diem awarded to the plaintiff for loss of use as completely unsatisfactory. Remembering, as I do, that special damages must be strictly proved. (p. 1199 F) D

UWAIFO.JSC

7. The essence of pleading special damages

One of the purposes of pleading special damages in support of compensation claimed is so that the defendant will know the case he has to meet, and if he wishes to settle he may be able to compute a payment. That is why it is said that a plaintiff has an obligation to plead and particularize any item of damage which represents out-of-pocket expenses, or loss of F earnings (as in the present case), incurred prior to the trial, and which is capable of substantially exact calculation: see B.E.O.O. Industries (Nigeria) Ltd. v. Maduakor & anor (1975) 12 S.C. 91 at 108 approving the observation of Lord Donovan in Perestrello E. Companhia Limitada v. United Paint co. Ltd. (1969) 1 WLR 570 at 579. (p. 1202 H) G

8. Where the evidence led in support of special damages is incredible

It follows that not only must special damages of the kind in the present case be carefully particularized, the evidence in support of them must be H credible. This is strict proof. It is true that this court has held that the strict proof required to establish special damages means no more than the evidence which shows the same particularity as is necessary for their

pleading; that is to say, evidence that makes precise calculation possible, and not that unusual proof is imposed upon such plaintiff: See Imana v. Robinson (1979) NSCC (vol. 12) 1 at 11. But when the claim for special damages has been carefully particularized and it turns out that the evidence led in support is not only suspect but clearly incredible, but claim falls to the ground irretrievably. This was what happened in the present case. (p. 1203 B)

REPRESENTATION

C Chief Ojo Esemokhai, with O. Mudiaga-Odje Esq. for the appellants
Chief C. O. Ihensekhien SAN, with D. O. Okoh Esq., A. I. Idigbe Esq. and C. O. Ihensekhien Jr. Esq. for the respondent

CASES REFERRED TO

Oladehin v. C. T. M. L (1978) 2 SC 23.
Imana v. Robinson (1979) 3-4 SC at p. 23
Kurubo v. Zach Motion Nig. Ltd. (1992) 5 NWLR 102.
E Adel Boshali v. Allied Commercial Exporters Ltd. (1961) All NLR 917
Olulaja v. Haddad (1973) 11 SC1
NMSL v. Afolabi (1978) 2 SC. 79
Onwuka v. Omogui (1992) 3 NWLR 393; (1992) SCNJ 98
F Sowole v. Nigersol Construction (1970) NCLR 435
Yoye v. Olubode (1974) 10 SC. 209 at 215-216
Jaber v. Basma (1952) 14 W.A.C.A. 140
Dumez (Nigeria) Ltd. v. Ogboli (1972) 1 All N.L.R. 241
Stroms Bruks Aktie Bolag v. Hutchinson (1905) A. C. 515 (H. L.)

G

LEAD JUDGMENT BY BELGORE JSC

The appellants were defendants at the trial High Court of former Bendel State. The case now on appeal from Court of Appeal, Benin Division arose out of an accident involving a trailer tipper of Mercedes Benz make of the appellants and Mercedes Benz make trailer tanker of the respondent. That was on 29th day of December 1988 along Benin - Auch highway. The Police visited the scene of the accident on 30th day

of December 1988 to investigate the accident. Thereafter the respondent's trailer tanker was towed to the Police post at Auchi. The respondent's vehicle, travelling along Benin-Auchi road, on its right side of the road, was suddenly ran into by appellants' vehicle that left its own lane. At trial Court the appellants were found liable. Court of Appeal never disturbed B the issue of negligence leading to the accident as found by the trial Court. However, the contention of the appellants is that the lower Court which upheld the trial Court's award of damages was in error just as the trial Court was. Thus the issue of liability for the accident is not contested C before the Supreme Court. In the statement of claim the respondent claimed under "Particulars of Special Damage" as follows:-

- (i) Estimated cost of Damaged spare parts 362, 578.00
- (ii) Estimated cost of labour and sundry charges 10,200.06
- (iii) Loss of use from

29/12/88 to 31/10/89 - 306 days less

44 Sundays = 262

X N2,000.00 = 524,000.06
896,778.06

(iv) Loss of use at the rate of N2000 00 per day from 1st November 1989 up to the date of repairs or date of judgment to be calculated. And the Plaintiff claims from the defendants special damages limited to N1,500,000.00"

The respondent made two subsequent amendments to the statement of claim under "Particulars of Special Damage" for "loss of use from 29/12/88 to 31/3/90 less Sundays and Public Holidays, 387 days at the rate of N2000 00 per day = N774,000.00". At the trial, P W 7 gave evidence; G the only evidence of loss of use was inter alia, as follows:-

"I claim N2000 00 per day from 29/12/88 to the date of judgment. I also claim N372,578,06 cost of repairs etc as per Exhibit 'A' "

In its judgment, trial court found for the respondent and awarded him

(a) Cost of spare parts and Labour N372,778.06

(b) Loss of use of vehicle from 29/12/88 to 31/5/90 Less Sundays and Public Holidays, 439 days at N2000 per day =

N878,000.00

Total N1,250,778. 06

Against the decision of the trial Court an appeal was lodged at the Court of Appeal , Benin Division, which dismissed the appeal on all the issues.

B Thus the appeal to this Court.

Before this Court, on the grounds of appeal filed the following issues were raised by the appellant:-

C (a) *"Can explanation given by counsel in his brief which explanation do (sic) not form part of the evidence and/or pleading be Sufficient to explain why a Plaintiff has not mitigated his loss or was the Court of Appeal right to hold that the explanation contained in the brief of the Respondents's counsel on why the Plaintiff did not mitigate her loss the same as oral evidence to show that the Plaintiff mitigated her*
D *loss?*

(b) *Was the Court of Appeal right to have affirmed the award of N2,000.00 per day from 29/12/88 to 31/5/90 in view of the pleading and evidence in the printed record of Appeal?*

E (c) *Was the use of Exhibit "D" by the lower Court which was affirmed by the Court of Appeal in calculating the loss of use proper in view of the various dates of preparation ascribed to Exhibit "D" and the evidence of P.W. 4 who tendered the said Exhibit "D".*

F (d) *From a calm view of the entire evidence contained in the printed records of Appeal, was the Plaintiff entitled to the damages awarded her for loss of use.*

OR

G *From a calm view of the entire evidence in the printed record of Appeal, has the Respondent succeeded in proving her case to entitle her to the amount awarded her which amount was affirmed by the Court of Appeal?*

(e) *Did the Plaintiff/Respondent mitigate her loss?"*.

H It must be pointed out that the issues before this Court are as to award of damages; not as to liability of negligence which is conceded. The vehicle in the accident belonging to the respondent, Business Ventures Limited, was extensively damaged as a result of the accident caused

by negligence of 1st Defendants. The evidence of Vehicle Inspection Officer (PW 3) and of the Engineer from Leventis Limited (PW 2) who valued cost of repairs is clear as to what was necessary to restore the vehicle to its mechanical state as of before the accident. To put the vehicle back on the road as roadworthy vehicle the Leventis Limited B needed N372,778.06 as pleaded and testified upon. This will be cost of spare parts, sundry supplies and labour. There was evidence that costs of materials and labour escalated due to the general inflationary trend in Nigeria's economy. But has the respondent done anything to mitigate its C loss? Why has the Company left the vehicle unrepaired? If the vehicle had been repaired promptly there would have been no loss of earnings claimed and cost of repairs would not escalate. Learned Justice of Appeal in the Court below held as follows in affirming the decision of trial D High Court decision:

"I have carefully considered the two arguments and the explanation given on behalf of Respondent for failing to repair the vehicle immediately after the accident on a reasonable time thereafter, and that there is no doubt that the plaintiff is under duty to minimize or mitigate E his loss. I must confess that after first reading the appellants' brief, I was minded to hold that the Respondents had failed to minimize their loss. But after reading the explanation given by the Respondent in their brief it appears that a reasonable explanation has been given why the vehicle F could not be repaired before the matter went for trial at the High Court".

Learned Justice of Appeal never set out the explanation for not considering failure to mitigate loss. It was clearly in evidence in the printed record that the respondent had at the time of the accident sixteen G other vehicles in the same business of carrying petroleum products from Pipelines and Products Marketing Company Ltd. and could easily have adjusted or even raised the funds for immediate repair to the vehicle. From evidence it is also clear that the entire Exhibit "D" is a spurious H document and the courts below never adverted to it. We pointed out this to the parties and there was no reply. The witness who tendered the document, PW 4, an accountant testified that he prepared Exhibit "D" on 15/3/90, the very day he was testifying, but at page 7 of the Exhibit

where he appended his signature the date is "2nd April 1990". Those discrepancies have not been explained. PW 4's report, Exhibit "D" is based on the alleged loss of income as in Exhibits B - B1 B58 being alleged earnings from October to December 1988. Exhibit D is therefore unreliable and is of no use in this matter.

B

In cases of this nature it is always expected of Plaintiff to mitigate the loss suffered due to negligence of the defendant. It is incumbent upon him to get such damaged vehicles repaired at the earliest opportunity. This is the requirement of the law all over the

C

world. It is not confined to Common law, and it is based on commonsense and reasonableness. To allow a party that is a victim of negligence time almost in perpetuity to leave his damaged object unrepaired and expect damages to be calculated against years rather than a few days is giving a

D

blank cheque to rake in undeserved compensation. The Respondent had got many vehicles, sixteen of them, there was no evidence that these vehicles were not running at profit or that the company had no access to bank to raise money for prompt repairs so as to mitigate loss. (See Linus Onwuka & Anor vs R.I. Omogui (1992) SCNJ 98, 124).

E

The claim for 262 days of loss of use is most unreasonable and the award of damages for that is unjustified. (See for persuasive effect the cases of British Westinghoney Electric Company Ltd. vs Underground Railways Company of London Ltd. (1912) AC. 673; Dredger Liestosch Company vs Owners of Steamship Edizon (1933) AC 449).

F

It is therefore clear that the only claim of damages maintainable is that of cost of repairs as submitted by Messers A. G. Leventis Ltd. for N372,778.06 and nothing more.

G

The appeal succeeds on damages awarded in respect of loss of use. It is dismissed in respect of cost of repairs put at N372,778.06.

I award the appellant N10,000.00 as costs in this appeal against the respondent.

H

OGUNDARE JSC

This appeal relates only to the issue of quantum of damages awarded by the trial High Court and affirmed by the Court of Appeal. The Plaintiff who is respondent before us, had sued the Defendants (now Appellants) claiming a total sum of N1,5000,000.00 being special and general damages for negligence and interest. The particulars of the special damages claimed are given in paragraph 8 (a) of the further amended statement of claim and they are:

8 (a) PARTICULARS OF SPECIAL DAMAGE

(i) Estimated cost of damage Spare parts from Leventis Motors Limited N362,578.06

(ii) Estimated cost of labour and sundry charges N10,200.00
N372,778.06

(iii) Loss of use from 29/12/88 to 31/5/90 less Sundays and Public Holidays =439 days at the rate of N2,000 per day.....
N878,000.00

N1,250,778.06"

Pleadings were filed and exchanged and, with leave of court, amended. The action proceeded to trial at the conclusion of which the learned trial Judge found the Defendants liable in negligence and awarded to the Plaintiff damages as hereunder:

"On the whole I am satisfied that the plaintiff has established his claim and I hereby award him as follows:-

(a) *Cost of spare parts and labour* N372,778.06

(b) *Loss of Use of vehicle from 29/12/88 to 31/5/90*

Less Sundays & Public Holidays 439 days at N2,000 per day
N878,000.00

N1,250,778.06"

The Defendants appealed unsuccessfully to the Court Appeal. They have now further appealed to this Court upon 6 grounds of appeal. And pursuant to the rules of this Court, the parties filed and exchanged their written briefs of argument. They were both represented by counsel at the oral hearing of the appeal. At this oral hearing, learned counsel for the Defendants, Mr. Okiemute Mudiage-Odje informed the Court that he

was not contesting the issue of liability but only the quantum of damages awarded.

In the Defendants/Appellants' brief the following five questions are set out as calling for determination, that is to say:

B (a) Can explanation given by counsel in his brief which explanation do/not form part (sic) of the evidence and/or pleading be sufficient to explain why a Plaintiff has not mitigated his loss or was the Court of Appeal right to hold that the explanation contained in the brief of the Respondent's counsel on why the Plaintiff did not mitigate her loss the same as oral evidence to show that the Plaintiff mitigated her loss?

C (b) Was the Court of Appeal right to have affirmed the award of N2,000.00 per day from 29/12/88 to 31/5/90 in view of the pleading and evidence in the printed record of Appeal?

D (c) Was the use of Exhibit 'D' by the lower court which was affirmed by the Court of Appeal in calculating the loss of use proper in view of the various dates of preparation ascribed to Exhibit 'D' and the evidence of P.W. 4 who tendered the said Exhibit 'D'.

E (d) From a calm view of the entire evidence contained in the printed records of Appeal, was the Plaintiff entitled to the damages awarded her for loss of use

OR

F From a calm (view) of the entire evidence in the printed record of Appeal, has the Respondent succeeded in proving her case to entitle her to the amount award her which amount was affirmed by the Court of Appeal?

G (e) Did the Plaintiff/Respondent mitigate her loss?
The Plaintiff/Respondent, on the other hand, posed only one question which reads:

H *"Whether the Respondent could have mitigated her loss by taking steps herself much earlier than 31/5/90 or date of judgment to send the vehicle for repairs."*

Going by the arguments both in the briefs and at the oral hearing of the appeal there is no doubt that the main complaint of the Defendants is that the Plaintiff failed to mitigate its loss and it could, therefore, not be

entitled to the award made to it by the two courts below. That being so, it is my considered view that is the main issue calling for determination in this appeal. If it is found that the Plaintiff failed to mitigate its loss, the follow-up question would be: What is the effect of this failure on the quantum of damages claimed? B

The sum total of the submissions of learned counsel for the Defendants is that Plaintiff failed woefully to mitigate its loss and was therefore not entitled to the award for loss of use. It is also contended that the evidence for the Plaintiff as to the rate per diem applied in quantifying the loss of use, was suspect and should not have been relied on. C Learned leading counsel for the Plaintiff, Chief C.O. Ihensekhien, SAN argued to the contrary and urged us not to disturb the award of damages,

As shown earlier in this judgment, the award of damages was under two headings - cost of repair and loss of use; there was no award D for general damages. Plaintiff did not appeal against the failure to award to it general damages. I will confine myself only to the award of special damages.

The law on the award of damages is clear. And that is, that the E onus is on the Plaintiff to prove special damages strictly - Faber v. Basma, 14 WACA 140; Agunwa v. Onukwe (1962) 1 All NLR 537, (1962) ANLR. 531 In order to discharge this burden the plaintiff must show by credible evidence that he is indeed entitled to the award of special damages - F Oladehin v. C. T. M. L (1978) 2 SC 23. That is, the evidence adduced by the plaintiff must show the same particularity as is necessary to its pleading - Imana v. Robinson (1979) 3-4 SC 1 at p. 23 where Aniagolu JSC delivering the judgment of this Court said:

"It should therefore normally consist of evidence of particular G losses which are exactly known or accurately measured before the trial. Strict proof does not mean unusual proof, as the play of appellant's counsel on those words tended to suggest, but simply implies that 'a plaintiff who has the advantage of being able to base his claim upon a precise calculation must give the defendant access to the facts which make such calculation possible.'" H

See also Kurubo v. Zach Motion Nig. Ltd. (1992) 5 NWLR 102. Unchal-

lenged evidence, without more, can constitute sufficient proof of special damage - Adel Boshali v. Allied Commercial Exporters Ltd. (1961) All NLR 917; Olulaja v. Haddad (1973) 11 SC1; NMSL v. Afolabi (1978) 2 SC. 79. See further Onwuka v. Omogui (1992) 3 NWLR 393; (1992) B SCNJ 98.

Coming now to the first head of claim, that for N372,778.06 being cost of spare parts and labour for the repair of Plaintiff's damaged vehicle, there was abundant evidence, particularly that of P W 7, Clement Kennedy Okweguale, the Managing Director of the Plaintiff Company, P W, Etim Umoh, a worker under Leventis Motors, Benin City and Exhibit A1, the estimate of repairs prepared by Leventis Motors which went to establish Plaintiff's claim. The evidence on this item of damage was not challenged. The trial court accepted it and made an award based D on it. The Court below affirmed the award. I see no reason to interfere with this award. The appeal against it fails and it is dismissed.

I now turn to the second item of special damages, that of N878,000.00 being loss of use from "29/12/88 to 31/5/90 less Sundays E and Public Holidays = 439 days at the rate of N2,000.00 per day." The accident involving the vehicles of the parties and resulting in damage to Plaintiff's vehicle occurred on 29/12/88. Plaintiff filed his writ on 25/10/89. Plaintiff's further amended statement of claim was dated 23rd F March, 1990. Case for the Plaintiff was concluded on 4/5/90 and judgment in the case was given on 28/6/90. Plaintiff by his claim was asking for damages for loss of use right up to almost the end of the trial in the High Court! And the two Courts below allowed this claim.

It is settled that a plaintiff is under a duty to mitigate his damages G and any neglect by him in this respect is a bar to a claim. The question what is reasonable for a plaintiff to do in mitigation of his damages is however a question of fact, and not of law, in the circumstances of each case and the burden is on the defendant to show that the plaintiff failed to H mitigate his loss - Sowole v. Nigersol Construction (1970) NCLR 435. See Onwuka v. Omogui (supra) and the cases cited therein.

It is argued for the Defendants that the Plaintiff in the case on hand failed woefully to mitigate its loss and, indeed, made no attempt to

do so. Reference was made to the evidence given for the Plaintiff and the Court is invited to find from the evidence that the Plaintiff failed in its primary duty to mitigate its loss. We are urged to disregard the explanation made by learned leading counsel for the Plaintiff in the Court below as to why the Plaintiff could not mitigate its loss. It was submitted that learned counsel's explanation was not evidence on which a court could act. The Courts below were criticized for making an award in favour of the Plaintiff on this item of claim. B

Learned counsel for the Defendants both in the written brief and in oral argument also criticized the evidence in support of the rate used by the Courts below in assessing the award for loss of use. It is submitted that if the Courts below had a careful look at the evidence, they would not have acted on it. C

In answer to the submissions for the Defendants, the learned leading counsel for the Plaintiff Chief Ihensikhien argued in his written brief thus: D

"It is true that the Plaintiff has a duty not to increase the damage to him by his own voluntary and unnecessary act. See the case of: E (1) Admiralty Commissions v. S S Amerika (1917) A. C. 38. It is true that the law imposes on the Plaintiff a duty to do all in his power to minimize his loss, otherwise, anything which must be ascribed to his failure to do so is not recoverable from the Defendant. (2) British Westinghouse Co. Ltd. v. Underground Electric Railway Ltd. (1912) A. F C. 673. But that duty is to act reasonably. (3) Payzu Ltd. v. Saunders (1919) 2 K. B. 651. As it is always a question of fact whether a person has acted reasonably or not, it is always necessary to raise the issue of the duty to mitigate and the failure to discharge that duty at the pleadings so G that the Court of trial could go into it and thereafter express opinion as to whether or not the Plaintiff would, on the facts of the particular case be adjudged to have reasonably breached that duty.

In this case, although in paragraph 11 (b) of the Further Joint Amended Statement of Defence of the 1st and 2nd Defendants, it was feebly averred: H

'In further answer to paragraphs 8 and 8 (b), the Defendants

averred that the Plaintiff has done nothing to mitigate his loss if any' No evidence was led by the Defendants to show what the Plaintiff could have done which he did not do to have reduced the loss. Merely stating in the Statement of defence that the Plaintiff did not mitigate his loss is not sufficient to discharge the onus which the law places on the Defendant on the issues of mitigation of loss. (4) Kosile v. Folarin (1989) 3 NWLR (pt. 107) p.3 ratio 5 states that:

"The law will never impose upon or impute unto a man the duty that will prove impossible for him to perform. There is evidence that the Plaintiff's company have many vehicles but the Defendants did not lead any evidence to show that the Plaintiff's company was being run on profit basis. That the Plaintiff's company has 16 TANKER vehicles can not be an index that the Plaintiff is a wealthy, bouyant or prosperous company. After all, the acquisition and ownership of 16 Old vehicles may result in abject poverty because of the inflationary cost of motor spare parts and repairs to-day in Nigeria."

Learned Senior Advocate urged the Court, in oral argument, not to interfere with the concurrent findings of the two Courts below that the Defendants were liable on the claim for loss of use.

In paragraphs 3-6 of its further amended statement of claim, the Plaintiff pleaded as follows:

"(3) On or about the 29th day of December 1988, the Plaintiffs' vehicle No. LAD 3278 A was being lawfully driven on the right hand side of Auchi to Benin Express Road by a driver of the Plaintiff when the first defendant who is the servant of the second defendant in the course of his employment so negligently drove, managed and controlled the second defendant's vehicle No. BD 6054 L that the said vehicle left its side of the Benin to Auchi Express Road and collided with the Plaintiff's vehicle.

(4) Immediately after the collision the Plaintiff's driver reported the incident at the Auchi Police Station and at 8.30 p.m. on 29/12/88 and before noon of 30/12/88 Policemen from Auchi visited the scene and after taking measurement, drew up a sketch of the scene, counter-signed by the driver of the Plaintiff and the first defendant. The Plaintiff will

rely on this sketch at the trial.

(5) The vehicle of the Plaintiff was towed from the scene to the Motor Traffic Division of the Nigeria Police Auchi where a Vehicle Inspection Officer inspected the vehicle on 10/1/89 and issued a report. The Plaintiff shall found on the findings and Report of the V. I. O. at the trial of this action. B

(6) The Plaintiff's vehicle was seriously damaged and the Plaintiff sustained loss and damage. The Plaintiff towed the vehicle from the Motor Traffic Division Auchi to Leventis Motors Limited Benin City where professional inspection of the damaged parts affecting 78 items were carried out. At the time of drawing up this Amended Statement of Claim the estimated cost of repairs stood at N362,578.06. The Plaintiff will rely on the estimate for Mercedes 1921 Registration No. LMB/WM/4/101 of 5th September 1989 at the trial. The said estimate may be 15% more or less subject to unseen damage and price variation. The Plaintiff will also found on this letter at the trial." C D

The evidence led at the trial showed -

1. That the accident occurred on 29th December 1988; E
2. That the Plaintiff's vehicle was towed to the Motor Traffic Division of the Nigeria Police Auchi on or about 10/1/89 when it was inspected by the vehicle Inspection Officer and a report was issued;
3. That the vehicle was towed to the garage of the Leventis Motors, Benin-City for repairs on 11/8/89; F
4. That the Leventis Motors by a letter dated 5/9/89 sent an estimate for repairs of the vehicle to the Plaintiff;
5. That the Plaintiff did not give authorization for the repairs to be carried out as he did not pay the deposit demanded by the Leventis Motors; G
6. That the vehicle had remained in the garage of the Leventis Motors until the trial of this action;
7. That the Plaintiff had at the time 16 other tankers in its fleet being used for the supply of kerosene. H

The above facts can be found in the evidence of P W 2, Etim Umoh of Leventis Motors, P W 3, Augustine Odiete, the Vehicle Inspection Officer and P W 7, Clement Kennedy Okoeguale, Plaintiff's Managing Di-

rector.

No reason whatsoever was offered by the Plaintiff either in its statement of claim nor in evidence why the vehicle was never repaired. It was in its brief in the Court of Appeal that the following explanation

B was given by its counsel:

"Between the 29th day of December 1988 and 10th August 1989, the Plaintiff could not have started the repairs of the vehicle as it was not available for repairs being the subject matter of Police investigation and subsequently of a pending case in the court. On 11th August 1989, after the conviction of the 1st Defendant on 10th August 1989 the vehicle was towed to the Leventis Motors for repairs. Leventis Motors sent estimated cost of repairs in Exhibits 'A' and 'A 1' and insisted on down payment of 80% of the total cost of repairs of N372,778.06k before the repairs could start. The Plaintiff could not get this deposit because of the down turn in our economy. So, from that time until judgment, there was a super-convening (sic) impossibility brought about by the Plaintiff's inability to effect the down payment of 80% of total cost of repair."

E This explanation, as rightly submitted for the Defendants, is no material on which any court could act

Regrettably, however, the Court below made use of it in coming to its decision. Akpabio JCA in his lead judgment, with which Ubaezonu and Ige JJCA agreed, said:

"I have carefully considered the two arguments canvassed above, and the explanation given on behalf of Respondent for failing to repair their vehicle immediately after the accident or a reasonable time thereafter, and find that there is no doubt that the Plaintiff is under a duty to minimize their loss. But after reading the explanation given by the Respondent in their brief it appears that a reasonable explanation has been given why the vehicle could not be repaired before the matter went for trial at the High Court."

H The learned Justice of the Court of Appeal then considered in full the 'explanation' given by Plaintiff's counsel both in his brief and in oral argument before them and concluded:

"Far from the Respondent failing to mitigate his loss, one might

even say that it was the Appellant who aggravated his damages, by unreasonably insisting that unless and until his driver (1st Defendant) has been found liable in both the criminal and civil courts, he would not consider repairing the vehicle."

Ige, J. C. A., with profound respect to her, appeared to have misapplied the law to the facts of the case, when in her judgment she said:

"On question of Respondent mitigating his loss as the court below; while agreeing with the decision in Kosile v. Folarin (1989) 3 NWLR (pt. 107) page 1 that the onus of proof on the issue of mitigation of loss is on the defendant, we must not lose sight of the fact that it is the plaintiff's duty to minimize his loss or damage as far as possible. It is the duty of the plaintiff to act reasonably and co-operate with a willing defendant. It is my view that the appellant in this case has failed in his duty to minimize his loss when he insisted that until his driver was found liable both in Tort and CRIME before he would repair the vehicle. The appellant has himself to blame in increasing his damages unnecessarily."

In my respectful view, their Lordships of the Court below, with respect to them, were wrong to have given consideration to the explanation given by Chief Ihensekhien for the failure of the Plaintiff to mitigate its loss. That explanation was no evidence and should not have been acted upon - see Salawu Yoye v. Lawani Olubode (1974) 10 SC. 209 at 215-216 where the following passage appears:

"We however, concede the fact that in the course of his judgment, the learned justice of appeal, after referring to the description of the land in dispute in the previous case as was set out in the address of counsel for the plaintiffs/respondents, said, inter alia, as follows:-

'He (meaning counsel) related these descriptions to the plan in this case'".

We would only point out however, that, as far as the facts of any given case are concerned, the address of counsel is supposed to deal only with the evidence before the court. But the mere mention of a matter in the course of such address is never a substitute for the evidence that has not been led. Nor can it supplement the inadequacy of the evidence already given at the trial. In the particular case which we are now con-

sidering, we believe that the Surveyor was the most competent witness to relate the plan in the present case to the descriptions of the land in dispute in the previous case. As that was not done, we take the view that the vital issue as to whether the land in dispute in the two cases is identical, or not, still remains inconclusive."

The Plaintiff did not plead nor adduce evidence for the reason for not repairing his vehicle within a reasonable time after the accident. On the facts as pleaded and proved in evidence, the Courts below ought to have found that the Plaintiff made no attempt whatsoever to mitigate its loss. Its conduct was clearly unreasonable - see Onwuka v. Omogui (supra).

If this were all there is to this item of damage, I would have considered fixing what appears to me on the facts a reasonable time within which to repair the vehicle as was done by this Court in Linus Onwuka & Anor. v. R. I. Omogui (supra). There is, however, the added difficulty of deciding the rate to use. The Plaintiff claimed N2,000.00 per diem. It pleaded in paragraph 8 (b) of its further amended statement of claim the particulars of how it arrived at this figure, called evidence and tendered in evidence its statement of account, Exhibit D. Had their Lordships of the two Courts below examined painstakingly Exhibit D along with evidence of PW 4, Patrick Iwelome who prepared and tendered it in evidence, they would have come to the conclusion that Exhibit D was not worth the paper on which it was written. The statement was prepared during the pendency of this case and is so full of flaws particularly as to dates, some of which came out under cross-examination of PW 4, that the Courts below ought to have rejected it as not worth any credit being placed on it. The only evidence worth examining is that of P.W.1, Jeremiah Onyema Ezeocha, sales supervisor at the NNPC Benin City. He testified thus:-

"I know the plaintiff in this case. They are an independent marketing company lifting petroleum products from Benin City at Ikpoba hill. The products are petrol, kerosene, diesel. They used their vehicles tankers in lifting the petrol. One of the plaintiff's vehicles was vehicle No. LAD 3278 A for lifting of products. Vehicle No. LAD 3278 A lifts 27,600 litres of kerosene per trip. For lifting such products the NNPC

pays the plaintiff. We sell at 5. 55k per litre of kerosene and the marketer is authorized to sell at 15k per litre. The difference is 9. 4k per litre and this represents our payment to the marketer to cover his rebate and transportation cost By rebate, I mean the overhead charges such as rents, salary, stationery. 9. 4k per litre covers rebate and transportation. B

There is no evidence as to what proportion of 9. 45k went to rebate and what proportion went to transportation. The latter of course, would be the earning made by the plaintiff on the use of the damaged vehicle. P.W. 7, the managing director, in his evidence, gave figures of expenses for October, November and December 1988 but did not give evidence of income. He then said: C

"Grand total for the 3 months N36,498.09 subtracting the total operational costs for the period from the total income per day of the vehicle for the last 3 months before the accident was N2,000.00 per day. D

He arrived at this rate remained a mystery. Later in his evidence he added:

"The company sells fuel at 15k per litre. We pay to NNPC 5.55k out of the 15k and the balance 8.45k is cost of transportation. The vehicle carries 27,600 litres of kerosene in a trip: vide Invoices Exhibit B.B1 - B58." E

This evidence would appear to contradict the evidence of p.w.1 who testified that the difference of 9. 45k for rebate and transportation. F

On a careful examination of the totality of the evidence adduced for the plaintiff in support of its claim for loss of use, I cannot say the evidence had shown the same particularity as is necessary for its pleading. The attitude of this Court to concurrent findings of fact of the two Courts below is well known and, that is, that this Court will not disturb such findings unless the findings are perverse - Sobakin v. The State (1981) 5 SC 75. In the instant case, the learned trial Judge made no evaluation of the evidence for the Plaintiff. Had he done so he would not have found that the item for loss of use was proved. And the Court below equally would not have affirmed his decision. G H

As it is clearly shown on the facts that the Plaintiff made no

effort whatsoever to mitigate its loss and as the rate per diem of loss of use was not satisfactorily proved, I have come to the conclusion that I must disallow the claim for N878,000.00 for loss of use; it was not strictly proved as required by law. That claim is hereby dismissed.

B For the reasons I have given above I agree with my learned brother Belgore JSC that this appeal succeeds to the extent of the claim for loss of use. The judgments of the Courts below relating thereto are set aside. For the avoidance of doubt, the award of N372,778.06 for cost of repairs is affirmed. I abide by the order for costs made by my
C learned brother, Belgore JSC.

MOHAMMED JSC

D I agree that this appeal has succeeded in respect of award of damages for loss of use. I however affirm the award of N362,778.06 made by the trial court being costs for the repairs of the vehicle, In considering a claim for damages for loss of use, similar to the one put up
E by the respondent, it is imperative to consider whether the plaintiff in all the circumstances had been reasonable in mitigation of his loss. Whether the plaintiff has acted reasonably is in every case a question of fact and not of law. See Payzu Ltd. v. Saunders (1918 - 19) All E. R. 219 at 221.

F The respondent in this case was not impecunious since it had been alleged that the company had other vehicles engaged in lucrative oil haulage. What then stopped the company from getting the vehicle repaired within a short time; since it could afford to do so immediately after
G the accident? The delay in effecting repairs of the vehicle is, in my view, deliberate and that being so it is quite clear that the respondent was unreasonable in failing to repair the car in time in order to mitigate its loss.

H I agree with my brother Belgore J.S.C., that the appeal against award of loss of use must succeed. It is allowed. The appeal from the award of N362,778.06 being costs for the repairs of the vehicle fails and it is dismissed. I award N10,000.00 costs to appellant.

IGUHJSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Belgore, J.S.C. and I agree that this appeal partly succeeds and must be allowed to the extent of the award of N878,000.00 representing loss of use of the plaintiff's Mercedes Benz B Trailer No. LAD 3278 A from the 29th December, 1988 to the 31st May, 1990 at N2000.00 per diem.

The circumstances that gave rise to this appeal have been adequately set out in the judgments of my learned brothers, Belgore and Ogundare, JJ.S.C. and no useful purpose will be served by my recounting them all over again. I need only state that following the award of N1,250,778.06 to the plaintiff by the trial High Court as special damages for negligence as affirmed by the Court of Appeal, the defendants have further appealed to this court.

The question of liability has, quite rightly in my view, not been contested in this appeal. This is because there is abundant evidence on record accepted by both courts below in proof of the defendants' negligence as averred and testified to by the plaintiff. The defendants have only contested the issue of damages awarded to the plaintiff by the trial court as affirmed by the court below.

Two main issues were canvassed before this court. The first relates to the duty of the plaintiff to mitigate its loss consequent upon the defendants' negligence and the second issue is whether or not the Plaintiff strictly proved the items of special damages it claimed against the defendants as required by law. The first issue has been dealt with exhaustively in the judgments of my learned brothers, Belgore and Ogundare, JJ.S.C. and I will say no more on that. I desire by way of emphasis only to say a few words of my own with regard to the items of special damages claimed by the plaintiff against the defendants.

In this regard, it will be necessary for easy reference to set out paragraph 8 of plaintiff's Statement of claim where the special damages claimed were particularized as follows:-

"(i) *Estimated cost of damaged spare parts from Leventis* N : K

<i>Motors Limited</i>	...	...	<i>N362,578.06</i>
<i>(ii) Estimated cost of labour</i>			
<i>and sundry charges</i>	...	...	<u><i>10,200.00</i></u>
			<i>N372,778.06</i>

B *(iii) Loss of use from 29/12/88*
to 31/5/90 less Sundays and Public Holidays =
439 days at the rate of
N2000.00 per day 878,000.00
N1,250,778.06k"

C I think I ought at this stage to examine briefly the general principles of law governing the award of special damages before a consideration of the evidence presented by the plaintiff in proof of its claims.

D It is elementary that special damages are such that the law will
not presume to flow or infer from the nature of the act or breach of duty
complained of by the plaintiff as a matter of course. They are excep-
tional in their character and connote specific items of loss which the
plaintiff alleges are the result of the defendant's act or breach of duty
E complained of. Unlike general damages, special damages must be claimed
specially and strictly proved and the court is not entitled to make its own
estimate of the same. See Abdul Jaber v. Mohammed Basma (1952) 14
W.A.C.A. 140, Dumez (Nigeria) Ltd. v. Patrick Ogboli (1972) 1 All N.L.R.
F 241.

On the broad distinction between a claim in special damages as
against one in general damages, Lord Macnaghten in the English case of
Stroms Bruks Aktie Bolag v. Hutchinson (1905) A. C. 515 (H. L.) com-
mented thus:-

G "*General damages, as I understand the term, are such as the law*
will presume to be the direct, natural or probable consequence of the act
complained of. Special damages on the other hand, are such as the law
will not infer from the nature of the act. They do not follow in ordinary
H *course. They are exceptional in their character and, therefore, they must*
be claimed specially and proved strictly."

I respectfully agree with the above view of Lord Macnaghten
and fully endorse the same.

Attention may also be drawn to another English case of British Transport Commission v. Gourley (1956) A. C. 185 where Lord Goddard, commenting further on this distinction between special and general damages, expressed himself as follows -

"In an action for personal injuries, the damages, are always divided into two main parts. First, there is what is referred to as special damage, which has to be specially pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of trial, and is generally capable of substantially exact calculation. Secondly, there is general damages which the law implies and is not specially pleaded. This includes compensation for pain and suffering and the like, and, if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the further."

With this proposition of law, I am again in full agreement.

The rule with regard to the award of special damages is that the burden of proof is on any one claiming it to prove strictly that he did suffer such special damages claimed. What is required is that the person claiming it should establish his entitlement to the special damages claimed by credible evidence of such a character as would establish that he, indeed, is entitled to an award under that head. See Oshinjinrin and others v. Elias and others (1970) 1 All N.L.R. 151 at 156, Odulaja v. Haddad (1973) 1 All N.L.R. 191 at 196. Accordingly, where the precise amount of a particular item of damage is known or has become manifest before the trial, either because it has already occurred and has thus become crystallized or because it is measurable with complete and total accuracy, this exact loss must be pleaded as special damage and strictly proved. See Mayne and McGregor on Damages, 12th Edition, Article 973 at page 815. As Bowen, L. J. put it in Ratcliffe v. Evans (1892) 2 Q. B. 524 in relation to proof of special damages, as follows:-

"The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be proved. As much certainty and particularity must be

insisted on in proof of damages as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry"

See too Gajapatiraju v. The Revenue Divisional Officer, Vizagapatam (1939) A.C. 302 P.C. at 312.

Turning now to the plaintiff's claims in special damages in the present case, the first item pertains to the sum of N372,778.06 awarded to the plaintiff as cost of spare parts and labour for repairs to its vehicle. In this regard, Exhibits A, A1 which indicate the cost of each and every damaged part of the plaintiff's vehicle were tendered by the automobile firm, Leventis Motors Ltd., Benin-City which was the authorized dealer in Mercedes vehicles such as the Plaintiff's Trailer involved in this collision. Each and every damaged part together with the precise costs were therein itemized.

The learned trial Judge meticulously considered the evidence of P.W.2, the automobile engineer who tendered Exhibits A, A1 and found his testimony with regard to the cost of the said items of the damaged parts of the plaintiff's Trailer to be reliable. Said the learned trial Judge:-

"I accept what is shown in Exhibit 'A' as a correct amount necessary to put the plaintiff's accidented vehicle into use again. Therefore, this court awards N372,778.06 as claimed by the plaintiff in paragraph 8 (a) (i) (ii) of the Further Amended Statement of claim."

The Court of Appeal similarly gave a thorough consideration to this arm of the plaintiff's claim and observed thus:

"Attention was drawn to Exhibit 'A' which was a letter from Leventis Motors Ltd. Benin City showing the estimate of repairs and the parts to be repaired as a result of the accident. One Mr. Etim Umoh testified as P.W. 2 in the case and tendered Exhibits A 1 which detailed out the parts affected by the accident and the estimated cost of repairs was contained in Exhibit 'A' The cross-examination of this witness did not challenge the accuracy or show the falsity of the figures contained in Exhibit 'A'. The total estimate in Exhibit A 1 was N372,778.06 made up

of estimated cost of damaged parts, labour and sundry supplies. The cross-examination of the witness did not challenge the accuracy of the total estimate of N373,778.06. No smaller estimate was alleged or proved."

It concluded:-

"In view of the fact that the Appellants never put forward any rival figure for the court to consider along side with the Respondent's figure, I hold that the learned trial judge was right in awarding the amount he did as special damages for cost of repairs".

I think both courts below cannot in the circumstances be faulted in their award of N372,778.06 to the plaintiff as the precise cost of the spare parts and labour for repairs to the plaintiff's Trailer.

There is next the sum of N878,000.00 awarded to the plaintiff as loss of earnings in respect of its damaged Mercedes Benz Trailer. As I pointed out earlier on in this judgment, a claim for loss of earnings is clearly a claim in special damages and must, therefore, be strictly proved. In this regard, both courts below based their award on the sum of N2000.00 per diem said to represent the loss of use in respect of the plaintiff's said Trailer. The vital issue is whether the plaintiff was able to prove its alleged loss of use at the rate of N2000.00 per diem as it claimed. If it did, a further consideration of the question of mitigation of damage will clearly arise in view of the unnecessarily long period of time covered by that head of award. If it did not, the award under that head cannot in such circumstance be justified.

I have given a most careful consideration to the evidence of P.W.7 and Exhibit D on which the plaintiff based its claim for loss of use and must confess that it is certainly unclear how the said P.W.7 arrived at the figure of N2000.00 he testified to as representing the plaintiff's loss of use in respect of its Trailer. But more importantly is the fact that a close examination of Exhibit D leaves one in no doubt that the document, in the face of the evidence surrounding it, cannot by any means be said to be credit worthy or reliable. The reasons for arriving at this conclusion are fully contained in the judgments of my learned brothers, Belgore, Ogundare and Uwaifo, JJ.S.C. and with which I completely agree. The

document, Exhibit D, in the face of those reasons can hardly be said to be reliable or authentic. It is a matter of great regret that both courts below were unable to advert their minds to these grave discrepancies surrounding Exhibit D and the evidence on its preparation. I entertain no
B doubt that had they adverted their minds to these, they would have discovered that the said Exhibit D was spurious and would have disallowed the plaintiff's claim of N2000.00 per diem as loss of use in respect of the Mercedes Benz Trailer. I feel bound to state that I regard the sum of
C N2000.00 per diem awarded to the plaintiff for loss of use as completely unsatisfactory. Remembering, as I do, that special damages must be strictly proved. I think both courts below were in definite error to have accepted the sum of N2000.00 per diem as established by the plaintiff in respect of the loss of use of the Trailer.

D It is for the above and the more detailed reasons contained in the judgments of my learned brothers aforementioned that I, too, allow this appeal to the extent of the award of N878,000.00 representing loss of use in respect of the plaintiff's Trailer No. LAD 3278 A. It is dismissed
E in respect of the cost of spare parts and labour for repairs to the plaintiff's vehicle which was assessed at N372,778.06. I abide by the order for costs made in the leading judgment.

F

UWAIFO JSC

I had the opportunity to read in advance the judgment of my learned brother Belgore, JSC. I agree with the decision reached.

G I merely wish to comment briefly on the special damages claimed as loss of use of the vehicle. In the further amended statement of claim this was put at N878,000.00 for a period from 29/12/88 to 31/5/90 less
Sundays and public holidays. A total of 439 days was arrived at; and then the loss per day was put at N2,000.00. Certain calculations were
H made on the basis that the plaintiff/respondent used his said vehicle No. LAD 3278 A to transport kerosene to its customers from NNPC at the transportation rate of 9.45k per litre of kerosene. It was then said that the sum of N2,608.30k was earned by the vehicle per day. The sum of

N608.30 was taken as cost of operations, leaving a balance of N2,000.00.

I need to reproduce in part the relevant pleading on this rate of transportation in para. 8 (b) (i) (ii) and (iii) of the further amended statement of claim as follows:

"(i) The plaintiff was using vehicle No. LAD 3278 A to transport kerosene for his customers from NNPC at the rate of 9. 45k per litre of kerosene. In the month of October, 1988, the plaintiff lifted 579,630 litres of kerosene for his different customers

(ii) The plaintiff was using vehicle No. LAD 3278 A to transport kerosene for his customers from NNPC at the rate of 9. 45k per litre of kerosene. In the month of November 1988, the plaintiff lifted 552, 020 litres of kerosene for his different customers

(iii) The plaintiff was using vehicle No. LAD 3278 A to transport kerosene for his customers from NNPC at the rate of 9. 45k per litre of kerosene. In the month of December, 1988, the plaintiff supplied 524, 417 litres of kerosene to his different customers

I have set the above out to show that the 9. 45k represented cost of transportation to the customers per litre which the plaintiff allegedly earned. That fact was persistently pleaded.

But it is interesting to relate these averments to the evidence of p.w.1, Jeremiah Onyema Ezeocha, NNPC Depot sales supervisor, Benin City. He said in evidence-in-chief:

"For lifting such products the NNCP pays the plaintiff. We sell at 5.55k per litre of kerosene and the marketer is authorized to sell at 15k per litre. The difference is 9. 45k per litre and this represents our payment to the marketer to cover his rebate and transportation cost."

In cross - examination he explained further:

"The marketer is not allowed to sell more than 15k per litre. By rebate, I mean the overhead charges such as rents, salary, stationery. 9. 45k per litre covers rebate and transportation."

The evidence so recited is clearly that 9. 45k received by a marketer is meant to cover rent, salary, stationery, transportation etc per litre of kerosene. Of course, that amount must leave a margin of profit to the marketer otherwise he would have no reason to be in that business.

Therefore it is reasonable to also add profit per litre to the list covered by the rebate made by the NNPC to a marketer. Now, the learned trial judge in his assessment of the evidence on that earning said:

"Although the defendants did not accept the figures, put forward by the plaintiff as representing loss of use of the vehicle, the defendants never put forward any figure for the court to consider along with the plaintiff's figure. The plaintiff tendered Exhibit D through an accountant to show how N2000 per day was realized by the plaintiff's vehicle. The plaintiff tendered Exhibits B-B1 - B 58, which show detailed particulars of the income realized by the vehicle, three months previous to the accident (from October to December 1988). The plaintiff has sufficiently established this.

In the month of October, the plaintiff's vehicle lifted 27,600 litres per day for 21 days and made a gain of N54,775. Kerosene sells at 15k per litre out of which NNPC gets 5.55k leaving a balance of 9. 45k The vehicle lifts 27,000 litres at a time and realises N54.775.07 for 21 trips. The vehicle realized N52,165.89 and N49,557.13 for November and December 1988 respectively. The gross income per day was N2,608.30 putting into operation the cost of operation the net income was N2000 per day."

I wish to draw attention to what kerosene is alleged to sell for per litre. This is 15k. It is said that NNPC gets 5.55k out of this, leaving a balance of 9. 45k. It will be recalled that the plaintiff/respondent calculated its loss of use of the vehicle at the rate of 9. 45k per litre. The questions which anyone would ask, and which neither the learned trial judge nor the Court of Appeal justices adverted to would be, does it mean that the plaintiff/respondent simply took all its customers would have received per litre of kerosene which is 9. 45k and regarded it as what it lost for the use of its vehicle? How would the marketers (the customers) meet their overhead costs and make profit if they simply handed all they got from NNPC to the plaintiff/respondent? This is extremely ridiculous.

One of the purposes of pleading special damages in support of compensation claimed is so that the defendant will know the case he has to meet, and if he wishes to settle he may be able to compute a payment.

That is why it is said that a plaintiff has an obligation to plead and particularize any item of damage which represents out-of-pocket expenses, or loss of earnings (as in the present case), incurred prior to the trial, and which is capable of substantially exact calculation: see B.E.O.O. Industries (Nigeria) Ltd. v. Maduakor & anor (1975) 12 S.C. 91 at 108 approving the observation of Lord Donovan in Perestrello E. Companhia Limitada v. United Paint co. Ltd. (1969) 1 WLR 570 at 579.

It follows that not only must special damages of the kind in the present case be carefully particularized, the evidence in support of them must be credible. This is strict proof. It is true that this court has held that the strict proof required to establish special damages means no more than the evidence which shows the same particularity as is necessary for their pleading; that is to say, evidence that makes precise calculation possible, and not that unusual proof is imposed upon such plaintiff: See Imana v. Robinson (1979) NSCC (vol. 12) 1 at 11. But when the claim for special damages has been carefully particularized and it turns out that the evidence led in support is not only suspect but clearly incredible, the claim falls to the ground irretrievably. This was what happened in the present case.

Added to the unsatisfactory evidence of loss of use or earnings were two other facts. First, the period for which claim was made (439 days) was inordinately long. The defendants/appellants were able to show by the evidence or circumstances they canvassed that the plaintiff/respondent failed to mitigate his loss. In a matter like this, a plaintiff is obliged to mitigate his loss where this is clearly possible although the burden is on the defendant to show that this was not done. Second, the documentary evidence (exhibit D) relied on by the plaintiff/respondent to support the said loss of use, which was prepared at its instance by an accountant, was less than an appealing effort to present a good case. It looks downright incompetent with avoidable errors here and there.

I too allow the appeal. Only the amount of N362,578.06 being the cost of repairs to the vehicle for which there was undisputed evidence is awarded. I abide by the order for costs.