

SUPREME COURT OF NIGERIA
FRIDAY 17TH MAY, 2013. SC. 247/2004
CORAM:- M. MOHAMMED, J. A. FABIYI,
B. RHODES-VIVOUR, M. U. PETER-ODILI,
K. B. AKA'AH, JJSC

OANDO NIGERIA PLC APPELLANT
(Substituted for UNIPETROL NIG PLC
By Order of this Court on 18/2/2013)
AND
ADIJERE WEST AFRICA LTD RESPONDENT

DAMAGES - Award - Pleadings - Specific claim - Award of N9,672.30 per day for loss of vehicle usage up to a point is justifiable - For failure of appellant to deny the claim (H1)

DAMAGES - General damages - Award of - This may be awarded where a Judge cannot point out any measure - By which they are to be assessed - Except the opinion of a reasonable man (H2)

DAMAGES - Chattel loss - Replacement time - Since the truck was completely burnt down - The reasonable period to make a replacement - Would be calculated as N9,672.30 multiplied by 180 days (H3)

PLEADINGS - Averment - Specific denial - By amendment of Supreme Court Rules in 1989 - Defendant must specifically traverse - Any claim for damages in an action (H4)

DAMAGES - Award - Chattel loss - Value - Restitutio integrum - Cross appellant should recover such sum - As will place him so far as can be done monetarily - In the same position as if the loss had not occurred (H5)

FACTS

Defendant/appellant engaged the services of plaintiff's/respondent's tanker to convey fuel from NNPC Jos depot to its service stations at Bauchi and within Jos metropolis. While the tanker

was discharging fuel at Jos, a fire incident erupted which resulted in the destruction of the entire tanker. Consequent upon the said incident, respondent commenced this action in the High Court of Plateau State for negligence against appellant.

Respondent therefore made claims for damages, loss of earnings from 10/01/98 to 31/03/98 at the rate of N9,672.30k for 80 days, a further loss of earnings from 01/04/98 till total liquidation of the judgment debt at the rate of N9,672.30k per day and interest on the judgment debt at the rate of 10%. The court in its judgment found in favour of respondent by awarding inter alia, the sum of N3.5 million as cost of the burnt truck. Aggrieved, appellant appealed to the Court of Appeal Jos Division. The court upheld trial court's findings but set aside the award of N3.5 million being the value of the tanker. Still dissatisfied, appellant filed appeal to Supreme Court and urged the court to dismiss respondent's case in its entirety. Respondent was also not satisfied with the setting aside of the award of N3.5 million. Hence, it cross-appealed against same.

ISSUES FOR DETERMINATION

MAIN APPEAL

1. Whether the court below was correct when in its judgment it affirmed the judgment of the trial court on:

(a) The award of damages for loss of use at N9,672.30 per day, and same running from 1st April, 1998 till 28th April 2000; a period of 839 days; and

(b) The award of N656,216.00 as general damages.

2. Whether the learned Justices of the court below were right when they endorsed the use of evidence of PW3 by the trial court which piece of evidence was not pleaded.

CROSS APPEAL

"Having regard to the pleadings and evidence, was the Court of Appeal right in setting aside the N3.5million awarded by the trial court for the value of the Cross-Appellant's burnt tanker?"

HELD (Unanimously allowing the main appeal in part and allowing the cross appeal per **AKA'AH'S JSC**)
DAMAGES - Award - Pleadings - Specific claim

1. The appellant's complaint on the award of damages is two-pronged. The first is that the award of N9,672.30 per day for 839 days for loss of use of the burnt down tanker is unreasonable and secondly the further award of N656,210.00 as general damages amounts to double compensation. Learned counsel for the respondent argued that the appellant as defendant did not deny the plaintiff/respondent's specific claims as required by the rules of pleadings and since the defendant failed to specifically deny the statement of claim, no issue was joined for determination by the court and so the learned trial Judge was justified even on the basis of the pleadings alone to award the amounts claimed by the plaintiff.

This argument may suffice for the award of N9,672.30 per day for the loss of use of the vehicle up to a point but it will not justify the award of N656,201.00 as general damages.
(p. 2470 C)

General damages - Award of

2. In certain cases general damages may be awarded in the sense of damages "such as the jury may give when the judge cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable man" As rightly pointed out by learned senior counsel for the appellant, the award of N656,210.00 as general damages amounts to double compensation when the loss per day has been ascertained and is justified. (p. 2470 F)

DAMAGES - Chattel loss - Replacement time

3. As regards the award of N9,672.30 for loss of use per day from 10th January 1998 to 28th April, 2000 a total period of 839 days or about 2 1/2 years, this Court has in a number of cases considered the award for 6 months to be reasonable. In view of the fact that the truck was completely burnt down the reasonable period within which a replacement can be made is 180 days and the calculation for the loss suffered would be N9,672.30 per day for 180 days. This comes to N1,661,104.00. (pp. 2470 H/2472 B)

PLEADINGS - Averment - Specific denial

- 4. The suit now on appeal to this court was filed in 1998 and the Plateau State High Court (Civil Procedure) Rules were enacted in 1988. The Rules of the Supreme Court were amended in 1989 and in the said amendment order 18 Rule 13(4) was deleted. In consequence of the amendment, the defendant must now specifically traverse any claim for damages in the action. Before 1989 any allegation as to the amount of damages in a claim was regarded as denied unless it was specifically admitted. The decision of Fatayi-Williams, J.S.C (as he then was) in *Nigerian Produce Marketing Board v. Adewunmi* (1972) All NLR 870 at 879 which was based on order 18 Rule 13(4) of the Rules of the Supreme Court to hold that any allegation that a party has suffered damage and any allegation as to the amount of damages is deemed to be traversed unless specifically admitted is no longer the law regarding pleadings.** (p. 2476 F)

DAMAGES - Award - Chattel loss - Value

- 5. There is no doubt that if there had been evidence of an expert of the value of the burnt down truck, it would have been the best type of evidence but we must not lose sight of the fact that a second hand vehicle may well cost more than what it was purchased for when it was new because of inflationary trends where vehicles are imported and even the cost of assembling the knocked down parts could be prohibitive, thereby making the imported products cheaper than those assembled in the country.**
- Since this was a case of complete loss the principle to be invoked in assessing the value of the vehicle is that of restitution in integrum which means that the cross-appellant should recover such sum as will place him so far as can be done by compensation in money, in the same position as if the loss had not been inflicted on him. The damages to be awarded therefore need not be based on the value of the chattel at the time of destruction. The lower court was wrong to set aside the award of N3.5million for the complete loss of the tanker.** (pp. 2478 H/2480 B)

REPRESENTATION

Rotimi Oguneso S.A.N., with Mabruk Kunmi Olayiwola and Olayiwola Ajani, for Appellant/Cross-Respondent
Charles Obishai S.A.N. with Peter Ebunilo, for the Appellant
Ademola Ajala, Josephine Akweze (Mrs.), Ranti Taduggoronno (Miss.) ^B
and Christy H. Yashim (Mrs.), for Respondent/Cross-Appellant

CASES REFERRED TO

Osuji v. Isiocha (1989) 3 NWLR (pt. III) 623 C
Prehn v. Royal Bank of Liverpool (1870) 5 Ex. 92
Kerewi v. Odugbesan (1967) NMLR 89
Soetan v. Ogunwo (1975) 6 SC 67
Onwuka v. Omogui (1992) 3 NWLR (pt. 230) 393
Obasuyi v. Business Ventures Ltd (2000) 3 NWLR (pt. 658) 668 D
Owata v. Anyigor (1993) 2 NWLR (pt. 276) 380
Ohadigha v. Garba (2000) 14 NWLR (pt. 687) 226
Honika Sawmill Nig. Ltd v. Hoff (1994) 2 NWLR (pt. 326) 252
Ezemba v. Ibeneme (2004) 14 NWLR (pt. 894) 617
Otapo v. Sunmonu (1987) 2 NWLR (pt. 58) 587 E
Olale v. Ekwelendu (1989) 4 NWLR (pt. 115) 326
Ayoke v. Bello (1992) 1 NWLR (pt. 218) 380
Bua v. Dauda (2003) 12 NWLR (pt. 838) 657
Atolagbe v. Shorun (1985) 1 NWLR (pt. 2) 360 F

RULES REFERRED TO

Plateau State High Court (Civil Procedure) Rules, O. 25
Supreme Court Rules 1976, O. 18 r. 13(4)
Supreme Court Rules 1989 (as amended), rr. 13, 14 and 15 G

BOOK REFERRED TO

Mcgregor on Damages, 13th Edn. p. 932 para. 1395

LEAD JUDGMENT BY AKA'AHs JSC

H

The Respondent/Cross-Appellant was the Plaintiff at the trial court while the Appellant/Cross-Respondent was the Defendant. Around 10th January, 1998, the Defendant engaged the services of the Plaintiff's tanker with registration No.AA418 LGJ to convey fuel

from NNPC Jos depot to its service stations at Bauchi and Joseph Gomwalk Road in the Jos metropolis. While the tanker was discharging fuel at the Jos Road Filling Station there was a fire incident which resulted in the destruction of the entire tanker, its hose, spare tyre and jack. Consequent upon the fire incident, the Plaintiff commenced an action in Suit No.PLD/J/90/98 for negligence against the Defendant and in paragraph 26 of the Statement of Claim asked for N5,000,000.00 (Five Million Naira) only as special and general damages made up as follows:-

- (a) N3,500,000.00 (Three Million Five Hundred Thousand Naira) only being the market value of the tanker
 - (b) The extra tyre N34,000.00 (Thirty-Four Thousand Naira) only
 - (c) Trailer Jack N6,000.00 (Six Thousand Naira) only
 - (d) Hose N30,000.00 (Thirty Thousand Naira) only
 - (e) Loss of earnings from 10th January 1998 to 31st March 1998 at the rate of N9,672.30k for 80 days giving a total of N773,784.00 (Seven Hundred, Seventy-Three Thousand Seven Hundred and Eighty Four Naira) only
 - (f) General damages N656,216 (Six Hundred and Fifty Six Thousand, Two Hundred and Sixteen Naira) only.
 - (ii) Plus loss of earnings from 1st April 1998 till total liquidation of judgment debt at the rate of N9,672.30k per day.
 - (iii) Interest on the judgment debt at the rate of 10%
- The learned trial Chief Judge found the Defendant negligent after the parties had given evidence upon the pleadings filed and exchanged and in his judgment delivered on 28th April, 2000 entered judgment for the Plaintiff and made the following awards:
- (i) N3.5million being the market value of a new truck
 - (ii) N9,672.30 daily as loss of earnings from 1/4/98 to 28/4/2000
 - (iii) N30,000.00 the loss of two hoses destroyed by fire
 - (iv) N6,000.00 cost of jack
 - (v) N34,000.00 being the cost of the extra tyre
 - (vi) N656, 216.00 as general damages.

The Defendant felt aggrieved and lodged an appeal to the Court of Appeal, Jos (hereinafter called the lower court). The lower court upheld the finding made by the trial court that the defendant/

appellant was negligent but set aside the award of N3.5 million being the value of the tanker. It left intact the awards of N9,67230 as daily loss of earnings for 839 days and the award of N656,216.00 general damages. Still dissatisfied with the judgment of the lower court, the appellant has appealed to this Court on those portions of the judgment which affirmed the awards made for loss of use and general damages and the findings of negligence and asked this Court to dismiss the plaintiff's case in its entirety. B

The Plaintiff/Respondent was equally dissatisfied with the order setting aside the award of N3.5million for the total loss of the tanker and cross-appealed and sought for the restoration of the award made by the trial court for the total loss of the tanker. C

Briefs of argument were filed and exchanged. The appellant formulated two issues as follows:

1. Whether the court below was correct when in its judgment it affirmed the judgment of the trial court on: D

(a) The award of damages for loss of use at N9,672.30 per day, and same running from 1st April, 1998 till 28th April 2000; a period of 839 days; and

(b) The award of N656,216.00 as general damages. E

2. Whether the learned Justices of the court below were right when they endorsed the use of evidence of PW3 by the trial court which piece of evidence was not pleaded.

The respondent also raised two issues in the main appeal as follows F

1. Whether the evidence of PW3 was adequately pleaded (Ground 4).

2. Whether the awards made in favour of the Plaintiff were justified (Grounds 1, 2 and 3). G

The Cross-Appellant formulated a lone issue in the cross-appeal which reads

"Having regard to the pleadings and evidence, was the Court of Appeal right in setting aside the N3.5million awarded by the trial court for the value of the Cross-Appellant's burnt tanker?" H

The cross-Respondent agreed with the issue formulated in the cross-appeal but worded the issue slightly differently as follows:

"Whether the Court of Appeal was right when it reversed the decision of the trial court in respect of the award of N3,5000,000.00

as the market value of the burnt trailer”.

Learned counsel for the cross-appellant filed a reply brief to draw a distinction between this case and what happened in *Osuji v. Isiocha* (1989) 3 NWLR (Pt. III) 623.

MAIN APPEAL

B Of the two issues raised in the main appeal, I wish to start with a consideration of the second issue which deals with whether there was any pleading on which the evidence of PW3 rested. Learned senior counsel for the appellant referred to paragraph 6 of the statement of claim and paragraph 10 in the statement of defence in which C issues were joined on whether the fire started from the underground tank and the evidence elicited from PW3 under cross-examination and submitted that the said evidence on which the learned trial Judge relied to make his finding of negligence against the defendant/appel- D lant was inadmissible.

Learned counsel for the plaintiff/respondent referred to paragraphs 7, 8, 9, 10, 15 and 16 of the statement of claim and submitted that the facts pleaded in the said paragraphs were sufficient to justify the learned trial Chief Judge's acceptance and use of the evidence of PW3 and the court below was right to affirm the finding of negligence by the defendant. In paragraphs 7, 8, 9, 10, 15 and 16 of E the statement of claim the plaintiff averred as follows:-

F “7. On arrival at the defendant's service station at Joseph Gomwalk Road Jos, the defendant directed the plaintiff's driver to drive the tanker towards the end of the fence at the back of the defendant's office building.

G 8. The reason given for directing the aforesaid position of the tanker is to enable the defendant utilise an improvised discharging point due to the faulty nature of the usual and appropriate discharging point which is outer.

H 9. Unknown to the plaintiff's driver, the outlet (a standing pole) through which heat ought to be passing out from the underground tank was bent thereby making the inside of the underground tank to be air tight, thereby causing poor air circulation.

10. The plaintiff and its agents at the material time were not aware that the defendant had no fire extinguisher and there was no functioning gadgets or equipments such as earth cable for protection against static electricity during the discharge of petrol into the

defendant's underground tank.

15. *The plaintiff avers that petrol being an inflammable and volatile substance, the handling is an act which requires special protection to guard against fire by providing all necessary safety devices. This fact is well known to the defendant who had on previous occasions issued such warning to its dealers. The plaintiff will use and rely on documents relating to this fact and they are hereby pleaded.* B

16. *The plaintiff avers that due to the defendant's negligence, while the petrol was flowing from the said tanker to the defendant's underground tank, fire emitted from the underground tank as a result of static field which ignited the rich vapour emanating from the petrol that was flowing into the underground tank. At the trial of this suit the plaintiff will use and rely on all the investigation reports of the police and fire service and the statements made by eye witnesses to the aforementioned bodies.* C D

PARTICULARS OF NEGLIGENCE

(a) *The defendant being the occupier of the said property failed to take any precautionary measure to guard against the occurrence of fire out-break in the course of discharging petrol at the premises.*

(b) *The defendant failed to install earth wire (bonding) for protection against static electricity to eliminate potential electric differences between product and the tank underground.* E

(c) *The defendant failed to provide an appropriate and convenient discharging point which influenced it to direct the plaintiff's vehicle to drive and park on top of the underground tank.* F

(d) *The defendant failed and or neglected to install appropriate poles for the passage of air from the underground tank to the atmosphere which caused poor air circulation.*

(e) *Defendant failed to provide the extinguishers which would have contained the fire outbreak"* G

The defendant pleaded in paragraph 10 of the amended statement of defence that-

"10. The defendant denies that the fire in question started from the underground tank and further states that after the fire incident the fuel in the underground tank was intact and unaffected by the fire." H

Mr. Samuel Musa Azwak testified as PW3. He is a fire prevention officer with the Plateau State Fire Service. He it was who led a

team of fire officers to investigate the cause of the outbreak and compiled a report which was received in evidence as Exhibit 3. He noted that the position of the tanker for discharging the petrol was not convenient for discharging petrol, no fire extinguisher was used for fighting the fire, the defendant had no bonding wire at the station. He explained that the bonding wire is fastened to the tanker discharging petrol while the other end is clipped to the underground tank to avoid static electricity from building up thereby preventing electricity from sparking which ignited the fire.

It was from the cross-examination that learned counsel elicited the evidence which the trial court used to make the finding of negligence. As gleaned at page 69 of the records the evidence which PW3 save under cross-examination is reproduced as follows:

“He denied the suggestion that as from Exhs 2, 2A - 2C only the tanker was burnt and that nothing happened to the underground tank. According to him, the hose that went into the underground tank was not burnt but the one that went to the tanker was burnt because the vapour that oozed out of the underground tank could not ignite fire while still in the tank, it is only when it comes into contact with oxygen that it can ignite fire.”

The compiled records did not contain the judgment of the learned trial Chief Judge. It is only the Notice of Appeal filed to the Court of Appeal, the briefs containing the arguments and the judgment of the lower court. In the Court of Appeal, 10 issues were formulated by the appellant and issue 1 which runs from pages 174 - 183 concentrated on whether the learned Chief Judge was right when he held that it was the defendant that caused the fire outbreak that resulted in the burning of the plaintiff's tanker. In the absence of the judgment of the learned trial Chief Judge it is necessary to reproduce in extenso the arguments relevant to the issue as learned counsel made reference to that brief in the present appeal albeit under issue 1 where he stated at page 5 thus:

“This issue has been treated in the appellant's brief filed in the court below at pages 190 - 196 and 197 - 198 of the records. We respectfully adopt all the arguments contained therein”

The arguments contained in issue 2 in the present appeal are a rehash of what learned counsel stated in issue 1 in the court below and it is concerned with the admissibility of evidence of PW3 and the

use which the lower court made of the evidence which learned counsel said was not pleaded. In his leading judgment, Sanusi J.C.A. dealt with the arguments raked up by learned counsel for the appellant when he said:

"I am mindful of the fact that in the appellant's amended brief of argument the competence of PW3 to give expert evidence and opinion was challenged. Issue of his qualification also surface (sic) for the first time on the said brief of argument when the appellant introduced it in the brief though he did not do so during the trial. With due respect to the learned counsel for the appellant, having failed to challenge his competence at the trial court he cannot now be heard disputing his evidence as on (sic) expert. See: Gonto v. State (supra). Assuming that I am wrong on this, I still hold that even if the PW3 the expert witness had no require (sic) qualification on the relevant profession field he can still testify on that field provided he acquired practical Knowledge in the relevant field and he is competent expert in the field. See: Ajani v. The Comptroller of Customs (1954) 14 WACA 37 at 39; Eshet v. Mercury Ass. Co. Limited (supra). In the instant case the issue of qualification or experience of PW3 was not raised or tested at all during the trial. Failure to do so, in my view, is sufficient to justify the admission of his evidence as an expert, see: Aguad v IGP (1954) 14 WACA 449 at 450. See also Akinrimade v. Lawal (supra). The learned counsel for the appellant in his amended brief of argument referred to the case of ANTS v. Atoloye (supra) wherein Tob J.C.A (as he then was) said at page 253:- "while a court of law is expected to treat expert evidence with respect and candour, it is not invariably bound to accept such evidence.

Thus, it is not unusual for the court in a clear case, to form their opinion on what an expert witness says, particularly when it is contradictory and not consistent with normal conduct and human happenings". With due deference to the learned counsel for the appellant, the reasons given by PW3 as the possible cause of fire is (sic) corroborated with pieces of evidence given in the testimonies of the eye witnesses especially regarding the point the fire outbreak started. PW3 has also given explanation as to why the fuel in the underground remained "intact" or there was no fire engulfing the underground tank..... From the explanation given by the plaintiff's witnesses especially PW3 there is no cogent reason to believe that the

fire broke out as a result of the washing of hands by the motor mates as explained by the defendant/appellant. See: NRC v. JC Emeaharo & Sons (1994) 2 NWLR (Pt.325) 206; Nwabueze v. Iwengwe (1978) 2 SC 61 at 70"

Thus the lower court effectively sealed the complaints of the appellant regarding the admissibility of PW3's evidence. There was a concurrent finding of fact made by the two lower courts as to the negligence of the appellant in causing the fire outbreak which completely burnt down the plaintiff's tanker. There is no way in which the appellant can escape liability.

The appellant's complaint on the award of damages is two-pronged. The first is that the award of N9,672.30 per day for 839 days for loss of use of the burnt down tanker is unreasonable and secondly the further award of N656,210.00 as general damages amounts to double compensation. Learned counsel for the respondent argued that the appellant as defendant did not deny the plaintiff/respondent's specific claims as required by the rules of pleadings and since the defendant failed to specifically deny the statement of claim, no issue was joined for determination by the court and so the learned trial Judge was justified even on the basis of the pleadings alone to award the amounts claimed by the plaintiff.

This argument may suffice for the award of N9,672.30 per day for the loss of use of the vehicle up to a point but it will not justify the award of N656,201.00 as general damages. In certain cases general damages may be awarded in the sense of damages "such as the jury may give when the judge cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable man" (per Martin B in Prehn v. Royal Bank of Liverpool (1870) 5 Ex.92 at 99). As rightly pointed out by learned senior counsel for the appellant, the award of N656,210.00 as general damages amounts to double compensation when the loss per day has been ascertained and is justified. See: Kerewi v. Odugbesan (1967) NMLR 89 and Anthony Soetan v. Ogunwo (1975) 6 S.C. 67 at 72. The said award of N656,210.00 as general damages is unjustified and is hereby set aside.

As regards the award of N9,672.30 for loss of use per

day from 10th January 1998 to 28th April, 2000 a total period of 839 days or about 2 1/2 years, this Court has in a number of cases considered the award for 6 months to be reasonable. In *Kerewi v. Bisiriyu Oduebesan* (1965) 1 ALL NLR 98 at 101, this Court stated that the measure of damages in negligence:-

"is the value of the car at the time of the accident plus such further sum as would compensate the owner for loss of earnings and the inconvenience of being without a car during the period reasonably required for procuring another car" ^B

In *Onwuka v. Omogui* (1992) 3 NWLR (pt.230) 393 at 421 - 422, the plaintiff claimed the sum of N118 as loss of use per day from 6th August 1981 till date of judgment. This Court awarded loss of use from 6th August 1981 to 5th February, 1982, which is a period of six month. In agreeing with the leading judgment delivered by Babalakin, J.S.C., Nnaemeka Agu, JSC observed at page 425 ^C supra:

"Before I conclude, I must confess that I was a bit worried about the length of the period claimed by the plaintiff as loss of use that is until the date of judgment. My worry was that the plaintiff had a duty to mitigate his loss. But because of the peculiar facts of this case wherein the defendants initially agreed to repair the plaintiff's motor vehicle but mid-stream unreasonably resiled from the agreement, this Court, as a court of equity, should balance the plaintiff's duty to mitigate with the defendant's unreasonable conduct and use its best endeavour to reach an equitable decision. I therefore, agree with my learned brother, Babalakin, J.S.C. that a period of six months for loss of use is reasonable on the facts and circumstances of this case." ^E ^F

Also in *Benjamin Obasuyi v. Business Ventures Limited* (2000) 3 NWLR (Pt.658) 668 at 683, this Court, per Belgore, J.S.C. (as then was) stated:

"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 to get such damaged vehicles repaired at the earliest opportunity. This is the requirement of the law all over the world. It is not confined to common law, and it is based on common sense and reasonableness. To allow a party that is a victim of negligence time almost in perpetuity to leave his damaged object un-repaired and ^H

expect damages to be calculated against years rather than a few days is giving a blank cheque to rake underserved compensation... 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 Limited v. Underground Railways Company of London Limited (1912) A.C. 673; Dredger Liesbosch Company v. Owners of Steamship Edison (1933) A.C.449)”

In view of the fact that the truck was completely burnt down the reasonable period within which a replacement can be made is 180 days and the calculation for the loss suffered would be N9,672.30 per day for 180 days. This comes to N1,661,104.00.

THE CROSS - APPEAL

In arguing the cross - appeal, learned counsel for the Cross-appellant submitted that the lower court correctly stated the principle for the award of special damages when it said:

“Where no effort was made by a party to attack the items of special damages claimed under cross-examination and the pleading and evidence led by the respondent clearly identified each item of the special damages claimed and the amount claimed is specific it would be inescapable to hold that the defendant conceived the items of special damages claimed”.

He submitted that the above principles of law were ignored when the court below considered the claim for the value of the burnt tanker and proceeded to set aside the award made by the trial court. He referred to paragraph 23 of the Statement of Claim where the current market value of a tanker of the same age and condition like that of the plaintiff was pleaded and the averments in paragraphs 2 and 12 of the Amended Statement of Defence and submitted that there was no averment disputing the amount of N3.5million as required by the rules of pleading. He argued that the decision in Nigeria Produce Marketing Board v. Adewunmi (1972) All NLR 870 at 878 and McGregor on Damages, 13th Edition at page 932 paragraph 1395 relied on by the lower court was based on the provisions of Order 18 Rule 13(4) of the old Rules of the Supreme Court of England formerly applicable in Nigeria have been deleted from the current rules in England and the position of the law now is that a

Defendant must specifically plead that the value stated for a particular item in the Statement of Claim is not correct. He said all the States in Nigeria, including Plateau State which operate the Uniform Rules have incorporated the new Rules of England into their legal system.

He then referred to Order 25 of the Plateau State Civil Procedure Rules and relying on *Owata v. Anyigor* (1993) 2 NWLR (Pt.276) 380 where it was held that the rule governing practice and procedure is the rule in force at the time of the trial noted that the Plateau State High Court (Civil Procedure) Rules came into operation in 1988 while the action was instituted in 1998 submitted that the traverse must not be evasive but must answer the point of substance and cited *Ohadigha v. Garba* (2000) 14 NWLR (Pt.687) 226 in support. He further contended that all material facts must be properly traversed before issues can be said to have been joined and relied on the following cases: *Honika Sawmill (Nig.) Limited v. Hoff* (1994) 2 NWLR (Pt.326) 252 at 270 - 271; *Ezemba v. Ibeneme* (2004) 14 NWLR (Pt.894) 617 at 661 - 662; *Otapo v. Sunmonu* (1987) 2 NWLR (Pt.58) 587 at 622; *A-G. Federation v. A.-G. Abia* (No.2) (2002) 6 NWLR (Pt.764) 542 at 677-678; *Bua v. Dauda* (2003) 12 NWLR (Pt.838) 657 at 679; *Atolagbe v. Shorun* (1985) 1 NWLR (Pt.2) 360

Learned counsel also referred to the lower court's judgment where it stated that the N3.5million being the worth of the burnt down tanker was an item of special damages which required strict proof and argued that there is nothing sacrosanct about the phrase "strict proof" and submitted that what is required of a claimant in strict proof has been clearly explained in a plethora of cases to mean no more than that the evidence must show the same particularity as is necessary for its pleading. The following cases were cited in support: *Imana v. Robinson* (1979) All NLR I; *Gurara Sec. & Fin Limited v. T.I.C. Limited* (1999) 2 NWLR (Pt.589) 29; *Nzeribe v. Dave Eng. Co. Limited* (1994) 8 NWLR (Pt.361) 124; *Olale v. Ekwelendu* (1989) 4 NWLR (Pt.115) 326; *Ayoke v. Bello* (1992) 1 NWLR (Pt.218) 380. He argued that the evidence of PW5 on the value of the tanker was not contradicted and so it is valid and sufficient to satisfy the requirement of "strict proof". The cases for this submission were: *Odulaja v. Haddad* (1973) ALL NLR 836 at 839 - 841; *Ajao v. Ashiru* (1973) 11 S.C. 23; *Ijebu-Ode Local Govt. v. Balogun & Co.* (1991) 1 NWLR

(Pt.166) 136 A.G. Oyo State v. Fairlakes Hotels (No.2) (1989) 5 NWLR (Pt.121) 255 at 281; Agbaje v. National Motors (1971) 1 UILR 119 at 123; Nwabuoku v. Uttih (1961) ALL NLR 507. He sought to distinguish the cases relied upon by the lower court by saying that they are either irrelevant or not applicable. He said the non-tendering of a receipt to establish the purchase price of the tanker is not fatal to the Cross-Appellant's case since the Statement of Claim regarding the value of the tanker was not denied.

As to the fact that the tanker was old and no evidence was led to establish its age, learned counsel argued that this is of no moment since it is a notorious fact that in this country old vehicles could be of a higher value than their original purchase price. He urged this Court to allow the Cross-appeal and restore the award made by the trial Judge since there was no pleading disputing the amount nor was any attempt made by the Cross-respondent to contradict the value which was given in evidence.

In his response, learned counsel for the Cross-respondent referred to the evidence of PW5 which was appraised by the lower court in which that court found that since the amount was for the market value of the burnt trailer was an item of special damages, it must be proved by credible evidence but the evidence adduced by PW5 was not cogent and having been discredited under cross-examination the lower court was right to set aside the award and relied on *Osuji v. Isiocha* (1989) 3 NWLR (Pt.111) 623; (1989) 6 S.C. 240. He asserted that the court below relied on established and sound principles of law to set aside the award and that the contention in the Cross-appellant's brief that the law on pleadings has changed is of no moment. He then referred to paragraph 16 of the Statement of Defence and submitted that there was neither express nor implied admission of the claim of N3,500,000.00 by the Defendant. He went further to contend that the Plaintiff abandoned his pleading to place reliance on a non-existing admission. Citing *Adegbite v. Ogunfaolu* (1990) 4 NWLR (Pt.146) 578 at 590 and *Egbue v. Araka* (2002) 13 NWLR (Pt.783) 89 at 105, learned counsel submitted that mere averment in the Statement of Claim without evidence is no proof of the facts averred therein. He argued that where a matter is made an issue as pleaded in paragraph 23 of the Statement of Claim, the opponent is entitled to lead evidence on the point. He cited

Morohunfolu v. Kwara Tech. (1990) 4 NWLR (Pt.145) 506. He said the pieces of evidence which were extracted from PW5 under Cross-examination fully discredited the Plaintiff's claims. He therefore urged this Honourable Court to hold:

(1) That the Plaintiff/Cross-Appellant did not prove its claim on the N3,500,000.00 as market value of the burnt trailer B

(2) There was no admission either express or implied from the pleadings of the parties of the claim of N3,500,000.00

(3) The evidence extracted under cross-examination from PW5 by the counsel for the Defendant/Cross-Respondent on the value and age of the trailer which the Court of Appeal relied upon is admissible. C

In paragraph 23 of Statement of Claim plaintiff pleaded that-
"23. The current market value of a tanker of the same age and condition like that of the Plaintiff now sells for N3,500,000.00 (Three D Million Five Hundred Thousand Naira) only."

The Defendant averred in paragraphs 2 and 12 of the Amended Statement of Defence as follows:-

"2. The Defendant denies paragraphs 7, 8, 9, 10, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26 of the Statement of Defence (sic) E and put the Plaintiff to a strict proof of the facts contained therein at the trial of this Suit."

12. "In answer to paragraphs 16 and 26 of the Statement of Claim, the Defendant denies being negligent for the outbreak of fire and denies being liable for the sum claimed or any sum at all". F

Paragraph 2 of the Amended statement of Defence is a general denial. Under the Rules of the Supreme Court, 1976 any allegation that a party has suffered damage and any allegation as to the amount of damages is deemed to be traversed unless specifically admitted. See: Order 18 Rule 13 (4) R.S.C 1976. Amendment No.4 of the Supreme Court Rules, 1989 contained in Statutory Instrument 1989 No. 2427 and Rules of the Supreme Court (Amendment No.4) 1991 (S. I. 1991 No.2671) revoked Rule 13(4). The current Order 18 Rule 13 which is in operation provides as follows: G

"13- (1) Any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 14 operates as a denial of it. H

(2) *A traverse may be made either by a denial or by a statement of non-admission and either expressly or by necessary implication.*

(3) *Every allegation of fact made in a statement of claim or counterclaim which the party on which it is seemed does not intend to admit must be specifically traversed by him in his defence or defence to counterclaim, as the case may be; and a general denial of such allegations, or a general statement of non-admission of them, is not sufficient traverse of them ”.*

Order 25 of the Plateau State High Court (Civil Procedure) Rules carries the same import as the Amended Supreme Court Rules 1989 which states, inter alia in Rules 13, 14, and 15 thus:

“13. It shall not be sufficient to deny generally the facts alleged by the statement of claim, but the defendant shall deal specifically with them, either admitting or denying the truth of each allegation of fact seriatim, as the truth or falsehood of each is within his knowledge, or (as the case may be) stating that he does not know whether any given allegation is true or otherwise.

14. When a party denies an allegation of fact he shall not do so evasively, but shall answer the point of substance. And when a matter of fact is alleged with diverse circumstances it shall not be sufficient to deny it as alleged along with those circumstances, but a full and substantial answer shall be given.

15. The defence shall admit such material allegations in the statement of claim as the defendant knows to be true, or desires to be taken as established without proof thereof”

The suit now on appeal to this court was filed in 1998 and the Plateau State High Court (Civil Procedure) Rules were enacted in 1988. The Rules of the Supreme Court were amended in 1989 and in the said amendment order 18 Rule 13(4) was deleted. In consequence of the amendment, the defendant must now specifically traverse any claim for damages in the action. Before 1989 any allegation as to the amount of damages in a claim was regarded as denied unless it was specifically admitted. The decision of Fatayi-Williams, J.S.C (as he then was) in *Nigerian Produce Marketing Board v. Adewunmi* (1972) All NLR 870 at 879 which was based on order 18 Rule 13(4) of the Rules of the Supreme Court to hold

that any allegation that a party has suffered damage and any allegation as to the amount of damages is deemed to be traversed unless specifically admitted is no longer the law regarding pleadings.

This fact has been brought out in McGregor on Damages 16th Edition par. 2048 at page 1333 where the learned author stated:- B

“Formerly there was in general no need for the defendant to plead to damages at all, R.S.C., Ord 18 r. 13(4) providing that “any allegation that a party has suffered damage and any allegation as to the amount of damage is deemed to be traversed unless specifically admitted”. C

The reference to allegations as to amount of damage was removed from the rule in 1989, in conjunction with the appearance of a new Ord. 18, r. 12(1) (c) requiring the pleading,

“where a claim for damages is made against a party pleading, D (of) particulars of any facts on which the party relies in mitigation of, or otherwise in relation to, the amount of damages.” “Gone therefore is the rule built up by the common law that matters in bar of the action must be pleaded but matters in mitigation need not; and the cases allowing a defendant, who has omitted to plead matter which E constitutes a defence, to prove such matter in mitigation though no longer able to set it up as a defence, have been overtaken. As did the old Rule, so also the new Rule applies not only in mitigation in the exact sense of avoiding the consequences of a wrong but also to F mitigation where damages are affected by the conduct, character and circumstances of various parties and where a plaintiff suing for breach of contract is also himself in breach”.

In the light of the above postulation, it becomes necessary to examine the evidence whether the appellant despite the absence of G denying the claim by the respondent successfully destroyed the evidence of PW5 under cross-examination as to justify the setting aside the award of N3.5million by the lower court on the ground that the item being special damages was not strictly proved.

In his brief of argument, Mr. Rotimi Oguneso, SAN reproduced H the evidence of PW5, Mr. Felix Ezeamoché, the Managing Director of the Plaintiff who stated in his examination-in-chief:

“The vehicle was burnt at the Unipetrol Filling Station at Polo Roundabout beyond repairs. I want the Defendant to pay the Plain-

tiff for the burnt truck at the price of N3,500,000.00. This was the price at 10/1/98”

And under cross-examination, he said:-

B *“The truck used for conveying the petrol on the fateful day was bought in April 1995. It was bought as a second hand truck. I do not know when it was bought from the manufacturers. It is not true to say that the cost of a new truck is N3,500,000.00.”*

C *Learned Senior Counsel then reproduced lower court’s appraisal of the evidence adduced by plaintiff s witnesses where it said- “It is beyond dispute that the PW5 (Plaintiff’s Managing Director) is not an expert or automobile engineer. There is also no gain-saying that the said vehicle is not a new one as in fact the Plaintiff himself confirmed that it was bought second hand, 3 years before it got burnt. He also confirmed that he did not know when it was bought*
D *by the original owner or the first buyer from the manufacturers. Again, PW5 did not give evidence on the price he bought the vehicle in 1995. Had these pieces of evidence being (sic) given, it would have assisted the trial court on ascertaining the actual cost of the vehicle or how the plaintiff arrived at his claim of N3.5million. Also evidence of*
E *the value of the vehicle was not produced”*

The lower court proceeded to set aside the award of N3.5million being a claim for special damages which was not strictly proved. This decision would not have been faulted if the old procedure of deem-
F *ing an allegation not specifically admitted as having been denied were still in place. Although the evidence of the value of the burnt down truck is based on the ipse dixit of PW5, since the claim was not specifically denied and the defence did not suggest a contrary figure, minimal evidence is needed to sustain this head of claim. The deci-*
G *sion in Osuji v. Isiocha (supra) is of no assistance to the cross-respon-*
H *dent. Furthermore since the evidence of PW5 on the value of the tanker was not contradicted, it is valid and sufficient to satisfy the requirement of strict proof. See: Odulaja v. Haddad (1973) All NLR 836 at 839 - 841; Ajao v. Ashiru (1973) 11 S.C. 23; A.G. Oyo State v. Fairlakes Hotels (No.2) (1989) 5 NWLR (Pt.121) 255. Ijebu-Ode Local Government v. Balogun & Co. (1991) 1 NWLR (Pt.166) 136; NEPA v. Alli (1992) 8 NWLR (Pt.259) 279 and Nzeribe v. Dave Eng. Co. Limited (1994) & NWLR (Pt.361) 124.*

There is no doubt that if there had been evidence of an

expert of the value of the burnt down truck, it would have been the best type of evidence but we must not lose sight of the fact that a second hand vehicle may well cost more than what it was purchased for when it was new because of inflationary trends where vehicles are imported and even the cost of assembling the knocked down parts could be prohibitive, thereby making the imported products cheaper than those assembled in the country. Nnaemeka - Agu J.S.C (of blessed memory) had this in mind when he discussed the best evidence of value in NEPA v. Alli supra at pages 304 - 305 where he said:-

"This raises the difficult but important question of what is the best evidence of value in the circumstances of this case? In the case of The Ironmaster (1859) Swab. 441 it was held that in the absence of a clear market value, the best evidence of value is the opinion of those who knew the vessel shortly before the incident or damage. The next best evidence is the opinion of those who are well conversant with the type of chattel destroyed generally, while the original cost, the cost of repairs due and the sum at which insurance had been taken out, though sometimes evidence of value, are of inferior weight. These principles were approved in The Harmonides (1903) P.I. 5-6. See: also, The Clyde (1856) Swab. 23. The cases and others in the class show that the price of the goods less depreciation which was applied in Leisboch case (supra) is not the only method of proving the value of a chattel destroyed. They also show that the opinion of a person, such as P.W.4 who is well conversant with the chattel involved is also an acceptable evidence involved as also an acceptable evidence of value. It should have been accepted in this case, moreso in this country in which it is a matter of common knowledge that because of the rapid depreciation of the Naira, a chattel could be sold for much higher price than it was bought after it had been used for a number of years. So, the value by PW4 should have been accepted: there is therefore, nothing to remit to the court below for assessment".

In Ubani - Ukoma v. Nicol (1962) 1 ALL NLR 107 Taylor FJ held at page 111 the value to be on a used chattel that -

"In an action sounding in negligence actual damage must be proved, but the value of a used article or chattel is not an item of special damage in the sense that it can be exactly quantified like the

cost of repairs or the expenses of hospital treatment. It is open to either party to call evidence and the Court must do the best it can on the material before it... The market value of any article is the sum it would fetch under the state of things for the time being existing. It is a matter of estimation on which opinions often differ."

B Since this was a case of complete loss, the principle to be invoked in assessing the value of the vehicle is that of restitutio in integrum which means that the cross-appellant should recover such sum as will place him so far as can be done by compensation in money, in the same position as if the loss had not been inflicted on him. The damages to be awarded therefore need not be based on the value of the chattel at the time of destruction. The lower court was wrong to set aside the award of N3.5million for the complete loss of the tanker.

D The cross-appeal therefore succeeds and the award made by the learned trial Chief Judge of Plateau State for the total loss of the burnt down tanker is hereby restored. The cross-appellant is entitled to the award of N3.5million being the amount he requires to replace the completely burnt down trailer.

E In the result the cross-appeal succeeds and the award of N3,500,000.00 made by Uloko Chief Judge of Plateau State is restored. The main appeal succeeds in part as the award of N656,210 as general damages is set aside as being tantamount to granting the plaintiff/respondent double compensation. Similarly the award of **F** N9,672.30 per day for loss of use of the tanker for 839 days is considered as unreasonable.

Instead it is hereby ordered that the plaintiff/cross-respondent shall be entitled to award of N9,672.30 per day for loss of use of the **G** tanker for 180 days or N1,661,014.00 bringing the total damages awarded to him for the replacement of the burnt down tanker and loss of the use to N5,161,014.00. The parties are to bear their own costs. Appeal succeeds partially.

H

MOHAMMED JSC

I have had the privilege before today of reading the lead judgment of my learned brother Aka'ahs J.S.C., which has just been delivered. I completely agree with the manner he treated and resolved

the two issues in the main appeal and lone issue in the cross-appeal before finally arriving at the conclusion to allow the appeal in part while the cross-appeal was allowed in full. As I have nothing new to add to the lead judgment, I hereby adopt the same as mine and abide by all the orders made therein including the order on costs.

B

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother - Aka'ahs, JSC. I agree with same. I shall briefly chip in a few words of my own in appreciation and support of the reasons therein contained.

C

The salient facts of the matter have been well stated in the lead judgment. Put briefly, the defendant employed the services of the plaintiff's tanker to discharge fuel at its depot. The tanker got burnt while discharging at the defendant's station. The plaintiff filed action at the trial High Court, Jos against the defendant for negligence. It claimed the sum of N3.5million as market value of the tanker, loss of earning for 839 days at N9,672.30 per day and the sum of N656,210.00 as general damages, as well as other sundry heads of claim.

E

The trial court found that negligence was established against the defendant tanker that got burnt beyond repairs. In a rather generous fashion it granted all the heads of claim of the plaintiff. The defendant appealed to the Court of Appeal, Jos Division which allowed the appeal partly in respect of the sum of N3.5million - market value of the burnt tanker which it maintained, was not proved but sustained other heads of claim made by the plaintiff.

F

The defendant has decided to further appeal to this court in respect of the other heads of claim by the plaintiff. The first issue which was seriously canvassed relates to the sum of N9,672.30 for loss of use per day for a period of 839 days granted to the plaintiff by the trial court and affirmed by the court below. The contention is whether or not the award is in consonance with well established legal principles.

H

It is now well settled that the measure of damages in an action for negligence is founded on the principle of *restitutio in integrum*. This means that for the loss of vessel or vehicle due to negligence, the

owner of the vehicle is entitled to what is called *restitutio in integrum*. The owner of the vehicle should recover such a sum as will replace same, so far as can be done by compensation in money, in the same position as if the loss had not been inflicted on him, subject to the rules of law as to remoteness of damages. This is as pronounced by this court in the case of *Lagos City Council Caretaker Committee v. Benjamin O. Unachukwu* (1978) 3 S.C. 199 at 202 per Bello, JSC (as he then was) relying on the decision in *Liesbosch Dredger v. SS Edison* (1933) AC 449 at 459.

In awarding damages for loss of vehicle due to negligence, this court has consistently maintained that the measure of damages in negligence is the value of the vehicle at the time of the accident plus such further sum as would compensate the owner for loss of earnings and inconvenience of being without the vehicle during the period reasonably required for procuring another vehicle. It is the duty of the plaintiff to mitigate his loss as he should not be allowed to make the incident an avenue for hitting an undeserved gold mine *ad infinitum*. See: the cases of *Kerewi v. Bisiriyu Odugbesan* (1965) 1 All NLR, 98 at 101; *Ubani-Ukoma v. G. E. Nicol* (1962) 1 All NLR 105; *Onwuka v. Omogui* (1992) 3 NWLR (Pt.230) 393 at 421 - 422; *Benjamin Obasuyi v. Business Ventures Ltd.* (2000) 5 NWLR (Pt.658) 668 at 683; and *Benin Rubber Producers Ltd. v. Ojo* (1997) 9 NWLR (Pt.52) 11; all cited by the appellant's counsel and clearly in point.

There is no doubt about it that the award for loss of use for a period of 839 days made by the trial court and affirmed by the court below is clearly outrageous and out of tune with the reality of the situation. An award for a period of 180 days will properly balance the equation and assuage the plight of the plaintiff. This is the current trend by this court and same is hereby ordered.

The next issue relates to the award of general damages in the sum of N656,200.00. An award of general damages after the award for special damages invariably equates to double compensation; in the main. The law frowns at same. It should not be allowed under normal circumstance. See: *Anthony Soetan v. Ogunwo* (1975) 6 S.C. 67 at 72 and *Kerewi v. Odugbesan* (1967) NMLR 89 at 91; both cited by learned counsel for the appellant. This head of claim is hereby set aside. The main appeal is accordingly allowed in part.

The cross-appeal has to do with the setting aside of the sum of

N3.5million being special damages for the value of the burnt tanker. There is no doubt that the tanker got burnt beyond repairs. Learned counsel for the cross-appellant submitted that the cross-respondent did not deny the cross-appellant's claim in respect of the burnt tanker as to raise issues for consideration. He maintained that there is nothing sacrosanct about the phrase 'strict proof' in respect of special damages as what is required is evidence showing a particularity necessary for its pleading. He said since the cross-respondent did not specifically deny that the burnt tanker was worth N3.5 million, the implication is an admission. He cited *Imana v. Robinson* (1979) All NLR 1; inter alia. B
C

He further submitted that apart from the testimony of PW5, there was no evidence in rebuttal by the cross-respondent. Mr. Oguneso felt that the quality of the evidence adduced by PW5 was not cogent and so the court below was right in setting the stated sum aside. PW5, the plaintiff's manager who was familiar with the tanker before it got burnt as a result of the negligence of the defendant said the tanker was worth N3.5 million. No contrary figure was given by the defendant. I feel the evidence given by PW5 satisfied the required proof. D
E

In any event, as the tanker got burnt beyond repairs and negligence was established against the defendant, the plaintiff should not be allowed to go empty handed. It is often said that where there is a proven right in law, there should be a remedy. I am of the considered view that the court below goofed in setting aside the award of the sum of N3.5million being special damages for the loss of the plaintiff's tanker. The cross-appeal should be; and it is hereby allowed. The order of the court below in respect of special damages is set aside while that of the trial court is restored. F
G

Let me stop here. I feel I am done. I endorse the view expressed in the lead judgment in respect of costs.

PETER-ODILI JSC, CFR

I am in agreement with the judgment just delivered by my learned brother, Kumai Bayang Aka'ahs, JSC. For emphasis on the reasoning of the decision, I shall chip in some comments.

This is an appeal against the decision of the Court of Appeal, H

Jos Division dated 13th day of April, 2004 wherein the Court partly allowed the Appellant's appeal on the issue of damages, but affirmed the decision of the trial High Court on other grounds and consequently dismissed the appeal.

FACTS BRIEFLY STATED:

B About the 10th of January, 1998, the Plaintiff engaged the services of the Defendant's Tanker with registration No. AA 418 LGJ to convey fuel from NNPC Jos Depot to its Service Station at Bauchi Road, Jos and Joseph Gomwalk Road, Jos. While the tanker was discharging fuel at the said Defendant's filling station, there was a fire incident which resulted in the destruction of the entire tanker, its house and some other properties. With the fire incident, the Plaintiff commenced an action before the High Court of Justice, Plateau State wherein it alleged negligence against the defendant. The Plaintiff's D claims are captured thus:-

"WHEREAS the Plaintiff claims against the Defendant the sum of N5,000,000.00 (Five Million Naira) made up as follows:-

(a) The market value of the tanker is N3,500,000.00 (Three million, five hundred thousand naira) only;

E *(b) The extra tyre N34,000.00 (Thirty-four thousand naira) only;*

(c) Trailer Jack N6,000.00 (Six thousand naira) only;

F *(d) Loss of earning from 10th January 1998 to 31st March, 1998 at the rate of N9,672.30k for 80 days given a total of N773,784.00 (Seven hundred and seventy-three thousand, seven hundred and eighty-four naira) only;*

(e) General damages N556,216.00 (Six hundred and fifty-six thousand, two hundred and sixteen naira) only;

G *(f) Plus loss of earnings from 1st April, 1990 till total liquidation of judgment debt at the rate of N19,572.30k per day;*

(g) Interest on the judgment debt at the rate of 10% "

H The Plaintiff's case as revealed by its pleadings is that it was the Defendant that was responsible for the fire incident of 10th January, 1998 in which its tanker was burnt. The following were the particulars of negligence:-

1. The Defendant used an improvised discharging point which is not convenient for discharging petrol and this was the reason why its tanker had to park at a spot which is not convenient.

2. The Defendant failed to install earth wire (bonding) for protection against static or to eliminate potential lactic differences between product and the tank underground.

3. The Defendant failed or neglected to install appropriate poles for the passage of air from the underground tank to the atmosphere which caused poor air circulation. B

4. The Defendant failed to provide fire extinguishers, which would have contained the fire outbreak.

The Plaintiff averred that due to the Defendant's negligence, while the petrol was flowing from the tanker into the underground tank, fire emitted from the underground tank as a result of the static field, which ignited the rich vapour emanating from the petrol that was flowing into the underground tank. C

As an alternative, the Plaintiff also relied on the doctrine of *Res Ipsa Loquitur*. However, the Defendant denied these allegations in its Statement of Defence and stated the following as the cause of the fire:- D

"i) The discharging point is not abnormal and that it has been using same for 3 years prior to the accident;

ii) The tanker had to park at the spot it parked because its hose was too short and could not reach the discharging point; E

iii) The Tanker's hose was leaking which necessitated it to use a metal bucket to collect the leaking fuel;

iv) The tanker Driver's Assistant was washing his hands with the petrol dropping from the leaking hose and at the same time holding a metal funnel at his armpit; F

v) In the process of the above, the metal funnel dropped from the armpit of the Driver's Assistant and fell into the metal bucket and fire ignited" G

The Plaintiff called five witnesses while three (3) witnesses testified in support of the defence case. The court visited the locus in quo. Counsel to the parties thereafter addressed the court and the address of counsel was concluded on 29th September, 1999. On 28th day of April, 2000, the learned trial Chief Judge delivered his judgment wherein he found the Defendant liable in negligence and granted the Plaintiff's claims. H

The Appellant being dissatisfied with the judgment of the learned trial Chief Judge appealed to the Court of Appeal. The Appellant

filed its Notice of Appeal which was amended and further amended by leave of court. Briefs of Arguments were filed and exchanged. The Appellant also filed a Reply Brief. The Court of Appeal heard the appeal on 14th January, 2004. In its judgment dated 13th day of April, 2004, the Court of Appeal (hereinafter referred to as “the Court Below”) partly allowed the appeal against the award of N3.5 million naira as the market value of the burnt tanker but affirmed the decision of the trial court on other grounds. The Appellant still being dissatisfied with the decision of the Court below appealed to this Honourable Court vide its Notice of Appeal dated 19th April, 2004 containing four (4) Grounds of Appeal.

The Respondent also being dissatisfied somewhat cross-appealed to this Court upon a sole ground. On the 18th February, 2013, date of hearing, learned counsel for the Appellant adopted their Brief of Argument settled by Rotimi Oguneso Esq. and filed on 3/2/05. In the Brief were distilled two issues for determination as follows:-

1. Whether the Court below was correct when in its judgment it affirmed the judgment of the trial court on:
 - (a) The award of damages for loss of use at N9,672.30 per day and same running from 1st April, 1998 till 28th April, 2000; a period of 839 days; and
 - (b) The award of N656,216.00 as general damages.
2. Whether the learned Justices of the Court below were right when they endorsed the use of evidence of PW3 by the Court, which piece of evidence was not pleaded.

On the other hand, learned counsel for the Respondent adopted their Brief of Argument settled by Charles Obishai Esq. and filed on 17/3/05. In the Brief were formulated quite precisely two issues for determination, viz-

1. Whether the evidence of PW3 was adequately pleaded?
2. Whether the awards made in favour of the Plaintiff were justified?

It seems to me that considering the two issues differently crafted, those framed by the respondent are precise and apt for use for our purposes and I adopt them and would have them taken together. For the appellant was submitted that the Court below did not advert to all the complaints or grievances of the appellant against the award

for loss of use. That the trial judge awarded in favour of the Plaintiff/ Respondent the sum of N9,672.30 for loss of use per day from 10th January, 1998 to 28th April, 2000, a period of 839 days or about two and a half 21/2 years. That the question that arises is if this award is in consonance with established legal principles to which the answer is in the negative. This for the reason that in an action for negligence, the measure of damages is “restitutio in integrum.” B

He cited Lagos City Counsel Caretaker Committee v. Benjamin O. Unachukwu (1978) 3 S.C. 199 at 202; Kerewi v. Bisiriyu Udubesan (1965) 1 All NLR 98 at 101; Ubani - Ukoma v. G. E. NICOL (1962) 1 ALL NLR 105; Onwuka v. Omogui (1992) 3 NWLR (Pt.230) 393 at 421 - 422, etc. It was further submitted for the Appellant that there is nothing justifying the award of loss of use for a period of 839 days made by the trial court which the court below affirmed which award is against established principles. D

That the principles guiding an award for loss of use in negligence differs from that of detinue and that is the rationale behind the award of loss of use made in Kosile v. Folarin (1989) 3 NWLR (Pt.107) 1 at 76. That the award of loss of use at N9,672.30 for 839 days which the Court of Appeal made is unreasonable, excessive and not in consonance with established principles. He referred to Ibeanu v. Ogbeide (1994) 7 NWLR (Pt. 350) 697 at 716 - 717; Technoexpostroy (Nig.) Ltd. v. Dick Njoku (unreported) decision of the Court of Appeal, Abuja Division delivered on 9th April, 2001 per Dahiru Musdapher J.C.A. (as he then was). E F

It was submitted also for the Appellant that the law is settled that if a plaintiff recovers in full under special damages, he will not be entitled to recover again under the head of general damages for that will amount to double compensation. He cited Anthony Soetan v. Ogunro (1975) 6 S.C. 57 at 72; Kerewi v. Odugbesan (1957) NWLR 89 at 91. On the matter concerning the pleadings and evidence, learned counsel for the Appellant said the evidence on the fire not burning the hose that went into the underground, while the hose that went into the tanker got burnt should not have been admitted since it was not supported by the pleadings and the evidence inadmissible being not pleaded. He referred to Salaudeen v. Mamman (2000) 14 NWLR (Pt.680) 63 at 71. H

Reacting, learned counsel for the respondent said the appli-

cable law is that a defendant must specifically deny a claim for damages which was not done in this case. He cited Ohadieha v. Garba (2000) 14 NWLR (Pt.687) 226; Otapo v. Sunmonu (1987) 2 NWLR (Pt.58) 587 at 622, etc. That since the appellant did not join issues on the specific amounts claimed by the respondent the learned trial judge was justified even on the basis of the pleadings alone, to award amounts claimed by the respondent. He cited many judicial authorities.

It was submitted for the respondent that the question of mitigation of damages rested on the defendant/appellant which he failed to do in this instance and so an award for the duration of two and a half years was not out of place since it had been granted by this court in Odulaja v. Haddad (1973) All NLR 836 at 839 - 841. He cited NEPA v. Alli (1992) 8 NWLR (Pt.259) 279 at 304. Learned counsel further said the award of general damages was in order since it did not need to be specifically pleaded. He referred to Yalaju - Amaye v. A.R.E.C. Ltd. (1990) 4 NWLR (Pt.145) 422 at 450 - 454; Calabar East Co-operative Thrift & Credit Society Ltd. v. Iko (1999) 14 NWLR (Pt.638) 225 at 248, etc. That the amount awarded as general damages covers all manner of inconvenience the respondent had been suffering since the Appellant's negligence in January, 1998 and will continue until its claims are paid. He said the amount awarded in this case is moderate and being upon concurrent award of the two Courts below should not be interfered with. He cited Sabru Motors Ltd v. Rajab Ent. Ltd. (2002) 7 NWLR (Pt.765) 234 at 260-261.

For the respondent was submitted that there was enough pleadings backed by evidence upon which the learned trial Chief Judge made the findings and reached the decision.

In resolving the issue of the award of loss of profit, the Court below per Amiru Sanusi, J.C.A. stated at page 47 of the Judgment as follows:-

"Quite clearly as it appears to me, though defendant might be said to have joined issues on the loss of earnings pleaded by the Plaintiff, but neither challenged or controverted the evidence led by the Plaintiff in proving the claims for loss of earnings. The Defendant did not debunk the evidence of PW5 (though ipsi dixit) that the sum of N9,672.30 was the sum it was entitled to be earning daily. It also did not adduce any evidence to the contrary or to dispute the rate

claimed on daily basis or that the plaintiff was not entitled to such payment on Saturdays, Sundays or public holidays. Where no effort was made by a party to attack the items of special damages claimed and the amount claimed is specified. It will be inescapable to hold that the defendant conceded the items of special damages claimed. See Calabar East Co-op v. Ekot (1999) 14 NWLR (Pt.633) 225 at 142; Bello v. Petegi (2000) 8 NWLR (Pt. 667) 21 at 40. B

The law always allows award on daily basis by courts. See Adisa v. Afuye (supra) and the argument that court usually reduced such claims as in cases of Adisa v. Aluye. Benin Rubber Producers and Kosile v. Folarin pointed out by learned Counsel for the Appellant, in view, depends on the circumstances of those decisions and are not of general application to all the cases where the claims are made.” C

From what transpired in the trial court and affirmed by the Court of Appeal, the award sought for by the Respondent in loss of earning per day from 10th January, 1998 to 28th April, 2000, a period of 839 days from or about two and a half (21/2) years which came to N7.6 million. It throws up the poser if that was allowable within established legal principles, thus the need to have recourse to similar situations placed before this court cannot be run away from so as to maintain the status of this court as that of policy. In that spirit, the fact has to be restated that in an action for negligence, the measure of damages is *restitutio in integrum*. The effect being that in circumstances such as the present, while it cannot be run away from that a plaintiff whose property has been damaged and suffers the loss of the earnings from that property no longer being put in use, the owner of the property has a duty to mitigate the loss and not leave the matter wide open so he can claim *ad infinitum*. See *Lagos City Council Caretaker Committee v. Benjamin O. Unachukwu* (1978) 3 G S.C. 199 at 202. D E F

Bello, JSC (as he then was) stated the position of the law thus:-

“The measure of damages in an action for negligence is founded on the principle of restitutio integrum. The principle was re-echoed by Lord Wright in Liesbosch Dredeer v. SS Edison (1933) A.C. 449 at 459, wherein he said ‘the substantial issue is what in such a case as the present one is the true measure of damage. It is not questioned that when a vessel is lost by collision due to the sole negligence of the wrong-doing vessel the owners of the former vessel are entitled to H

what is called restitutio in integrum, which means that they should recover such a sum as will replace them, so far as can be done by compensation in money, in the same position as if the loss had not been inflicted on them, subject to the rules of law as to remoteness of damage.”

B Also, in *Kerewi v. Bisiriyu Uduebesan* (1965) 1 All NLR, 98 at 101, this Court stated that the measure of damages in negligence:-

C *“Is the value of the car at the time of the accident plus such further sum as would compensate the owner for loss of earnings and the inconvenience of being without a car during the period reasonably required for procuring another car.”* See also *Ubani-Ukoma v. G. E. Nicol* (1962) 1 All NLR 105.

D In *Onwuka v. Omogui* (1992) 2 NWLR (Pt.230) 393 at 421 - 422, the Plaintiff claimed a sum of N118 as loss of use per day from 6th August, 1981 till date of judgment. This Honourable Court awarded loss of use from 6th August, 1982 to 5th February, 1982, a period of six (6) months. In his contributing judgment, Nnaemeka Agu, J.S.C. observed:-

E *“Before I conclude, I must confess that I was a bit worried about the length of the period claimed by the Plaintiff as loss of use, that is until the date of judgment. My worry was that the Plaintiff had a duty to mitigate his loss. But because of the peculiar facts of this case wherein the defendant initially agreed to repair the Plaintiff’s motor vehicle but midstream unreasonably resiled from the agree-*
F *ment. This court, as a court of equity shall balance the plaintiff’s duty to mitigate with the defendant’s unreasonable conduct and use its best endeavour to reach an equitable decision.*

G *I, therefore agree with my learned brother, Babalakin, J.S.C. that a period of six months for loss of use is reasonable on the facts and circumstances of this case.”*

Also in *Benjamin Obasuyi v. Business Ventures Ltd.* (2000) 5 NWLR (Pt.658) 668 at 683, this Honourable Court, per Belgore, J.S.C. stated:-

H *“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 on him to get such damaged vehicles repaired at the earliest opportunity. This is the requirement of the law all over the 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 un-repaired and expect damages to be calculated against years rather than a few days is given a blank cheque to rake in underserved compensation...

The claim for 262 days of loss of use is most unreasonable and the award of damages for that is unjustified.” B

In Benin Rubber Producers Ltd. v. Ojo (1997) 9 NWLR (Pt.521) at P411, this court citing with approval the dictum of Lord Wright in Liesbosch Dredger (Owners) v. SS Edison (Owners) stated:-

“The Law cannot take account of everything that follows a wrongful act, it regards some subsequent matters as outside the scope ‘it were infinite for the law to judge the cause of causes or consequences of consequences’...” C

In a case, such as the present one, therefore it cannot in my opinion be right to make an award in respect of loss of use of a chattel up to eternity, unless of course, and depending on the circumstances of the case there is enough evidence in strict proof of such a special damage. Somewhere a line has to be drawn between the consequences for which a wrong doer is liable and those for which he cannot conceivably be liable.” E

The position of the respondent supporting the award of damages for 839 days by the two Courts below on the ground that this court had in other instances granted such claims per day no matter how long and cited among other cases that of Kosile v. Folarin (1989) 3 NWLR (Pt. 107) 1 at 15. That angle cannot be equated to what is on ground here since those were instances of detinue which is different to a case of negligence where the chattel has not been seized by the defendant. Therefore, following the safe pathway laid out by this Court, which nothing has happened for which we can now depart, it is for certain to say that 839 days to calculate for loss of use is excessive and beyond what is contemplated by the law and legal principles applying. There is no running away from 180 days which is the maximum limit of the reasonable in the computation of time vis-à-vis loss of earnings. F G H

On the matter of the award of general damages of N656,216.00 which was granted by the trial court and affirmed by the Court of Appeal, would not need be wasted time on since with a plaintiff recovering in full the items of special damages would not be entitled to

a head of general damages otherwise it would be tantamount to double compensation which is not allowed. I refer to *Soetan v. Ogunro* (1975) 6 S.C. 67 at 72; *Kerewi v. Odugbesan* (1967) NWLR Page 89 at 91.

B In respect to the attack on the finding of negligence by the trial court, there is no basis for that attack, the pleadings and evidence in support there for being on display. The case of *Salaudeen v. Mamman* (2000) 14 NWLR (Pt. 680) 63 at 71 would not apply to have inadmissible the evidence that came from cross-examination even if not pleaded on the matter of how the fire started and why it did not affect the petrol in the underground tank. This is because appellant seems to forget that in negligence when a fact speaks for itself, *res ipsa loquitur*, then, it is so accepted and usable to found negligence.

C From the foregoing and the better reasoning in the lead judgment, the appeal is allowed in part. That is the 180 days in the calculation of the damages due to loss of earnings and the setting aside of the general damages awarded. I abide by the consequential orders as made.

CROSS-APPEAL:

E This cross-appeal is predicated on the Court of Appeal disallowing the award of N3,500,000.00 as market value of the burnt trailer on the ground that the plaintiff had not proved its claim in respect of that item of special damages. The Cross-Appellant wants this court to restore that award as granted by the trial High Court.

F In the quest to persuade this court, the Cross-appellant filed a brief of Argument settled by Charles Obishai and filed on 25/2/05. In the Brief was couched a single issue, viz:-

G Having regard to the pleadings and evidence, was the Court of Appeal right in setting aside the N3.5 million awarded by the trial court for the value of the Cross-Appellant's burnt tanker.

Cross-Appellant also filed a cross-Appellant Reply Brief on 20/2/05. The Cross-Respondent filed a Brief of Argument on 15/4/05 and it had been settled by Rotimi Oguneso Esq. He framed a sole H issue as follows:-

Whether the Court of Appeal was right when it reversed the decision of the trial court in respect of the award of N3,500,000.00 as the market value of the burnt trailer.

Clearly the two issues crafted in different words pose the same

question and so without beating about the bush, it is easy to go into the arguments. Mr. Obishai of counsel for the Cross-Appellant submitted that this court will discover from the record that the Cross-Respondent did not deny the Cross-Appellant's claim in respect of the burnt tanker as to raise issues for consideration. That there is nothing sacrosanct about the phrase "strict proof" in respect to special damage as what is required is evidence showing a particularity as is necessary for its pleading. That is evidence of particular losses which are exactly known or accurately measured before the trial. B

He said since the Cross-Respondent did not specifically deny that the truck was worth N3.5 million, the implication is an admission and no need for any further proof and therefore the requirement of strict proof is made out. He cited *Imana v. Robinson* (1979) All NLR 1; *Gwara Sec & Fin Ltd v. T.I.C. Ltd.* (1999) 2 NWLR (Pt. 589) 29; *Nzeribe v. Dave Eng. Co. Ltd.* (1994) 8 NWLR (Pt.361) 124 at 140, etc. C D

It was also submitted for the Cross-Appellant that from the Record apart from the testimony of the PW5, there was no other evidence in respect of the value of the tanker while the cross-respondent did nothing in rebuttal. He said the non-tendering of a receipt to establish the purchase price of the truck is not fatal to cross-appellant's case. It was submitted that the answers given by PW5 under cross-examination on facts not pleaded by either party go to no issue and should be disregarded as the parties had not joined issues on the matter as stated in cross-examination. He referred to *Honika Sawmill (Nig.) Ltd. v. Hoff* (1994) 2 NWLR (pt.326) 252 at 270 - 271, etc. E F

In reaction, Mr. Oguneso referred to the evidence of PW5 in regard to the cross-examination and contended that from the quality of evidence adduced by the cross-appellant, it can be said that the claim for N3.5million was market value of the burnt trailer was not cogent and so the Court of Appeal was right in setting aside that head of claim made by the trial court. That having regard to the pleadings, there was neither express nor implied admission of the claim of N3.5million by the cross-respondent. He relied on *Osuji v. Isiocha* (1989) 3 NWLR (Pt.111) 623 at 636. G H

For the Cross-Respondent was submitted that the plaintiff abandoned his pleading and placed reliance on a non-existing admission

without regard to the fact that an averment in a statement of claim without evidence is no proof of the facts averred therein. He cited *Adegbite v. Osunfaolu* (1990) 4 NWLR (Pt.146) 578 at 590; *Egbue v. Araka* (1998) 3 NWLR (Pt.84) 598 at 609; *Oki v. Oki* (2002) 13 NWLR (Pt.783) 89 at 105. Going further, learned counsel for the cross-respondent said the position of the law is that where a matter is made an issue by either party, the opponent is entitled to lead evidence on the point and where issues are joined in respect of a matter, the onus is on the plaintiff. That in this instance, the cross-appellant having made the issue of the age, condition and value to the truck an issue that the cross-respondent was entitled to lead evidence on same by way of cross-examination aimed at discrediting the evidence of PW5. He said those pieces of evidence extracted under cross-examination which discredited the plaintiff's claims are admissible. He cited *Morohunfola v. Kwara Technical* (1990) 4 NWLR (pt.145) 506 at 522.

In reply on points of law, Mr. Obishai of counsel said it was not correct that the plaintiff abandoned his pleading on the value of the truck. That an averment not traversed is deemed admitted and cannot be regarded as abandoned. He referred to *Olale v. Ekwelendu* (1989) 4 NWLR (pt.115) 326 at 362. This cross-appeal is contested on the matter of the award of three million and five hundred thousand naira (N3.5m) by the trial court as the market value of the tanker to the plaintiff which the Court of Appeal set aside. In the Statement of Claim, paragraph 23, it was averred as follows:-

"23: The current market value of a tanker of the same age and condition like that of the plaintiff now sells for N3,500,000.00 (Three Million, Five Hundred Thousand Naira only.)"

The defendant/cross-respondent in its Amended Statement of Defence pleaded thus:

"2: The Defendant denies paragraphs 7, 9, 9, 10, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26 of the Statement of Claim and puts the plaintiff to a strict proof of the facts contained therein at the trial of this suit."

It is evident that the cross-respondent had made a general traverse on this claim of three million, five hundred thousand naira only as market value of the tanker. The trial court rejected the claim of the plaintiff's traverse said it had to be specifically denied. The

Court of Appeal disagreed. This then takes us to the Rules of Court of Plateau State 1988 applicable in 1998 time of the cause of action. I shall refer to some salient paragraphs, thus:-Order 25, Rules 6(1), 13, 14 and 15 provides as follows:-

“6(1): A party shall plead specifically any matter - for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality - which, if not specifically pleaded might take the opposite party by surprise.

13: It shall not be sufficient to deny generally the facts alleged by the statement of claim, but defendant shall deal specifically with them either admitting or denying the truth of each allegation of fact seriatim, as the truth or falsehood of each is within his knowledge, or (as the case may be) stating that he does not know whether any given allegation is true or otherwise.

14: When a party denies an allegation of fact, he shall not do so evasively but shall answer the point of substance. And when a matter of fact is alleged along with those circumstances, but a full and substantial answer shall be given.

15: The defence shall admit such material allegations in the Statement of Claim as the defendant knows to be true or desires to be taken as established without proof thereof.”

This Court has severally in similar circumstances within rules of court akin to the above, stated that a denial in general terms means no issue was joined in the averment or claim of a party and the opposing party cannot be taken to have disputed the heard of claim. See Honika Sawmill (Nig.) Ltd v. Hoff (1994) 2 NWLR (Pt.325) 252 at 270; Ezemba v. Ibeneme (2004) 14 NWLR (Pt. 894) 617 at 661 - 662, Otapo v. Sumonu (1987) 2 NWLR (Pt.58) 587 at 622. It is not difficult in the prevailing circumstance to hold that the Court below erred in utilising the general traverse to jettison the award of the market price of the tanker of three million, five hundred thousand naira only (N3.5m). There was no traverse or denial of the claim, the implication being that the claim remained unchallenged and thereby taken as specifically pleaded and proved.

From the above and the well articulated reasoning in the lead judgment, this cross-appeal succeeds and is allowed. The decision of the Court of Appeal set aside in respect to the award of N3.5million granted by the trial as the market value of the tanker. Therefore, the

judgment of trial High Court in that regard is restored. I abide by the consequential orders of the lead judgment.

B

C

D

E

F

G

H