**IN THE HIGH COURT OF JUSTICE, EDO STATE OF NIGERIA**
**IN THE BENIN JUDICIAL DIVISION**
**HOLDEN AT BENIN CITY**

**BEFORE HIS LORDSHIP, THE HONOURABLE JUSTICE V.O. EBOREIME, JUDGE**
**SITTING IN HIGH COURT NO. 10 BENIN CITY**
**ON FRIDAY THE 7TH DAY OF MARCH 2014**

**SUIT NO.B/623/99**

**B E T W E E N:-**

IDODO UMEH PUBLISHERS LTD. é CLAIMANT

AND

NIGERIAN BOTTLING COMPANY PLC é DEFENDANT

# J U D G M E N T

The Claimant instituted this action on the 14th day of September, 1999 when he filed the Writ of Summons. By the Amended Statement of Claim filed on the 10th day of December, 2012, the Claimant Claims the following reliefs from the Defendants:-

(a) **Special damages**: Hiring of vehicle everyday at Five Thousand Naira only (N5,000.00) for 280 days from June 1999 to March 20th, 2000 .. .. ₦1,400,000

(b) **General damages** .. .. 1,000,000

**Total** **2,400,000**

In proof of his case, the Claimant called two witness and tendered Exhibits ñA - A9ò the receipts for hiring of vehicle, Exhibit B the letter written to the Defendant and Exhibits ñC1ò ï ñC2ò, the photographs and negative of the Claimantôs accidented vehicle.

The Claimant opened his case by calling Francis Okpene C.W.1 who testified on 11th day of March, 2013 and adopted his Statement on Oath as his evidence in chief. I hereby reproduce same as follows:-

ñI, Mr. Francis Opene: male, Christian, Nigerian, of Idodo Umeh Publishers Limited, do hereby make Oath and state as follows:-

1. That I am sales manager in Idodo Umeh Publishers Limited
2. That by virtue of my position, I am conversant with the facts of this case.
3. That I have the authority and consent of the Claimant to depose to the facts sated herein.
4. That the Claimant is a Limited Liability Company duly incorporated and carrying on the business of Printing and Publishing in Nigeria.
5. That Claimantôs Registered Office is at 52 Ewah Road, Benin City, within the jurisdiction of this Honourable Court.
6. That Defendant is a Public Limited Company engaged in the Bottling of soft drinks, with its Office along Sapele Road here in Benin City, within the jurisdiction of this Honourable Court.
7. That Claimant in course of its business, engage in sales promotion of its numerous books throughout the States of the Federation.

8. That on the 8th of June 1999, on my way to Warri for sales promotion with the Claimantôs Panel Van Registration Number AE547LEH the Defendantôs Driver negligently ran unto Claimantôs Panel Van from behind; with the Defendantôs Truck, Registration Number AY472LSR at Kilometer 8, Sapele Road Benin City.

9. That I reported the accident to the Defendant who immediately sent its Transport Manager to the scene of the accident.

10. That the Defendantôs Transport Manager was openly and impartially aghast at the Defendantôs Driverôs negligence in causing the accident.

11. That Defendantôs Transport Manager then pleaded with the Claimantôs Sales Manager not to report the matter to the police-promising to take care of all damages suffered by Claimant.

12. That I thereafter paid several visits to the Defendant, to make good its promise to restore Claimant for the damages to its vehicle.

13. That the Defendant showed no seriousness of its intention to keep its word to Claimant.

14. That at the time of instituting this action, Claimantôs accidented vehicle was still parked at the premises of Leventis Motors-

adjourning Defendantôs premises on the instructions of the Defendant.

15. That when it became apparent that the Defendant was being evasive on making good its promise to it, the Claimant briefed its lawyer who entered into correspondence with the Defendant.

16. That the Claimant had to resought(sic) to the hiring of a vehicle on a permanent basis to meet up its business obligations.

17. That as at March 20, 2000 the Claimant had spent a total of N1,400,000.00 (One Million Four Hundred Thousand Naira) on the hiring of the vehicle.

18. That there are receipts of payment issued to Claimant for hiring of vehicle during the period its accidented vehicle remained with the Defendant.

19. That Claimant accidented vehicle was severely damaged; due to Defendant over speeding and Defendant negligence in managing its truck properly and consequently running unto Claimant Panel Van from behind.

20. That the Claimant caused a photographer to take photograph of the accidental vehicle.

21. That the fact will speak for itself.

22. That the Defendant eventually repaired Claimant vehicle- and handed same over to the Claimant on the 20th of March, 2000.

21. That the Claimant Claims from the Defendant as follows:

a. The sum of N1,000,000 (One Million Naira) as general damages

b. N1,400,000 (One Million Four Hundred Thousand Naira) cost of hiring vehicle everyday at N5,000 for 9 months.

22. That I make this solemn declaration conscientiously believing the same to be true and in accordance with the provision of the Oath Act.

Under cross-examination by the Defence Counsel, C.W.1 stated as follows:

1. That he does not work on public holidays and Sundays and Christian holidays including the 25th and 26th days of December, 1999 and on 1st day of January, 2000.
2. That there is nothing on Exhibit ñBò, the letter written to the Defendant, to show that it was received by Defendant and that the accidented vehicle was repaired and returned to his Company.
3. He said there is no document to show that the Defendant promised to repair the vehicle on a particular date and the repaired vehicle was handed over nine (9) months after the accident.
4. He told Court that it is not true the vehicle was repaired on compassionate grounds.

The C.W.2 testified on the 19th day of March, 2013 and gave his names as Vincent Ogbeide and that he is a photographer by profession and he adopted his witness Statement on Oath as his evidence in chief in this case.

On the 15th day of July, 2013, the Defence opened his case and called D.W.1 Armstrong Idahor as a witness and he adopted his Statement on Oath as his evidence in chief in this case:

> ñI, Armstrong Idahor, Male, Nigerian, Christian, a Staff of Nigerian Bottling Company Plc and of Nigerian Bottling Company Plc, depose to Oath and state as follows:-
>
> 1. That I am the Human Resources Manager of the Defendant, Benin Depot.
> 2. That as a principal officer of the Defendant, I am conversant with the facts of this case.
> 3. That after the accident, in which the Claimantôs driver ran violently into the truck of the Defendant the Claimantôs driver pleaded with the Defendant that the matter should not be reported to the police and also pleaded with the workshop manager of the Defendant that the Defendant repaired the Panel Van of the Claimant on compassionate ground as anything contrary to that would amount to the Managing Director of the Claimant deducting the cost of repair from his salary.
> 4. That on compassionate and was dully returned to the Claimant by the workshop and Personnel Manager of the Defendant to Claimantôs company premises in presence of the managing director and manager.

5. That the Defendant did not receive any letter from the Claimantôs solicitor at any time either before or after the accident.

6. That the Defendant is not liable to the Claimant for loss of use, as the Claimantôs driver was the one who pleaded with the Defendant to effect repairs on their Panel Van car on compassionate ground which said vehicle was repaired at high cost and dully returned to the Claimantôs company premises and delivered to the manager and managing director, who were grateful for the magnanimity of the Defendant.

7. That even if the Claimant suffered damages for loss of use (which is denied) the Claimant failed or refused to take any or any reasonable steps to mitigate the loss and damage suffered by him by reason whereof the Claimant is not entitled to recover such alledged loss or damages or any part thereof.

8. That the Claimant ought to have effected repairs on the accidented vehicle when there was unreasonable delay by the Defendant to do same.

9. That the Claimant ought to have replaced the vehicle at a reasonable cost equal to the amount being claimed as damages for loss of use.

10. That the Defendant bought a new body for the Panel Van and effected other minor repairs.

9.(sic)That the manager of the Claimant visited the Defendant premises on the instruction of the managing director of the Claimant to inspect the progress of work on the Panel Van and also directed on what to repair, before the Panel Van was finally returned.

10. That the Claimant is not entitled to the Claims contained in the Statement of Claim.

11. That this suit is not competent in law, as it does not disclose reasonable cause of action against the Defendant.

12. That the doctrine of *res ipsa loquitur* is not applicable in this case.

13. That the Defendant relies on the equitable principle of estoppels.

14. That the Defendant is not negligent or reliable to the Claim of the Claimant and that the Claimant has not suffered any damage.

15. That the Claim of the Claimant is frivolous, vexatious and gold-digging and should be dismissed with substantial cost.

16. That I depose to this affidavit in good faith believing its contents to be true and correct and in accordance with the Provision of the Oaths Act, 2004.ò

Under cross-examination by Learned Counsel for Claimant, this witness said the accidented vehicle was with his company for three (3) months before it was

returned to the Claimant and that the vehicle was repaired on humanitarian grounds. He said Defendant is not a charitable organization but they have a social responsibility. He said he was not aware if they got any letter from Claimant.

This is the case for the Defence.

On the 28th day of November, 2013, both counsel for Defendant and Claimant adopted the written addresses they had earlier filed.

In his address, the Defence Counsel, Bamidele Abina, Esq., without canvassing any issue for determination, argued that the Claimant has failed to prove his Claim on balance of probability as required by Section 134 of the Evidence Act, 2011 to be entitle to the reliefs sought. He argued that the burden of proof of negligence falls on the Plaintiff who alleges negligence because negligence is a question of facts and not law, relying on **ABUBAKAR VS. JOSEPH** (2008) 13 NWLR (part 1104) 307 at 318 ratio 20. Learned Counsel also submitted that mere occurrence of an accident is not a proof of negligence; he argued that to succeed in a Claim of negligence, the Plaintiff must first plead the particulars of the negligent act and prove that the accident was as a result of the negligence of the Defendant. He cited the following cases:

a. **JOSEPH ABUBAKAR** (Supra) (sic) at 318 ratio 17.
b. **NGILARI Vs MOTHERCAT LTD** (1999) 13 NWLR (part 636).

Learned Counsel argued that the Court must at all time resist speculation in arriving at its decision, relying **ANIMASHAUN VS UCH** (1996) 10 NWLR (part 476) page 65 at 66 ratio 1. He argued that the Claimantôs evidence that the

Defendantôs truck ran into his panel van from behind without more was a mere speculation.

Learned Counsel further submitted that the doctrine of ñ*res ipsa loquitur*" does not apply where the cause of accident is known, citing **ABUBAKAR VS. JOSEPH** (Supra) at 318 ratio 19. He further submitted that whether a document is received or not is purely an issue of facts to be proved by evidence, citing **YADIS (NIG.) LTD VS. G.N.T.G. LTD.** (2007) 14 NWLR (1055) page 548 at 590 ratio 3.

He submitted that Exhibit ñBò herein being Claimantôs letter to the Defendant should be expunged by this Court as it was never received by the Defendant.

He urge this Court not to act on unstamped Exhibits ñAò ï ñA9ò being evidence of payment in respect of car hired by the Claimant relying on Section 72 (3) (a), Stamp Duties Law, Cap 155, Laws of the Bendel State of Nigeria, 1976, Vol. VI and applicable to Edo State. He thus argued that the Court cannot act on the Exhibit ñAò ï ñA9ò notwithstanding that the admission of them was as a result of consent of the opposite party or that partyôs, default in failing to object at the proper time, citing the following cases:

a. **ABUBAKAR VS JOSEPH** (SUPRA) at 315 ratio 8.
b. **AJASE VS OLORI ILU** (1965) NWLR 66.
c. **NWAOGU VS ATUMA** (2013) 11 NWLR (part 1364) ratio 1 and 2, following
d. **OLUKADE VS. ALADE** (1976) 2 S.C. 183 page 136 ï 137 paragraph H ï A.

Learned Defendantôs Counsel also submitted that the onus is on the Plaintiff to prove special damages strictly by credible evidence that he is entitled to the award of same, citing **CONSOLIDATED BREWERIES PLC VS. AISOWIEREN (**2001) 15 NWLR (part 736) 424 at 430 ratio 7. He also submitted that the Plaintiff must be able to show his calculation upon a specific calculation which must give the Court precise facts which made such calculation possible, citing the case of **ORIENT BANK PLC VS BILANTE INTERNATIONAL** (1997) 8 NWLR (part 515) 37 at 48 ratio 15.

He also submitted that special damages should normally consist of evidence of particular losses which are exactly known or accurately measured before the trial, relying on **CONSOLIDATED BREWERIES PLC VS. AISOWIEREN** (Supra) at 429 ratio 5. Learned Counsel submitted further that parties are bound by the pleadings filed in a suit and as such a trial Court will not adjudicate on an issue or issues not pleaded; that whatever evidence adduced in the Course of trial that is not in conformity with the pleading of the party adducing the evidence is inadmissible and goes to no issue, relying on **ABUBAKAR VS. JOSEPH** (Supra) at 313 ratio 3. He argued that nine (9) months in the evidence of the Claimant is not in conformity with 280 days in his pleadings.

Learned Counsel again submitted that special damages must be proved with exactitude without space for speculation, estimation or fraction, citing the following cases:

a. **O.M.T.C. CO. LTD VS IMAFIDON** (2012) 4 NWLR (part 1290) 332 at 334 ratio 2.

b **ORIENT BANK PLC VS BILANTE INTERNATIONAL** (1997) 8 NWLR (part 515) 37 at 48 ratio 15.

Learned Counsel submitted that the obligation on the Claimant to particularize special damages arises not because the nature of the loss is necessarily unusual but the Claim on a precise calculation must give the Defendant access to the facts which make such calculation possible, citing the case of **CONSOLIDATED BREWERIES PLC VS AISOWIEREN** (2001) 15 NWLR (part 736) 424 at 427 ratio 1; **NNADI VS OKORO** (1998) NWLR (part 535) 573 at 584 ratio 35. He argued that the Panel Van having been returned to the Claimant, the law is that the Court should avoid double compensation to a victim, citing **O.M.T. CO. LTD VS IMAFIDON** (2012), 4 NWLR (part 1290) pages 332 at 335 ratio 6.

Learned Counsel argued that the Claimant did not mitigate his loss and the damage suffered by him, submitting that it is always expected of Plaintiff to mitigate the loss suffered due to negligence of the Defendant.

He cited the following cases:

a. **OBASUYI VS BVL** (2000) 12 WRN page 112 at 114 ratio 2 and 3.

b. **AKANBI VS ALAIDE (NIG.) LTD** (2000) 1 NWLR (part 639) 125 at 133 ratio 6.

He also submitted that a failure by a Plaintiff to mitigate his damage is a bar to Claim, relying on **OBASUYI VS BVL** (2000) 12 NWLR page 112 at 114 ratio 2.

Learned Counsel further submitted that if special damage cannot be proved a trial Court cannot compensate him by way of general damages, citing the case of **O.M.T.C. CO. LTD. VS. IMAFIDON** (2012) 4 NWLR (part 1290) 332 at 335 ratio 4. He further argued that general damages is recognized where tort has resulted in some interference with the Plaintiffôs person short of physical injury yet has caused him physical inconvenience, the latter must necessarily appear as a separate head of damages; that in trespass to property there can be an award for injury for feelings but all these matters should be properly averred in the pleading and evidence of a sort given in order not to fall foul of the rule against double compensation, relying on **BADMUS VS ABEGUNDE** (1999) 11 NWLR (par 627) 493 at 496 ratio 4.

Furthermore, the Learned Counsel argued that the Plaintiff can recover damages from the Defendant which said damages must be within the contemplation of the parties at the time of entering into the contract and if the action is in tort, the damages must be direct consequence of the act of negligence of the Defendant. He cited the cases of **RE POLEMIS** (1921) 3 KB page 560; **WAGON MOUND** (1961) AC page 388; **OBMIAMI BRICK STONE NIG. LTD VS. ACB LTD.** (1992) 3 NWLR (part 229) page 260 at 311. He therefore submitted that the damages Claimed by the Claimant against the Defendant are too remote and not within the contemplation of the Defendant considering the evidence. He concluded that the Claimant has not been able to prove his case as required by law urging this Court to dismiss the Claim of the Claimant with substantial cost.

On the part of the Claimant his Learned Counsel, J.O. Ukpedor (Mrs.) of Obaro-Umeh and Co. also argued in his adopted written address without canvassing any issues as follows:

Learned Counsel submitted that the Claimant has proved its Claim on the preponderance of evidence and/or the balance of probability as required by law. He argued that C.W.1ôs evidence in paragraphs 8 and 11 proved the facts pleaded in its paragraph 5 and 15 of the Amended Statement of Claim to the effect that the Defendant was negligent. She therefore submitted that this evidence was led in support of fact pleaded and it is admissible, relevant and being uncontroverted by cross-examination, a Court can legally rely on it. She cited the case of **OBMIAMI BRICK AND STONE (NIG.) LTD. VS A.C.B LTD** (1992) 3 NWLR (par 229) page 260 at page 265 ratio 9 and 266 ratio 10.

Learned Counsel submitted that where in a motor accident the one at the rear hit the one in front there is a presumption that the driver of the rear vehicle drove negligently, citing the case of **ESIEGBE VS. AGHOLOR** (1993) 9 NWLR (part 316) 128 at 141 ï 142 paragraphs H ï A.

She submitted that for a Claimant to succeed in a Claim for negligence, he must give particulars of the negligence and lead evidence in proof of it; that if a Claimant alleges negligence, unless the facts as pleaded and proved are such that negligence will necessarily be inferred, in which case those facts give rise to what is called *res ipsa loquitur* he must give particulars of the alleged negligence. She cited the case of **SEISMOGRAPH SERVICE (NIG.) LTD. VS. MARK** (1993) 7

NWLR (part 304) page 203 at page 206 ratio 4. She argued that the Claimant had proved negligence on the part of the Defendant; that he only raised the plea of *res ipsa loquitur* as an alternative. He cited the case of **FLASH POOLS LTD VS. AKATUGBA** (2001) 9 NWLR (part 717) at 46.

Learned Counsel submitted further that nothing stops a Claimant from pleading two different facts in a Claim and rely on any one of the facts pleaded in seeking the same relief from the Court, citing the case of **G.K.F. INVT. (NIG.) LTD. VS. TELECOM. PLC** (2009) 45 WRN page 36 at 68-69 lines 40 ï 5. He further submitted that the Court can *suo motu* without the Claimant pleading *res ipsa loquitar* base its decision on the doctrine from the facts before it, citing the case of **ESIEGE VS. AGHOLOR** (Supra) at page 140 paragraph H.

Learned Counsel also submitted that the Claimant having raised the plea of *res ipsa loquitur,* it behooves the Defendant to disprove negligence as the presumption of negligence imposed on it by the plea of *res ipsa loquitur* is rebuttable. He cited the case of **PHSMB VS. GOSHWE** (2003)10 WRN page 1 at ratio 3 and 4. He also submitted that a document speaks for itself and oral evidence cannot vary its content, citing the case of **ANYANMU VS UZOWAKA** (2009) 49 NRW page 1 at page 7 ratio 5.

On special damages, Learned Counsel submitted that they are those pecuniary loss actually suffered up to the date of the trial. He cited **IYERE VS. B.F. AND F.M. LTD**. (2008) 2 MJSC page 102 at 111 ratio 17; that special damages is also damages alledged to have been sustained in the circumstances of a

particular wrong which must be specially Claimed and proved to be awarded, also citing the case of **O.M.T. CO. LTD. VS. IMAFIDON** (2012) 4 NWLR (part 1290) page 332 at 334 ratio 1. He argued that the Claimant is entitled in law to rely on Defendantôs evidence which supports Plaintiffôs case, relying on **IYERE VS B.F. AND F.M. LTD.** (Supra) ratio 14.

Learned Counsel also submitted that minor inconsistencies (if any) in the evidence of a party to a civil action is not fatal to his case, relying on **CONSOLIDATED BREWERIES PLC VS. AISOWIEREN** (2000) 15 NWLR (part 736) page 424 at 433 ratio 13. He argued that the Claimantôs evidence is not at variance with its pleadings of nine (9) months and 280 days.

Learned Counsel submitted that the law that governs admissibility of a document is the Evidence Act, a Federal Legislation and cannot be subject to a State Legislations ï Laws of Bendel State; that the law relating to admissibility of a document are whether the document is pleaded; whether it is relevant, whether it is admissible in law. He argued that Exhibits ñA1ò ï ñA9ò, ñBò, C1ò and ñC2ò passed the conditions for admissibility. He cited Section 103 of the Evidence Act, 2011.

Learned Counsel further submitted that where a document is unstamped the document is not inadmissible merely because it was not stamped since the purpose of stamping is to ensure revenue. He relied on **OGBAHON VS REG. TRUSTEES C.C.C CA** (2002) 1 NWLR (part 749) page 675 at 683 ratio 11.

He argued that the Defendant having not objected to the tendering of Exhibits ñA ï Cò during trial cannot ask that they be expunged from Court record, citing

**FIRST INLAND BANK VS CRAFT 2000 LTD**. (2011) 48 WRN page 62 at 67 ratio 8.

He further argued that once a document is already admitted as Exhibit in evidence, it is incompetent for a trial judge to expunge it from the Court record. He cited **AGAGU VS DAWODU** (19990) 7 NWLR (part 160) page 58 ratio 6.

On general damages, Learned Counsel submitted that they flow naturally from the wrongful act of a Defendant complained of; that it does not require strict proof as it is generally implied. He cited **ADMIN VS MBC LTD**. (2010) 28 WRN page 1 at 6 ratio 1.

He also submitted that general and exemplary damages can be awarded to a party for tortuous liability, citing the case of **FIRST INLAND BANK VS CRAFT 2000 LTD.** (supra) ratio 9.

Learned Counsel argued that this case is distinguishable from that of **O.M.T. CO. LTD VS IMAFIDON** (Supra) for double compensation. He submitted that where there is a Claim for special damages, the failure of the Claim for special damages will not stop the Court from awarding general damages if merited. He cited **O.M.T. CO. LTD VS. IMAFIDON** (Supra) page 110 ratio 16.

He argued further that the Supreme Court has frowned at a party who, by his negligence, caused damage to another and thereafter contends that the injured party should have mitigated his loss. He cited the case of **IFEANYI CHUKWU OSUNDU CO. LTD. VS AKHIGBE** (1999) 11 NWLR (part 625) page 1 at 26 paragraphs D ï F. Learned Counsel argued that the evidence of D.W.1 was hearsay

submitting that hearsay evidence is the evidence given of a Statement made to a witness by a person who is not himself called as a witness, citing the case of **ACHORA VS. A.G. BENDEL STATE** (1990) 7 NWLR (part 160) page 62 ratio 1, 2, and 3; **MAIGORO VS BASHIR** (2000) FWLR (part 19) page 553 ratio 9. She argued that the evidence of the D.W.1 does not fall within the exceptions to the rule of evidence in Sections 39 – 50 of the Evidence Act, 2011. She urged Court to discountenance D.W.1's entire evidence.

In conclusion, Learned Counsel submitted that the Claimant has proved its case on the preponderance of evidence and therefore entitled to the reliefs sought.

On his reply on point of law, Learned Counsel to the Defendant, Bamidele Abina Esq. submitted that the doctrine of *res ipsa loquitar* does not apply to this case since C.W.1 in paragraph 19 of his Statement of Claim and in his evidence told the Court that the Defendant was over speeding, citing **IBEANU VS OGBEIDE** (1998) 12 NWLR (part 576) 1 at 3 ratio 5. He submitted that it lies on the Claimant to prove negligence against the Defendant on preponderance of Evidence as required by Sections 134 of the Evidence Act, 2011 and not on presumptions as spelt out in Section 146 – 148 of Evidence Act, 2011. He also cited the case of **OJO VS. GHARORO** (2006) 10 NWLR (part 987) 173 at 117 ratio 1.

Learned Counsel argued that in relation to admissibility of document in evidence is that admissibility and the probative value to be placed on the document are different. He relied on **OKONJI VS NJOKANMA** (1999) 14 NWLR (part

638) 250 at 254 ratio; **OYEDIRAN VS ALEBIOSU II** (1992) 6 NWLR (part 249) 550.

Learned Counsel to the Defendant argued that Exhibits ñA1ò ï ñA9ò and ñBò though pleaded are inadmissible in law. He relied on Section 72 (3) of the Stamp Duties Law, Cap. 155, Laws of the Defunct Bendel State of Nigeria, 1976 Vol. VI and **ABUBAKAR VS. CHUKS** (2007) 18 NWLR (part 1006) 386 at 391 ratio 4. He further submitted that a Court can only act upon evidence that is legally admissible, citing **OMEGA BANK NIG. PLC VS O.B.C LTD** (2006) 4 WRN 1 at 10 ratio 5.

Learned Counsel submitted that the Claimant can no longer pay Stamp Duties on Exhibits ñA1ò ï ñA9ò and ñBò owing to the fact that both parties have already closed their case, relying on Section 72 (3) of the Stamp Duties Law. He submitted that a company as a juristic person can only act through natural person; that any agent or servant of a company can give evidence and tender documents to establish any transaction it entered into or the activities not of necessity have to be one who actually took part in the transaction or activities for the company; that such evidence is admissible and not hearsay. He relied on the cases of **ANAJA VS. G.B.N. PLC** (2011) 15 NWLR (part 1270) 377 at 384 ratio 11; **KATE ENT. LTD. VS. DAEWOO** (1985) 2 NWLR (part 5) 116. He concluded that the Claimant has not been able to prove his case against the Defendant to be entitled to the reliefs sought and urge this Court to dismiss his Claim with substantial cost.

**COURT**:

I have carefully gone through the Statement of Claim of the Claimant, the Statement of Defence of the Defendant, the evidence led in the course of the trial, the Exhibits admitted and the addresses of the Counsel to the various parties in this case. I must place on record the appreciation of this Court for the industry and hard work put in this case by the Counsel to the parties by way of their written addresses which have helped the Court greatly. I hereby commend their effort.

In the addresses of both Counsel, there was no issue canvassed by Learned Counsel. However what can be garnered from the pleadings and evidence led and of course the address of Counsel is that TWO ISSUES will suffice to determine this case which are:

1. Has the Claimant proved negligence in this case or is the doctrine of *res ipsa loquitur* applicable?
2. Is the Claimant entitled to special and/or general damages in this case?

ISSUE ONE: The definition of negligence is vital before delving into whether the Claimant proved it in this case. Musdapher, J.S.C has defined it thus:

> ñNow, negligence is the breach of duty to take care. A duty to take care can be imposed by law or can be created by contract or trust.ò See **INTER MESSENGERS NIG. LTD VS. ENGINEER DAVID NWANCHUKWU** (2004) Vol. 119 LRCN 4331 at 4344 paragraph K.

The duty on a driver has been explained by Wali, J.S.C. (as he then was) thus:

ñWhile driving on a high way, there is common law duty on a driver to take all necessary and reasonable precaution against occurrence of accident.ò See **IBEANU VS. OGBEIDE** (1998) 62 LRCN 4880 at 4909 paragraph F.

On the issue of negligence, Learned Claimantôs Counsel argued that it was pleaded in paragraph 5 and 15(1) and (2) and substantiated in evidence vide paragraph 8 and 19 of the C.W.1 Statement on Oath that the driver of the Defendant was negligent. The pleadings are reproduced below:

**Paragraph 5:**

ñThe Plaintiff sales Manager ï Francis opene ï was on his way to Warri on the 8th of June, 1999 for sales promotion with the Plaintiffôs Panel Van; Registration Number AE547LEH when the Defendantôs driver negligently ran into Plaintiffôs Panel Van from behind; with the Defendantôs Truck, Registration Number AY 472 LSR at kilometer 8, Sapele Road, Benin City.ò

**Paragraph 15**:

Plaintiff avers that its accidented vehicle was severely damaged. Phonographs(sic) of the accidented vehicle (and their negatives) are hereby pleaded and shall be relied upon at the trial of this suit.

Particulars of Negligence:

1. The Defendant was over speeding.
2. The Defendant neglected to exercise due care with regards to other road users; and consequently failed to notice the Plaintiffôs vehicle which was in front of it.
3. The Defendant neglected to manage its truck properly and consequently ran unto Plaintiff Panel Van from behind.ò

While the Defendant never denied that there was an accident, it only maintained on the contrary that it was the Plaintiffôs driver that ran violently into the truck of the Defendant. Learned Counsel to the Defendant even submitted on this point and referred this Court to paragraph 4 of the Defendantôs Statement of Defence which I now reproduced:

**Paragraph 4:**

> ñIn answer to the denied paragraphs, after the accident, in which the Plaintiff driver ran violently into the truck of the Defendant the Plaintiff driver pleaded with the Defendant that the matter should not be reported to the police and also pleaded with the workshop manager of the Defendant that the Defendant repaired the Panel Van of the Plaintiff on compassionate ground as anything contrary to that would amount to the Managing Director of the Plaintiff deducting the cost of the repair from his salary.ò

The Learned Defence Counsel did not cross-examine the C.W.1 who testified on Oath on the 11th day of Mach, 2013 on this point.

If the Claimant says the driver of the Defendant negligently ran into Plaintiffôs Panel Van and the Defendant says it was the Plaintiffôs driver who ran violently into the truck of the Plaintiff who should this Court believe? The onus of proof in negligence is unmistakably on the Claimant who alleges it which proof can only shift if he discharges it. See the decision of the Supreme Court which held thus:

> ñThe tort of negligence is traditionally described as damages which is not too remote and caused by a breach of duty of care owned by the Defendant to the Plaintiff. The established legal position is that the

> onus of proving negligence is on the Plaintiff who alleges it and unless and until that is proved, it does not shift. In other words where a Plaintiff pleads and relies on negligence by conduct or action of the Defendant, he or she must prove by evidence, the conduct or action and the circumstances of its occurrence, giving rise to the breach of the duty of care. It is only after this that the burden shifts to the Defendant to adduce evidence to challenge negligence on his part. And what amount, to negligence is a question of fact not law and each case must be decided in the light of its own facts and circumstances.ò

Per Kalgo, J (as he then was) at page 618, paragraph U ï EE in **UNIVERSAL TRUST BANK OF NIG. VS FIDELIA OZOEMENA** (2007) Vol. 145 LRCN 607.

To discharge this proof, the Claimant tendered Exhibits ñC1ò and ñC2ò ï the photographs and negatives of the accidented vehicle of the Claimant. When the C.W.2 ï Vincent Ogbeide testified on Oath on the 19th day of March, 2013, these Exhibits ñC1ò and ñC2ò were admitted in evidence. The Learned Counsel to the Defendant did not cross-examine him at all but rather waited to address this Court in his final written address to the effect that, ñExhibits ñC1 ï 2ò only showed the accident vehicle of the Claimant and not both partiesô Vehicles.ò However, when the Learned Counsel to the Claimant, Mrs. J. O. Ukpedor cross-examined the D.W.1 on this point on the 15th day of July, 2013, he said:

> ñI was in Benin when the accident happened in 1999. I saw the pictures (which are now Exhibit ñC1ò and ñC2ò before this Court) of the accidented vehicle a long time ago. The accidented vehicle was with us for about three (3) months before it was returned to Claimant.ò

The above piece of evidence gotten under the fire of cross-examination point to one thing ï the negligence of the Defendantôs driver which corroborates Exhibit ñC1ò and ñC2ò. A closer examination of Exhibit ñC1ò and ñC2ò would reveal that the impact of the accidented vehicle was from the rear and the presumption will be in favour of the man driving the vehicle in front. As rightly submitted by the Learned Counsel to the Claimant, which I cannot fault, I hold that the Defendantôs driver drove negligently and hit the vehicle of the Claimant being driven by the Claimantôs driver on the strength of the Supreme Court decision in **ESEIGBE VS AGHOLOR** (1993) 9 NWLR (part 316) page 128 at page 141 ï 145 paragraphs H ï A where Belgore, J.S.C held thus:

> ñ1. When two vehicles are going in the same direction on the highway, one after the other, and the one at the rear hits the one in front, the presumption is that the driver of the rear vehicle drove negligently. This presumption is based on the reasonable supposition that a driver observes all the time the road leading to his destination and only occasionally looks at the rear-view mirror to know the traffic situation at his rear.ò

The evidence lead by the Claimant on Exhibits ñC1ò and ñC2ò having not been challenged, I hold that the piece of evidence that the Defendantôs driver was negligent which caused the accident of 8th June, 1999, remains uncontroverted and uncontradicted. I rely on the Supreme Court authority of **MART CHEM IND.**

**NIG. LTD VS M.F. KENT WEST AFRICAN LTD**. (2005) Vol. 129 LRCN 1896 where Oguntade, J.S.C held at page 1910 paragraph P thus:

> ñé .it is now trite law that when evidence is unchallenged and uncontroverted, the same may be accepted by the trial Court for the purpose the evidence is offered provided the evidence itself is in its nature credible.ò

The evidence of the C.W.1 and C.W.2 on the negligence of the driver to the Defendant is unchallenged; the evidence is given to prove negligence and it is credible.

The Claimant also raised the issue of *res ipsa loquitur* in its paragraph 16 of the Statement of Claim thus:

**Paragraph 16:**

> ñPlaintiff shall in the alternative rely on the plea of *res ipsa loquitar(sic)*.ò

The C.W.1 testified on Oath on the above averment in his paragraph 21 thus:

> ñThat the fact will speak for itself.ò

The Defendant joined issues on the above in paragraph 11 (c) of its Statement of Defence when it pleaded thus:

**Paragraph 11 (c):**

> ñThat the doctrine of *res ipsa loquitur* is not applicable in this case.ò

In the D.W.1 Statement on Oath, he testified in paragraph 12 thus:

> ñThat the doctrine of *res ipsa loquitur* is not applicable in this case.ò

The Learned Counsel to the Claimant submitted that it is not abnormal for a Claimant to plead *res ipsa loquitur* as an alternative; that the judge is not to examine it with the particulars of negligence adduced by the Claimant, citing authorities in support. The Learned Counsel to the Defendant, F. Bamidele Abina, Esq. submitted that the doctrine of *res ipsa loquitur* does not arise or apply where

the cause of an accident is known, (part 1104) 307 at 318 ratio 19. On this submission, the Supreme Court held in **ABUBAKAR VS JOSEPH** (as cited by the Learned Counsel, but also reported in (2008) Vol. 160 LRCN 159 per Ogbuagu, J.S.C at pages 212 J.J and 213 A thus:

> ñI should have been obliged to deal with the issue of *res ipsa loquitur* which however or in any case, was pleaded in the alternative by the Appellants. But suffice it to say that this doctrine does not apply where the cause of an accident is known.ò

I shall look at the above whether it is applicable in this instant case, but I need to establish first what the doctrine entails.

The simplest meaning of the doctrine is that the thing speaks for itself. The Defendant is only called upon to rebut this doctrine once the Claimant has established it. It is the law that:

> ñWhen a *prima facie* case of negligence against the Defendant has been established under the doctrine of *res ipsa loquitur,* the Defendant can rebut that case by proving that he was not negligent even though he cannot prove how the accident happened. ñSee per Edozie, J.S.C (as he then was) at page 3913, paragraph 11 in **ROYAL ADE LTD. VS NATIONAL OIL AND CHEMICAL MARKETING COMPANY PLC** (2004) Vol. 117 LRCN 3894.

It can also Shift to the Defendant to rebut the doctrine when the Defendant accepts the plea of it by the Claimant as held in the Supreme Court thus:

> ñWhere *res ipsa loquitur* is pleaded and the facts are accepted by the Defence, the presumption is that there is a *prima facie* case and the burden of adducing rebuttal evidence that the Defendant was not

negligent is shifted on him, the duty is in him to establish inevitable accident and act of God. ï per Wali, J.S.C (as he then was) at page 4909 paragraphs A ï C in **IBEANU VS. OGBEIDE** (1998) 62 LRCN 4880.ò

In this instant case, the Defendant did not admit the plea of *res ipsa loquitur* but arguing that the doctrine does not apply to this case. Is the Learned Counsel to the Defendant right? Lets look at the pleadings of the Claimant and his evidence on Oath in this regard. Paragraph 15 (1) of his Statement on Oath says:

ñ15 (1) The Defendant was over speeding.ò

The above was part of the particulars of negligence pleaded by the Claimant. The C.W.1 testified on this in his Statement on Oath in paragraph 19 thus:

ñ19. That Claimant accidented vehicle was severely damaged due to Defendant over speeding and Defendant negligence in managing its truck properly and consequently running unto Claimant Panel Van from behind.ò (Underlining mine for emphasis)

From the above piece of evidence, it undoubtedly appears that the Claimant knew of the cause of the accident to be over speeding. The law is quite trite that once the cause of an accident is known, the doctrine of *res ipsa loquitur* would not arise. See the ratio decidendi reproduced concerning the above by Ogbuagu, J.S.C at page 212 JJ and 213 A in **ABUBAKAR VS JOSEPH** (Supra). This doctrine, which was pleaded in the alternative, does not apply to the present case. I therefore hold on ISSUE ONE that the Defendantôs driver was negligent in causing the Defendants vehicle to violently run into the Claimant vehicle, though the doctrine

of *res ipsa loquitur* does not apply as the cause of the accident by the pleading and evidence of the Claimant was known.

ISSUE TWO: This issue is whether the Claimant is entitled to special damages and/or general damages in this suit. Having been held by me that the Defendantôs driver was negligent, it is imperative for me to state that it is the law that negligence is only actionable if actual damage is proved. The Supreme Court held per Musdapher, J.S.C at page 4350 paragraphs A ï F in **INTER. MESSENGERS NIG. LTD VS. ENGINEER DAVID NWACKHUKWU** (Supra) that:

> ñIt is also obvious that negligence is only actionable if actual damage is proved. There is no right of action for nominal damages in the tort of negligence. In **MUNDAY VS. L.C.C.** (1916) 2 KB 331 at LORD READING C.J. Stated:-
>
> > ñNegligence alone does not give a cause of action, damage alone does not give a cause of action; the two must co-exist.ò

Again, the prerequisite to the award of special damages is that the damage must be specifically pleaded and proved in respect of claimable heads of damage where the damage can be assessed. The Supreme Court, Per Uwaifo, J.S.C (as he then was) at page 4495 paragraphs A ï F in **NWANJI VS. COASTAL SERVICES** (2004) Vol. 119 LRNC 4481 held thus:

> ñThe law is that for special damage to be awarded, apart from being specifically pleaded, they must be proved in respect of claimable heads of damage; and the special damages should easily lend themselves to qualification or assessment, and supported by credible evidenceé .. In

any event, the special damages must be strictly proved since without such proof no award can be made.ò

In awarding special damages, the Trial Judge cannot make his own individual or arbitrary assessment of what he conceives the plaintiff may be entitle to but on the hard facts presented and proved. On this, I reproduce the Supreme Court reasoning in **NEKA LTD. VS. A.C.B. LTD**. (2004) VOL. 115 LRCN 2949 at 2979 ï 2080 paragraphs. EE-JJ and A-P per Onu, JSC thus:-

> ñSpecial damages must be pleaded with distinct particularity and strictly proved and a court is not entitled to make an award of special damages base on conjecture or on some fluid and speculative estimate of alleged loss sustained by a plaintiffé é .. This is unlike an award in general damages where, if the issue of liability is established, a Trial Judge is entitled to make his own assessment of the quantum of such general damages and, on appeal, such general damages will only be altered or varied if they were shown to be either so manifestly too high or so extremely too low or that they were awarded on an entirely wrong principle of law as to make it, in the judgment of the appellate court, on entirely erroneous estimate of the damages to which the plaintiff is entitledé é . In so far as an award of special damages are concerned therefore, a Trial Judge cannot make his own individual or arbitrary assessment of what he conceives the plaintiff may be entitled to. He must in such a case act strictly on the hard facts presented before him which he accept, as establishing the amount awarded.ò

In considering the award of damages in negligence, the measure of it is always restitution in integrum. A reproduction of the reasoning of the Supreme Court, per Fabiyi JSC at page 130 EEJJ and 131 All in **OANDO NIG. PLC. VS.**

**ADIJERE W.A LTD** (2013) VOL. 223 LRCN (Part 2) page 100 is of paramount usefulness:

> ñIt is now well settled that the measure of damages in an action for negligence is founded on the principle of restitution 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 restitution 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 the remoteness of damages. 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 doing the period reasonable required for procuring another vehicle. It is the duty of the plaintiff to mitigate his loss or he should not be allowed to make the incidence an avenue for hitting an undeserved gold mine ad infinitum.ò

The above position of the law is quite clear. What do we have in this instant case? The claimant has alleged that the driver of the Defendant had negligently ran into its vehicle (which negligence has been established) on the 8th day of June, 1999 and only repaired and returned the vehicle to it on the 20th of March 2000, that is nine (9) months later. These facts were pleaded by the Claimant in its paragraphs 5 and 17 of its Amended Statement of Claim, while evidence was lead by C.W.1 in his paragraphs 8 and 22 reproduced below:-

**Paragraph 8:**

> ñThat on the 8th of June, 1999, on my way to Warri for sales promotion with the Claimantôs Panel Van, Registration Number EA547LEH the Defendantôs Driver, negligently ran unto Claimantôs Panel Van from behind, with the Defendantôs Truck, Registration Number AY472LSR at Kilometer 8, Sapele Road, Benin City.ò

**Paragraph 22:**

> ñThat the Defendant eventually repaired Claimant vehicle and handed same over to the Claimant on the 20th of March, 2000.ò

The Claimant tried to prove the above via documentary evidence, Exhibit ñA1ò to ñA9ò, that is nine (9) receipts from Sammy Car Hire Service covering 15th day of June, 1999 to 16th day of March, 2000 and Exhibit ñBò, that is letter from the Claimantôs Lawyer to the Personnel Manager of the Defendant dated January 27th, 2000.

The Defendant denied receiving Exhibit ñBò and urged this Court to expunge Exhibits ñA1ò ï ñA9ò for failing to comply with the Stamps Duty Law of the Defunct Bendel State of Nigeria, 1976, now applicable to Edo State, precisely Section 72 (3) (a) thereof.

On Exhibit ñBò, the C.W.1 testified under the heat of cross-examination on the 11th day of March, 2013 thus:

> ñThere is nothing on Exhibit ñBò to show that it was received by Defendant.ò

As submitted by the Learned Counsel to the Defendant, it is trite that the issue of whether a document is received or not is purely an issue of facts to be

proved by evidence as held by the Supreme Court in **YARDIS NIG. LTD VS GREAT NIG. INSURANCE CO. LTD** (2007) Vol. 149 LRCN 1415 at page 1436 paragraph Z ï EE, per Onnoghen, J.S.C thus:

> ñé I hold the view that the issue as to whether a document is received or not is purely an issue of fact to be proved by evidenceé ò

The Exhibit ñBò, having not been proved of its receipt by the Claimant as no issue was joined on it as a reply by the Defendant on it, I therefore discountenance it in its entirety.

Lets now turn to the thorny issues of Exhibit ñA1ò ï ñA9ò. The Learned Counsel to the Defendant has argued in his written address on why this Honourable court should expunge these exhibits should be expunged. In his Reply on Points of law, he went ahead to re-argue his earlier submission on the point which I consider as irrelevant and mere surplusage

In urging Court to expunge this Exhibits, which were tendered without his objections, he relied heavily on Section 72 (3) (a) Stamp Duty Law of Bendel State of Nigeria, 1976 which I reproduced under:

Section 72 (3) (a):

> ñWhere in any legal proceedings or before any arbitrator or referee a receipt is inadmissible by reason of it not being duly stamped, the officer presiding over the Court, the arbitrators or referee may, having regard to the illiteracy and ignorance of the party tendering the receipt in evidence, admit the receipt upon payment of a penalty six naira and the officer presiding over the Court, the arbitrator or referee, as the

case may be, shall note the payment of the penalty upon the face of the receipt so admitted and a receipt shall be given for the same.ò

ñReceiptò as envisaged by the law was given further expatiation Under Section 70 therein thus:

Section 70:

ñ70(1) For the purposes of this law the expression ñreceiptò induces any note memorandum or writing whereby any money amounting to Four Naira or upward, is acknowledged or expressed to have been received or deposited or paid, or whereby any debt or demand, or any part of a debt or demand, of the amount of Four Naira or upwards, is acknowledged to have been settled, satisfied, or discharged, or which signifies or imports any such acknowledgment, and whether the same is or is not signed with the name of any parson.

(2) The duty upon a receipt may be denoted by an adhesive stamp which is to be cancelled by the person by whom the receipt is given before he delivers it out of his hands.ò

On the part of the Learned Claimantôs Counsel, he submitted that the law governing admissibility of a document is the Evidence Act, a Federal Legislation which cannot be subject to a State Legislation ï Laws of Bendel State. He argued that nowhere under Section 103 of the Evidence Act, 2011 was any condition attached to the admissibility of a private documents which Exhibits ñA1ò ï ñA9ò are, that even if unstamped where supposed to be stamped, it could always be done by the party, as the purpose is to raise revenue.

I have considered the whole fuss about the Exhibits ñA1ò to ñA9ò and discovered they are private documents, relevant to the case of the Claimant and copiously pleaded. The Supreme Court held in **OKOYE & ANOR. VS OBIASO AND ORS** (2010) VOL. 186 LRCN 181 AT 203 PARA PZ - Z, Per Adekeye, J.S.C thus:

> ñOrdinarily, admissibility of evidence is governed by section 6 of the Evidence Act. The cardinal consideration in the admissibility of a document is relevance. Once a piece of document is relevant, it is admissibleé However, there is a distinction between admissibility of a document and the weight to be attached to it, when put through the crucible of evaluation of evidence and the weight to be attached to it. The courts have always engaged three criteria in the admissibility of a document like:-
>
> 1. Whether the document is pleaded.
> 2. Whether the document is relevant to the subject matter of dispute.
> 3. Whether it is legally admissible.ò

Whether the weight to be attached to Exhibits ñA1ò ï ñA9ò should be huge or slight is quite another thing. If the Evidence Act does not make the Exhibits ñA1ò to ñA9ò inadmissible and the Bendel State Law, through the Stamps Duty Law makes it inadmissible, there is a conflict. The position of the State Law must submit to that of the Federal Law. I therefore hold that Exhibits ñA1ò to ñA9ò being original of private document, pleaded and relevant are admissible and I therefore hold that their admission stands.

What weight should I attached to this Exhibits ñA1ò to ñA9ò? The evidence led by the Claimant is of utmost importance. A cumulative total of the amounts in

Exhibit ñA1ò to ñA9ò will equal ₦1,400,000.00 (One Million, Four Hundred Thousand Naira) as claimed by the Claimant as special damages.

The claim of the Claimant as regard this sum in his paragraph 11 of the Amended Statement of Claim is this:-

> ñWHEREOF the Plaintiffôs Claim from the Defendant the sum of ₦2,400,000 (Two Million, Four Hundred Thousand Naira) as special and general damages for the Defendant negligence in causing the accident.
>
> **SPECIAL DAMAGES**
>
> Cost of hiring vehicle everyday at N5,000.00 for 280 days
> from June 15th, 1999 to March 20th 2000. ₦1,400,000.00
> **General Damages** - ₦1,000,000.00
> **Total** - **₦2,400,000.00"**
> ==========

However in the C.W.1ôs Statement on Oath, he stated at his paragraph 21 thus:

> ñThat the Claimantôs Claim from the Defendant is as follows:-
>
> a. The sum of ₦1,000,000.00 (One Million Naira) as general damages.
> b. ₦1,400,000.00 (One Million, Four Hundred Thousand Naira) as cost of hiring vehicle everyday at ₦5,000 for 9 months.ò

From the above piece of evidence it is clear that it is at variance with what was pleaded. What was pleaded was ₦1,400,000.00 as special damages at ₦5,000.00 everyday for 280 days but evidence given for the special damages was ₦5,000.00 everyday for 9 months. Should this Court construe 9 months to be equal

to 280 days? That would be absurd. The law is trite that parties are bound by their pleadings and as such evidence given not in conformity with the pleading goes to no issue. This was the holding of the Court of Appeal in **ZENITH BANK PLC VS. EKEREUWEM** (2012) 4 NWLR (part 1290) 207 where Akeju, J.C.A held at page 230 paragraphs B thus:

> ñWhen pleadings are filed therefore, the parties as well as the Court must be bound by the pleadings. The implication is that the oral evidence of the parties must be in line with pleadings and no party is allowed to adduce evidence outside what is pleaded, where a party does so, such evidence must go to no issue.ò

It should be noted that the C.W.1 during cross-examination said:

> ñI do not work on public holidays and Sunday naturally. I do not work on Christian holidays 26th of December, 1999 and on 1st of January, 2000.ò

If these days ï public holidays and Sundays are excluded from June 15 1999 to March 2000 which the claimant is claiming, the remaining days would neither amount to 280 days nor equate 9 months. Even this computation becomes irrelevant as the evidence on Oath of 9 months is at variance with 280 days. I therefore discountenance the piece of evidence by the C.W.1 that he hired vehicles at the cost of ₦5,000.00 daily for 9 months. I therefore discountenance the claim for special damages.

Should the Claimant go home from this Court of justice empty handed? The principles as earlier highlighted in the award of damages for negligence is based on the principle of restitution in integrum. It is evidence before this Court that there

was an accident caused by the negligence of the Defendantôs driver which damaged the Claimantôs Panel Van vehicle. It is also undoubted that the Panel Van vehicle was repaired and returned to the Claimant. What is being disputed now is the time of returning the Panel Van ï the Defendant said it was after 3 months while the Claimant said it was after 9 months. The Defendantôs Learned Counsel has however argued that once the claim for special damages fails, automatically the claim for general damages fails too as the Court cannot award the latter on the failure of a Claimant to prove the former. He cited the case of **O.M.T. CO. LTD VS. IMAFIDON** (2012) 4 NWLR (part 1290) page 332 ratio 4. I will like to disagree with the position of the Learned Counsel as the Learned Justice, Iyizoba, J.C.A brought out the rationale behind the lead judgement in that very case cited by the Learned Counsel where he said at pages 349 ï 350 paragraphs H ï A thus:

> ñWhen there is a Claim for special damages and another separate claim for general damages; the failure of the claim for special damages will not stop the Court from awarding general damages if merited. In this case, the cross-appellant in the Court below claimed ₦3,000 per day as special damages for hire of vehicles and ₦3,000,000.00 general damages for the inconvenience suffered. The Court rejected the claim for special damages as there was no evidence in proof but awarded ₦200,000 general damage. The award of general damages under the circumstance was in order.ò

In applying the above to this case, below is again the C.W.1ôs evidence under cross-examination:

ñThe accidented vehicle was repaired and returned to my company. I would not have gone to Court but for Defendantôs perceived delay in repairing my vehicle. I did not collect the vehicle for repairs to cut my loss because the vehicle was not active. The amount I am claiming can buy another Panel Van of the same status. We hire a car for use before repairs, because it was comfortable for us.ò

From the above, it is obvious that the Claimant did not do anything to mitigate his loss as required by the law. He should not be allowed to hit an underserved gold mine ad infinitum. I rely on the case of **OANDO NIG. PLC ADIJERE W.A. LTD.** (Supra).

Instead of mitigating his loss, the Claimant instituted this action as evidenced by his Writ of Summons on the 14th day of September, 1999, three months after the accident of 15th June, 1999. This however should not be construed to say the Claimant has not suffered pains as a result of the negligent act of the 1st Defendantôs driver. The Claimant on the above authorities is therefore entitled to general damages which I accessed at ₦500,000.00 by answering ISSUE TWO in the affirmative.

HON. JUSTICE V. O. EBOREIME
JUDGE
7th March, 2014.

**COUNSEL**:

J O. UKPEDOR, (MRS.) FOR CLAIMANT

F. BAMIDELE ABINA, ESQ. FOR DEFENDANT