

An Appraisal Of Liability For Defective Products Under Consumer Protection Law In Nigeria

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Abstract: This work is an appraisal of liability for defective Products under Consumer Protection law in Nigeria. It is a response to the unending exploitation occasioned Nigerian consumers due to either a complete absence of a clear consumer law for defective product or lack of efficacy of such protective legislation. Despite the existence of laws and regulations in the area of Consumer Protection, the level of practical protection for consumer has remained rather low. This is due to the imbalance in power relations between the consumers and manufacturers which often leads to exploitation of the former. Consequently, there have been vehement consumer's complaints of defective products. Although, the incidence of consumers' complaints in this area varies depending on the nature of the product in question. However, some of these consistent complaints are issues of fake and substandard products, adulteration, underweight, engine defects and presence of foreign particles in product. Also, consumers of defective products in Nigeria are often confronted with the defense of foolproof system of production, which is a demonstration of the due diligence taken by the manufacturers or producers at every stage of the production process to ensure that the end products are safe for consumption. Our courts get easily convinced by this without taking due cognizance of the main issues in products liability cases. This work therefore seeks to determine the extent of consumer protection afforded by the existing regulatory framework, in matters of defective products. It also advocates for systemic charges for an enhanced consumer protection regime in matters of defective products.

I. INTRODUCTION

The consumer protection problems have occupied public discourse for decades. Over forty-two years after the first consumer protection agency was established, Nigerian consumers are still grappling with difficult problems in the consumption and usage of products and services. Prominent among these problems are the complexity of modern products, strict legal rules, ignorance, poverty, exorbitant prices, fake, adulterated, defective and substandard products.

In the same vein, the services rendered by service providers leave much to be desired. Consumers or the end users are consequently left in the most unfortunate position of having to pay for products that are below the required standard and for shoddy services and sometimes for no service at all. Nigerian consumers have been exposed to a myriad of problems of safety and quality of products and services. Reports of fake and substandard products gaining ground in

the Nigerian market is no longer news as these substandard goods are brought in from outside Nigeria through thousands of porous and unmanned routes.

The seriousness of the situation is underscored by the high level of substandard goods such as food and beverages, drugs and other pharmaceutical products, electrical items and electronics, vehicle spare parts, batteries *et al*.

As the incidence of fake, substandard, defective and adulterated product assumes an alarming dimension, the quality of services rendered by service providers leaves a much bitter taste in the mouths of consumers. There is a high level of infiltration of inferior and substandard products coming into the country from different parts of the world: Europe, Asia, and from other West African countries. Most of these products are substandard and dangerous to the health of Nigerians. Nigeria consumers are therefore faced with a very high possibility of purchasing fake products in the market, where second hand products are preferred to the original

mainly because they are cheaper and more available. These second hand and fake products are the direct result of collapsed buildings, frequent break down of vehicles, high rate of incidents of fire and food poisoning, mainly to the low quality materials involved *ab initio*.

The attitude of the Nigerian Courts which tend to place emphasis on the burden of proof on the plaintiff does not apparently fare any better for the protection of Nigerian consumer or the end users. Consequently, most consumer actions against manufacturers and their agents have usually failed because of their inability to meet the required standard of proof expected of them by the courts. To this end, this study has examined the administrative and regulatory framework institutionalized for the effective protection of consumers in Nigeria in the area of defective products, by examining products liability and safety in Nigeria under the Consumer Protection law in Nigeria. Liability here presupposes that the product is defective, and has caused injury to the consumer.

Consumer Protection deals with questions about the rights and privileges of consumers and how these rights are safeguarded. According to Ladan, consumer protection is about the provision of appropriate and effective mechanisms to protect the pecuniary, health, safety and security interests of all legal persons against misleading, fraudulent and harmful business practices including, manufacturing, trading, packing, advertising, distributing and selling of products/goods and services to the ultimate consumer”.

The importance of consumer protection lies in the fact that the majority of Nigerian consumers are ordinary domestic consumers buying products principally for consumption or use in the home. Consumption, is the sole end and purpose of all production and the interest of producers ought to be attended to, only so far as it may be necessary for promoting that of the consumer. Thus, consumption is what drives production and is often said to be the end product of production. Sadly, the consumer being at the tail and end of the process is not considered important enough and is always willing to accept whatever goods or products that are available to him, most times he is ignorant of the safety status of such products, which not guaranteed, due to the process of economic rivalry, through the instrumentality of competition. It is against the above premise that product liability, seeks to hold manufacturers, distributors, suppliers, retailers and others who make products available to the public responsible for injuries those products cause to consumers.

II. HIGHLIGHT OF HISTORICAL BACKGROUND

As far back as 1266, there was legislation in England imposing criminal liability for the supply of corrupt food. The remedy was grounded on failure to match the prevailing standard. Although the remedy was initially targeted independently on contracts against those who followed a common calling, the barrier of privity of contract soon intervened to exculpate the supplier of goods from liability to non-purchasers. From the 19th century, serious attacks on “the citadel of privity” began to be mounted. Under Common Law, the introduction by the Consumer Protection Act, 1987 (part 1) of a strict liability regime for harm caused by defective

products has whittled down the common law of negligence relating to defective products. At common law, fault is still the basis of liability for defective products. The new law however applies both to personal injuries and in some circumstances, to property damages, which must have amounted to at least a reasonable value in the eye of the law. In practice, the role of the common law in this area will be considerably diminished. Until the celebrated landmark decision in the case of *Donoghue v. Stevenson*, the assumption by that judgment, that it would violate the doctrine of privity of contract to allow anyone, other than a person who had given value for it, to sue in respect of harm caused by a defective chattel, greatly obstructed the development of the law of tort in this context.

The traditional approach of the Common Law was that, where defective products were concerned, the tort of negligence only provided redress in respect of personal injuries caused by the product, or in respect of damage other than the defective product itself, and so he could not by claiming in negligence seek redress for his loss incurred in repairing the product, paying more for it than it had been worth or in suffering a loss of profit. Redress for such losses had to be sought in contract law. The consumer could only look to the person with whom he had a contractual relationship, with respect to the chattel and the outcome will be governed by the terms of the contract. The House of Lords decision in the case of *Junior Books Ltd. v. Vetchi Co. Ltd.*, did cast doubt upon the correctness of the traditional view and indeed appeared to indicate that there was an exception to it, albeit of uncertain scope, whereby financial losses caused by a defective product could after all be recovered in tort.

In Nigeria however, there is no developed body of product liability law in the United Kingdom. What exists are rules of liability under Sale of Goods Law and rules of liability as couched by the tort of negligence. While liability under the Sale of Goods Law is contractual and essentially strict, although limited in application, liability under the tort of negligence is fault-based and of course, also limited in application. The attitude of the Nigerian courts, towards product liability is equally in consonance with what the courts of England do. Under contract law, as it concerns product liability, the Nigerian courts are of the opinion that a court can only assume jurisdiction to review a contract, if there are contractual terms to guide it. If there are no contractual terms, the court will be deemed to be ill suited, as the court will be interfering with the freedom of the parties. This was stated by Ayoola J. S. C. in the case of *Nkakwa v. Shell Petroleum Co. & Ors.*

The above position of the Nigerian courts tends to support the Common Law doctrine of privity of contract, which prior to 1932 worked so much injustice on the consumer of defective goods who had no contractual relationship with the manufacturer. However, in *Anyah v. Imo Concorde Hotel & Ors.*, the Supreme Court in deciding whether a breach of contract may give rise to an action in negligence, held that there is no doubt that negligence is a species of tort and one may owe a duty to another even though there is no contract between them. But a breach of contract may give rise to a proper action on negligence, and for the plaintiff to succeed in a negligence case, he must prove the particulars of negligence or duty of care owed. In that case, the plaintiff claimed against

the defendants jointly and severally, general and special damages, in that between 19th and 20th December, 1986 he suffered the loss of his car parked in the premises of the defendant, along Port Harcourt Owerri Road, due to the negligence and/or breach of duty of care on the part of the defendant. The Supreme Court, *per Ejumunmi*, J.S.C held that the defendants were not liable because parking of a car and other valuables in a facility provided by a party will not necessarily result in liability if interfered with by a third party, because this does not necessarily give protection to the car.

Nevertheless, the attitude of Nigerian courts toward product liability under the law of tort received a boost in the case of *N.B.C Ito v. Ngonadi*, where the appellant bought a defective kerosene refrigerator that exploded few days after and caused severe injuries to the appellant. It was held that the onus is on the plaintiff to prove his case in the tort of negligence. It was also held that, where a breach of implied warranty forms the basis of negligence, the onus is on the plaintiff to prove the special relationship out of which arose the duty of care and what amounts to breach of the duty. It was also further held that in an action for breach of implied warranty of fitness under section 14 (a) of the Sale of Goods Act, 1893, all that the plaintiff need to do was to plead that the defect is latent or patent. Where it is shown that the plaintiff had no opportunity of examining the good(s) before they were sold, and very shortly afterwards, the defect manifested itself, such defect would be deemed latent. It was also stated that, the rule of *caveat emptor* will only apply where the defect in the commodity is an open one that the plaintiff ought to have discovered. Consequently, the attitude of the Nigerian courts tend to place emphasis on separate grounds, to determine whether contract or tort law would be applicable.

III. PRODUCT LIABILITY

As earlier stated, this is the area of law in which manufacturers, distributors, suppliers, retailers and others who make products available to the public are held responsible for the injuries those products cause. The issue of liability is crucial because the notion of contractual freedom excludes non-parties to a bargain from the burden and the benefits of the bargain. The doctrine of privity was essential in proving a case of product liability. Because of the hardship it occasioned, the courts created an exception to avoid denying an injured person a remedy. Consequently, privity of contract was not required where the seller fraudulently concealed the defect or where the products were inherently or imminently dangerous to human life or health, such as guns or poisons.

The case of *Macpherson v. Buick Motor Co.* broadened the category of inherently or imminently dangerous products so as to effectively abolish the privity requirement in negligence cases. It held that lack of privity is not a defense if it is foreseeable that the product if negligently made is likely to cause injury to a class of persons that include the plaintiff. Thus, in recent times, an exception to the privity rule developed for cases involving products intended for human consumption such as food, beverages, drinks and eventually also for products intended for intimate bodily use such as

garments and cosmetics. In product liability law, claims are distinguished into three major types.

- ✓ Manufacturing defects occur in the manufacturing process and usually involve poor quality materials or shoddy workmanship.
- ✓ Design defects occur where the design is inherently dangerous or useless (and hence defective) no matter how carefully manufactured. This may be demonstrated either by showing that the product fails to satisfy ordinary consumer expectations.
- ✓ Failure-to-warn defects claims arise in products that carry inherent non-obvious dangers which could be mitigated through adequate warnings to the user, and these dangers are present regardless of how well the product is manufactured and designed for its intended purpose.

Typical causes of action in product liability include strict liability (the usual theory of recovery), breach of warranty, negligence and breach of the duty to warn. In *Okwejiminor v. Gbakeji & Nigerian Bottling Co. Plc*, a case of illness resulting from the consumption of a bottled drink which contained a dead cockroach, the main issues considered were the manufacturer's "duty of care; the liability of a retailer in negligence; burden of proof and causation. Evidence showed that the drink manufactured by the second respondent was sold by the first respondent to the appellant in the same condition in which it left the second respondent. The court held that in the circumstance of the case, only the second respondent was liable to the appellant because there was a manufacturing defect. The foregoing indicates that, consumer redress can be remedied through civil action, which can be based on contract, if there is privity of contract between the parties or on tort, if the case is that of negligence.

IV. LIABILITY FOR DEFECTIVE PRODUCTS

From the discourse above on product liability and defective goods, the consumer question that arise is "does the purchaser or consumer of defective goods have any remedy against the seller, distributor or manufacturer for defectiveness of the goods?" If the answer is in the affirmative, what then is the nature of this remedy and what are the conditions for accessing the remedy?

Under contract, purchaser can sue for the breach of any of the express terms of the contract as well as breach of any of the conditions or warranties implied under the Sale of Goods Law. Action in contract is however marred with many problems. In order to succeed in a claim, the implied terms of fitness for purposes and merchantable quality implied by the Sale of Goods Law must be satisfied. With respect to the implied term of fitness for purpose, it must be shown that the buyer made known his purpose to the seller so as to show that the goods are of a description, which is in the seller's course of business. This implied term will not apply if the goods are brought under their patent or other trade names. In an action based on breach of merchantable quality, the conditions are that the goods must be brought by description from a seller who deals in goods of that description.

These requirements have led to problems of interpretation especially with reference to the correct import of sale by

description and when a seller can be said to deal in goods of that description. The provision contains a proviso which excludes goods that are examined as regards defects which such an examination ought to have revealed. This proviso poses a big problem to the buyer because if he has examined the goods and the defect is such as should have been revealed through such examination, he will not be entitled to rely on the implied term. In *John Holt Ltd. v. Leonard Ezeafulukwe*, it was shown that the respondents conducted an examination of the goods before concluding the contract. It was held that since the defect was obvious he could not rely on the implied condition as to merchantable quality. Other factors which limit contractual claims are the rules relating to acceptance and passing of property. The Sale of Goods Laws appear to create a conflict over application of these rules. Section 521 of the contract law provides that where there is an unconditional contract for the sale of specific or ascertained goods in a delivery state; the property in the goods passes to the buyer when the contract is made. By section 546 (1) where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them to unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

S. 547 lists the instances under which a buyer will be deemed to have accepted the goods. These rules are crucial to the rights of a buyer because if he is deemed to have accepted the goods he may no longer reject but also be entitled to damages. Another factor which limits contractual claims is the principle of exemption clauses. A seller can escape liability if the clause is wide enough to cover the breach that has arisen. This is predicated on the Supreme Court decision in the case of *Niger/Benue Transport Corporation v. Narumal & Sons Ltd.*, which adopted the rules of construction approach. It is however worthy of note that in the case of implied terms, an exclusion clause cannot apply where there is express statutory prohibition.

In addition to the problems stated above, a major serious lacuna with contractual claims, is the "doctrine of privity" of contract and the effect it has on third party who is not privy to the contract, meaning that the contractual rights and duties only affect the parties, as contractual rights are binding on and enforceable by the immediate parties to the contract. In contract claims, the absence of privity will defect a contract. This principle was enunciated in the case of *Otto Hamman v. Sen-Banjo & Anor*, the plaintiff's claim against the second defendant, was not-suited on ground of lack of privity. Privity of contract thus, constituted a great limitation to actions instituted by non-buyer consumers, who thus, have to look to other branches of the law for remedy.

V. LIABILITY UNDER TORT LAW

In tort law, there is usually no agreement between the parties hence no easy way of ascertaining the expectations of the injured party. Instead, tortious liability is imposed in accordance with societal standard of fairness and reasonableness. However, a consumer injured by a defective product can sue the person responsible in the tort of

negligence. Thus liability for defective product is predicated upon breach of a duty of care and this burden must be discharged by the person who alleges it. He must prove that the person against whom the allegation is made owes him a duty of care and this duty has been broken, resulting in the injury suffered by the plaintiff and his property. In order to discharge this burden, it is usually necessary for the plaintiff to prove specific acts or omissions on the part of the defendant which will qualify as negligent conduct and that the defendant failed in his duty to take reasonable care. Since the essential decision of the House of Lords in *Donoghue v. Stevenson* case, it has been the policy of the law to extend the tort of negligence into areas where previously no remedy existed or the existed remedies appeared to be inadequate.

Product liability under tort law, simply concerns product safety. Thus, while a safe but inferior product may be regarded as defective in contract, it may not be so regarding in tort. For a product to be defective in tort, it must be capable of causing injury to a consumer or his property. In *Boardman v. Guinness (Nig.) Ltd.*, it was held that the duty of the manufacturer is to ensure that he takes reasonable care to avoid injury on the purchaser. Conversely there has been a controversy on the applicability of the doctrine of *res ipsa loquitur* from a plethora of judicial authorities. In *Ebelamu v. Guinness (Nig.) Ltd.*, the plaintiff's attempt to rely on the doctrine was disallowed. According to Nnaemeka Agu, J.C.A. "the principle of *res ipsa loquitur* has no place in a case of this nature. Similarly, in *Okonkwo v. Guinness (Nig.) Ltd.*, it was held that "*res ipsa loquitur* does not apply and nothing is to be resumed in favour of plaintiff" in defective product cases.

From the foregoing, one can appropriately opine that the attitude of the court in this regard does not help the case of the consumer. This is more so as it is obvious from judicial decisions that the courts are easily carried away by a well demonstrated fool-proof system of manufacture. Thus, apart from showing a good quality control system, a manufacturer should be required to give evidence in rebuttal of the negligence imputed to him.

VI. STRICT LIABILITY TREND

In order to deal with the problems faced by victims of product defects in contract or tort based actions, the principle of strict liability has been resorted to in many jurisdictions as a viable alternative. Explaining the notion of strict enterprise liability as applied by the court in *Solu v. Total (Nig.) Ltd.* Apori observed that the calculations underlying such a theory are purely economic. Apart from this factor, Clark explains that strict liability would be to create an economically motivated safety consciousness amongst all products sellers. Moreso, procedures and sellers are by their skills, knowledge and position in a better position to prevent risks and in a better position to insure against possible risks. Furthermore, having to display his goods/products presupposes that such products are impliedly guaranteed of their safety. Thus, he should be held liable for any harm that may arise therefrom.

In Nigeria, the Sale of Goods Laws of various states contain terms which are to be implied into every contract of sale, which is similar to the position in the United Kingdom,

but there implied terms create strict liability. Evidence of strict liability can also be found in other statutes on Consumer Protection.

VII. REGULATORY REGIMES ON CONSUMER PROTECTION IN NIGERIA

Chapter IV of the 1999 Nigerian constitution as amended, aims at protecting the Consumer. In Section 33, the right to life is paramount, presupposing that whatever food or drug or any form of services that can maintain life should therefore be of good standard and should not be negligently prepared, however, in reality consumers are daily exposed to fake and substandard foods, drugs and products which often cause death as in the case of *Igbokwe v. UCH Board of Management*. From the foregoing, it is hereby submitted that although there has been a chapter expressly devoted to consumer protection in the Constitution, this Section provides an additional platform for the protection of consumers in Nigeria.

The Criminal Code and Penal Code also contain enabling provisions which in their application tend to enhance Consumer Protection. For instance, some sections of chapter XXIII of the Criminal Code Act which is on "offences against public health", make provisions intended to protect the consumer and punish offenders, who sell defective foods or drinks.

Furthermore, the Penal Code punishes wrongful acts relating to foods, drinks, drugs, medicines, poisons and other substances which prove harmful to human beings. These include adulteration of foods and drinks intended for sale, not corresponding to the description; sale of adulterated food or drink, noxious foods or drink; and adulteration of drugs or medical preparations.

Among all the statutory regulations, the principal legislation in matters of Consumer Protection, in the absence of any coherent legal framework, is the Consumer Protection Council Act. This is an Act which provides for the establishment of the Consumer Protection Council and matter connected therewith. The CPC attends to public safety by sharpening consumer's skills, providing them with information and practical protection against obnoxious practices. In S.12 of the Act, the council is empowered to administer and enforce relevant provisions of all consumer legislation that have to do with safety, provision of information or the economic interest of Nigerian consumers. This section makes it imperative for the council to enforce compliance with the relevant standards and specifications for all products and services in the country. S.14 of the Act empowers the council to establish laboratories in collaboration with government agencies or other professional bodies to enable the council carry out quality test on Consumer Protection.

Another regulatory regime for the protection of consumer in Nigeria is the Standard Organization of Nigeria. The basic aim of the enactment is to establish an umbrella organization for the standardization of methods and products in Nigerian industries and to provide for other matters relating there to. The 1970 amendment of the Act offered partial autonomy on

the SON from the ministry of industry with strict enforcement powers of seizures, confiscation and destruction of substandard products, including powers to seal up premises where defective products are manufactured or stored. Section 12 of the Act contains the procedure for establishing industrial standards, which shall be called the Nigerian Industrial Standard (NIS). Certification marks and identification are given to items that fall under the NIS, which is aimed at guiding the consumer, while defaulting manufacturers are to be punished.

The National Agency for Food and Drugs Administration and Control Act, is yet another regulatory statutory body. It is a body corporate with perpetual succession and has a common seal. The mandate of the agency is to regulate and control quality standard for foods, drugs, cosmetics, medical devices, chemicals, detergents and packaged water imported, manufactured locally and distributed in Nigeria. To accomplish its pharmaceutical mandates, NAFDAC is empowered by the Act to compile standard specifications and guidelines for the production of drugs, cosmetics, medical devices and chemicals. Similarly, it should collaborate with the National Drug Law Enforcement Agency in taking measures to eradicate drug abuse in Nigeria. Section 5(c)(d) empowers the agency among others to carry out appropriate investigation into the premises where consumer products are produced to ensure that regulated products are safe for human consumption. Section 25 creates a number of offences and penalties upon contravention. For optional performance of the Agency, reliance on the relevant subsidiary legislation is of importance. These pieces of legislation are specific with reference to particular products, for instance where the agency has to exercise its advertising function with respect to food products, it will have recourse to the Food Product (Advertisement) Regulations of 1996, while for registration of bottled water, the Agency will rely on the Bottled Water Registration Regulations of 1996. In addition, the agency is vested with wide powers under the Act to ensure that regulated products are safe for human consumption. Thus, it has the power of inspection of raw materials, establishment of quality assurance system and inspection of production sites.

VIII. CONCLUSION AND RECOMMENDATIONS

It has been demonstrated that a major problem in the area of consumer protection is that of enforcement of consumer rights. The problems associated with contractual and tortious claims have been highlighted. It has been shown that none of these branches of the law offers adequate protection to the consumer. Actions in the tort of negligence ought to be regarded as necessary for the protection of innocent persons and the interest of the public. Fault based liability as per defective products should not be readily adopted as, this is limited in scope and capable of depriving an injured party a right to seek redress, especially in the law of contract.

Furthermore, the principle of reasonableness laid down in the case of *Donoghue v. Stevenson*, which is directed at the conduct of producers should easily be adopted in areas where statutes is not available to proffer solutions. Consumers should be encouraged by the law to feel protected from the reckless

handling of products by most manufacturers or their agents. This will create more awareness to anyone involved in the handling of any product that may cause injury to an innocent third party.

A better solution, it is suggested, is the introduction of strict liability. It may appear counterproductive to impose strict liability at a time when industrial capacity is in its height in Nigeria. The country may however develop a strict liability regime in selected fields such as in the fields of pharmaceuticals and processed foods, which will dispense with the need to prove negligence. It will also save the courts the temptation of unnecessary fusion of contract and tort principles in a bid to achieve a desired solution. It is also worthy of note that the existing regulatory regimes are not adequate in their provisions and cannot adequately protect the consumer. This is so because they expose the existence of several distinct legal regimes which do not operate in any organic holistic fashion. They operate independently of one another and most often conflict with each other. In relation to the committees under the Consumer Protection Council, each state should be allowed to have the power to legislate on issues affecting the consumer based on the peculiarities of the state. The issue of applying to the court to prevent the circulation of any product which constitutes imminent public hazard poses a difficult problem, because while making efforts to obtain the court orders, as fake products still get circulated to the innocent consumers. Furthermore, the fines imposed on violators and jail terms are grossly inadequate and should be reviewed.

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