

Liability in Tort for Defective Products: A Review.

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Abstract Liability in tort for defective product is anchored on negligence. It is governed by legal principles found chiefly in the judgment of judges entrusted with the administration of justice and partly from law books of eminent scholars. This work examines the subject of defective product within the confines of law of tort, and argues that consumers should be protected at all times and independently of contractual relations otherwise producers themselves may become ‘killers’ in the near future.

Keywords: Care, Consumer, Defective, Duty, Product, Negligence, Liability.

1. Introduction

Liability[1] in tort for defective product is an exception to the strict legal order that none but a party to a contract can be found on its breach. In this, the case becomes one of *delict* and not of breach of contract. It must therefore be shown that there was a duty owed and breached which led to injury to the person whom the duty is owed. This is because a man cannot be charged with negligence if he has no obligation to exercise diligence.

Thus, rules and principles have been enunciated upon tort-based actions to ensure protection of a consumer. One obvious example is the tort of negligence[2], which applies to hold manufacturers and producers of defective products and services liable.[3] Originally, liability was restricted to the existence of a contractual relationship.[4] The general principle was that a person selling an article, which he did not know to be dangerous cannot be held liable to a person with whom he made no contract by reason of the fact that reasonable inquiries might have enabled him to discover that the article was in fact dangerous. Hence, a person who is not a party to a contract can neither sue for its breach nor enforce its performance even if it confers benefit on him.[5] Lord Hunter in *Cameron v. Young*[6] put the law thus: “a stranger to a lease cannot found upon a landlord’s failure to fulfill obligations undertaken by him under contract with the lessee”. Lord Macmillan reviewed liability cases under contract on the one hand and under negligence on the other hand and concluded as follows:-

It humbly appears to me that the diversity of view which is exhibited in such cases as *Gorge v. Skivington* on the one hand and *Blacker v. Lake & Elliot, Ltd.* on the other hand – to take two extreme instances – is ex-

plained by the fact that in the discussion of the topic which now engages your Lordships’ attention, two rival principles of the law find a meeting place where each has contended for supremacy. On the one hand, there is the well-established principle that no one other than a party to a contract can complain of a breach of that contract. On the other hand, there is the equally well-established doctrine that negligence apart from contract gives a right of action to the party injured by that negligence – and here I use the term negligence, of course, in its technical legal sense, implying a duty owed and neglected. The fact that there is a contractual relationship between the parties which may give rise to an action for breach of contract, does not exclude the co-existence of a right of action founded on negligence as between the same parties independently of the contract, though arising out of the relationship in fact brought about by the contract.[7]

Obviously therefore, liability exists both in contract and in tort via negligence arising from the same or different set of facts. The near impracticability to prove negligence in order to protect consumers in Nigeria necessitated this research. This study therefore aims to achieve the following specific objectives: (i) to determine the extent to which action founded on negligence can avail a consumer without contractual relation and (ii) to ascertain the extent to which duty of care exists in the context of Nigerian case laws. To investigate these, the following research questions are imperative, namely, does negligence *simpliciter* avail a consumer without contractual relation? and can the duty of care exist independently of any contract? The paper appraises common law authorities and juxtaposes same with Nigerian case laws on the subject. It questions the *ratio decidendi* in Justice K. O. Anyah’s case.

2. Definition of Terms

Certain terms emerge in the topic of discourse – consumer, product and defective product. Attempt is made to define them within the coverage of this paper.

(a) **Consumer:** The definition of a consumer is not a simple task. Variegated definitions abound. Some define it from

individualistic[8] point of view, others see it from organizational[9] angle yet another defines it from the point of contract – purchases.[10] Section 32 of the Consumer Protection Council Act defines consumer to mean an individual who purchases, uses, maintains or disposes of product or services. Monye in an all-embracing description, wrote that "... the term consumer is not confined to purchasers. It extends to contractual consumers; ultimate users as well as any person who comes into contact with a product or service in any way whatsoever".[11] For the purpose of this paper, the term consumer is restricted to ultimate users and any person who comes into contact with a product or service in any *legitimate*[12] way whatsoever. The qualification is necessary to exclude those who may come into contact with the product in an improper and illegitimate manner. Thus, in terms of goods and services, every (human) being[13] is a consumer. A consumer is a receiver of goods, services or both for use or consumption either *gratis* or otherwise. Hence, a giver or provider of such goods and services is under a duty of care and may be liable for injury arising from the defects in the goods and services so provided, provided the consumer sustains injury in the use of the product.

(b) **Product:** The Consumer Protection Act of 1987(UK) defines a product as "any goods or electricity and ... includes a product which is comprised in another product..."[14] In the same vein, section 45 defines goods as including "substances, growing crops and things comprised in land by virtue of being attached to it and any ship, air craft or vehicle". In general, 'product' is not limited to articles of food, drink *et cetera*. It includes articles such as underwear,[15] tombstone,[16] motorcars,[17] lifts,[18] hair-dye,[19] condom,[20] contraceptive pills,[21] perambulator[22] *etcetera*. The liability for defective product has also been extended to building; hence, building[23] may also be viewed as product. But, is a statement capable of being a product so as to entitle one to damages for injuries sustained as a result of a careless statement via defective statement, nay defective product- negligent statement?[24]

The issue of liability for negligent statement upon which injury or loss results was once unsettled. Of the two divides, one posited that no action could lie for a negligent statement even if it was intended to be acted upon and indeed was so acted upon by anyone to his loss.[25] This was predicated on the legal principle that the duty to be careful in making statements arises only out of either contract or fiduciary relationship. On the other hand, the progressive views restricted liability for such statements to professionals acting in their professional capacities.[26] Lord Denning himself stated:

Let me now be constructive and suggest the circumstances in which I say that a duty to use care in making a statement does exist apart from a contract in that behalf. First, what persons are under such duty? My answer is those persons, such as accountants, surveyors, valuers and analysts, whose profession and occupation it is to examine books, accounts, and other things, and to make reports on which other people – other than their clients – rely in the ordinary course of business. Their duty is not merely a duty to use care in their reports. They have also a duty to use care in their work, which results in their reports...[27]

The duty is not one at large. It is restrictive. It is a duty, which the professionals owe to their employers or clients and also "... to any third person to whom they themselves show the account or to whom their employer is going to show the accounts so as to induce him to ... or take some other action on them". Implicitly, the duty does not extend to strangers. Again, it is limited to a given transaction specifically required and disclosed to the concerned professional. Thus, the duty of care and the consequent liability do not extend to indeterminate persons, time and transaction.[28]

(c) **Defective Product:** Etymologically, the verb "defect" is synonymous with default, deficiency, destitution, lack, shortcoming, spot, taint, want, blemish, blotch, error, flaw, imperfection, mistake, failing, fault, foible.[29] In the same vein, the adjective 'defective' means deficient, inadequate, incomplete, insufficient, scant, short, faulty, imperfect, marred.[30] Generally, therefore, a 'defective product' is one that is deficient, faulty, inadequate or incomplete. Such product lacks something essential to make it adequate, sufficient, faultless and spotless. According to Monye, "a product which poses some hazards to life or property is certainly defective".[31] It is reasoned that this definition is not entirely correct. A product is defective when the hazard to life or property is not expected. If the hazard is expected, the product is merely dangerous and not necessarily defective. She further illustrated: "A poison, a chemical or an explosive is inherently dangerous; but if accompanied with an appropriate label and warning it may not be construed as defective".[32] This again is objectionable. Is every inherently dangerous article defective, and is such defect curable by mere appropriate labeling or warning? It is appropriate to observe that an inherently dangerous article is not necessarily defective whether there is warning or otherwise. For example, a properly timed time bomb is inherently dangerous though not defective. Conversely, an improperly timed time bomb is both inherently dangerous and defective. Hence, 'defective product' and 'dangerous product' are not strictly the same though related.

It is imperative to point out that a distinction exists between defect in contract and defect in tort. Monye says and rightly too that a safe but inferior product may be regarded as defective in contract but not so in tort.[33] This is true where the buyer specifically and expressly demanded from the seller a non-inferior product and the latter, knowingly or otherwise sales inferior product to the former. The learned author illustrated with a measure of authority thus:

For a product to be considered defective in tort, it must be in such a condition as is capable of causing injury to person or property. Using our earlier illustration, if a skin lotion contrary to its presentation fails to tone the skin, the claimant cannot succeed in the absence of a definite injury. This is because the duty owed to a consumer in tort is to guard against possible injuries.[34]

From the bench, the judgment of Lewis J is apt. The jurist opined:

I have to remember that the duty owed to the consumer, or the ultimate purchaser, by the manufacturer is not to ensure that his goods are perfect. All he has to do is to take reasonable care to see that no injury is done to the consumer or ultimate purchaser. In other words, his duty is to take reasonable care to see that there exists no defect that is likely to cause such injury.[35]

Although Lewis J. did from the quoted statement define neither defect nor product, it is clear that whatever is categorised, as 'defect' must be capable of causing injury and indeed must have occasioned injury to the plaintiff. Currently, the issue of product defect and consequent liability is regulated by statute[36] rather than the case law in most jurisdictions. This paper is delimited to the tort aspect of defective product liability.

3. Liabilities in Tort for Defective Products

As a general proposition of law, a party is liable for damage caused by defective product only when there is contractual relationship. The principle of privity of contract applies to

limit liability[37] to parties to the contract except in few cases of undisclosed principal, constructive trust among others.[38] The importance of contractual relation as a basis of liability was emphatically stated in *Dunlop Pneumatic Tyre Company Ltd v. Selfridge and Company Ltd*[39] thus:

My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in *personam*. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request... A third proposition is that a principal not named in the contract may sue upon it if the promisee really contracted as his agent. But again, in order to entitle him so to sue, he must have given consideration either personally or through the promisee, acting as his agent in giving it.[40]

The House of Lords in *Scruttons Ltd v. Midland Silicones Ltd*[41] unanimously cited with firm approval the decision in *Dunlop's* case. This position is anti-consumerism. It is rare to see a case of contract between a manufacturer of a product and its consumer, i.e. contract of sale. The contractual relationship in most cases exists between the manufacturers and the wholesalers or retailers and not between the manufacturers and the ultimate users. Yet it may not be denied that the manufacturer had the ultimate consumer in contemplation from when the

idea of making the product was conceived, through the processing time until the end of production. It is therefore argued that even when there is a chance of intermediate examination of the product but without the possibility of tempering with same, the manufacturer should still be liable to the ultimate user in the event of injury unless the former can show that the product left its control in non-defective condition.

Notwithstanding the judicial decisions in *Dunlop's case* and other similar cases, judicial authorities exist where liability avails without contractual relation. These instances are discussed below.

i. Fraud: Where the injury results from fraudulent misstatement, liability avails in favour of a third party even in the absence of contract. In *Longridge v. Levy*[42] a man sold a gun which he knew was dangerous for the use of the purchaser's son. The gun exploded in the hand of the purchaser's son. The court held that the purchaser had a right of action in tort against the gun maker based on fraud of concealment on the part of the seller of the gun. This was subsequently held not to be of wider application.[43]

The liability here is anchored on the fact that the article was dangerous to the knowledge of the manufacturer. The knowledge of the danger creates an obligation on the manufacturer or any such person to warn the third party and its concealment is in the nature of fraud.

ii. Where the article is dangerous per se: In respect of this, a special or peculiar duty is imposed on those who send forth or install such articles to take precautions as necessary as other parties may come within their proximity.[44] In *Dominion Natural Gas C., Ltd v. Collins and Perkins*,[45] the appellant company installed gas apparatus, which supplied natural gas on the premises of a railway company. The company installed a regulator to control the pressure but their men negligently made an escape – valve discharge into the building instead of the open air. The railway workmen – the plaintiffs were injured by an explosion in the premises. The defendants were held liable. In the absence of contractual relation, the court per Lord Dunedin who read the majority judgment held:

There may be, however, in the case of anyone performing an operation, or setting up and installing a machine, a relationship of duty. What that duty is will vary according to the subject matter of the things involved. It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things *ejusdem generis*, there is a peculiar duty to take precaution imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity.[46]

The distinction of articles dangerous *per se*[47] and articles dangerous *sub modo*[48] has been a subject of sustained criticism. Heuston and Buckley wrote:

The distinction is certainly difficult to support in principle. There is nothing, which is at all times and in all circumstances dangerous;

there is an element of danger in every object.[49]

Similarly, in *Read v. J. Lyons & Co.*[50] the Attorney General Sir Hartley Shawcross argued:

The true question is not whether a thing is dangerous in itself but whether, by reason of some extraneous circumstances, it may become dangerous. There is really no category of dangerous things, which require more and some which require less care.

It is conceded that there is an element of danger in everything. However, it is contended that certain objects are inherently dangerous. A loaded gun at all times and in any hand is inherently and patently dangerous – pull the trigger and the consequence is grave harm to person if the nozzle is pointed to a person, but not so for a toy gun. The common ground is that a degree of care arises proportionately to the level of danger associated with the article and special care ought to be exercised in respect of articles dangerous *per se* than articles dangerous *sub modo*.

Iii Negligence and Neighbourhood Principle

The defendant has the duty to exercise ordinary care in compounding an article in order to maintain the safety of those he knew or ought to know the article may be purchased for. The duty is not limited to the immediate purchaser but also extends to the ultimate consumer. In *Francis v. Cockrell*,[51] the plaintiff was injured by the fall of a race course stand while he sat on a seat he had booked and paid for. The defendant was the proprietor of the stand and acted as a receiver of the money. The contractor negligently erected the stand though the defendant was not aware of the defect. The court followed the decision of Lord Chief Baron in *George v. Skivington* where the Law Lord put the law succinctly thus:

He said there was a duty in the vendor to use ordinary care in compounding the article sold, and that this extended to the person for whose use he knew it was purchased and this duty having been violated, and he having failed to use reasonable care, was liable in an action at the suit of the third person.[52]

It is important to state that the defendant is presumed and reasonably to know or foresee the ultimate consumer of his article. Ignorance does not avail. Lord Lush J. in *White v. Steadman*[53] opined:

That a person who has the means of knowledge and only does not know that the animal or chattel which he supplies is dangerous because he does not take ordinary care to avail himself of his opportunity of knowledge is in precisely the same position as the person who knows.

The defendant should know or ought to know or contemplate the defect and foresee the consequent danger and

therefore, independently of contract, take reasonable care to prevent injury to the purchaser and or ultimate user. The actual or constructive knowledge of the defect in the article raises the duty of care upon the maker of the article. In the American case of *Macpherson v. Buick Motor Co.*[54] the plaintiff bought a car from a retailer. The car was manufactured by the defendant. The defect in the construction of the car caused injury to the plaintiff. The court held that the plaintiff was entitled to recover damages from the manufacturer. Cardozo J. opined:

There is no claim that the defendant knew of the defect and willfully concealed it... The charge is one, not of fraud, but of negligence. The question to be determined is whether the defendant owed a duty of care and vigilance to anyone but the immediate purchaser... The principle of *Thomas v. Winchester* 6 N.Y 397 is not limited to poisons, explosives, and things of like nature, to things, which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by person other than the purchaser and used without new tests then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.

Similarly Breth MR. in *Heaven v. Pender*[55] held:-

The proposition which these recognised cases suggest and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other a duty arises to use ordinary care and skill to avoid such danger.

The court employed a scenario where goods were to be supplied to be likely used by some other person who had no contractual relation with the supplier. The Judge then put the law in its considered perspective thus:-

Whenever one person supplies goods, or machinery or the like, for the purpose of their being used by another person under such circumstances that everyone of ordinary sense would, if he thought, recognize at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to

the condition or manner of supplying such thing. And for a neglect of such ordinary care or skill whereby injury happens a legal liability arises to be enforced by an action for negligence. This includes the case of goods, etc....[56]

Even when the manufacturer of the article has shown reasonable care and diligence he may still be held liable if the article had left its company in a defective condition. In *Grant v. Australia Knitting Mill*,[57] the defendant was an underpant manufacturer. The plaintiff complained of dermatitis arising from the use of the underpant manufactured by the defendant, as a result of the latter's use of excess sulphitis. The defendant led evidence to the effect that he had manufactured 4,737,600 pairs of underpants without complaints. The plaintiff succeeded because the underpant was proved and held to be defective when it left the defendant's company.

Similarly, in the Nigerian case of *Edward Okwejiminor v G. Gbakeji & anr*[58], the plaintiff/appellant pleaded that on the 13th day of February, 1991, he took out a bottle of Fanta Orange drink from a crate of mineral he purchased from the first defendant/respondent earlier same day. Meanwhile the first defendant/respondent purchased from the manufacturer, the 2nd defendant/respondent. While drinking the Fanta orange, the plaintiff/appellant allegedly felt some sediments and rubbish down his throat and stopped half way to take closer look at the content of the bottle. He then discovered that the bottle contained a dead cockroach. He developed stomach pain and was consequently hospitalized. During trial, an unopened Fanta orange containing a fly in the same crate of mineral was tendered and admitted (exhibit G). The trial court held that the contaminated Fanta orange which the plaintiff bought and consumed caused him stomach pain, vomiting and stooling and led to his admission in hospital. The Supreme Court set aside the decision of the Court of Appeal and affirmed the decision of the trial court on the point that 'plaintiff is a person closely and directly affected by the act of the 2nd defendant and he owes the consumers including the plaintiff the duty of care or that the drinks manufactured by them should not do damage to the consumers'.[59] This decision is highly commendable as it upholds the liability of the 2nd defendant/respondent without contractual relationship with the plaintiff/appellant.

On the contrary, the case of *Bates v. Batey & Co Ltd*[60] stands out. In that case, the plaintiff bought a bottle of ginger beer from a retailer who bought from the manufacturer. The bottle was defective though unknown to the manufacturer who could have discovered it by the exercise of reasonable care. The court per Horridge J. held that the manufacturer was not liable because he did not know of the defect.[61] Lord Buckmaster in *Donoghue v. Stevenson* viewed cases that granted damages for injury sustained by the plaintiff without contract as legally vexatious and prayed that those cases "should be buried so securely that their perturbed spirits shall no longer vex the law".[62] In answer to this in clear terms and rightly so, Lord Macmillan in the same case adumbrated: "In a true case of negligence, knowledge of the existence of the defect causing damage is not an essential element at all". Hence, ignorance of the defect is not a defence.

In the case of *Longmeid v. Holliday*[63] a defective lamp was sold to a man whose wife was injured by its explo-

sion. Although the vendor of the lamp against whom the action was brought was not the manufacturer[64], the judgment of the court covered manufacturers. The court put the law thus:-

It would be going much for to say, that so much care is required in the ordinary intercourse of life between one individual and another, that if a machine not in its nature dangerous, but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it.[65]

It is submitted that the case of *Bates v. Batey & Co Ltd* and the likes are against public interest, public health and safety[66]. They are capable of promoting the circulation of defective products to the public and still render the ultimate consumers helpless in the event of injury. There is no reason the ancient position in relation to negligent act should not be extended to defective product. In the 15th century case of the *Thorns*[67] the court held: "though a man doth a lawful thing yet if any damage do hereby befall another he shall answer for it, if he could have avoided it".

This is the correct principle, which is reasonable and just. To hold otherwise is to accord legal sanctity to injurious avoidable negligent conduct. Hence, the opinion of Lord Esher in *Emmeus v. Pottle*[68] is apt. The jurist opined:-

Any proposition the result of which would be to show that the common law of England is wholly unreasonable and unjust cannot be part of the common law of England.

Indeed to hold otherwise is to encourage product chaos, which is dangerous to the unborn, unhealthy to the living and ungodly, may be, to the dead. In *Donoghue v. Stevenson*,[69] the appellant on August 26, 1928 drank a bottle of ginger beer manufactured by the respondent. A friend of the appellant bought the bottle of the ginger beer at paisley; the said friend poured some of the ginger beer out into a tumbler, which the appellant drank. Again the friend proceeded to pour the remainder of the contents of the bottle into the tumbler when a snail, which was in a state of decomposition, floated out of the bottle. The appellant further averred that the results of the nauseating sight of the snail and the impurities in the ginger beer caused her shock and *severe* gastroenteritis. The House of Lords in a majority judgment[70] reviewed pre-existing relevant and related authorities on the issue and held:-

My Lords, if Your Lordships accept the view that this pleading discloses a relevant cause of action you will be affirming the proposition that by Scots and English Law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care

in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.[71]

The court enunciated the principle of duty of care to one's neighbour and defined neighbour in relation to the proximity of action of one man in relation to another and not necessarily physical closeness. Lord Atkin in the lead judgment explained:-

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour receives a restricted reply. You must take reasonable care to avoid acts or omission, which you can reasonably foresee would be likely to injure your neighbour. The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[72]

By this, the duty to take care and the liability for breach, independently of contract was re-affirmed with judicial seal of finality. This landmark decision accorded the concept of consumer protection a pride of place in the society.

However, in the Nigerian case of *Justice K. O. Anyah v. Imo Concord Hotels Ltd & 2 ors.*,[73] negligence was judicially sanctioned as an impractical theory of consumer protection. The facts of the case are that on the 19th day of December, 1986, the appellant, Justice K. O. Anyah came to Owerri, Imo State of Nigeria to attend a book launching ceremony. He drove his 505 Peugeot Saloon Car with registration No IM 6583 AF into the premises of the 1st Respondent, Imo Concord Hotels Ltd and booked accommodation for one night. At the gate of the hotel, the 2nd and 3rd respondents who were the hotel security men on duty on that day registered the number of the appellant's car and issued him with a plastic disc No 102. Thereafter, the security men lifted the bar across the gate and the appellant drove his said car into the hotel and parked it in a parking space therein. He then locked the car, pocketed the keys and checked into the room allocated to him where he slept for the night.

The following morning, the appellant checked out of the hotel, went to pick his car where he parked it but discovered that the car had been stolen. He immediately reported same to the hotel management and the latter ordered investigation yet the car was not recovered. Consequently, the appellant filed an action in court claiming a total of ₦150,000.00 (One Hundred and Fifty Thousand Naira) for the value of the stolen car, expenses incurred and general damages on the ground that the respondents were negligent in allowing his car to be stolen in the hotel on 20th December, 1986. The trial court held that the Respondents owed duty of care to the appellant, a decision the Court of Appeal reversed. At the Supreme Court, the apex court noted the meaning and relevance of 'duty of care' and 'neighbour' in an action for negligence. The court affirmed that the principle of negligence is that a person owes a duty of care to his neighbour who would be directly affected by his act or omission. The court adumbrated thus:-

There is a legal duty owed to take reasonable care to avoid acts or omissions, which can be reasonably foreseen to likely injure a neighbour. "Neighbours" in this regard are persons who are so closely and directly affected by one's act that one ought reasonably to have them in contemplation as being so affected when one is directing his mind to the acts or omissions which are called in question.[74]

Thereafter the Supreme Court per Kalgo JSC in the leading judgment reasoned and concluded to wit: "I have carefully studied the submissions of both counsel on this issue and after considering the facts of this case and read the case cited by the respondents' counsel, I am satisfied that the appellant is not such 'neighbour' that the respondents must or ought reasonably to have him in contemplation when directing their minds to their acts or omissions".[75]

On the facts of the case, the court opined:

The parking of a car or other valuable possessions does not necessarily give protection to the properties so parked from being interfered with by third parties. The proprietor of such hotels and/or the provider of such facility may not necessarily be liable for any loss that may occur as a result of the use of the space so provided. The fact that there are security men employed by the hotel assisted by policemen does not, *ipso facto*, create any legal relationship between the hotelier and the lodger requiring the former to ensure the security of the lodger's car parked in the hotel. After all, the hotel itself has its own properties to protect and unless there is an existing legal duty for it to protect the properties of others who come into the hotel, it has no duty of care owed to them and the presence of security men and policemen in its premises alone cannot be taken to be security to protect the properties of visitors. But where, for example, a visitor who came through the hotel gate was given a plastic or metal disc and he parked his car in the hotel park, locked it up, gave the key to the hotel security men and drew their attention to where he parked the car[76], there may arise a duty of care on the part of the security men to ensure the safety of the car. In the instant case, the appellant merely parked his car in the hotel park after he was allowed in and given the hotel disc.[77]

Implicitly, the court reasoned that the defendants/respondents owed a duty of care and vigilance to no one but those who parked their cars in the hotel premises and surrendered their keys to the hotel security men and drew their attention to where the cars were parked. This writer is of the humble view that the respondents owed legal duty of care to their neighbours, and their neighbours include all the customers to the hotel, whether the cars' keys were surrendered to the

securitymen or otherwise, and whether their attention was drawn to the place the cars were parked or not. In this case, the relationship between the appellant and the respondents created a clear legal duty of care on the part of the respondents for the safety of the car of the appellant. The appellant was a neighbour to the respondent, and the latter owed legal duty of care to the former, the breach of which entitled the appellant to reliefs sought. Hence, this writer reasons that the decision of the trial court is preferable in the circumstance of the case.

4. Defenses to Liability on Defective Product

The case of negligence arising from defective products is not yet a strict liability wrong. The defendant is legally entitled to certain defences. These range from inherent risks to statutory defences among others. These are examined below.

a. Where a risk is inherent in a product and well known: When a risk of a product is well known and widely publicised, there can be no defect in the product if the risk occurs. In *Richard v. LRC Products Ltd*, [78] a condom was held not to be defective even though the woman became pregnant after its use. This was because there is always the risk of pregnancy even with the proper use of it. Again, in *XYZ v. Sihering Health Case Ltd* [79] it was held that a contraceptive pill was not defective for causing cardiovascular problems because it was a known possible side effect. However, it has been held that contamination of blood used for transfusion renders the blood defective as the public expected not to be given contaminated blood. [80] It therefore follows that where a given risk is associated with a particular product, the occurrence of that risk does not render the product defective and consequently, the manufacturer cannot be held liable for any injury. However, there must be a warning to all and sundry.

- b. Statutory Defences include;
- i. Defects attributable to legal requirements. [81]
 - ii. Defendant was not the supplier of the product. [82]
 - iii. The defect was not in existence at the relevant time. [83]
- c. Other possible defences are:
- i. Frolic or user's negligence;
 - ii. The act of a third party. It is necessary to observe that products may really pass from manufacturer into other hands from which they may be exposed to vicissitudes which may render them defective or noxious and for which the manufacturer may not be held responsible.
 - iii. Defendant's exercise of duty of care.

This onus is on the defendant to assert and prove any of the defences available to him.

5. Conclusion

It is clear from the reviewed cases that liability in tort has not just gone one step beyond, it has gone more than fifty. It is obvious that *Winterbottom v. Wright* [84] is no more a good law in that regard. In that case, upon negligence in the construc-

tion of a carriage, it broke down and a stranger to the manufacture and sale sought to recover damages for injury sustained allegedly due to the negligence in the work. It was held that there was no cause of action either in tort or contract. The court categorically ruled: "The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that; there is no reason why we should not go fifty".

The point of emphasis is that the categories of carelessness, which can assume the legal quality of negligence in law of tort are never closed, much as social and economic life of man remains infinite in variety and in degree. In *Chapman v. Pickersgill* [85], Pratt CJ opined: "I wish never to hear this objection again. This action is for tort: torts are infinitely various; not limited or confined, for there is nothing in nature but may be an instrument of mischief." The cardinal principle of liability for negligence, in the words of Lord Atkin: "is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty". [86] Each case depends on its own peculiar facts and circumstances.

References

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- [1] Liability means subjection to a legal obligation. It may be civil or criminal. The former arises either from breach of contract or duty of care owed to the injured party. F. N. Monye, 'Liability for Defective Products', *The Nigerian Juridical Review*, Vol.6, 1994-1997, pp. 137-157.
 - [2] In *Chevron Nigeria Limited & anr v. Kehinde Omoregha & 5ors* (2015) 16 N.W.L.R. (pt.1485) 336 @ p. 350 paras. A- D, negligence was defined as 'negligence in law ranges from inadvertence that is hardly more than accidental to sinful disregard of the safety of others. It denotes the failure to exercise the standard of care that a reasonable prudent person would normally have exercised in a similar situation. That is to say, any conduct falling below the legal standard established to protect others against reasonable risk of harm, as against conduct that is intentionally, wantonly, or wilfully disregarding of other's rights'. *G.K.F. Inc. Ltd v. NITEL* (2009) 39 NSCQR 426, F.N., Monye 'Liability For Defective Products', *Loc. Cit.*, p.142, note 1.
 - [3] David Oughton and John Lowry, *Textbook on Consumer Law*, Great Britain: Blackstone Press Ltd, 1997, p.134
 - [4] *Otto Hamann v Senganjo & Anr* (1962) ALL N.L.R. 1070, *John Holt Ltd v Leonard Ezeafulukwe* (1990) 2 N.W.L.R. (pt. 133) 520 C.A., *D&E Estates Ltd v. Church Commissioners for England* (1989) A.C 177; *Murphy v. Brentwood District Council* (1991) 1 A.C 398. Lord Denning in *Candler v. Crane Christmas & Co.* (1951) 1 All ER 426 at p. 431 described it as

- 'cardinal error', and adumbrated the consequences thus, '... if one of the parties to a contract was negligent in carrying it out, no third person who was injured by that negligence could sue for damages on account of it'.
- [5] *Beswick v. Beswick* (1968) A.C 68 (1908) A.C 176, 1908 S. C (H.L) 7; *Cavalier v. Pope* (1906) A. C. 428.
- [6] Quoted in *M'alister (or Donoghue) (Pauper) v. Stevenson* (1932) A.C 562 at pp.621 – 622.
- [7] Kanyip, B. Bakwaph, Consumer Protection in Nigeria Law, Theory and Policy, (Abuja: Rekon Books Ltd., 2004), p.26; Aaaker, P.A. and Day, G. S., Consumerism, 2nd ed., (New York: Free Press, 1974), p. XVII, cited from Monye, F. N., Law of Consumer Protection, (Ibadan: Spectrum Books Ltd., 2003), p. 16.
- [8] Schiffman, L.G. and Kanut, L.L. Consumer Behaviour, Prentice – Hall, Inc., Engle Wood Cliffs, 1978, cited from Monye, F. N. *Op. Cit.* p. 16.
- [9] Section 32, Consumer Protection Council, Act, 1992.
- [10] Monye, F. N. *Op. cit.* p. 19.
- [11] Italics mine for emphasis.
- [12] This includes both natural and corporate bodies capable of use or consumption of goods and services. There is no good reason a corporate body cannot sue for damage to it arising from defective product since it can sue to enforce its fundamental rights. See Mr. Charles Okechukwu & ANR v. EFCC & ors (2015) 18 N.W.L.R. (pt. 1490) 1 @ p.24, Onyekwuluje v. Benue State Govt. (2005) 8 N.W.L.R (pt. 928) 614
- [13] Section 1 (2) Consumer Protection Act, 1987.
- [14] *Grant v. Australian Knitting Mills* (1936) A. C. 85.
- [15] *Brown v. Cotterill* (1934) 51 T.L.R. 21.
- [16] *Herchtal v. Stewart & Awdern* (1940) 1 K.B. 155.
- [17] *Haseldine v. Daw* (1941) 2 K.B. 343; (1941) 3 All E.R. 156.
- [18] *Watson v. Buckley* (1940) 1 All E.R. 174.
- [19] *Richards v. LRC Products Ltd.* (2000) 59 BMLR 185.
- [20] *XYZ v. Sihering Health Care Ltd* (2002) EWHC 1420.
- [21] *Abouzaid v. Mother Care (UK) Ltd* (21 December, 2000, C.A).
- [22] *Rimmer v. Liverpool City Council* (1984) Q. B. 1, 16.
- [23] *Candler v. Grane, Christmas & Co(A Firm)* (1951) 2 K.B. 164; *Hedley Byrns & Co Ltd v. Heller &Partners Ltd* (1964) A. C. 465.
- [24] *Low v. Bouverie* (1891)3 Ch. 82; *Le Lieevre v. Gould* (1893) 1 QB 491. However, the following cases were to the contrary: *Slim v. Croucher* (1860) 1 De G.F.&J 518; *Cann v. Willson* (1888) 39 Ch. D 39.
- [25] *Candler v. Crane Christmas (supra)*; *Derry v. Peek* (1889), 14 App. Cas. 339; *Fish v. Kelly* (1864) 17 C. B. N. S. 194
- [26] *Candler v. Crane Christmas & Co supra* at p.433. The law Lord did not mention legal practitioners in his list. He opined that "The Lawyer is never called on to express his personal belief in the truth of his client's case" unlike an accountant. It is observed that a lawyer is never called to express his personal belief in the truth of his client's case but a legal opinion of the position of his client case. See also *Everett v. Griffiths* (1920) 3K.B. But see *Nocton v. Lord Ashburton* (1914) A. C. 932.
- [27] *Ultra mares Corpn v. Touche* (28) (174 N. e. 144) cited in *Candler v. Crane Christmas & Co supra* at p.435.
- [28] *English Thesaurus, Geddes & Crosset*, 1997, p. 56
- [29] *Ibid.*
- [30] Monye, F. N. *op. cit.* p. 122.
- [31] *Ibid.*
- [32] *Ibid.* p. 128
- [33] *Ibid.*
- [34] *Daniels v. White & Sons* (1938) 1 All ER 258 cited in Monye, F.N., *Op. Cit.* p. 128; See also *Boardman v. Guinness (Nig.) Ltd* (1980) NCLR 109.
- [35] Sale of Goods Act 1979, The Fair Trading Act 1973, The Unfair Contract Terms Act 1977, The Supply of Goods and Services Act 1982, Consumer Safety Act 1978, Consumer Protection Act 1987. For Nigeria, see the following statutes – Consumer Protection Act, Cap. C25 LFN 2010, Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provision) Act, Cap. C34 LFN 2010, Dangerous Drugs
- [36] Act, Cap. D1 LFN 2010, Food & Drugs Act, Cap. F32 LFN 2010, Food, Drugs & Related Products (Registration etc) Act, Cap. F.33 LFN 2010., National Agency for Food and Drug Administration and Control Act, Cap. N1 LFN 2010., National Drug Law Enforcement Agency Act, Cap. N30 LFN 2010., Standards Organization of Nigeria Act, CAP. S9 LFN 2010., Trade Malpractices Act Cap. T12 LFN 2010, Weights & Measures Act, Cap W3 LFN 2010, etc. See Monye, F.N., *Loc. Cit.*, pp.137-157.
- [37] *Nigerian Bottling Co. Ltd v. Ngonadi* (1985) 5 SC 313, *Solu v. Total (Nig) Ltd* (unreported) Lagos State High Court, Suit No ID 361/85 delivered on March 25, 1988, cited in Monye, F.N., *Op. Cit.*, p. 136; *Vee Cee (Nig.)Ltdv. Contact (Overseas) Ltd. & anor* (1992)2 NWLR (pt. 266) 503, CA; *Otto Harmann v. Sen – Banjo & anor.* (1962) All N.L.R. 1070; *John Holt Ltd v. Leonard Ezeafulukwe* (1990) 2 NWLR (pt. 133) 520, CA.
- [38] *Abusomwan v. Marcautile Bank Ltd* (No. 2) (1987) 3 NWLR (pt. 60) 196 SC.
- [39] (1915) A. C. 847.
- [40] *Ibid.* at p. 853 Per Lord Viscount Haldane L. C.
- [41] (1962) 1 All E.R. 1.
- [42] 2 M & W 519, 4 M&W 337.
- [43] *Longmeid v. Holliday* 6 Ex. 761.
- [44] *Dominion Natural Gas Co, Ltd v. Collins & Parkins* (1909) A.C 640, 646.
- [45] *Ibid.*
- [46] *Jefferson v. Derbyshire Farmers Ltd* (1921)2 K.B. 281.
- [47] Examples loaded guns, petrol, explosives.
- [48] Examples oil can, domestic boiler, catapult; see *Wrayv. Essex C.C Supra Ball v. L.C.C supra*; *Smith v. Leurs Supra.*
- [49] Henston, R.F.V. and Buckley, R. A., Salmond & Heuston on the Law of Torts, 20th ed. London: Sweet

- & Maxwell Ltd, 1992, p. 300; *Oliver v. Saddler* (1929) A. C. 584, 599.
- [50] (1947) A. C. 156, 161.
- [51] L. R. 5 Q.B, 501, 515.
- [52] *George v. Skivington. Supra*
- [53] (1913)3 K. B 340, 348; *Thomas v. Wincheste* 6 N. Y. 397.
- [54] 217 N. Y. 382
- [55] 11 Q.B.D 503, 509
- [56] Cited in *Donoghue v. Stevenson Supra* at pp. 571-572.
- [57] (1936) A. C. 85.
- [58] Suit N0. 67/2002, Judgment delivered on Friday, the 25th day of January, 2008.
- [59] *Ibid.* per F.F. Tabai JSC @ p. 10 of the judgment.
- [60] (1913) 3 K. B. 351.
- [61] See also *Longmeid v. Holliday* 6 Ex. 761; *Earl v. Lubbock* (1905) 1 K. B 253, *Blacker v. Lake Elliot Ltd.* 106 L.T 533.
- [62] *Donghue v. Stevenson supra* at p. 576.
- [63] *Supra.*
- [64] Action in negligence may be brought against the manufacturer, the distributor, the retailer, etc. See *Monye, F.N., Loc. Cit., p.142*
- [65] Cited in *Donoghue v. Stevenson supra* at p. 568; see also Lord Summer in *Blacker v. Lake & Elliot Ltd.* 106L. T. 583, 536.
- [66] Section 45 (1)(a), Constitution of the Federal Republic of Nigeria, 1999 (as amended), Cap. C23, LFN, 2010.
- [67] (1466) V. B. Ed. 4, 7a, PL. 18 Cited in *Susu, B. A. , Law of Torts Lagos: CJC Press (Nigeria) Ltd., 1996, pp. 85-86.*
- [68] (1885) 16 Q.B.D. 354, 357, 358.
- [69] (1932) A. C. 562 H. L.
- [70] Majority Judgement by Lord Atkin, Lord Thankarton, and Lord Macmillan while Lord Buckmaster and Lord Tomlin Dissented.
- [71] *Donoghue v. Stevenson supra*, at p. 599.
- [72] *Ibid.* of p. 580.
- [73] (2002) 18 N.W.L.R (Part 799) 377.
- [74] *Ibid.*
- [75] *Ibid.* at p.400 Paras E-F.
- [76] Underline mine for emphasis
- [77] *Ibid* P . 397, Paras. E- H; P. 412 Paras. C – E.
- [78] (2000) 59 BMLR 158.
- [79] (2000) EWHC 1420.
- [80] *A and others v. National Blood Authority and Another* (2001) 3 All ER 289.
- [81] Section 4 (1) (a) Consumer Protection Act 1987.
- [82] Section 4 (1) (c) *Ibid.*
- [83] Section 4 (1) (d) *Ibid.*
- [84] 10 M. & W. 109.
- [85] (1762) 2 Wils 145
- [86] *Donoghue v. Stevenson, Supra*, at p. 619.