

# **THE JURISPRUDENCE OF PRODUCT LIABILITY IN NIGERIA: A NEED TO COMPLEMENT THE EXISTING FAULT THEORY**

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## **ABSTRACT**

This article argues for the adoption of strict liability principle as an additional theoretical basis of liability, to complement the existing fault theory on product liability claims in Nigeria. The fault theory, which currently is the only theoretical basis of liability, unduly burdens claimants. The reason for this is that such claimants are expected to establish fault despite the lack of insight into the complex processes of production. While establishing fault in cases of manufacturing defect may seem less onerous, it is an uphill task when it concerns design or warning defects. Bearing in mind that a principal rationale of tort law is to ensure that prejudiced parties are compensated for losses suffered, this article explains why it is necessary to assess and review applicable principle of liability in Nigeria to ensure that it is in line with the demands of justice, which should be in conformity with the peculiar circumstances of its operating environment.

**Keywords:** torts, strict liability, fault, product, consumer

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## **1. INTRODUCTION**

The focus of this article is to make a case for the adoption of strict liability principle as an additional theoretical basis of liability to complement the existing fault theory. Currently, the fault theory is the only theoretical basis of ascertaining liability within the tort law on product liability claims. The Nigerian product liability law, as it currently stands, is still anchored on the fault-based principle as formulated in

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the case of *Donoghue v Stevenson*.<sup>1</sup> It is nowhere near strict liability. The negligence regime is bedevilled with series of shortcomings, and our courts are often reluctant to expand the principle enunciated in the *Donoghue's* case as opposed to the practice in other jurisdictions. Apart from the inadequacies and complexities of this principle in resolving product liability claims, it unduly burdens the claimant. Prospective claimants are expected to establish fault as one of the constituent elements of the fault theory before a manufacturer could be held culpable. The fact must be reiterated that the consumer or prejudiced party does not have an insight into the complex production processes of the manufacturer.

Given this position, how does one expect such claimant to establish fault on the part of the manufacturer? Even though it may seem obvious to establish a fault, as in the cases of manufacturing defects, it is an uphill task in cases of design defects and inadequate warning instructions defects. The need for the adoption of strict liability principle becomes more compelling given that the nation's borders are porous, thereby making it easy for substandard goods capable of causing harm to find their way into the country's market.

Also, the courts place undue emphasis on legal technicalities and procedure at the expense of doing justice. The courts have failed to take into consideration the social realities of the Nigerian environment, unlike the practice in other jurisdictions<sup>2</sup> where the peculiar circumstances of their environment and the desire to further the end of justice influenced the adoption of strict liability principle to complement the existing fault regime in resolving product liability

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1 [1932] A.C., p. 562.

2 The above attitude of our courts can be contrasted with the practice in other jurisdictions where the circumstances and realities of their environment were taken into consideration. For instance the adoption of strict liability principle in South Africa to complement the existing negligence regime was as a result of the shortcomings associated with the negligence regime, particularly in the area of establishing fault. Also the adoption of strict liability in Britain was as a result of the shortcomings occasioned by the negligence regime to the Thalidomide victims. See <<http://edition.cnn.com/2010/WORLD/europe/01/14/uk.thalidomide.apology/index.html>> accessed 10 October 2016.

3 See the cases of *Macpherson v Buick* 6 N.Y 397 (1852) *Escola v Coca-Cola Bottling Co.* 24 Cal.2d 453, *Greenman v Yuba Products Inc.* 377 P 2d 897 (1963), *Anna Elizabeth Wagener v Pharmicare Ltd.* 2003 4 SA 285 (SCA) 300.

claims.<sup>3</sup> Notwithstanding the country's experience<sup>4</sup> on the havoc caused by defective products, nothing is being done to review the present position of the law in this area.

It is as a result of the above that this article sets out to advance reasons for the adoption of strict liability principle as an additional theoretical principle of liability to complement the existing fault regime in Nigeria. The article is divided into five segments. Section 2 defines key concepts and terms that will be employed in this article, while an overview of the current position of the law on product liability shall be the focus of section 3. Section 4 considers the reasons why strict liability should be adopted. This section will also examine the circumstances that led to the adoption of strict liability in some common law countries and a civil law country where the fault regime formerly operated as the only theoretical principle to resolve product liability claims. The article concludes in section 5.

## 2. CONCEPTUAL CLARIFICATION

The importance of the analysis of legal concepts involved in any field of discussion is very important. By nature, words are evasive, slippery and capable of more than one interpretation. Consequently, it is necessary to put some salient key words to be employed in this article in clear context, bearing in mind that words are not instruments of mathematical precision.<sup>5</sup>

### Consumer

A consumer has been defined as: 'one who buys goods or services for personal, family, or household use, with no desire of reselling same.'<sup>6</sup> This definition, though appropriate under certain circumstances, for instance within the ambit of contract law, however, does not in any way assist in defining a consumer under tort mechanism, it limits rather than widen its meaning.

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4 We should not be too quick to forget the Pfizer polio immunization trial exercise in Kano State, which led to the death of some innocent children. <<http://www.irinnews.org/printreport.aspx?ReportId=72601>> accessed 10 October 2016.

5 See the case of *Seaford Court Estate v Asher* [1949] 2 K.B.481.

6 Garner Bryan A, *Black's Law Dictionary* (7th edn. West Group) 311.

Robert Lowe and Geoffrey F. Wordroffe,<sup>7</sup> in their text, define a consumer beyond the ultimate buyer to include any person likely to be injured by lack of reasonable care. While considering the scope of those to whom the manufacturer might be potentially liable, the court in the case of *Stennet v Hancock and Peters*,<sup>8</sup> held that a by-stander was entitled to damages from the second defendant who had negligently repaired the wheel of a vehicle, which came off, shortly before the accident. Liability has been imposed on manufacturers in the following instances based on the fact those affected were regarded as consumers. Those who borrowed defective products have been held to be consumers of such product,<sup>9</sup> likewise, passengers in a vehicle;<sup>10</sup> retailers who stock the defective products,<sup>11</sup> and employees who handle or service such products.<sup>12</sup> Furthermore, on this issue, Lord Atkin's neighbour principle formulated in the case of *Donoghue v. Stevenson*<sup>13</sup> has widened the scope of who a consumer is under product liability law. The learned law Lord stated *inter alia*:

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. Who, then, in law, is my 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.

It must be noted that lack of contractual nexus will not vitiate an action initiated by an injured consumer since the issue of privity is not relevant under the fault theory in product liability cases. The guiding

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7 Robert Lowe and Geoffrey F. Wordroffe *Consumer Law and Practice*, (4th ed.) London, Sweet and Maxwell (1980) 29.

8 [1936] All E.R. 568.

9 *Griffiths v Arch Engineering Co. Ltd.* [1968] 3 All E.R. 217.

10 *Malfrout v. Noxal Ltd.* (1935) 51 T.L.R. 551.

11 *Barnet v H. and J. Packer and Co. Ltd.* [1940] 3 All E.R. 575.

12 *Vachwell Engineering Co. Ltd v B.D.H. Chemicals Ltd.* [1971] 1 Q.B. 88, [1970]; See also the following cases: *Mason v Williams and Williams Ltd.* [1955] 1 All E.R. 808.

13 *Donoghue* (n 1).

parameter is whether the prejudiced party is closely connected to the manufacturer who ought to have him in contemplation as a user of his product. From the above, the scope of the definition of a consumer under the law of tort is wider than its connotation within the ambit of contract law in that any foreseeable user of the product could qualify as a consumer.

### **Manufacturer/Producer**

The importance of defining a manufacturer/producer is to ascertain those that will be liable. A manufacturer is defined as: 'A person or entity engaged in producing or assembling new products.'<sup>14</sup> This definition does not fully cover the various classes of person who have been regarded as manufacturers. A manufacturer/producer within the context of product liability claim has been extended to include retailers and even in some jurisdictions repairers of the product. For instance, a producer under the European Economic Community Directive, which formed the basis of the Consumer Protection Act of 1987 in the United Kingdom described producer as<sup>15</sup>

... The producer of the finished article, the producer of any material or component, and any other person who, by putting his name, trademark, or other distinguishing feature on the article, represents himself as its producer. Where the producer of the article cannot be identified, each supplier of the article shall be treated as its producer unless he informs the injured person within a reasonable time of the identity of the producer or of the person who supplied him with the article. Any person who imports into European Community an article for resale or similar purpose shall be treated as its producer.

It is obvious from the above provision that the meaning ascribed to a producer/manufacturer under the tort mechanism is beyond the producer or manufacturer of the finished product. This is because those in the chain of distribution are also regarded as producers if the 'real' producers cannot be identified.<sup>16</sup> Liability has also been extended beyond manufacturers to cover wholesalers, retailers, assemblers,

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14 Garner (n 6) 977.

15 See Article 3 of the Product Liability Directive (85/374/EEC).

16 *ibid.*

repairers and those who hire products out to domestic or business users.<sup>17</sup> The precise scope of retailer's liability in tort is open to debate.<sup>18</sup> In *Malfrout and Anor v. Noxal Ltd.*,<sup>19</sup> the court held that the defendants were liable to plaintiff and a female passenger, on the ground that they were negligent in fitting a sidecar to a motorcycle.<sup>20</sup>

## Product

The meaning associated with the word product under product liability is wide. It is posited that it may include any conceivable tangible or intangible item so long as it is distributed commercially for use or consumption.<sup>21</sup> The Consumer Protection Act of 1987, which implemented the Product Liability Directive, defined a product as any good or electricity, including product comprised of other products either as component raw materials or otherwise. The product, in this regard, covers blood and even body parts, despite objection to the fact that such could not qualify as a product.<sup>22</sup>

## Dangerous/Defective Product

The word 'defect' has been defined as: 'an imperfection or shortcoming, especially in a part that is essential to the operation or safety of a product',<sup>23</sup> while the word dangerous is defined in terms of an unsafe or perilous condition'.<sup>24</sup> I juxtapose both definitions, a defective product

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17 Miller and Lovell, *Product Liability* (1st Ed Sweet and Maxwell 1980) 178.

18 *ibid* 304-305.

19 (1935) 51 T.L.R. 551.

20 See the case of *Parker v Oloxo Ltd and Senior* [1937] 3 All E.R. p 42, in this case the plaintiff who was a regular customer, customarily had her hair dyed with 'henna' at the second defendant's shop. The second defendant suggested to the plaintiff that she should use, 'Oloxo' dye, which she described as harmless despite the fact that the plaintiff hesitated. The Oloxo dye was used and plaintiff suffered acute attack of dermatitis and nervous trouble. It was held that the plaintiff was entitled to recover against the second defendant in contract and the first defendant in tort. See also the decision in *Grant v. Australian Knitting Mills Ltd.* [1936] A. C. 85.

21 *ibid* 1225.

22 See the case of *Henning Veedfald v Arhus Amtskommune*, C-203/99 [2001] ECR I-3569, see note G. Howells (2002) 6 European Review of Private Law 847.

23 Garner (n 6) 429.

24 *ibid* 399.

may be defined as one that is dangerous for usage or not fit for the purpose of its manufacture due to some inherent shortcomings associated with its production.

### **Meaning of Product Liability**

Product liability has been defined as a manufacturer's or seller's tort liability for any damages or injuries suffered by a buyer, user, or bystander as a result of a defective product.<sup>25</sup> It has also been defined as the responsibility of the manufacturer or seller of goods to pay for damages occasioned as a result of the use of goods in question.<sup>26</sup>

### **3. OVERVIEW OF PRODUCT LIABILITY AND ITS PRINCIPLE NIGERIA**

Product liability in Nigeria is still in its infancy, while problems associated with product defects can be dealt with under an amalgam of laws.<sup>27</sup> Thus, the Nigerian laws dealing with defective products can be garnered from the prevailing principles of contract, sale of goods and tort laws. However, the scope of this work is within the ambit of tort law. It will be apposite at this stage to briefly embark on an overview of the current state of Nigerian product liability under the fault theory. In this segment of this work, reference will be made to the position of English law as a result of dearth of Nigerian case and statutory authorities in this area of law.

Negligence, which is the basis of culpability, is defined as 'the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to prevent others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or wilfully disregarding of others' right. Negligence is a matter of risk – that is to say, of recognizable danger of injury... In most instances, it is caused by heedlessness or inadvertence, by which the negligent party is unaware of the result, which may follow his act. It may also arise

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25 Garner (n 6) 1225.

26 The Free Legal Dictionary <<http://legal-dictionary.thefreedictionary.com/Product+Liability>> accessed 10 October 2016.

27 Product defect cases can be commenced under Contract Law, Sale of Goods and Warranty amongst a host of other laws.

where the negligent party has considered the possible consequences carefully, and has exercised his own best judgment. The almost universal use of the phrase 'due care' to describe conduct which is not negligent should not obscure the fact that the essence of negligence is not necessarily the absence of solicitude for those who may be adversely affected by one's actions but is instead behaviour which should be recognized as involving unreasonable danger to others.<sup>28</sup> Lord Wright in *Lochgelly Iron & Coal Co v Macmillan*,<sup>29</sup> equally observed as follows:

'... In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission, it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owed.'

In the case of *Abubakar v Joseph*,<sup>30</sup> the Supreme Court defined negligence as '... the omission or failure to do something which a reasonable man under similar circumstances would do, or the doing something which a reasonable man would not do.' It can safely be inferred that acts, which fall short of the standard of a reasonable person, will be adjudged to be a negligent one. To successfully prosecute an action under the fault regime, it is necessary to establish the following constituent elements: duty, breach of duty, causation that has resulted in damages or occasion harm to the complainant. For the purpose of a product liability claim, a prospective claimant must prove the following constituent elements of negligence (duty of care, breach of duty, and causation resulting into damages) before he can succeed in an action premised on product defect.

### **Duty of Care**

The first constituent element of negligence, which is one of the bases of establishing culpability in respect of product defect, is the existence of a duty of care. The duty in question must be a legal and not a moral one. What does a duty of care connote and when does it arise?

To Dias, 'duty is seen as a notional pattern of behaviour,<sup>31</sup> while to Winfield, duty means a restriction of the defendant's freedom of

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28 Garner ( n 6) 1056.

29 [1934] A.C 47.

30 (2008) All FWLR part 432 at 1100 para. G-A.

31 R.W.M Dias, 'The Duty Problem in Negligence Cases' (1928) 28 Col. L.R. 1014.

conduct; and the particular restriction here is that of behaving as a reasonably careful man behave in similar circumstances.<sup>32</sup>

Describing what a duty relation connotes, Morrison<sup>33</sup> observed as follows:

'By duty situation is meant a situation described by reference to the particular characters and relations of the parties involved in it recognized by the courts as giving rise to a legal duty to take care. Such, for example, are the duty situations of occupiers and invitee, manufacturer or repairer of chattels and the user of the chattels. It is a short method of referring with some particularity and correctness to the specific set of concrete circumstances giving rise to the duty of care in the individual case.'<sup>34</sup>

Brett, M. R., in his own contribution to this issue in the case of *Heaven v. Pender*,<sup>35</sup> observed as follows:

Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would recognize 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.<sup>36</sup>

Thus a manufacturer owes his consumer a duty of care. In *Donoghue's case*,<sup>37</sup> which has been adopted by our courts in resolving product liability cases, the court recognized the existence of a duty relation between a consumer and manufacturer when the court stated as follows:

A manufacturer of products, which he sells in such a form as to show that he intended 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

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32 Percy Winfield, 'Duty in Tortious Negligence' (1934) 34 Col. L.R. 41, 43.

33 WL Morrison, 'A Re-examination of the duty of care' (1948) 11 Mod.L.R. 9.

34 *ibid* 17-18.

35 (1883) 11 QBD 503.

36 *ibid* 509.

37 *Donoghue* (n 1).

will result in an injury to the consumer's life or property, owes a duty of care to the consumer to take that reasonable care.<sup>38</sup>

The duty of care is owed to consumers, and it extends to those whom ordinarily one would not have thought could qualify as one. The guiding parameter of determining a consumer is the foreseeability rule, formulated in the case of *Heaven v Pender*,<sup>39</sup> and approved by Lord Atkin in *Donoghue's case*.<sup>40</sup>

In *Anns v Merton London Borough Council*,<sup>41</sup> the House of Lords considered the circumstances when a duty of care might be said to exist and to whom the duty is owed. Lord Wilberforce in the course of the court's judgement stated as follows:

Rather the question has to be approached in two stages. First one has to ask whether as between the wrong doer and the person who has suffered damage there is sufficient relationship of proximity or neighbourhood such that in reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter in which case a prima facie duty arises. Secondly if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negate or reduce or limit the scope of duty or limit the class of person to whom it is owed or the damage to which a breach of it may give rise.

The principles enunciated in the above cases are applicable in Nigeria, and have also been applied as the basis of ascertaining whether a duty relation exist in some cases on product liability brought before the court for resolution. Suffice to state that the proximity rule is the foundation of ascertaining the existence of a duty relation in respect of product liability. The manufacturer is expected to take reasonable care to avoid injury being caused or suffered by those who are to use or consume his product as intended.

The duty extends not only to the person who actually bought the product, but may also include bystanders whom the manufacturer should have reasonably foreseen or contemplated as been susceptible

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38 *ibid* 599.

39 *Heaven* (n 35).

40 *Donoghue* (n 1).

41 [1977] 2 All E .R. 492, at pp. 498-499.

to injury from the use of his product. In the case of *Nigerian Bottling Co. v Ngonadi*,<sup>42</sup> the respondent purchased a refrigerator, which exploded shortly after delivery. The defendants/appellants raised a number of issues pertinent to product liability concerns. The defendants/appellants contended that as distributors of a foreign product they were not the manufacturers, nor were they responsible for putting a defective product in the stream of commerce. The Supreme Court took the position that as retailers, the defendants/appellants had been in proximate relationship to the Plaintiff and owed her a duty of care which duty they breached in supplying a defective product.

Also in *Osemobor v Niger Biscuit*,<sup>43</sup> the plaintiff purchased at a supermarket a packet of biscuit manufactured and packed by the defendants. While chewing one of the biscuits in the pack, she felt something hard in her mouth, which turned out to be a decayed tooth. As a result of this incident, she took ill and required medical attention. Holding the defendants liable in negligence, the learned judge stated as follows:

I am satisfied that there was no possibility of an intermediate examination of the biscuits before they reached the plaintiff, and I find myself unable to uphold the submission of the learned counsel for the defendants that she was bound to look at the biscuits before she put them in her mouth ... A person who manufactures goods, which he intends to be used or consumed by others, is under a duty to take reasonable care in their manufacture, so that they can be used or consumed in the manner intended, without causing physical damages to person or property.<sup>44</sup>

Thus, in product liability case a duty is owed to potential consumers and users of the product in question along with those who are proximate enough to come in contact with the usage of the product in question. A blanket allegation of negligence in the pleading is not sufficient and quite apart from giving explicit evidence of the producer being negligent; for the Plaintiff to succeed, he must also show that the defendant breached the duty of care owed to him.

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42 (1985) 1 NWLR (Pt) 739.

43 (1973) 7 CCHCJ 71.

44 Ibid.

### **Breach of Duty of Care**

The second constituent element necessary to establishing liability of the manufacturer of a defective product under the fault-based regime is for the claimant to establish that the defendant breached the duty owed. Breach of duty enquiry under the fault based regime entails an examination of whether the product in question was produced in a different form from what the manufacturers contemporary would have produced. It further entails an enquiry into whether the shortcomings identified in the alleged product was as a result of some lapses on the defendant's failure to exercise reasonable care. This indirectly is attributing some element of fault to the defendant. Breach of duty may manifest itself in the following ways: the manner of production, design or inadequate warning instructions or labelling. To determine this, the court will inquire into whether or not a reasonable manufacturer placed in the defendant's position would have acted as the defendant did. Alderson B,<sup>45</sup> describing what negligent act entails posited as follows:

Negligence is the omission to do something which a reasonable man, guided by upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.<sup>46</sup>

To determine what a reasonable manufacturer or producer would have done in the circumstances and to assess the standard of care expected of the producer, the court customarily takes into consideration or account what may be called the risk factors, which comprised of the following four elements:

- (a) The likelihood of harm;
- (b) Knowledge;
- (c) Skill;
- (d) Damages.<sup>47</sup>

For instance, the greater the likelihood of the defendant's conduct causing harm, the greater the amount of caution required of him. In the case of *Northwestern Utilities Ltd v London Guarantee & Accident Co*

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45 *Blyth v Birmingham Waterworks Co* [1843-60] All ER Rep 478.

46 *ibid.*

47 For further readings, see W. Page Keeton, *The Law of Torts* (5th ed.).

*Ltd*,<sup>48</sup> Lord Wright opined thus: ‘The degree of care which the duty involves must be proportioned to the degree of risk involved of the duty of care should not be fulfilled.’<sup>49</sup>

In *Osemobor v Niger Biscuit Co Ltd*<sup>50</sup> the court arrived at the conclusion that duty of care owed to the claimant was breached, given that she had no opportunity of intermediate examination of the biscuit in which she found a decayed tooth.

### **Causation**

The consideration here is for the claimant to establish that the breach of duty caused or was responsible for the injury occasioned to him. There are two aspects to the causation requirement, namely, causation in fact and causation in law, otherwise known as the remoteness of damage.

### **Causation in Fact**

The first step of the causation enquiry is whether the defendant’s breach of duty, in fact, caused the damage. If this question is answered in the affirmative, then the defendant may be held liable if other conditions are fulfilled.

In ascertaining whether the defendant’s act was, in fact, the cause of the injury sustained by the plaintiff, the ‘but for test’ test is used. This was adopted in the case of *Barnett v Chelsea and Kensington Hospital Management Committee*,<sup>51</sup> the facts of which can be summarized as follows: The plaintiff’s husband, after drinking some tea, experienced persistent vomiting for three hours. He went later that night to the casualty department of the defendant’s hospital along with another man who drank tea with him.

A nurse contacted the casualty officer, Dr. B by telephone and she informed him of the man’s symptoms. Dr. B., who was himself, tired and unwell, sent a message to the men through the nurse to the effect that they should go home to bed and consult their own doctors the

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48 [1936] A.C. 108 at p. 126. See also the case of *Bolton v Stone* [1951] A.C. 850.

49 *ibid.*

59 *Osemobor* (n 43).

51 [1968] 1 All E.R.1068. See also the cases of *Overseas Tankship (U.K) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound No 1)* 1961 A.C. 388. See further the decision in the case of *Re Polemis* [1921] 3 K.B. 560.

following morning. Some hours later, the plaintiff's husband died of arsenical poisoning, and the coroner's verdict was one of murder by a person or persons unknown. In a subsequent action for negligence brought by the plaintiff against the hospital authority as employers of Dr. B., it was held that, in failing to examine the deceased, Dr. B., was guilty of a breach of his duty of care, but this breach could not be said to have been the cause of the deceased death because even if he had been examined and treated with proper care, he would in all probability have died. It could not, therefore, be said that 'but for the doctor's negligence' the deceased would have lived. The 'but for' act test was also adopted by the court when it dismissed the plaintiff's/claimant's claim in the case of *Nigerian Bottling Company Plc v Okwejiminor & Anor*.<sup>52</sup>

In this case, the first respondent claimed against the second respondent and the appellant jointly and severally the sum of (N2,000,000.00) being special and general damages for injuries suffered by him arising from a Fanta drink, which he drank. The first respondent case was that on or about 13 February 1991 at Ughelli, he bought a crate of Coca-Cola mineral drink from the second respondent, an agent of the appellant the manufacturers of Coca-Cola range of mineral drinks. From the crate of drinks, he opened a bottle, took some of its content during which process he felt some sediment down his throat. On examination, he discovered that another bottle of Fanta drink in the same create contained some foreign bodies. He felt uncomfortable and went to sleep without food. The following morning, he developed stomach pain and was rushed to a nearby hospital where he was confirmed to be suffering from food poisoning which could have been caused by the Fanta orange drink which he consumed. He was subjected to some laboratory tests and later discharged. Despite copious evidence in his favour by witnesses, including a medical doctor and a laboratory scientist report, it was held that there was no nexus between his injury and the Fanta drink, which he allegedly consumed. It follows that if there is no nexus between the injury and the breach of duty the defendant would not be held culpable for the resulting damage. If however, the reverse is the case, then the issue of the remoteness of damage comes up for consideration.

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52 (1938) 5 N.W.L.R. 295.

### Remoteness of damage or causation in law

Bearing in mind that the consequences of an act of carelessness on the part of a defendant may be far reaching, the concept of the remoteness of the damage came into play to determine the extent of a tortfeasor's liability for the consequences of his negligence. Consequently, the results of an act will be regarded to be too remote if a reasonable man would not have foreseen them. Thus, foreseeability is not only a criterion for the determination of when a duty of care is owed, but also for the question whether a particular damage is or is not too remote.<sup>53</sup> This principle illustrated by the case of *Mange v Drurie*.<sup>54</sup> In this case, the plaintiff was riding his bicycle along the Jos-Bulewa road, when a lorry knocked him down. He suffered an injury to his leg as a result of the careless driving of the lorry by the defendant. Before completion of treatment and against medical advice, he discharged himself from the hospital and did not return until after two days. During the two days period, the leg became infected, and it was eventually amputated. His claim for damages for the loss of the leg was rejected. The court refused his claim based on the fact that

... Compensation will only be awarded in respect of a class of damage which the defendant could reasonably be expected to have foreseen and compensation will not generally be awarded in respect of injury sustained as the result of the act or default of the injured party, or to the extent to which the injured party has failed to take reasonable steps to mitigate the damage. In the present case, it was foreseeable that the plaintiff would, as a result of the accident, sustain pain and suffering and also incur medical expenses. But it was not reasonably foreseeable that the plaintiff would, contrary to medical advice, leave the hospital where the defendant had himself taken him, spend at least two days without proper medical or surgical care or attention, and during that interval pick up an infection that necessitated the amputation of his leg. And, apart from the question of foreseeability, the plaintiff, so far from taking reasonable steps to mitigate the damage, brought

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53 It must be noted that apart from other basic rule in the Wagon Mound, there are other established principles regarding remoteness of damage like the egg-shell skull principle, plaintiff's impecuniosity, quantum of damage.

54 [1970] N.N.L.R. 62.

upon himself the amputation of his leg by his own ill[-]advised action.<sup>55</sup>

In a product liability claim, like other tort cases, where the chain of causation is broken by an intervening event caused by the act of a third party, the defendant may be exempted from liability depending on the surrounding circumstances of the case. A. Hart and Honore put this view succinctly: 'The free[,] deliberate and informed omission of a human being, intended to exploit the situation created by the defendant, negates causal connection.'<sup>56</sup>

In the case of *Taylor v Rover Co Ltd*,<sup>57</sup> the default of the foreman who had knowledge of the defective nature of a chisel, which he refused to withdraw from use, was taken as an intervening event, which relieved the manufacturer of liability for the injury suffered by the plaintiff. The court held that the foreman's failure to withdraw the chisel was the sole effective cause of the injury.

### **Recoverable Damages**

Since the focus of this study is restricted to the province of tort, it must be stated from the outset that the scope of recoverable damages to be discussed will be those permitted under tort law. Once a claimant in a product liability claim can establish that he was owed a duty, which had been breached, consequent upon which he suffered an injury, such claimant is entitled to compensation in the form of damages paid to him.

Damages recoverable in a product liability claim can conveniently be grouped as follows: damage to person or property caused by the defective product along with financial losses arising as a result of such damage, cost of effecting repairs in anticipation that a defect in the property may cause damage and consequential loss from such, damage to the defective product itself, cost of remedying a defect inherent in the product which in itself pose threat to person and loss of profit or financial loss caused as a result of the defective nature of the product

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55 *ibid* 64.

56 H.L.A.Hart and Honore, *Causation in Law* (Clarendon Press 1985) 136.

57 [1966] 2 All ER 181.

despite the fact that it does not pose threat of damage to person or the property in question.<sup>58</sup>

In terms of applicable defences, it must be noted that the following defences apply to product liability cases. These are contributory negligence, *volenti non fit injuria*, voluntary assumption of risk and limitation.

### ***Volenti non fit injuria***

This principle is to the effect that no harm is done or occasioned to anyone who knowingly and voluntarily consents to the act leading to such an injury. For instance, if a product has an expiry date, as a result of which it has been withdrawn off the shelves, a consumer conscious of the expiry date solicits an attendant to sell it to him, though illegal, cannot hold the manufacturer liable for any consulting injury occasioned by such product.

### **Contributory Negligence**

The effect of the defence of contributory negligence in a product liability case is to the effect that it will reduce the liability of the manufacturer, to the extent of his liability. Liability for the resulting damage will be occasioned between the manufacturer and the injured party.

### **Limitation**

There are applicable statutory provisions which stipulate time limitation within which an action can be brought. The effect is that if a sustainable cause of action is not initiated within the period stipulated in the act, the right to institute an action upon such cause of actions becomes statute barred. For actions relating to tort, the period of limitation in Ogun State is six years.<sup>59</sup>

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58 See Cane, 'Physical Loss, Economic Loss and Product Liability' (1979) 95 LQR 117. For further readings on recoverable damages on product liability claim, see the following: *The Alikamon* [1986] A.C 785, *Junior Books v The Veitch Co* [1983] 1 A.C.520, *Muirhead v. Industrial Tank Specialities* [1986] Q.B.507, *D.F Estates v. Church Comrs for England* [1988] 2 W.L.R.368, *Murphy v Brentwood District Council*. [1991] A.C. 398. See also the decision in *Bellefield Computers Services Ltd v E.Turner and Sons Ltd* [2000] BLR 97, *Anns v Merton London Borough* [1978] AC 728 and *Spartan Steel v. Martin & Co. Contractors Ltd* [1972] 3 ALL E.R. 705.

59 See section 4 Limitation Law of Ogun State. Vol.3 Laws of Ogun State of Nigeria, 2003.

#### 4. ADOPTING THE STRICT LIABILITY PRINCIPLE: SOME LEGAL JUSTIFICATIONS

The prevailing circumstances and the peculiar reality of our environment make the adoption of strict liability imperative. First, Nigerian markets are flooded with fake, adulterated and substandard goods which put life and limb in danger. These goods are not limited to consumables like foods, drinks, drugs, but include spare parts and equipment. The perpetrators of these dangerous activities are Nigerians, (individuals and corporate bodies) along with their foreign collaborators.<sup>60</sup> Like a pandemic, the fake product virus is everywhere in the country, and practically every product in the nation's market has its own twin. The News media almost every day are replete with various stories that the Nigerian Customs Services,<sup>61</sup> National Agency for Food and Drug Administration Agency,<sup>62</sup> National Drug Law Enforcement Agency<sup>63</sup> or the Nigerian Police Force, etc. have confiscated some fake and substandard goods.<sup>64</sup> Apart from the negative economic implications<sup>65</sup> of these incidents on our national economy, substandard and fake products have resulted in the death of many people or caused permanent disability in some situations.<sup>66</sup> If strict liability is adopted, it will ensure protection and promote public safety.

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60 See Solomon Ibharenefe, 'Nigeria: Don't Spill Our Milk' *All Africa* (19 June 2001, Lagos, Nigeria) <<http://allafrica.com/stories/200106190095.html>> accessed 15 April 2015. A multinational company, Nestle Plc, sometimes in 2001 imported into the country nine containers of expired skimmed powdered milk. Even though the milk had expired as at the time it arrived at Apapa port in Nigeria, the expiration date on the containers had been tampered with.

61 See Cap N100 Vol.11 1994 LFN.

62 See Cap N1 Vol. 10, 1994 LFN.

63 See Cap N 30 Vol.10 1994 LFN.

64 Clement Udegbe, 'Too much fake products in Nigeria' *The Vanguard* (27 September 2013, Nigeria) <<http://www.vanguardngr.com/2013/09/too-much-fake-products-in-nigeria/>> accessed 15 April 2015.

65 An estimated sum of 15 billion naira is said to be lost annually. See NBF News, 'Sub-Standard Products: Nigeria's Growing Menace' *The Nigerian Voice* (6 December 2010). <<http://www.thenigerianvoice.com/nvnews/40238/1/sub-standard-products-nigerias-growing-menace.html>> accessed 15 April 2015.

66 See <<http://news.biafranigeriaworld.com/archive/2004/may/14/009.html>> accessed 15 April 2015. See also <[http://www.nigeriapharm.com/Library/Drug\\_regulation.pdf](http://www.nigeriapharm.com/Library/Drug_regulation.pdf)> accessed 15 April 2015.

Second, victims of product injury under the negligence regime are required to establish fault on the part of the manufacturer, this they often find difficult if not impossible to establish. An action founded on product defect is a civil claim, proof of which is based on a preponderance of evidence.<sup>67</sup> This evidential burden is not static; it tilts like a pendulum. For instance, in the case of *Boardman v Guinness*,<sup>68</sup> the claimant while consuming the contents of a bottle of beer manufactured by the defendant, observed that it tasted sour and thereafter became ill. His companions examined the rest of the beer and discovered it was cloudy with a considerable quantity of sediment. In the claimant's action for negligence, the defendant denied liability on the ground that the beer in question could not have been from their factory. They also adduced evidence that their system of production was reasonably safe and as near perfect as possible.

The court held that the plaintiff had failed to show that the defendant was careless. The judge observed that the defendant took great pains to adopt a fool proof process in the manufacture of their products and that it was up to the Plaintiff to show that the people engaged in this process were so incompetent that they rendered the fool proof process irrelevant.<sup>69</sup> Closely connected to the above is the difficulty of establishing fault or breach of duty on the part of the manufacturer if the product itself is damaged in an accident.

Third, prospective claimants find it difficult to impeach the complex evidence mostly adduced by manufacturers of products when they are sued in respect of product defects. This is mostly caused by their inability to match the financial resources directed towards the prosecution of such cases.

### **Lessons from Other Jurisdictions**

Drawing inspiration from the practice in other jurisdictions, for instance Britain; the Thalidomide incident greatly influenced the adoption of strict liability. This led to setting up various committees in Europe. The first of such efforts began in November 1971, when the British and

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67 Sec 134 of the Evidence Act, 2011.

68 1980 NCLR 109.

69 See also the case unreported decision of the Court of Appeal Enugu Division in the case of *Nigerian Breweries Ltd v Lawrence Obiano and Uba Ifeancha* (unreported CA/E/147/90).

Scottish Law Commissions were charged with the responsibility of considering 'whether existing law governing compensation for personal injury, damage to property or any other loss caused by defective products was adequate, and to recommend what improvements, if any, in the law are needed to ensure that additional remedies are provided and against whom such remedies should be available.'<sup>70</sup>

This was followed in the subsequent year by the work of a Royal Commission established under the Chairmanship of Lord Pearson with the following terms of reference: 'to consider to what extent, in what circumstances, and by what means compensation should be payable in respect of death or personal injury (including antenatal injury) but which expressly included instances where this was suffered through the manufacture, supply or use of goods of [sic] 'services'.<sup>71</sup> However, the European Economic Community Directive, which was eventually adopted on 25 July 1985 set the stage for the promulgation of the Consumer Protection Act of 1987, which introduced strict liability as another theoretical basis of liability under English law. Since then till date the fault theory and strict liability principle are the two theoretical principles of liability used in resolving product liability claims, with prospective litigants having the choice of the election from which to choose.

Furthermore, the adoption of strict liability in the United States was gradual; not spontaneous.<sup>72</sup> It was as a result of the shortcomings associated with the fault regime. The case of *Greenman v Yuba Power Products Inc*<sup>73</sup> was one of the leading decisions, which marked the beginning of the introduction of strict liability theory to complement the fault principle within the realms of product liability in the United States.

In this case, the plaintiff commenced an action against the defendants for injuries sustained from a combination of power tool manufactured by them, bought by his wife for him from a retailer. Though the case also succeeded on the ground of warranty, Justice Traynor expressly stated that: 'A manufacturer is strictly liable in tort

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70 C.J Miller & RS Goldberg *Product Liability* (2nd ed. Oxford University Press) 12.

71 *Hansard*, HC Debs Vol 848, Col 1119 (19 Dec 1972).

72 See the following cases: *Thomas v Winchester* 6 NY 397, *Huset v JI Case Threshing Co* 120 F 865, 870 (8th Cir (1903).

73 27 Cal Rptr 697 (1963).

when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.’

The adoption of strict liability for the defective product has been justified in this jurisdiction based on some of the following grounds that consumers lack adequate information on the manufacturing process, while they also lacked the skill to investigate by themselves the soundness of a product. Further to insure that the costs of injuries resulting from defective products are borne by those who market such products, rather than by the injured persons, who are powerless to protect themselves.<sup>74</sup> Consumers also purchase products on faith based on the reputation of the producer or his trademark.<sup>75</sup>

The adoption of strict liability though quite recent in South Africa, was also as a result of the shortcoming associated with the negligence regime. The fault theory came under serious attack in the case of *Anna Elizabeth Wagener v. Pharmacare Ltd.*<sup>76</sup> The principal issue for consideration, in this case, was whether the manufacturer of a local anaesthetic called *Regibloc* injection could be held strictly liable in *derelict* for harm caused as a result of the defective nature of the product. From the facts of the case, it was not in dispute that the product in question was administered as prescribed by the manufacturer, though it was defective at the point it left the manufacturer. Also, the injury sustained by the plaintiff was caused by the defect inherent in the product. Judgement was entered against the Appellants. At the hearing of the appeal, arguments were canvassed on the need for the court to adopt strict liability.

It was argued in favour of the appellant that the common law remedy for the protection of the appellant’s constitutional right to bodily integrity was inadequate. The court was prayed upon to develop

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74 *Clary v Fifth Ave. Chrysler Ctr. (Alaska)* 454 P2d 244, *Hawkeye-Security Ins. Co. v Ford Motor Co. (Iowa)* 174 NW2d 672; *Chubb Group of Ins. Cos. v C.F. Murphy & Associates, Inc. (Mo App)* 656 SW2d 766; *Jarrell v Ftt. Worth Steel & Mfg. Co. (Mo App)* 666 SW2d 828, *Johnson v American Motors Corp. (ND)* 225 NW2d 57; *Ritter v Narragansett Elec. Co.,* 109 Rt 176, 283 A2d 255; *Ernest W. Hahn, Inc. v Armco Steel Co. (Utah)* 601 P2d 152. The theory behind the rule of strict liability is that the pecuniary loss will ultimately fall on the one who caused it. *First Nat’l Bank v Otis Elevator Co.,* 2 Ariz App 80, 406 P2d 430.

75 Tim A Thomas et al, *American Jurisprudence* (2d New York Law Publishing Company 1996) Sec.520.

76 [2003] 4SA 285 (SCA) 300.

the common law in line with the 'intendment, spirit and purport' of the Bill of Rights. The difficulty associated with establishing fault was also canvassed as part of the reasons why strict liability ought to be adopted. The respondent counsel equally canvassed arguments on why strict liability should not be adopted. The counsel contended that strict liability should not be imposed on a case by case basis, and that assuming that strict liability was to be imposed there was still an obligation on the plaintiff to prove that the product was defective. The court reviewed the submissions of both counsels and relevant authorities and in its judgement concluded that though the product in question was defective, however, the appellant having failed to establish negligence, the respondent could not be held *delictually* liable.

This decision attracted a lot of comments, thus setting the stage for the adoption of strict liability as an additional theory to complement the existing fault liability. This led to the promulgation of the Consumer Protection Act of 2008. Strict liability principle is not novel under tort mechanism in Nigeria.<sup>77</sup> It is defined as 'liability that does not depend on actual negligence or intent to harm, but is based on the absolute breach of an absolute duty to make something safe.'<sup>78</sup> Regarding origin, it is traceable to the case of *Rylands v Fletcher*.<sup>79</sup>

In this case, the plaintiff made a non-natural user of his land by constructing thereon water storage reservoir, which malfunctioned. The defect was not attributable to the defendant's personal negligence. The contents of the reservoir through percolation caused damage to the properties of an adjoining neighbour. In the ensuing action, the trial court found the defendant not culpable. The plaintiff's appeal to the Exchequer Court was resolved in his favour. The majority of the Exchequer's court held the defendants liable.<sup>80</sup> Applying this principle to product liability will relieve prospective litigants of the need to establish fault, which is one of the greatest obstacles encountered by

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77 See the cases of *Oladehinde v Continental Textile Mills Ltd* (1975) 6 CCHCJ 1269, and *Umudje v Shell BP (Nigeria Ltd)*. (1975) 11 S.C. 155 at p.155.

78 Garner (n 6) 926.

79 (1865) 3333 H & C 774.

80 Blackburn CJ while delivering the court's decision stated as follows '...The plaintiff, though free from all blame on his part, must bear the loss, unless he can establish that it was the consequence of some default for which the defendants are responsible ... We are of the opinion that the plaintiff is entitled to recover.'

prospective litigants in this area of the law.<sup>81</sup> Despite the fact that the country has witnessed series of avoidable deaths caused by product defect nothing is being done towards complementing the existing fault regime. It is time that something was done in this regard. It must however be noted that the adoption of strict liability will not eradicate all the challenges faced by prospective litigants in the area of product liability claims.

## 5. CONCLUSION

Shortcomings associated with negligence regime, and the challenges and peculiarities of our environment, make the adoption of strict liability principle imperative in this area of the law. Its adoption could put manufacturers on guard while they would also be alive to their responsibilities. It will also relieve prospective litigants of that onerous burden of establishing fault on the part of the manufacturer or impeaching sophisticated and complex evidence which may be adduced in proceedings seeking compensation for injury caused by defect product. The essence of tort law is to provide compensation where desirable in the interest of justice. Justice on its own is not static; it is relative and ought to be administered in the light of the relative peculiarity and challenges of the operating environment.

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81 An average litigant in Nigeria does not have insight into the complex manufacturing processes; consequently they find it difficult if not impossible to impeach evidence adduced by manufacturers.