Thesis

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A CRITICAL EXAMINATION OF CONSUMER PROTECTION LAW AND PRACTICE IN NIGERIA

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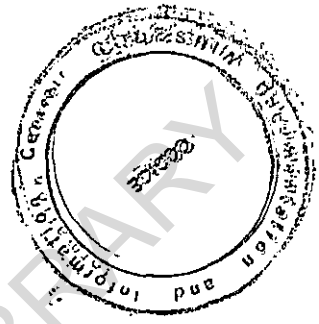

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CERTIFICATION

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DEDICATION

To my husband, Mr. Felix I. Monye and children, Ngozichukwu, Ifechukwude, Ogochukwu and Ebelechukwu for their love.

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To the Almighty God be the glory for this highly demanding work .

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I am grateful to my children for their constant company and for exchanging views with me on some doubtful issues.

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I will ever cherish the University of Lagos, an epitome of academic excellence.

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ABBREVIATIONS

A.C.	Appeal Cases
All E. R.	All England Reports
All N. L. R.	All Nigeria Law Report
ALR	African Law Reports
B & S	Best and Smith's Reports, Queen's Bench
Cap	Chapter
CCHCJ	Selected Judgements of High Courts of Lagos or Certified Copies of High Court Judgments
Ch.D.	Chancery Division
C.L.R.	Commercial Law Reports Quarterly
Crim. L.R.	Criminal Law Reports
Exch.	Exchequer
FCA	Reserved Judgments of Federal Court of Appeal
Ibid	The same work as the one last cited
Infra	Below
K.B.	King's Bench
K.B.D.	King's Bench Division
LFN	Laws of the Federation of Nigeria
Loc. cit	The same page or pages of the work already cited elsewhere in the essay
LRCN	Law Reports of Courts of Nigeria
L.R.Exch	Law Reports Exchequer
LR.H.L.	Law Reports, House of Lords

LR.QB.	Law Reports, Queen's Bench
LT	Law Times
Lyds L.R.	Lloyd's Law Reports
M & W	Meeson and Weiby's Reports, Exchequer
N.C.L.R.	Nigerian Commercial Law Reports
NMLR	Nigerian Monthly Law Reports
NRNLR	Northern Region of Nigerian Law Reports
NSCC	Nigerian Supreme Court Cases
NWLR	Nigerian Weekly Law Reports
NZLR	New Zealand Law Reports
Op. cit	The work previously cited
PLR	Plateau Law Reports
Q.B.	Queen's Bench
Q.B.D.	Queen's Bench Division
S.C.	Judgments of the Supreme Court of Nigeria
SOI.JO.	Solicitors' Journal
TLR	Times Law Reports
WACA	Selected Judgments of the West African Court of Appeal
WLR	Weekly Law Reports

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<u>State Statutes</u>

Foreign Statutes

ABSTRACT

This work considers two broad aspects of consumer law, namely, substantive and practical protection of consumer rights. The former examines the law on consumer protection as contained in the statute books and judicial decisions. The latter deals with the law in practice. This considers the practical implementation of the various laws on consumer protection by the operative agencies. It also examines the practical effects of these laws on the level of consumer protection. The work is divided into ten chapters.

Chapter one gives a survey of consumer protection in different jurisdictions. It also states the research problems, objectives of the study, hypotheses, scope, significance of the work, conceptual frame work and literature review.

Chapter two discusses the methodology adopted in this work.

Chapter three considers the laws governing dealings in regulated products. These products are food, drugs, cosmetics, medical devices, bottled water, chemicals and hazardous products. It is seen from this chapter that the law makes reasonable provisions on the control of regulated products. In contrast, the level of practical protection has remained low due to weak enforcement system.

Chapter four examines the laws which impose further restrictions on dealings in drugs. This reveals that the law adequately controls dealings in drugs. But like the case of laws considered in the preceding chapter, implementation of the statutory provisions remains a problem.

Chapter five examines the functions and activities of the Standards Organisation of Nigeria whose duty it is to prescribe and ensure compliance with product standards. Like the cases of the agencies discussed in the previous chapters, a major problem facing the organisation is the ineffective implementation of its standards.

Chapter six discusses the civil liability of an offender to the victim. This chapter reveals that a person whose product causes injury to the person or property of another,

is civilly liable to that other person. His liability is without prejudice to his criminal liability.

Chapter seven examines the course of action open to a claimant who is not in privity of contract with the defendant. This chapter reveals that such a claimant can sue in the tort of negligence. But his chances of success are greatly limited by the restrictive meaning accorded the term "product defect" in tort law. Proof of negligence also constitutes an almost insurmountable obstacle. The chapter concludes that as a way of getting round the problem of proof of negligence, there is need to introduce strict product liability in selected cases particularly in the fields of pharmaceuticals and articles of food.

Chapter eight examines the contractual rights of a consumer/purchaser. This chapter shows that action in contract is of immense benefit to the claimant because he does not have to prove negligence on the part of the other contracting party. In addition, liability is strict since an exercise of due care will not absolve the offender. But this course of action is of limited application because it is not available to a consumer who is not also the buyer of the product. This chapter concludes like the preceding one that the only solution to the basic contract requirements is the introduction of strict liability in selected areas.

Chapter nine analyses the data on the practical implementation of consumer laws, while chapter ten summarises our research findings and proffers some suggestions.

POSTSCRIPT

Between the submission of this work and the defence some amendments were introduced which have affected some parts of the work particularly the areas dealing with penalties. For details of the amendments see -

(a) the National Agency for Food and Drug Administration and Control (Amendment) Decree 1999[1];

(b) the Drugs and Related Products (Registration, Etc) Amendment) Decree 1999[2];

(c) the Food and Drugs (Amendment) Decree 1999[3]; and

(d) the Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Decree 1999[4].

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1 No. 19

2 No. 20

3 No. 21

4 No. 25

CHAPTER ONE

GENERAL INTRODUCTION AND RESEARCH FRAMEWORK

1.1 Introduction

Despite the principle of caveat emptor[1], the law has always provided some degree of protection for the consumer. In the main, this is effected through legislative enactments. Prosser[2] observes that as far back as 1266, there was legislation in England imposing criminal liability for the supply of "corrupt" food. Harvey[3] notes that bread, beer, meat and fuel were singled out from earliest times as being commodities which the Crown, through the agency of the justices or other local courts should regulate both as to quantity and quality. The learned author notes that there were similar attempts to control the sale of almost all primary commodities of everyday life (particularly grain, cloth, wine, cheese, fish, honey, coal, salt and butter) in many cases dating from the fourteenth or fifteenth centuries. In addition, the author records some convictions affected by Courts-Leet, the Manorial Criminal Courts, between the 17th and 18th centuries for offences relating to Weights and Measures as well as unfair trading.

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1 This is a common law principle which simply means "let the buyer beware". It requires a buyer to examine the goods he buys and to satisfy himself as to quality and other matters. See also the opening sentences of SS. 15 & 16 Sale of Goods Law/Edict of Lagos and Kaduna States respectively. These provisions restate this common law principle.

2 Prosser, "The assault Upon the Citidal (Strict Liability to the Consumer)" (1960) 69 Yale L.J., 1099 at 1103; cited in Clark, A.M., Product Liability, Modern Legal Studies (London: Sweet and Maxwell; 1989), p.2.

3 Harvey, B.W. The Law of Consumer Protection and Fair trading, (London: Butterworths; 1978), pp. 5 & 6.

Other early English Legislation on Consumer Protection included, the Magna Carta, 1215; the Assize of Bread and Ale Act 1266; the Bread Act 1836; the Adulteration of Food and Drugs Act 1872; the Sale of Goods Act 1893;[4] and the Weights and Measures (Metric System) Act 1897.

The English system of consumer protection is sustained by a number of legislation which now govern the subject. These include, the Hire Purchase Act, 1965; the Misrepresentation Act 1967; the Medicines Act 1968; the Trade Description Act 1968; the Unsolicited Goods and Services Act 1971; the Fair Trading Act 1973; the Supply of Goods (Implied Terms) Act 1973; the Consumer Credit Act 1974; the Unfair Contract Terms Act 1977; the Sale of Goods Act 1979; the Supply of Goods and Services Act 1982; the Food Act 1984; the Weights and Measures Act 1985; the Consumer Protection Act 1987; the Consumer Arbitration Agreements Act 1988; and the Sale and Supply of Goods Act 1994;[5]

The above statutes are complemented by agencies which carry out specific functions. These include the Department of Trade and Industry;[6] the Home Office;[7] the Office of Fair Trading;[8] the National Consumer Council;[9] the British Standard Institute;[10]

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4 Now replaced by the Sale of Goods Act 1979.

5 Lowe and Woodroffe, Consumer Law and Practice, 4th ed., (London: Sweet and Maxwell; 1995), pp. 1 & 2; Britain 1990: An Official Handbook prepared by the Central Office of Information, London, pp. 260 &261.

6 Makes regulations under the Consumer Credit Act and the Consumer Protection Act. 1987.

7 Responsible for fire arms and explosives.

8 Takes care of matters relating to Fair Trading and Credit Transactions.

9 A pressure group in negotiations with government.

(continued...)

the County Council and London Boroughs.[11] Consumer Advice Centres have also been set up in many parts of the country under the Local Government Act, 1972. These give pre-shopping advice and mediate in consumer complaints.

Furthermore, there are some voluntary associations which foster consumerism in the United Kingdom. But unlike the position in America, consumerism in the United Kingdom is of a relatively recent origin. Borrie[12] writes that as recent as 1955, consumers had no collective voice. Inspite of this late origin, the development of this social movement has been very impressive. Many consumer associations have been formed. The largest is the Consumers' Association, funded by the subscriptions of its membership of over one million.[13] The association conducts extensive programme of comparative testing of goods and investigation of services. Its views and test reports are published in its monthly magazines and other publications.[14] The reports published in one of its journals, which? have undoubtedly had great influence on manufacturers who have hastened to rectify any faults noted about their products.[15] The National Federation of Consumer Groups - a centre co-ordinating body with a membership of over 2,000 is an

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10 (...continued) Lays down uniform standards for certain products and awards the B.S.I. "kite mark" to manufacturers whose products are in conformity with set standards.

11 Concerned with standards inspections awards.

12 Gordon Borrie and Aubrey Diamond, The Consumer, Society and the Law, 4th ed. (England: Pengium Books; 1981) p. 9.

13 Britain 1990: An Official Handbook, Prepared by the Central Office of Information, London; Her Majesty's Stationary Office; p. 26.

14 Ibid., p. 261.

15 Hanson, J.L., Introduction to Applied Economics, 3rd ed. (Plymouth: MacDonald & Evans Ltd; 1981) p. 118.

organisation actively involved in the protection of consumer rights.[16] Additionally, there are some professional associations which operate voluntary conciliation and arbitration in disputes involving members. Examples include, the Retail Motor Industry Federation; the Association of British Travel Agents (ABTA); Association of Manufacturers of Domestic Electrical Appliances (AMDEA); Vehicle Builders and Repairers Association (VBRA) and Consumer Credit Association of the United Kingdom (CCA).[17]

In pursuance of section 124 (3) of the Fair Trading Act 1973 which enjoins the Director General of Fair Trading to encourage associations to prepare and disseminate to their members, Codes of Practice for guidance in safe-guarding and promoting the interests of consumers, some codes have been prepared by some associations.[18] So far, about 23 Codes of Practice have been negotiated with various trade associations. These voluntary efforts enhance consumer protection and reduce the need for legislation.

Early legislative actions by the United State Government included, the Sherman Antitrust Act 1890; the Pure Food and Drug Act 1906; the Federal Trade Commission Act 1941; and the Food and Drug Administration Act 1931.[19] Other legislation which impact on consumer protection are the Uniform Commercial Code; the American Restatement (2nd) of Torts 1965; and the Federal Truth in Lending Act 1968.

Some agencies charged with the protection of the consumer in the United States

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16 Lowe and Woodroffe, op. cit.; p.5.

17 Lowe and Woodroffe, Ibid. pp. 5 & 6.

18 Lowe and Woodroffe, Ibid;, pp. 164 165

19 The Concise Columbia Encyclopedia, p. 203.

are the Consumer Affairs Council;[20] the Consumer Products Safety Commission;[21] the Federal Trade Commission;[22] the General Service Administration;[23] and the United States Office of Consumer Affairs.[24]

In addition, there exist a number of non-governmental associations which perform various consumer functions. These include, the Automotive Consumer Action Program;[25] Consumer Federation of America;[26] Consumers Union of the United States;[27] Council of Better business Bureau;[28] and Trial Lawyers for Public Justice.[29] Others include,

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20 Which reviews consumer policy and provides leadership in improving the management, co-ordination and effectiveness of Federal Agency Consumer Programs.

21 Establishes and enforces product safety standards, collects data, studies the causes of product related injuries and identifies and recalls hazardous products from the market.

22 Seeks to promote the interests of consumers by encouraging market competition; represents consumers during policy-making process, responds to consumer complaints and conducts researches.

23 Publishes quarterly consumer information catalog that lists free and low-cost federal publications.

24 Co-ordinates federal consumer program and serves as a resource centre for government agencies.

25 A citizens' interest group that promotes national standards and procedures in resolving auto dealer/manufacturer and consumer disputes.

26 Promotes consumer interests in product pricing, quality, servicing, and warranties.

27 A consumer advocacy group which represents consumer interests before congress and regulatory agencies and litigates consumer affairs and cases involving the government.

28 Trains and co-ordinates volunteers who arbitrate disputes between business and consumers.

Citizen Utility Board Campaign; National Consumer league; National Association of Consumer Agency Administration; National Co-operative Business Association; United States Chamber of Commerce and the United States Public Interest Research Group.[30]

In the United States, consumerism is a social movement to be reckoned with. Stanton[31] writes that consumerism is not a new phenomenon in this country. In the early 1900's there was a "Consumer movement" in which efforts were made to protect the consumer from harmful products and from false and misleading advertising.

But by and large, it was in the 1960's and 1970's that consumer movement gained significant impetus in the United States. This was when consumer activists such as Ralph Nader succeeded in promoting laws that set safety standards for automobiles, children's clothing, toys and a wide range of household products.

In Nigeria, early legislation on product quality included, the Sale of Drugs Act 1891 (Lagos);[32] the Food Adulteration Act 1903; the Drugs and Poisons Act 1915 and the Adulteration of Produce Act 1958. There were also some state laws which included, the Sale of Food Law 1917 (Northern Nigeria),[33] the Sale of Food Law 1917 (Eastern Nigeria),[34] and the Sale of Food Law (Western Nigeria).[35] These regional laws were

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29 Litigates to influence corporate and government decisions about products or activities adversely affecting health or safety.

30 Washington Information Directory 1990-1991; Congressional Quarterly Inc., p. 230-247.

31 Stanton, W.J., Fundamentals of Marketing, 5th ed. (New York: McGraw-Hill Book Company; 1978), p. 557.

32 Extended to the whole country by the Drugs and Poisons Extension Act 1970.

33 Laws of Northern Nigeria, 1963, Cap. 121.

34 Laws of Eastern Nigeria, 1963, Cap 117.

repealed and replaced by the Food and Drugs Act 1974.[36] Consumer protection is now governed by myriad of laws which shall be discussed in subsequent chapters.

With the increased advancement in technology, the need for a greater protection of the consumer is increasingly felt. This is because many products, some of which are complex, are introduced into the market daily. This creates problem of choice for the uninformed consumer. Cranston[37] observes that the advancement of technology means that consumer products are now more complex. He notes that expert knowledge is essential to appreciate the features of many modern products which fall below the threshold of perception of the ordinary consumer.

Writing in the same vein, Mark Green[38] points out that even the most sophisticated consumer may face difficulties. He states:

> *"How does an average consumer know how much unhealthy radiation is being emitted from a microwave oven, or from his dentist's x-ray machine? Should we assume a car buyer can know ...whether tasteless and odourless carbon monoxide is seeping into the passenger compartment from the exhaust system; or whether the drug he purchases is effective or toxic?".*

A similar view was expressed by the Molony Committee on Consumer Protection.[39] The Committee observed that the performance of many products cannot in some cases be accurately established by a short trial; shortcomings of design are not

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35 Laws of Western Region of Nigeria, 1959, Cap. 115:

36 See S. 21 of this Act.

37 Rose Cranston, Consumers and the Law, (London: Weidenfeld and Nicolson; 1978), p. 1.

38 Mark J. Green, "Appropriateness and Responsiveness' can the Government Protect The Consumer? (1974) 8 J. Econ. Issues 09-10. Cited in Cranston, Ibid., p. 2.

39 Final Report of the Committee on Consumer Protection, 1962 (Comnd. 1781) para 31.

apparent to the inexpert eye; inherent faults may only come to light when the article breaks down after a period of use". Lowe and Woodroffe[40] while agreeing with the fact that the law had always imposed duties on persons exercising certain callings (such as in-keepers and carriers) observe that the explosion of interest in consumer matters is very much a creature of the second half of the twentieth century. The authors illustrate this point by giving a chronological list of major Acts on Consumer Protection from the 1950's to date. They attribute this development to a combination of new business methods and changing social attitudes. They observe that the key factors on business methods are to be found in the complexity of the goods themselves and in the changing forms of advertising and distribution. They further explain that the need for what is called consumer protection has become far greater because the consumer is no longer in a position to rely on his own judgement when buying complex articles.

Apart from complexity of modern products, consumer's choice is equally inhibited by intensive advertising which may create a false impression about a product. This is clearly the case with promotional sales strategies. In Nigeria such sales promotions have become rather popular. Between 1993 and 1998 a total of 150 sales promotions were mounted by various firms in the country. Often the promised reward creates an irresistible incentive for patronage of the advertised product thus denying the consumer the freedom of rational choice.

The society has reacted appropriately to problems affecting the consumer. Besides legislative safeguards mentioned above, the judiciary has made appreciable in-roads into some legal principles which hitherto constituted obstacles to the protection of

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[40] Lowe and Woodroffe, op. cit.; p. 1; Clark, A.M. Product Liability, Modern Legal Studies (London: Sweet and Maxwell; 1989) p. 13-21.

the consumer. Principles such as privity of contract, caveat emptor and exemption clauses have been considerably whittled down by purposeful judicial interpretations. There is however, no doubt that there is a limit to judicial activism since as secondary enforcer of consumer rights, the role of the court is adjudicatory not inquisitorial. External initiative is therefore required to enable the court to act in a particular case.

Apart from legislative and judicial efforts, consumer interest is equally advanced by the efforts of some non-governmental associations. Thus like the cases of United Kingdom and the United States of America, mentioned above, there exist a number of voluntary consumer associations in the country. Prominent examples are the Consumer Protection Organisation of Nigeria (CPON); the National Consumers of Nigeria (NCN); the Consumer Rights Association of Nigeria (CRAN);[41] the Public Interest Law Organisation (PILO) and the Consumer Organisation of Nigeria (CON).

The Consumer Protection Organisation of Nigeria (CPON) appears consistent in advancing the cause of the consumer. Formed in 1970, the aims of the association include, consumer information, consumer education and advocacy. The association represents consumers in some governmental bodies such as the Council of the Standards Organisation of Nigeria (SON), the Advertising Practitioners Council of Nigeria (APCON) and the Oyo State Government Task Force on Food-stuff Prices. CPON conducts market researches to monitor prices and quality standards of goods and services. It also publishes a quarterly magazine called "THE CONSUMER" which covers various consumer related issues including public alerts. The association is a

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[41] This has remained virtually redundant since its inception in 1993.

member of the Consumers International (CI).[42]

The aims of the National Consumers of Nigeria (NCN)[43] encompass environmental Programmes, research, information, education and health protection. A major objective of the Consumer Organisation of Nigeria (CON)[44] is consumer awareness creation. The Public Interest Law Organization (PILO)[45] has two major objectives, namely, protection of consumers from unfair trade practices and consumption of contaminated goods.

But unlike the position in some advanced countries, efforts of consumer associations in this country have remained rudimentary, Data on consumers' awareness of the existence of voluntary consumer associations show that many consumers are ignorant of their existence. Out of the 602 consumers interviewed only 46 or 7.6 per cent indicated awareness while 556 or 92.4 per cent displayed lack of awareness. This means that the voluntary consumer associations are yet to make any appreciable impact in this country.[46]

The protection of consumer interests by non-governmental bodies has graduated to global level via the activities of the Consumers International, formerly known as the

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42 The Consumer, Journal of the Consumer Education and Protection Council of Nigeria (CEPCON), Oct. - Dec. 1992; International Consumer Directory 1992 (Published by the International Organisations of Consumers Unions Registered Office for Europe and North America, Emma Straat, 259 EG, The Hague, The Netherlands, 1992)

43 Formed in 1971.

44 Formed in 1992.

45 Formed in 1996.

46 A detailed analysis of research findings in this area is done in chapter nine.

International Organisation of Consumer Unions (IOCU). The CI which has its headquarters at the Hague, the Netherlands, is a federation of consumer organisations. It is dedicated to the protection and promotion of consumer rights world-wide. Eight basic rights are protected, namely, right to satisfaction of basic needs, safety, information, choice, representation, redress, education and healthy environment. The United Nations Guidelines on Consumer Protection[47] adopted in 1985 after a decade - long campaign by C.I. and other consumer activists embrace these eight rights and offer a framework for strengthening national consumer protection policies.

C.I. organises information networks, international seminars, workshops and a triennial world congress. It initiates research and action on global issues relating to consumer interests. The organisation has a representative in many international bodies such as the Economic and Social Council of the United Nations (ECOSOC), the United Nations Children's Fund (UNICEF), the World Health Organisation (WHO), the Food and Agriculture Organisation (FAO), the International Standards Organisation (ISO), the United Nations Development Programme (UNDP) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO).

The C.I. which was formed in 1960 by five consumer groups from the United States, Australia, the United Kingdom, Belgium and the Netherlands now has 203 organs in 83 countries.[48] World Consumer Rights Day first celebrated in 1983 is observed by C.I. and its members on March 15 as an annual occasion for protesting the abuses and injustices which undermine consumer protection.

Protection of consumer rights is also effected at regional level. A case in point

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47 General Assembly Resolution 39/248; April 9, 1985.

48 Daily Times, Wed., July 3, 1996, p. 11

is that of the European Union (EU). Even though consumer protection did not receive much attention under the EEC Treaty, 1957,[49] series of directives aimed at achieving product safety and redress for the consumer have been issued by the Council. The list includes Directives on General Produce Safety; Liability for Defective products;[50] Unfair Terms in Consumer Contracts;[51] Safety of Toys;[52] Cosmetic Products;[53] Rapid Exchange of Information on Dangers arising from the use of Consumer Products;[54] Misleading Advertising;[55] Products which endanger the health or safety of consumers;[56] and Dangerous Preparations the packaging of which must be fitted with child-resistant fastenings.[57]

Although some of the directives are declared non-mandatory, in most cases Member States are obligated to adopt them in their national laws within a specified period.[58] The effect is that many Council Directives are now transposed into national laws. For instance, the directives on Product Liability was implemented in the United

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49 Ss. 39 & 85 (3) confer some economic benefits on the consumer.

50 92/57/EEC of June 1992.

51 95/13/EEC

52 88/378/EEC

53 76/768/EEC

54 84/133/EEC

55 84/450/EEC

56 87/359/EEC

57 91/442/EEC

58 See for instance, Directive on Safety of Toys - Member States given up to June 30, 1989 to adopt; also Unfair Terms in Consumer Contracts - Dec. 31, 1994; General Products Safety - June 29, 1994.

Kingdom under Part 1 of the Consumer Protection Act 1987. Other directives adopted by the United Kingdom under amended Article 100A of the EEC Treaty[59] include, Toy Safety Directive,[60] Units of Measurement Directive,[61] Price Indication Directive[62] and Dangerous Imitation Directive.[63]

To further enhance the move towards a Single European Market, the Commission of the European Union has introduced other safeguards for the consumer. These include, the Product Certification System, the Green Paper on Guarantees and After-Sales Services; Free Movement of Persons and other favourable conditions for trans-frontiér transactions.[64]

In addition, the commission has set up a unit specifically catering for consumer interests - the Consumer Policy Service. This paves way for independent analysis of consumer issues.[65] The commission has also set up a Consumers' Consultative Council (CCC) which brings together representatives of the four major European organisations concerned with consumer affairs, namely, Bureau European des Unions de Consommateurs (BEUC); Confederation of Family Organisations in the European Community (CONFACE), European Trade Union Confederation (ETUC) and the

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59 The amendment was introduced by the Single European

60 88/378/EEC

61 89/617/EEC

62 88/314 & 313

63 87/357/EEC

64 Commission of the European Communities, Green Paper on Guarantees for Consumer Goods and After-Sales Services, (Brussels, 15 Nov. 1993) p. 5-16.

65 The Consumer and the Internal Market; a publication of the Economic and Social Consultative Assembly, Brussels, 1993, p. 10.

European Community of Consumer Cooperatives (EUROCOOP). National Consumer Organisations are represented in the CCC.[66] This enhances harmonisation of consumer laws.

Without prejudice to the national enforcement bodies, there exists at community level, a European Office of Consumer Unions. Complaints are directed to this office by both Member States and individual consumers.

While conscious efforts are being made at community level to build a strong and harmonised protection for the consumer, Member States are encouraged to provide protection in areas not covered by community laws.[67] In addition, greater protection than those offered by the community law may be provided by a national law. In fact the EU policy makers maintain the principle of "minimum harmonisation", whereby Member States are allowed to opt out of a community instrument if they wish to adopt or retain stricter consumer protection provisions within the limits laid down by community law.[68]

This practice was affirmed by the European Court of Justice in Buet v. Minister Public.[69] A total ban on door-step selling of educational materials which was imposed by a French Law was approved by the court. The relevant EEC Directive[70] gives the consumer the right to withdraw from any such agreement.

Evidence of Consumer Protection at national level within the European Union can equally be seen from some national laws which specifically deal with the matter.

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66 The Consumer and the Internal Market, Ibid., p. 10.

67 The State (Italy) v. Ciacono Caldana (1989) 1 CMLR 340 cited in Penelope Kent op., cit., p. 296.

68 The Consumer and the Internal Market, p. 12.

69 Case 328/87 cited in Penelope Kent, op. cit., p. 296.

70 CD. 85/577/EEC

Examples are, the Spanish General Act for the Protection of Consumers and Users (GAPCU) 1984 which requires adequate after-sale services for durable goods; the Greece Act No. 1961/91, a legislation on consumer protection which devotes a chapter to after-sales services; and the Ireland Sale of Goods and Supply of Services Act, 1980 which mandates after-sale services and availability of spare parts for a reasonable period.

Furthermore, an investigation carried out by Commission of the European Union shows that all national legislation in the Member States contain provisions relating to the vendor's guarantee in the event of a defect in a product sold. The investigation reveals that several countries have supplemented or amended the provisions of their Civil Codes through specific legislation which concern general issues of consumer protection.[71]

It is seen from the foregoing that in varying degrees, the consumer can be said to be protected all over the world. The assertion is particularly true as regards statutory enactments. The main variance is in the area of enforcement. Thus while many advanced countries have well-established enforcement procedure, many developing countries lack effective enforcement system. In Britain for instance, apart from an active Food and Drugs Department which engages in sample purchases of product among other things, there exists the Office of Fair Trading (OFT) to which consumer complaints are made. Cases of breach of consumer rights discovered both as a result of own investigation and consumer complaints are promptly handled.

This contrasts with the position in Nigeria. as we shall see in subsequent chapters, ineffective enforcement machinery is the greatest bane of consumer protection this country.

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[71] Commission of the European Communities, Green Paper on Guarantees for Consumer Goods and After-Sales Services, Brussels, 15 Nov., 1993, p. 17.

1.2 Statement of Research Problem

Despite the existence of numerous laws on consumer protection, Nigeria witnesses a low level of consumer protection. This is evidenced by the existence of many fake and sub-standard products in the country. The problem cuts across various product groups including drugs.[72] The low level of consumer protection constitutes a great problem both to the consumer, the manufacturer, and the government and its agencies.

On the part of the consumer, a supply of fake or sub-standard product denies him proper worth for his money. Worse still, the product may be injurious to health thus exposing him to many health hazards.

As for the manufacturer of genuine products, the low level of protection can be felt in one or two ways. First, he is exposed to unnecessary competition from product fakers whose products are invariably cheaper in price. In order to remain in business and also to safe-guard the interest of consumers of his product, he may resort to intensive advertising and "advice" to the public on how to detect the "difference". This strategy which is capital intensive, naturally pushes up the price of the genuine product thereby taking it out of reach of the average consumer. In addition, the presence of fake brands may lead consumers to shun the product in question for fear of purchasing the fake brands. The manufacturer of the genuine brand loses out in the long run.

On the part of the government and its agencies, the low level of protection often leads to unpleasant experiences. A case in point is the ban on the importation of drugs from Nigeria by some West African countries in 1990. This was sequel to the death of

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[72] The results of the Field Survey conducted by the present researcher confirm this assertion.

some children who were administered with adulterated paracetamol syrup.[73] There is no doubt that the government feels concerned about this problem. This concern is demonstrated by the various measures being taken to eradicate the circulation of fake and sub-standard products one of which is the enactment of statutes which impose severe penalties for consumer offences.[74] More agencies have also been set up to take care of different aspects of consumer rights.[75]

Despite these efforts, the level of consumer protection has remained low. The choice of this topic is, therefore, informed by the negative correlation between statutory enactments and the level of practical consumer protection in Nigeria.

1.3 Research Objectives

The aim of this work is to investigate the reasons for the low level of consumer protection in Nigeria. The overall objective is to evolve a means of improving the level of consumer protection in the country. To this end, some issues to be addressed include the following:

(a) the adequacy of existing laws on consumer protection;

(b) areas of existing laws requiring amendment;

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[73] Obi C.C. and Okoro, R. Guide to Good Pharmaceutical Whole-saling, (Lagos; Christ & Robins (Nig) Ltd.; 1992) p. 53.

[74] See for instance the Counterfeit and Fake Drugs (miscellaneous Provisions) Act 1989 and the Trade Malpractices Decree 1992, No. 67, The former imposes a penalty of ₦500,000 for a contravention of its provisions.

[75] The Task Force on Counterfeit and Fake Drugs (1989); the Consumer Protection Council (1992); and the National Agency for Food and Drug Administration and Control (1992).

(c) ways of improving the attitude of the consumer to the enforcement of his rights;

(d) ways of improving the participation of voluntary consumer associations in the enforcement of consumer rights;

(e) the role of judiciary in the enforcement of consumer rights;

(f) the role of the manufacturer in the protection of consumer rights; and

(g) the effectiveness of the existing enforcement machineries.

1.4 Hypotheses

This research tests three hypotheses.

HO_1: *Level of consumer protection does not depend on sufficiency of consumer protection laws.*

HO_2: *Awareness of consumer protection laws does not depend on level of education.*

HO_3: *Awareness of consumer protection laws does not depend on place of residence.*

1.5 Scope and Delimitations of the Study

This work considers all laws dealing with the manufacture, sale and advertisement of products regulated by the law. Such products include, food, drugs, cosmetics and hazardous products. Civil liability for defective products and civil rights of a victim of product defect are also examined. The general awareness and attitude of consumers to consumer-related issues; the roles of manufacturers; voluntary consumer associations; the law enforcement agencies; and the judiciary are also considered. Due attention is also given to the Standards Organisation of Nigeria (SON) which is the only agency charged with the prescription and implementation of product standards. To test the level of compliance with mandatory standards prescribed by this body, the Standard on Road Vehicles: Requirements for Passenger Cars is used as a case study, using motorists as our respondents.

In order to make room for an indepth study of the chosen areas, other aspects of

consumer protection such as price control; credit sales; supply of services; and restrictive trade practices are excluded.

1.6 Definition of Terms

1.6.1 *Consumer*

Black's law Dictionary defines consumer as one who consumes, individuals who purchase, use, maintain and dispose of products and services; users of the final product: a member of the broad class of people, who is affected by pricing policies, financing practices, quality of goods and services, credit reporting, debt collection, and other trade practices for which the State and general consumer protection laws are enacted. The term is further defined as a buyer of any consumer product; any person to whom such product is transferred during the duration of an implied or written warranty applicable to the product, and any other person who is entitled by the terms of such warranty or under applicable State Law to enforce against the warrantor the obligations of the warranty.[76]

The Collins Cobuild English Language Dictionary[77] defines consumer as a person who buys things or uses services; a person or company that buys a particular thing or uses a particular service; something or someone that uses up a supply or amount of something.

The Chambers English Dictionary[78] simply defines consumer as one who consumes; as opposed to producer, one who uses an article produced.

Some statutory definitions may be considered. The Fair Trading Act (U.K) provides that a consumer means any person who is either:

(a) a person to whom goods are or are sought to be supplied (whether by way of sale or otherwise) in the course of business carried on by the person supplying or seeking to supply them; or

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[76] Henry Campell Black M.A; 6th ed. (St. Paul, Minn. West Publishing Co.; 1990) p. 316.

[78] Schwarz, Davidson Seaton & Tebbit; Chambers English Dictionary, 7th ed., (Edinburgh: W.R. Chambers Ltd., 1990).

(b) a person for whom services are sought to be supplied in the course of a business carried on by the person supplying or seeking to supply them, and who does not receive or seek to receive the goods or services in the course of a business carried on by him.[79]

The Supply of Goods (Implied Terms) Act 1973 (U.K) defines a related term - "consumer sale" as a sale of goods (other than a sale by auction or by competitive tender) by a seller in the course of a business where the goods-

(a) are of a type ordinarily bought for private use or consumption; and

(b) are sold to a person who does not buy or hold himself out as buying them in the course of a business.[80]

In Nigeria, there was no local statutory definition of the term consumer until 1979 when the Industrial Promotion Act 1979[81] was enacted. This Act defines the term as including any person (whether or not another manufacturer) who buys goods from a wholesale or retail trader in the goods concerned.[82]

The term is further defined by the Consumer Protection Council Decree 1992 as an individual who purchases, uses, maintains or disposes of products or services.[83]

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79 S. 137 (2)

80 S. 4 (7)

81 Laws of the Federation of Nigeria Cap. 181, 1990.

82 S. 10.

83 Decree No. 66, 1992, S. 32.

Legal Scholars have not been left out in this regard. Aaaker and Day[84] equate the term "consumer" with citizens. They write that "consumer interest" is involved when citizens enter exchange relationships with institutions such as hospitals, libraries, police force and various government agencies, as well as with businesses".

Schiffman and Kanut[85] in their book on Consumer Behaviour classify consumer into two different kinds of consuming entities: (1) the personal consumer, and (2) the organisational consumer. According to them, the personal consumer is the individual who buys goods and services for her own use, for the use of her household or for just one member of the household, or even as a gift for a friend. In all these contexts, the goods are bought for final or "end" use by individuals who are referred to as"end users" or "ultimate users". The second category, encompasses private businesses, government agencies, and institutions, all of which must buy products, equipment, and services in order to run their organisations - whether for profit or non-profit.

One fact that emerges from the above definitions is that writers and legal draftsmen are not agreed on a precise meaning of the term consumer. While some confine it to contractual relationships, others favour an extended meaning that is uninhibited by contractual requirements. The infinite nature of the term can be seen from the fact that some writers ascribe to it, two or more meanings which may be considered conflicting. The Black's Law Dictionary is a good example. Perhaps the aim is to achieve comprehensiveness and ensure that anyone adversely affected by a product

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84 Aaaker, P.A, and Day, G.S., Consumerism, 2nd ed. (NewYork: Free Press; 1974) P. XVII. Also Ross Cranston, op. cit., pp. 7 & 8.

85 Schiffman, L.G. and Kanut, L.L., Consumer Behaviour, (Prentice-Hall, Inc., Englewood Cliffs; 1978 pp. 4 & 5.

is covered.

The reference to the term by the Collins Cobuild English Language Dictionary as something[86] that uses up a supply or amount of something, introduces some controversy.[87] The implication is that an inanimate object may be regarded as a consumer. This extended meaning appears untenable. This is because all inanimate things are subject of ownership. It, therefore, follows that only owners of such things can rightly be regarded as consumers. A contrary interpretation would amount to conferring a right on an object which cannot exercise it. Some practical illustrations are useful. First, a motorist buys some quantity of fuel which turns out to be adulterated. His car is consequently damaged. Who should be regarded as the consumer of the fuel; the motorist or the car which actually consumed the fuel? The realistic answer is that the motorist is the consumer. He is the only one who has the right to sue. The car being an inanimate thing cannot exercise any right and so cannot be regarded as a consumer.

Second, a person feeds his dog with a product purchased by him; who is the consumer of that product: the owner of the dog or the dog itself? The obvious answer is that the owner is the consumer. He is the only one that can sue.

The attempt by some writers to confine the term consumer to purchasers of goods or services is rather restrictive. This implies that only a contractual plaintiff is qualified as consumer. This approach will adversely affect possible claims of many end users and so cannot be supported.

Reference to consumer as "Individual" in some of the above definitions is remarkable. "individual" is defined by the Consumer Credit Act 1974 (U.K) as including

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86 Emphasis supplied

87 Supra.; p. 18 - 20.

partnership or other unincorporated body of persons not consisting entirely of bodies corporate.[88] In this work the term consumer is confined to natural persons.

Some of the restrictions inherent in some definitions considered above can be said to have been effectively taken care of by judicial interpretations. The decision in Donoghue v. Stevenson[89] and other subsequent cases[90] clearly illustrate that the term consumer goes beyond the realm of contract. Thus in Stennett v Hancock & Peters,[91] the owner of a motor lorry took the wheel of the lorry, the flange of which had come off, to a motor repairer for repairs. After the work was done, the flange came off again while the lorry was being driven on the highway, and bowling along the road, it mounted a pavement and hit the plaintiff, a pedestrian, injuring her. It was held, following Donoghue v Stevenson that the repairer was liable to the plaintiff in negligence as he was in the same position as the of the manufacturer of an article sold by a distributor in circumstances which prevented the distributor or ultimate purchaser or consumer from discovering by inspection any defect in the article.

It is seen that the concept of consumer has assumed a very wide connotation. As rightly observed by Charlesworth and Percy,[92] the category of persons who may be

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88 S. 189 (1)

89 [1932] A.c. 562.

90 See Grant v. Australian Knitting Mills Ltd. [1940] AC 85; Brown v Cotterill (1934) 5 TLR 21; Barnett v H.J. Packer & Co. Ltd. (1940) 3 All E.R. 575.

91 [1939] 2 All E.R. 578.

92 Charlesworth and Percy on Negligence 8th ed. (London: Sweet & Maxwell; 1990) p. 1089.

deemed to be ultimate consumers has been extended to include the user[93] of the product, as well as the person who comes into contact with it whether accidentally[94] or deliberately".[95]

The term "consumer", therefore, covers every person who acquires a product under a contract of sale as well as any person who uses, consume s or is injured by a product. This is the sense in which the term is used in this work.

1.6.2 *Consumerism*

The New Encyclopaedia Britannica,[96] defines consumerism as movement or policies aimed at regulating the products, services, methods, and standards of manufacturers, sellers, and advertisers in the interest of the buyer.

The term is defined by The Encyclopedia Americana[97] as the movement toward increased consumer protection.

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93 Grant v. Australian Knitting Mills Ltd. [1936] A.C. 85.

94 Brown v. Cotterill (1934) 5 TLR 21 (a tombstone fell on a child. He was held entitled to recover); Power v. The Bedford Motor Co. Ltd. (1959) I.R. 391 (track rods of a car were set incorrectly and caused a fatal accident through faulty steering). See Charlesworth and Percy op. cit., p. 1089.

95 Barnett v H.J. Packer & Co. Ltd. [1940] 3 All E.R. 575. (a shop assistant suffered injury while picking a protruding wire from a sweet; held entitled to recover).

96 The New Encyclopaedia Britannica vol. 3, 15th ed. (Chicago etc. Encyclopaedia Britannica Inc. 1981) p.210.

97 The Encyclopedia American International Edition vol. 7 (Danbury, Connecticut: Grolier Incorporated, 1981) p. 628.

The Oxford English Dictionary[98] simply defines it as protection of the consumer's interest. According to the Webster's Dictionary[99], it is a program to promote consumer interest including protection of the environment, restraints on abuse by business etc.

A wider view has been expressed by Stanton.[100] He defines consumerism as the actions of individuals and organisations (consumer, government, and business) in response to consumers' dissatisfaction arising in exchange relationships. He writes that consumerism is (1) a protest against perceived business injustices and (2) the efforts to remedy those injustices.

From the foregoing definitions, it can be summarised that consumerism is a social movement aimed at enhancing the position of the consumer. The primary objective is to ensure that the consumer obtains the money worth of what ever he buys. The movement could be championed by an individual, a group of individuals, business concerns or by the government. This movement which is a product of consumer discontent has assumed a greater significance today. A prominent prompting factor is industrialization with its attendant side-effects. The essence of consumerism is to maximize consumer satisfaction. Satisfaction in this sense cuts across diverse issues ranging from product quality, prices, relevant information, metrology and environmental protection.

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98 The Oxford English Dictionary of the English Language, 1991 ed: (New York: Lexicon Publications, Inc.; 1992) p. 210.

99 The New Lexicon Webster's Dictionary of the English Language, 1991 ed: (New York: Lexicon Publications, Inc.; 1992).

100 Op. cit., p. 556.

1.6.3 *Consumer Protection*

The phrase "consumer protection" has been defined as "legislation which protects the interests of consumers"[101] This definition is clearly restrictive. It excludes other forms of protection which are not statutory such as protection by the judiciary, trade associations, and other voluntary consumer organisations. The definition is therefore, not very helpful. The Encyclopaedia Americana[102] defines consumer protection as "safeguarding the buying public from dangerous or inferior goods and services and from fraudulent and other unfair selling practices". Like the one considered above, this definition equally suffers some limitations. It has been shown that the concept of consumer goes beyond the notion of buyer.[103] Consequently, a definition which confines consumer protection to the buyer is not appropriate.

A broader definition which comprises all aspects of consumer protection is preferable. Thus consumer protection can be defined as the act of safeguarding the interest of the consumer in matters relating to supply of goods and services, misleading advertising as well as environmental degradation.

1.6.4 **Operational Definitions**

Levels of Education

a. High: HND, 1st Degree and above

b. Medium: SSC, NCE and Diploma

c. Low: FSLC and below

1.7 Literature Review

Unlike the case of social science research where the bulk of literature on a subject matter is derived from previous works of researchers, in law, statutory enactments and judicial decisions constitute part of the literature. This explains why, contrary to the practice in other fields, a whole chapter is not devoted to literature review. Statutory enactments and judicial decisions are reviewed in relevant chapters of the work. For the

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101 Roger Bird, Osborn's Concise Law Dictionary, 7th ed. (London: Sweet & Maxwell; 1983) p. 90.

102 Op. cit., p. 682.

103 See definitions of consumer, supra. p. 18-25

enactments and judicial decisions are reviewed in relevant chapters of the work. For the present purpose, we have confined ourselves to the works of other researchers and cursory references to judicial decisions and statutory enactments.

Consumer protection is rather neglected by writers and researchers in Nigeria. So far, there is no local text book in the field. Snippets of information on the matter can, however, be gathered from chapters in some texts particularly those on Commercial Law and Management Sciences. There are also journal and newspaper articles as well as dissertation.[104] This contrasts with the position in some other jurisdictions where there exists a considerable body of literature on consumer protection. In the United Kingdom for instance, there exist standard textbooks[105], an impressive body of case law and numerous enactments.

Various aspects of consumer protection have been addressed by some writers. One such aspect is legislative intervention in the protection of consumer rights. Cheshire, Fifoot and Furmston[106] consider this a healthy development due to the

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104 See for instance Apori, K.A., "Towards a Strict Liability Standard in Defective product Law" Bendel State University Law Journal 1991/92, vol. 1, No. 1 p. 33-46 Yerokun, O.M. "The Nigerian Food Laws and Consumers". Nigerian Current Law Journal, p. 152-165: Adenike, F., "Fake Drugs: Implications for consumers", National Concord Tues. May 18, 1993, p. 7: Nwabuzor, A.M., Business Government Relations in Nigeria (Lagos: MacMillan Nigerian Publishers Ltd., 1990) Monye, F.N., "Adulteration of Goods and Consumer protection". PG-LL. M - 84-2563, University of Nigeria, Nsukka, Sept., 1986.

105 See for instance, Clark, A.M. Product Liability: Modern Legal Studies, (London: Sweet & Maxwell; 1989): Cranston, R., Consumer and the Law, (London: Weidenfeld and Nicolson; 1978); Lowe, R. & Woodroffe, G., Consumer Law and Practice, 4th ed., (London: Sweet & Maxwell; 1995); Ransay, I., Consumer Protection; Text and Materials. (London: Butterworths: 1994).

106 Cheshire, Fifoot and Furmston, Law of Contract, 11th ed., (London: Butterworths & Co. (Publishers) Ltd;

inadequacy of the law of contract to address the problem of consumer protection. They observe that the law of contract is in many ways an unsatisfactory instrument since enforcement depends on the consumer knowing his rights; being able to enforce them; and considering the cost and time involved worth-while.

Writing on credit sales in the United Kingdom, Diamond[107] observes that the central criticism of the law is the way in which different forms of contract are attended with different legal consequences, though the choice of form is often dictated by the creditor, not by economic considerations. He notes that if a debtor wishes to acquire goods and to pay by instalments, the legal rights of the parties will depend on whether the form used is that appropriate to a hire-purchase agreement, a conditional sale agreement, a credit card or a loan on the security of goods.

The above observations which are based on Crowther Report[108] apply with equal force to the position in Nigeria. Fogam[109] observes that the objectives of any commercial law should be to offer a fair and sensible solution to the practical problems that are likely to arise. When applied to particular disputes of a common nature, it should produce results which would commend itself to the commercial world as being realistic and reasonable. This writer notes that the existing laws on consumer credit seem to fall short of this requirement.

1986), p. 23.

107 Diamond, A.L., Commercial and Consumer Credit; An Introduction, (London: Butterworths; 1982), p. 357.

108 Report of the Crowther Committee on Consumer Credit (Comm. 4596), 1968.

109 Fogam, P.K, "Legal Regulation of Consumer Credit Transactions in Nigeria: An Appraisal" Essays on Nigerian Law, vol. 11; Omotola, J.A. ed., (Lagos: Faculty of Law , University of Lagos, July 1990) p. 31-52.

Commenting on the implementation of private law rights, Cranston[110] observes that a general feature of private law is that it is not self-implementing. Consumers must take initiative to enforce their legal rights. He notes that consumers frequently fail to utilize their rights.

A point that has attracted some attention is the need to enshrine compensation order in criminal proceedings. By section 13(1) of the Consumer Protection Council Decree, a court by or before which a person is convicted of an offence may in addition to dealing with such person in any other way, make an order requiring the person to pay compensation for any personal injury, loss or damage resulting from that offence.[111]

Mickleburgh[112] writes that as a means of gaining redress, compensation orders have some considerable advantages for the consumer. This order, according to him spares the consumer the necessity of bringing separate legal proceedings. He notes that for most practical purposes, the making of a compensation order may be regarded as equivalent to an award of damages in a civil action.

In fact the advantages of a compensation order cannot be over-stressed. A suggestion to this effect was made in an earlier research.[113] Such an order will save the victim of the trouble and expenses of having to take a separate civil action. The

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110 Ross Cranston, op. cit p. 79.

111 This is also the position under the Powers of Criminal Courts Act 1973 (U.K.) (as amended). See the Criminal Justice Act 1982 for the amendments.

112 Mickleburgh, J., Consumer Protection, (Abingdon, Oxon, Professional Books; 1979) p. 315.

113 Monye, F.N., "Adulteration of Goods and consumer Protection", LL.M. Dissertation, University of Nigeria, Nsukka, Sept., 1986.

necessity for this order has been stressed by many researchers.[114] It is hoped that the provision of the Consumer Protection Council Decree which is yet to be tested will meet the expectations of writers.

One issue that has bothered writers is the inadequacy of protection accorded the consumer in Nigeria. Ineghedion[115] writes that the level of consumer protection in Nigeria is inadequate. In support of this assertion this author notes that where the provisions of the existing statutes are infringed, it is the State that has locus standi to initiate any action, civil or criminal, against the infringing party.

Writing in the same vein, Akande[116] notes that statutes which are related to consumer protection are of very limited application. The learned author observes that the existing statutes only prescribe punishment for the breach of their provisions and, therefore, give no civil remedy.

Nwabuzor[117] writes that, compared with what obtains elsewhere, the Governments of the Federation have lagged behind in the area of consumer protection. To buttress this point, he cites the absence of any Federal Agency with functions and powers similar to those of the United States Consumer Product Safety Commission. The assertion has been over-taken by events. There are now agencies charged with the implementation of

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114 See Compensation and Remedies for Victims of Crime in Nigeria (Published by the Federal Ministry of Justice, 1990); papers presented at a three-day National Conference held in Abuja from June 28-30, 1989

115 Ineghedion, N.A., "Consumerism, Merchantability and the Standards Organisation of Nigeria", Edo State University Law Journal. 1993. Vol. 2 No. 1, p. 79.

116 Akande, J.O., "Consumer Protection", Paper presented at the Anambra State Law Conference, 10-12- Dec., 1986, p. 12. cf. Consumer Protection Council Decree.

117 Nwabuzor, op cit p. 82-84.

consumer protection laws in Nigeria.[118]

Another issue that has attracted the attention of writers in Nigeria is that of exemption clauses. Although the rule of construction has been affirmed by the Supreme Court in its decision in Narumal & Sons Ltd. v. Niger/Benue Transport Co. Ltd.,[119] writers appear to prefer the rule of law doctrine. Sagay[120] asserts that the rule of law doctrine of fundamental breach is a healthy rule of public policy. He writes that an unrestricted principle of freedom of contract would be dangerous and contrary to the public interest at the present state of Nigeria's industrial and commercial development and culture.

Commenting on the adoption of the rule of construction by the Supreme Court, Agomo[121] observes that "The glaring implication of the present trend is to give the classical freedom of contract theory a completely free hand under circumstances where there is a glaring inequality of bargaining strength". The learned writer advocates that in the application of the rule of construction, the relative strength of the contracting parties must be considered; that local conditions such as illiteracy must be taken judicial notice of, and that in all circumstances the concept of reasonableness must be applied.

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118 These include, the National Agency for Food and Drug Administration and Control (NAFDAC): the Standards Organisation of Nigeria (SON); the Task Force on Counterfeit and Fake drugs and the Consumer Protection Council.

119 (1989) C.L.R.Q. 28.

120 Sagay, I.E. Nigerian Law of Contract, (London: Sweet and Maxwell; 1985) p. 155.

121 Agomo, C.K. "Exclusion Clauses in Contract and the Implications for Consumer protection n the Nigerian law of Contract". In Obilade ed. A Blueprint for Nigerian Law. (University of Lagos, 1995) pp. 11 and 12.

Uvieghara[122] writes that the uncritical acceptances of the decision in Photo Production Ltd. v. Securicor Transport Ltd.[123] by the Supreme Court is unfortunate. He observes that no attempt seems to have been made to reflect on its implication for the Nigerian society which is predominantly illiterate and which, perhaps, more significantly, can benefit from the injection of a dosage of morality in commercial activities.

One is apt to agree with the foregoing observations. In an article titled, "The Need to Restrict the Scope of Application of Exemption Clauses", the present researcher notes that the shortcoming of the rule of construction is glaring when viewed in terms of product liability. As noted in the work, if the rule of construction is extended to product liability cases, the consumer would be at the mercy of the other contracting party.[124]

The development of consumer law through the judicial process has been rather slow despite the willingness of the courts to advance the cause of the consumer. Available literature shows that the courts are willing to uphold the rights of the consumer where appropriate. Evidence of this willingness can be seen from some decided cases. In Osemobor v Niger Biscuits Co. Ltd.[125] where a decayed tooth was found in a biscuit, the manufacturer was held liable for negligence. In Solu v. Total Nigeria Ltd.[126] involving the sale of defective gas cylinder, the defendants were held liable in negligence

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122 Uvieghara, E.E., Sale of Goods (And Hire Purchase) Law in Nigeria, (Lagos: Malthouse Press Ltd.; 1996) p. 29.

123 (1980) A.C. 827.

124 Money, F.N., Justice (A Journal of Contemporary Legal Problems, June 1991, Vol. 2, No, 6) p. 19-27.

125 (1973) N.C.L.R. 382.

126 Unrep. Lagos State High Court Suit No. ID/619/85, March 25, 1988.

despite the fact that they were mere distributors and not manufacturers of the cylinder.

The willingness of the courts to protect the consumer is demonstrated by the statement of Aniagolu, J.S.C. in Nigerian Bottling Co. Ltd. v. Ngonadi.[127] His Lordship stated:

> *"While commending the respondent in her tenacity in pursuing her claim in the courts below, one would trust that others of the citizenry who have suffered or are suffering from purchase of unmerchantable goods would readily have recourse to the courts for remedy."*[128]

But the foregoing notwithstanding, development of consumer law through this channel is seriously affected by certain factors. Prominent in this regard is the lukewarm attitude of the consumer. Consumers rarely institute actions to enforce their rights. This denies the courts the opportunity of pronouncing on relevant issues. Another factor relates to some legal principles which abridge judicial discretion. These include, privity of contract, caveat emptor and proof of negligence. Thus in a contract-based action, the plaintiff apart from showing privity of contract with the defendant must satisfy the requirements of the Sale of Goods Laws as regards implied terms. In a tort-based action, the plaintiff must establish negligence against the defendant.

Statutory enactments constitute the bulk of literature on consumer protection in Nigeria.[129] The combined effect of the provisions of all existing laws is that many aspects of consumer protection are fairly covered, at least, on paper. There are

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127 (1985) 5 S.C. 317.

128 Ibid., at p. 322.

129 Examples are the Standards Organisation of Nigeria Act 1971; the Food and Drugs Act 1974; the Counterfeit and Fake Drugs (Misc. Provns) Act 1989; the Trade Malpractices Decree 1992; the Pharmacists Council of Nigeria Decree 1992; the National Agency for Food and Drug Administration and Control Decree 1993 and the Drugs and Related Products (Registration etc) Decree 1993.

however, some exceptions. One major exception is in the area of unfair contract terms. Another is strict liability for defective products. Lack of legislative control in these areas makes the consumer vulnerable to exploitation by the other contracting party.

The global trend shows a drift towards a strict liability for defective products. The American position typifies this trend. By section 402A of the Restatement of Torts, 2nd (1965), a manufacturer is strictly liable for injuries caused by his product. Subject to the defence contained in section 4(i) (a), the Consumer protection Act 1987 achieves this purpose in the United Kingdom. The position is the same in all the Member States of the European Union which have adopted the E.U. Council Directive on Product Liability.[130]

The Nigerian courts appear to favour this trend. Inclination towards strict product liability can be inferred from the cases discussed above. But the courts are yet to achieve a freedom from the burden of proof of negligence and strict contract rules. As a way of getting round this problem, it has been suggested by the present researcher that strict product liability be introduced in selected areas such as in fields of pharmaceuticals and articles of food.[131]

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130 85/374. ECC.

131 Monye, F.N., "Strict Product Liability: The only Solution to Proof of Negligence and Strict Contract Rules"; accepted for publication in the Nigerian Current Law Review.

CHAPTER TWO

RESEARCH DESIGN AND METHODOLOGY

2.1 Research Design

Asika[1] writes that research design means the structuring of investigation aimed at identifying variables and their relationships to one another. He further writes that research design is used for the purpose of obtaining data to enable the researcher test hypotheses or answer research questions.[2]

As we stated in chapter one, the main objective of this work is to evolve a means of improving the level of consumer protection in Nigeria. In order to achieve this objective, it is important to ask certain questions which include the following: Who do we study? What do we investigate? What type of data do we need? Where do we get our data? What methods of analysis do we employ? To do justice to these issues it is important to choose a research design which will produce a most reliable result.

Nwabueze[3] writes that most researches in the behavioral sciences adopt one or a combination of four designs. These are:

i Experiments

ii Field Observation

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1 Asika Nnamdi, Research Methodology in the Behavioural Sciences (Lagos: Longman Nig. Plc. 1991) p.27.

2 Ibid.

3 Nwabueze N., Anglocentric Nigerian Laws and Bias Against Customary Law Marriage: A Critique of Colonial Cultural Imperialism, Unpublished , A Dissertation Submitted to the Faculty of Law, University of Lagos as a part of requirements for the award of the LL.B (Hons) Degree, October, 1997.

iii Survey Research: and

iv Library Research/Documentary Analysis.

He notes that the one chosen from all these depends on the nature of the study and the purpose of the investigation.

2.2 Our Design

Given the nature of the evidence required to answer our research questions and test our hypotheses we have adopted a combination of Field Observation, Survey Research and Library/Documentary Analysis. Chapter one and three to five are based on a combination of these three methods. Thus field observation was used to obtain information in areas where it was unlikely to obtain objective or true responses from persons involved in the matters being investigated. Such areas include sale of prescription drugs without prescription by pharmacists; and sale of prescription drugs by patent medicine dealers. As regards the former, oral requests for prescription drugs were made at 50 pharmacy shops. In the same way, requests for prescription drugs were made at 50 patent medicine shops. The pharmacy and patent medicine shops visited were coded to avoid unnecessary adverse reactions. Other data obtained by field observation include those on sale of drugs in prohibited places; sale of fake products and the availability of quality control units in the manufacturing outfits covered by this study.

Survey method was employed to elicit information on practical implementation of consumer laws as well as the level of awareness of members of the public on consumer matters. In this regard oral interviews and questionnaires were administered. Oral interview was adopted to obtain information on matters peculiar to some agencies. For instance, data relating to registration of products; sales promotions; subsidiary legislation; and control of the importation of sub-standard foreign products were obtained by oral interviews with relevant enforcement agencies. Questionnaires were administered to five groups of respondents, namely, consumers, motorists, manufacturers, law enforcement agencies and voluntary consumer associations.

Library/Documentary Analysis of laws on consumer protection were undertaken. The intention was to determine the extent of statutory protection of the consumer.

The results of the field observation and surveys are considered in comparison with the provisions of the laws discussed in these chapters.

Issues in chapter six to eight are based on secondary data as contained in reported judicial decisions; unreported cases; statutory provisions; text books; and law journals. In selecting the materials needed for this part of the work we have employed the content analysis method. This has helped us to isolate the materials which are observably relevant to our work. It has also helped us to achieve some degree of concision.

2.3 Survey Framework

Survey method involves a number of distinct operations. These include, determination of sample size, decision as to appropriate sampling theory or theories to apply; choice of study setting and choice and operationalisation of means of data gathering.[4]

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[4] Nwabueze., op. cit. p. 9

The structure of our survey design is very much influenced by the nature of our study and the data needed to achieve our purpose. Being a law thesis we have been cautious to employ survey methods that are devoid of much technicalities. At the same time, mindful of the fact that reliability is the crux of any research effort, we have been careful to adopt methods that will enable us achieve this purpose.

2.4 Sampling Techniques

The study of consumer protection in Nigeria would necessarily involve the whole population of the country. This is because the term consumer covers everyone who consumes goods or services. Every human being, irrespective of age or social status consumes goods and services in one form or another. It logically follows that every person in the country is a consumer. With a population of about 88 million (eighty-eight million), it is practically impossible to cover the whole population. We have been cautious to choose our samples in such a way that will be representative of the whole population. This has enabled us to produce good generalisations.

In the main, the probability sampling technique is used. The aim is to give all the elements of the population equal chance of being selected as a sample element. Probability sampling techniques used in this study are the multi-stage, the cluster, the stratified, the systematic and the random sampling methods. In addition we have employed the census method where the population is small in size thus permitting a coverage of the whole constituent elements.

Non - probability sampling is used to select a State for this study. In this regard, the purposive sampling method was used to select Lagos State. The criteria that informed our judgment are set out below.

2.5 Stage One: Choice of State

By virtue of the nature of the evidence required for this research, Lagos State was chosen as study setting. This choice was based on the following criteria: all the law enforcement agencies have their offices in this State; the State has the highest number of industries out of all the States in the Country; it has all categories of consumers, both enlightened and unenlightened. It was therefore felt that a study of this State would yield a more representative result than a study of a State that lacks these pre-requisite features.

2.6 Stage Two: Choice of Local Government Areas

Out of the 20 local government areas in Lagos State, 5 were chosen by random sampling method. Care was taken to ensure that the selected local government areas would include two rural areas. To achieve this, local government areas with urban and rural population settlements were grouped respectively. Thus, to choose two rural areas, the following eight local government areas, namely, Ajeromi-Ifelodun, Alimosho, Ojo, Badagry, Ibeju Lekki, Epe, Ikorodu and Agege were grouped together and two chosen by random sampling method. Three local government areas were chosen from the urban settlements. This increased number was informed by the preponderance of urban settlements in Lagos State.

To select our sample, the following local government areas namely, Kosefe, Ikeja, Apapa, Lagos Mainland, Oshodi-Isolo, Mushin, Amuwo - Odofin, Eti - Osa, Ifako-Ijaye, Lagos Island, Shomolu and Surulere were grouped together and three chosen by simple random method. This exercise yielded 5 local government areas namely Surulere, Ikeja, Mushin(Urban) and Ojo and Agege (rural)

2.7 Stage Three: Choice Of Respondents

As earlier noted, five groups of respondents, namely, consumers, motorists, manufacturers, law enforcement agencies and voluntary consumer associations were covered. In the absence of a comprehensive and up-to-date sampling frame for law enforcement agencies, manufacturers and voluntary consumer associations, directories and other sources were used to create a list of these categories of respondents in the State. This exercise yielded the following results:

1. Four law enforcement agencies which are as follows:
   a. the National Agency for Food and Drug Administration and Control (NAFDAC)
   b. the Standards Organisation of Nigeria (SON)
   c. Lagos State Ministry of Health; and
   d. the Pharmacists Council of Nigeria.

2. Three voluntary consumer associations, namely:
   a Consumer Protection Organisation of Nigeria (CPON);
   b. Consumer Organisation of Nigeria (CON); and
   c. Public Interest Law Organisation (PILO)

The census method was used to obtain information from the law enforcement agencies. This method was adopted because of the limited number of agencies and also because of the heterogeneous nature of their functions. The same method was used with respect to the voluntary consumer associations; also, for the same reasons.

To select manufacturers to be interviewed, the stratified sampling method was used. Manufacturers were stratified according to their product groups. Four firms were selected from each group by random method. This yielded twelve firms, four each for food, drugs and cosmetics.

To choose consumers, each Local Government Area was divided into three clusters. This gave a total of 15 clusters. Systematic sampling technique was then used to select households. This was achieved by taking street formations in each cluster and numbering them in serial order. Selection started from street No. 1 and progressed up. A sampling gap of three was adopted in the low density areas while five was adopted in the high density areas. In each building, the first available and willing adult was interviewed. Once a cluster produced 42 responses, data collection was discontinued. This yielded 630 responses for the 15 clusters covered.

2.8 Sample Size of Consumers

The sample size of 630 consumers was used for this study. Our pilot study shows that consumers generally exhibit similar characteristics depending on where they are located: their level of education; and critical awareness. It was, therefore, felt that reliability of research result would be achieved by effective clustering of the sampled areas rather than a study of an unwieldy sample. It was also felt that a moderate sample would aid data analysis and accuracy of research findings.

2.9 Data Gathering Techniques

The main method by which data were collected for this work was the self-administered questionnaire. A questionnaire comprising five modules was administered to different groups of respondents. Module one which consists of two sections was meant for all respondents. Section A covers questions on respondents' basic biodata such as age, educational qualification, sex, marital status, place of residence, occupation and critical awareness of consumer issues. Section B contains questions that elicit information on respondents' awareness of the activities of the Standards Organisation of Nigeria (SON). This organisation , being the only agency charged with the responsibility of prescription and enforcement of product standards, the questions here were aimed at assessing the practical relevance of the activities of the organisation.

Module two contains questions meant for motorists. An important standard prescribed by the SON, the Standard on Road Vehicles : Requirements for Passenger Cars was used as a case study. This standard, being a mandatory standard, the questions in this module were intended to assess compliance with standards prescribed by the organisation.

Module three was meant for manufacturers. Questions asked include the attitude of manufacturers to the certification marking scheme of SON, modes of compliance with statutory requirements on consumer protection and problems militating against efforts at consumer protection.

Module four was for law enforcement agencies. Questions covered include those on functions of the agencies, strength of enforcement personnel, enforcement procedures; major constraints and achievements.

Module five was for Voluntary Consumer Associations. Questions asked include those on objectives of the associations, membership strength, areas of consumer protection covered, problems and achievements.

Most of the questions were close ended with optional answers supplied by us. This was to achieve unanimity and comparability of respondents' responses. The questionnaires were coded for easy post field work analysis. The results of the survey are analysed in appropriate chapters.

Questionnaires were administered by research assistants who were hired for this purpose. Assistants were used to minimise errors and improper completion of the questionnaires, particularly by illiterate respondents. The assistants were closely supervised by us.

Oral interviews were conducted as a supplement to the questionnaire. These were done in areas involving information which is peculiar to the respondent. Because of the specialised nature of the information gathered by this method, the interviews were conducted personally by the researchers.

2.10 Methodological Problems

A major problem encountered in this work was the unwillingness of the staff of the enforcement agencies to disclose basic information. The attitude was almost the same in all the agencies visited. Many staff declined to give requested information on the ground that as civil servants, they are not allowed to disclose any information. This compelled us to pay many visits to some of the agencies in order to interview the overall bosses.

Apart from the mandatory standard on motor vehicles which we used as a case study, we could not test compliance with other mandatory standards. The other sixteen mandatory standards such as those on liquid milk, matches, portland cement and galvanized iron sheets require scientific experiments. Such experiments are beyond our competence. We could not organise external assistance due to resource constraints.

CHAPTER THREE

CONTROL OF THE MANUFACTURE, SALE AND ADVERTISEMENT OF REGULATED PRODUCTS

3.1 Introduction

This chapter considers the laws governing the manufacture, sale and advertisement of regulated products. In this work, the phrase "regulated products" is used in reference to products specifically regulated by the law for the protection of the consumer. These include, food, drugs, cosmetics, medical devices, bottled water, chemical and hazardous products. In the main, this subject is governed by the Food and Drugs Act; the National Agency for Food and Drug Administration and Control (NAFDAC) Decree; the Consumer Protection Council Decree; the Trade Malpractices (Miscellaneous Offences) Decree; and the Criminal Code Act.

3.2 The Food and Drugs Act

3.2.1. *Scope*

The Food and Drugs Act only applies to the products stated therein. The products covered can be inferred from the long title as well as sections 1, 10(2) and 20. The Act deals with the manufacture, sale and advertisement of food, drugs, cosmetics and devices. Section 10(2), in defining the expression "articles to which this Act or regulations apply" states among other things that it means any food, drug, cosmetic or device. These terms are defined in section 20. By this section "food" includes any article manufactured, sold or advertised for use as food or drink for man, chewing gum, and any ingredient that may be mixed with food for any purpose whatsoever. Certain articles are excluded from this definition. These include water, live animals, birds, fish, fodder or feeding stuff for animals. The exclusion of water cannot, be justified especially in this

era of bottled water. This anomaly has, however, been taken care of by the National Agency for Food and Drug Administration and Control Decree which includes bottled water as one of the regulated products.[1]

The term "drug" is defined to include any substance or mixture of substances manufactured, sold or advertised for use in -

(a) the diagnosis, treatment, mitigation or prevention of any disease, disorder, abnormal physical state or the symptoms thereof in man or in animals;

(b) restoring, correcting or modifying organic functions in man or in animals;

(c) disinfection or the control of venom, insects or pests; or

(d) contraception.

"Cosmetic" is defined by the section as any substance or mixture of substances manufactured, sold or advertised for use in cleansing, improving or altering the complexion of skin, hair or teeth, and includes deodorants.

"Device" means any instrument, apparatus or contrivance (including component parts and accessories thereof) manufactured, sold or advertised for use in the diagnosis, treatment, mitigation or prevention of any disease, disorder, abnormal physical state or the symptoms thereof, in man or in animals.

It is seen that unlike the specific approach adopted with respect to the terms "device"and "cosmetic" the word "include " is used in the definitions of the terms "food" and "drug". This implies that the definitions are not intended to be exhaustive. Admitted that the courts would be guided by the 'jus generis' rule in the interpretation of these terms, the leverage created by this word makes room for a liberal interpretation. Therefore any article intended for human consumption would qualify as food.

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[1] See s. 24(5)(a).

In summation, it can be stated that, subject to the exceptions mentioned above, the Food and Drugs Act covers all articles of food, drugs, cosmetics and devices irrespective of description.

3.2.2 *Offences Created by the Act*

a. Sale of Poisonous or Harmful Food, Drugs and Cosmetics

Section 1(1)(a)prohibits the sale of any article of food which has in it or upon it any poisonous or harmful substance not being a food additive or contaminant of a type, and within the level permitted by regulations made under the Act. The words "poisonous" and "harmful" are not defined by the Act.

The Black's Law Dictionary[2] defines "poison" as a substance having an inherent deleterious property which renders it, when taken into the system, capable of destroying life. A substance which, on being applied to the human body, internally or externally is capable of destroying the action of the vital functions or of placing the solids and fluids in such a state as to prevent the continuance of life. The word "harmful"as used in connection with foods means noxious, hurtful, pernicious, likely to cause illness or damage.[3] It can be inferred from these definitions that any substance which is capable of producing any adverse effect on the health of the consumer can be regarded as harmful or poisonous.

b. Sale of Food Unfit for Human Consumption

Section 1(1)(b)prohibits the sale of any article of food which is unfit for human

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[2] Black H.C., 6th ed. (St. Paul, Minm. West Publishing Co.; (1990) p.1156.

[3] Op. cit., p.718.

consumption. Like the terms considered above, the phrase "unfit for human consumption" is not defined by the Act. Also, there are no local judicial decisions on this issue. A review of some English decisions, however, shows that the phrase applies to unwholesome, putrid or diseased articles. In David Greig Ltd. v Goldfinch[4] a consumer claimed that a pork pie bought from the defendants had some patches of mould. It was established that a small amount of mould had been present at the time of sale. It was held that the mould, although harmless in nature, made the pie unfit for human consumption. The court stated that for the offence to be committed, it was not necessary to show that the product in question was dangerous to health. It is sufficient if the article is unsuitable for human consumption.

The presence of a foreign body may not necessarily make an article unfit for human consumption. In J. Miller Ltd. v Battersea Borough Council,[5] a chocolate cream bun was found to contain a piece of metal. The appellants were charged under section 9 of the Food and Drug Act, 1938 (U.K.) for selling food unfit for human consumption. It was held that the presence of the metal did not render the bun unfit for human consumption.[6] Similarly, in Turner & Sons Ltd. v Owen,[7] a charge preferred under the same section, a loaf of bread which contained a piece of string was held not unfit for human consumption. The English Court of Appeal stated that if by pure accident a

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4 (1961) 105 Sol. Jo. 367.

5 [1956] 1 Q.B. 43.

6 It was admitted by the court that the presence of the metal might give grounds for complaint under s.3 of the Act, namely, sale of food not of the nature, substance or quality demanded.

7 [1956] 1 Q.B. 48; See also Lindley v George W.Hornes & Co. Ltd. [1950] 1 AII E.R.234.

foreign body gets into a perfectly good loaf, that does not make the loaf unfit for human consumption. This approach was rationalised by Lord Goddard, C.J. in J. Miller Ltd. v Battersea Borough Council[8] where he stated that:

> *"...when one is construing an Act of parliament of this sort one has to use a certain modicum of common sense, and I cannot understand how the magistrate could have thought that a bun containing a small piece of metal could fairly be described as unfit for human consumption. The bun was perfectly good. It had in it this metal which ought not to have been there, and therefore it can be said that metal to the prejudice of the purchaser was in the bun, but that does not make the bun unfit for human consumption."*[9]

The above decisions do not in any way suggest that there is no liability in the case of presence of foreign bodies in articles of food. In fact, the court admitted in the two cases considered above that information could be preferred under a different section of the Act prohibiting sale of an article not of the nature, substance and quality demanded.[10] In Lindley v George W. Hornes Co. Ltd.[11] where the information was brought under the appropriate section, the respondents were held liable. In that case, a sweet was found to contain a nail. The respondents were convicted under section 3 of the Food and Drugs Act 1938 (U.K.) for selling to the prejudice of the purchaser, food which was not of the nature, substance or quality demanded.

As can be gathered from the above decisions and observations of some learned authors the legal position as regards presence of foreign bodies not injurious to health appears fluid. Drawing an influence from the decision in Chibnall's Bakeries v Cope

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8 Supra..

9 Ibid., at p. 47.

10 S.3 Food and Drugs Act 1938.

11 [1950] 1 AII E.R. 234.

Brown[12] where a dirty used bandage was found in the bottom of a loaf of bread, John Mickleburgh[13] observes that to be unfit, the additional matter must cause the food to be actually or potentially unwholesome. Commenting on the decision in David Greig Ltd v Goldfinch, Harvey[14] writes that the issue of unfitness for human consumption is a matter of degree and that the Justices' finding that the pie was unfit for human consumption could not be held wrong. It can thus be said that it is rather difficult to know where to draw a line as to when the presence of a foreign body would create liability. The issue appears a question of fact. As summarised by Lord Widgery, C.J., in Smedleys Ltd. v Breed.[15]

> *"...the presence of a foreign body would lead to a breach if the ordinary reasonable purchaser of the article in question would be so affronted by the presence of the extraneous matter that he or she would regard the whole article as being unfit and therefore not of the substance demanded."*[16]

A necessary inference that can be drawn from the foregoing analysis is that the presence of a foreign body can only make an article of food unfit for human consumption if it puts it in such a state that no reasonable man would be expected to consume it.

The above controversy does not arise with respect to cosmetics. This is because the Food and Drugs Act specifically imposes liability in this case. Section 1(4) (b) prohibits the sale of any cosmetic which consists wholly or in part of any filthy or

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12 [1956] Crim. L.R. 236.

13 John Mickleburgh: Consumer Protection (Abingdon, Pkon: Professional Books; 1979) p.258

14 Harvey, B.W. The Law of Consumer Protection and Fair Trading, (London: Butterworths; 1978) p.275

15 [1973] Q.B.977.

16 Ibid., at p.985.

decomposed substance or any foreign matter.[17] The word 'or' in this provision shows that a plaintiff can base his claim on any of the stated grounds. In fact, it has been decided that a claim which alleges three different grounds to substantiate the same offence would be bad for duplicity.[18] This being the case, it would be advisable for a plaintiff to base his case on the last ground, namely, presence of foreign matter irrespective of the nature of the offence. This is because any substance which may be regarded as filthy or decomposed can as well be regarded as a foreign matter. So rather than burden oneself with proof of subjective terms such as 'filthy' or 'decomposed' one can simply allege presence of foreign body.

Practical difficulties may, however, arise as to the nature of foreign body that may ground liability. Can it be said that the presence of any foreign body will create liability irrespective of size or nature? It appears that each case will depend on its particular merits. It is obvious that a strand of hair, a piece of stone or a tiny piece of metal will each constitute a foreign body when present in an article of food or cosmetic. So also the presence of a grain of rice. But the question is whether it is realistic to hold a manufacturer liable in all these cases.

A strict interpretation of similar English Statute led the courts to impose liability in similar circumstances. In Lindley v George W.Hornes Co Ltd.[19] where a sweet was found to contain a nail, the manufacturers were held liable. Also in Smedleys Ltd. v

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17 Emphasis mine.

18 See Bastin v Davis [1950] 2 K.B. 579 C.A. While affirming the decision of the court below, Lord Goddard, C.J. chose to base his judgement on uncertainty rather than duplicity. See p. 581

19 [1950]1 AII E.R. 234.

Breed[20] the House of Lords upheld the conviction of the manufacturers of a tin of peas which contained a small green caterpillar. The House refused a plea of "unavoidable consequence of the process of collection or preparation".[21] But a caveat was placed by the court in Goulder v Rook[22] involving the presence of a certain quantity of injurious arsenic in beer.

Lord Alverstone, C.J., after convicting the offender stated:

> *"I only desire to add that I must not be understood to suggest that every accidental introduction of deleterious matter into an article sold for food of necessity makes it different in nature, substance, and quality from the article demanded. It is for the magistrate in each case to find whether in fact the article supplied is of the nature, substance or quality of the article demanded."*[23]

The Nigerian case of Osemobor v Niger Biscuits Co. Ltd.& Anor[24] involving the presence of a decayed tooth in a biscuit was decided in negligence and it was held that the sellers were not liable since negligence was not proved. On the same ground, the plaintiff in Chuma Onyejekwe v Nigerian Breweries Ltd.[25] lost his claim. The allegation was that the beer brewed by the defendants contained some foreign bodies.

As can be seen from the citations of these cases, the claims arose before the commencement of the Food and Drugs Act. It is arguable that if similar cases arise today, the position may not be different. In other words, such cases can only be based

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20 [1974] A.C. 839.

21 A defence contained in S. 4(4) of the Act. The defence is applicable to section 3 offences mentioned above.

22 [1901] 2 K.B. 290.

23 Ibid., at p. 293.

24 [1973] N.C.L.R. 382.

25 (unreported) Suit No. E/129/72.

on negligence. This is because under the Food and Drugs Act, offences involving presence of foreign bodies can only be committed in relation to cosmetics.[26] It is suggested that the Act be amended to accommodate cases outside the field of cosmetics. This is necessary because, as revealed by this research, majority of consumer cases involve presence of foreign bodies.[27]

c. Sale of Filthy, Disgusting, Rotten or Diseased Substance

It is an offence under section 1 (1) (c) to sell any article of food which consists in whole or in part of any filthy, disgusting, rotten or diseased substance. Unlike the case of fitness for human consumption considered above, proof of offences under the present paragraph appears less difficult. This is because there is no requirement that the presence of such filthy, disgusting, rotten or diseased substance should render the food unfit for human consumption or injurious to health. The mere presence of any such substance constitutes an offence. It is, however, uncertain whether the courts will apply the objective or subjective test to arrive at a decision. It is suggested that an objective test be adopted.

d. Sale of Adulterated Food or Drug

Section 1(2) provides that no person shall sell any article of food or any drug which is adulterated. It is not stated when an article of food or drug can be said to be adulterated. The meaning of adulteration can, however, be gathered from other sources.

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[26] See S. 1-8 of the Act.

[27] See for instance, Boardman v Guinness (Nig) Ltd. [1980] N.C.L.R. 109; Okonkwo v Guinness (Nig.) Ltd [1980] 1 P.L.R. 583; Soremi v Nigerian Bottling Co. Ltd. [1977] 12 CCHCJ 2735.

According to Encyclopedia Britannica,[28] adulteration means the act of debasing a commercial commodity with the object of imitating or counterfeiting a pure or genuine commodity, or substituting an inferior article for a superior one in order to gain an illegitimate profit.

Stroud's Judicial Dictionary[29] states that an article of food is adulterated when any substance other than that which the article purports to be, is mixed with, or added to or placed upon it, either to increase the bulk, weight or apparent size of the article or to give it a deceptive appearance.

Furthermore, section 2 of the Adulteration of Produce Act 1958[30] provided as follows:

> *"'adulterate' means to falsify, deteriorate or increase the apparent bulk or weight or conceal the inferior quality of produce by the combination, admixture or addition therewith or thereto of some foreign, superfluous or inferior substances, matter or thing whether deleterious or not, or by the use of artificial means, and includes abstraction from produce part of it so as to injuriously affect its nature, substance or quality, or soaking or manipulating it so as to increase its bulk or weight."*

Section 16 of the Food and Drugs Act gives the Minister the power to make regulation for determining what constitutes the adulteration of any food or drug. To date, no regulation has been made in this regard. However there exists some draft regulations specifying minimum standards for certain products. From the drafts it is clear that adulteration may occur in various ways. These include, the addition of some extraneous

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28 Encyclopedia Britannica, (London: Encyclopedia Britannica Ltd; 1962) Vol. 1, p.188

29 James, J.S. Strand's Judicial Dictionary of Words and Phrases, 4th ed. (London: Sweet & Maxwell Ltd; 1973)

30 Laws of the Federation of Nigeria and Lagos, 1958 Vol. 1.

substances, the abstraction of some compositional ingredients, failure to comply with the prescribed standard or the substitution of inferior ingredients for superior ones.[166]

It is not necessary that the adulterated product should be injurious to health before an offence may be committed. It is sufficient if the article in question contains substances or ingredients which ought not to be there. Thus if the adulterant used is perfectly innocuous such as water, the offence is nonetheless committed. In the light of this, definitions which tie up the meaning of the term to injury to health cannot be supported. The definition by Brain Harvey[167] falls into this group. According to the learned author, the offence of adulteration consists of adding any substance to food, using any substance as an ingredient in the preparation of food, abstracting any constituent from food or subjecting it to any other process or treatment, so that in each case the food is rendered injurious to health, with the intent that it shall be sold for human consumption in that state. Reference to injury to health in this case is an unnecessary extension.

In summation it may be said that adulteration means the act of mixing a product intended for sale with any substance or ingredient which is injurious to health or which reduces the quality of the product so represented.

e. Sale Under Insanitary Conditions

Sections 1 and 6 prohibit the sale and manufacture of food, drug, or cosmetics under insanitary conditions. By section 1(3), no person shall sell any article of food or any drug or cosmetic which was manufactured, prepared, preserved, packaged, or stored under insanitary conditions. Section 6 extends the offence to the act of manufacture.

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166 See for instance, the Poultry Products Regulation, 1980; the Fats and Oils Regulation, 1980; both still in draft.

167 Op. Cit., p.267; Emphasis supplied.

Under this section, no person shall, under insanitary conditions, manufacture, prepare, preserve, package or store for the purpose of sale any food, drug or cosmetic.

"Insanitary conditions" is defined by the Act as such conditions or circumstances as might contaminate any food, drug or cosmetic with dirt or filth or render it injurious to health.[33] This research shows that these requirements are not obeyed in practice. Evidence abounds of sellers who sell various articles of food under insanitary conditions. There is need to check this practice which invariably leads to untold health risks.

f. Sale and Advertisement For the Cure of Certain Diseases

Section 2 prohibits advertisement or sale of any food, drug, cosmetic or device as a treatment, prevention or cure for any of the diseases, disorders or abnormal physical states specified in the first Schedule. The diseases covered by the Schedule include, alcoholism, appendicitis, asthma, blood disorders, cancer, cataract, diabetes, kidney disorder and obesity. On the whole, a total of sixty- five diseases and disorders are covered. One possible reason advanced for the prohibition of advertisement of these products is that since such diseases have no known cure, such advertisements are likely to be false.[34]

Despite the contrary impression created by the Act, sale for the cure, treatment or prevention of the listed diseases is not prohibited. A contrary interpretation would have been counter-productive since the society cannot do without the sale of such products. It suffices for the law to prohibit advertisements and spurious claims and these are adequately taken care of by section 2(a). It is, therefore, not a surprise that drugs for

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33 S.20.

34 Y. Osinbajo & K. Fogam, Nigerian Media Law (Lagos: Gravites Publishments, 1991) p.264.

the listed diseases are sold in most pharmacies and nobody considers such sales as offences. This should be so.

Apart from outright prohibition, the law also imposes restrictions on the advertisement of other articles of food, drugs, cosmetics and devices. These restrictions relate to the texts of advertisements. Section 5(a) prohibits the advertisement of any food, drug, cosmetics or device in a manner that is false or misleading or is likely to create a wrong impression as to its quality, character, value, composition, merit or safety.

Other Offences Under the Act

Other offences covered by the Act can be briefly stated. Section 1(3) prohibits the sale of cosmetic which has in it any substance which may cause injury to the health of the user.

Another offence relates to the manufacture of any drug specified in the fourth schedule. Section 7(1) obligates any prospective manufacturer of such drug to obtain a certificate of the Minister to the effect that the premises in which the drug is intended to be manufactured and the process and conditions by and under which the manufacture is to be carried on are suitable for ensuring that the drug will be safe for use. The drugs covered by the schedule include, liver extract in all forms, insulin in all forms, anterior pituitary extracts, radioactive isotopes and living vaccines for oral or parenteral use.

In the case of drugs in the fifth schedule,[35] an offence is committed if a sale is effected without the certificate of the Minister that the batch from which the drug was taken is safe for use. Except as provided in the regulations, no person shall distribute or cause to be distributed as samples any of the drugs listed in the fourth or fifth

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[35] Arsphenamine, dichlorophenarsine, hydrochloride, neoaisphenamine, oxophenarshine, hydrochloride, sensitivity discs and tablets and sulpharsphenamine

schedules.[36]

Section 3 prohibits the importation and exportation of drugs specified in the second schedule except as authorised by the regulations. Also no regulated product may be imported into the country unless it is accompanied with a certificate from the manufacturer to the effect that it was manufactured in accordance with an existing standard or code of practice pertaining to such product or, where such standard or code of practice does not exist for the particular product, in accordance with any international standard. The product must also be accompanied with a certificate issued by or on behalf of the Government of the country where it was manufactured to the effect that its sale in the country would not constitute an offence.[37]

The foregoing provisions notwithstanding, the Minister may, by regulation, prohibit the importation of any regulated product which does not comply with any standard laid down in the regulations.[38] These provisions are aimed at ensuring that the country is not made a dumping ground for sub-standard and inferior goods. Despite these statutory safe guards, it can not be denied that some fake and sub-standard products still circulate in the country. A good illustration is offered by the seizure and destruction of some quantity of fake chloroquine tablets by the National Agency for Food and Drug Administration and Control (NAFDAC). The drugs which were valued at ₦1.3m were imported from India by a company which operates in Lagos.[39]

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36 S. 7(3)

37 S. 8(2)

38 S. 8(3)

39 National Concord, Thursday, January 14, 1993, p. 15; See also "Reign of Fake Goods", Daily Champion, Tuesday August 22, 1995, p. 8.

Obstruction of enforcement officers, failure to provide required information and provision of false information are also offences under the Act.[40] Further, it is an offence to manufacture any product under insanitary conditions.[41]

3.2.3 *Penalties and Defences.*

The Act provides a maximum of ₦1,000 or imprisonment for a term not exceeding two years, or both.[42] A question that readily comes to mind is whether these penalties provide adequate deterrence against the offences covered by the Act. It is obvious that some of the offences are capable of endangering human life. Offences such as adulteration, sale of article of food with poisonous or harmful substances, sale of food unfit for human consumption, sale of injurious cosmetic or devices certainly expose the consumer to untold health hazards. The need for an upward review cannot, therefore, be over-emphasised. The limitation restricts the discretion of the court since a higher penalty cannot be imposed.[43]

A person charged with selling a product in contravention of the Act can prove that he sold the product in the same package and in same condition as it was when he bought it and that he could not with reasonable diligence have ascertained that the sale would be in contravention of the Act or regulations.[44] This provision implies lack of knowledge of the malpractice or breach. The defence would thus be available to a person

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40 S. 12.

41 S. 6.

42 S. 17(1).

43 See S. 17(1). of the Interpretation Act; Laws of the Federation Of Nigeria, 1990, Cap.192

44 S. 18(2).

who sells products in ignorance of any sharp practice perpetuated by the manufacturer.

To avail himself of this defence, the accused is required to give notice of his intention to do so at least ten days before the trial and at the same time disclose to the prosecution the name of the person from whom he bought the article and the date of the purchase thereof.[45] A necessary inference that may be drawn from this provision is that when such a disclosure is made, the prosecution can proceed against the disclosed offender. The practice adopted under a similar English provision is to take a third party proceedings against the actual offender. In Breed v British Drug Houses Ltd.[46] some pills bought by a medical doctor from a firm were found 25 percent deficient. It was shown that the firm did not manufacture the drugs but had obtained them from the defendants. A direct proceedings was taken against the defendants. Similarly, in Tonkin v Victor Valve Ltd.[47] deficient mock salmon cutlets were sold by the first respondent to a purchaser. An information was preferred against the second respondent under section 113 of the Food and Drugs Act 1955 (U.K.) being the person whose act or default caused the breach.

The foregoing defence, apart from saving an innocent person from unnecessary charges also ensures that somebody is held responsible for the breach. This is logical since invariably, every breach must be caused by the act or default of someone. This

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45. S. 18(2) This requirement is not a mere formality but a condition precedent to reliance on the defence. See Birkenhead and District Co-operative Society Ltd. v Roberts, [1970] / W.L.R. 1497

46 [1947] Z A II E.R. 613

47 [1962] 1 W.L.R. 339

point was emphasised by Lord Goddard, C.J. in Moore v Ray & Anor[48] where a licensed retailer of milk successfully proved that he was not responsible for the alleged deficiency. Condemning the dismissal of the information against him by the court of first instance, his Lordship stated:

> *"The justices in the present case found that the retailer did not add the water; but I do not know whether they appreciate that, unless he could prove that the suppliers were guilty of the contravention, he must be convicted; for he did, in fact, sell an article to the prejudice of the purchaser."*[49]

It is to be noted that the defence in section 18 (1) only relates to the offence of sale. This means that other offences in the Act such as advertisement and manufacture in prohibited circumstances are not covered. In effect, there is no defence for such offences. As regards the manufacturer, it may be argued that it is difficult to envisage a circumstance where a person accused of engaging in the manufacture of a prohibited article may point an accusing finger on somebody else. Once he is proved to be involved in such manufacture he cannot claim ignorance of the contravention. The exclusion of the defence in this case is therefore reasonable. In the case of advertising, it may be argued that the accused person may raise the defence that he is an advertising practitioner and that the advertisement was published in the course of business. But this argument may be countered by Article 6.10 of the Code of Advertisement Practice which enjoins every media house to clear every advertisement for food or cosmetic with the National Agency for Food and Drug Administration and Control before publishing it. So any advertising practitioner who publishes an offending advertisement may be charged along with the originator of the advertisement.

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48 [1951] 1 K.B. 98.

49 Ibid, at p. 100

It is pertinent to note that the word "sell" in the Food and Drugs Act is given a very wide meaning. The Act defines 'selling' to include offering for sale, exposing for sale and having in possession for sale or distribution. [50] The Interpretation Act[51] provides that 'to sell' includes to exchange and to barter and to offer or expose for sale. The definition in the Food and Drugs Act is wider than the latter because it extends to distribution. Since the latter Act only applies where no contrary provision is made, its application can be said to be excluded in this case. The definition in the Food and Drugs Act can be regarded as a purposeful definition as it leaves no room for technicalities.

A controversy may, however, arise where articles are distributed to consumers not by way of sale but as free samples. The Act does not make express provision on this issue. It is not certain whether such free gifts can be brought within the purview of the Act. The definition of ' selling' already considered includes "distribution". The word distribution is not defined by the Act. It is defined by the Chambers English Dictionary[52] as "the act or process of distributing". According to the Oxford Advanced Learners Dictionary of Current English,[53] to distribute means to give or sell things to a number of people.

These definitions show that the word "distribution" could cover products distributed to consumers other than by way of sale. It is, therefore, arguable that the word "selling" under the Act has a very wide scope and so can cover free gifts.

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50 S. 20.

51 Cap. 192, Laws of the Federation of Nigeria, 1990.

52 Catherine Schwarz, et al., Chambers English Dictionary, (Edinburgh: W & R. Chambers Ltd., 1990) p. 419

53 Hornby A.S., 5th ed. (New York: Oxford University Press 1995) p.338

Furthermore, as earlier noted, the word "include" in section 20 implies that the definition of selling is not intended to be exhaustive. The Food and Drugs Act deals with the health and safety of the consumer. It is, therefore, not unreasonable to presume that the intention is to prohibit the circulation (whether by sale or otherwise) of articles which do not comply with the statutory requirements.

3.2.4 *Limitation Period*

By section 17(3) of the Act, proceedings for offences shall not be commenced except within six months of the commission thereof. This provision which is akin to the limitation principle under the contract law is curious in the sense that it talks about period of commission of the offence. A strict adherence to this requirement may lead to practical difficulties. The question is whether time begins to run from the time of manufacture or from the time of sale. If the former represents the law, then offences relating to products which are not sold within six months from the date of manufacture cannot be prosecuted. To obviate the problem of time limitation, it is suggested that in the case of offences relating to manufacture, time should begin to run from the date of discovery of the offence.

It must be noted that once the period within which an action is to be commenced has been prescribed by statute, the courts are usually reluctant to entertain any action commenced after the expiration of the prescribed period. Thus in The Sterling Products (Nig) Ltd. & ors v C.O.P.[54] the applicants were charged before the magistrate under the Food and Drugs Act, for an offence alleged to have been committed in the month of may, 1976 On November 26, 1976, on the application of the prosecuting officer to withdraw the charge, the magistrate dismissed it under section 284 of the Criminal

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54 (1976) 7 CCHCJ

Procedure Law and stated that the dismissal was not on merit. On the same day, a fresh charge was preferred against the applicants by which time six months had elapsed. A "no case" submission was made on behalf of the applicants on the ground that the court had no jurisdiction having regard to the lapse of time. The court disregarded this and called on the applicants to enter their defence. Thereupon, the applicant applied to the High Court for order of prohibition and certiorari. The High Court granted the order quashing the ruling of the Magistrate Court that the applicant had a case to answer.

The above decision can be described as technical particularly as it was stated by the magistrate that the dismissal of the first charge was not on merit. The decision was, however in order since the fresh charge was only commenced after the expiration of the statutory period. It is suggested that a longer period be prescribed in order to accommodate cases which cannot be commenced within six months.

3.2.5 *Powers of the Minister*

A very important power conferred on the Minister[55] is the power to make regulations. This power is significant because most of the offences created by the Act are dependent on regulations to be made by the Minister. He can, by regulation, expand or restrict the scope or nature of offences under the Act. In fact, some of the offences may only be committed where no contrary regulations are made. For instance, the prohibition of sale or advertisement of the regulated products as treatment, cure or prevention of the diseases in the first schedule is subject to regulations to be made by the Minister.[56] The same applies to the prohibition of importation or exportation of drug specified in the

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55 Minister of Health. S. 20.

56 S. 3

second schedule.[57] Furthermore, no drug listed in the fourth or fifth schedule may be distributed as samples except as provided in the regulations.

Another power conferred on the Minister is the power to require information from persons engaged in the preparation, importation or sale of any food, drug, cosmetic or device. In particular, he may request the furnishing of particulars of the composition of a product to which the Act applies and the chemical formula of every ingredient thereof; he may also require particulars of any investigations carried out by or on behalf of and to the knowledge of the person carrying on the business, for the purpose of determining whether or not the product is injurious to or otherwise affects health and the results of any such investigations. Particulars of any investigations carried out for the purpose of determining the cumulative effect on the health of any person consuming the product in ordinary quantities may also be required.

In addition, the Minister or any person authorised by him in that behalf may order the manufacturer of any article to which the Act applies to furnish a declaration in the prescribed form that the article was manufactured in accordance with the provisions of the Act and the regulations.

The certificate of the Minister is required before any person may manufacture for sale any drug listed in the fourth schedule. In this case the Minister must certify the suitability of the premises and the process and conditions under which the manufacture is to be carried out.[58] Sale cannot be effected unless the certification of the Minister as to the safety of the batch from which the drug was taken is obtained by the prospective

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57 S. 4

58 S. 7(1)

seller.[59] The Minister may also, by regulation, prohibit the importation of any product which does not comply with any standard that may be specified in the regulations.[60]

In addition to the foregoing specific regulatory powers, section 16 confers on the Minister power to make regulations on all matters dealt with by the Act. Such matters include what constitutes the adulteration of any product ; the type and level of food additive or contaminant that may be present in any food offered for sale; standards of composition, potency, purity or quality of any product, method of manufacture, packaging or testing of products and analysis of any such product.

Extensive as the powers of the Minister under the Food and Drugs Act are, not much has been achieved by way of implementation. The greatest shortfall is the fact that 24 years after the commencement of the Act, none of the regulations made thereunder has been put into legislative form. All the regulations made under the Act are in draft form yet to be enacted as subsidiary legislation. This anomaly is explained on the ground that the Advisory Council, whose duty it is to approve the regulations is yet to be inaugurated.[61] It is obvious that this council can no longer be inaugurated because regulation making power is now conferred on the Governing Council of NAFDAC with the approval of the Minister.[62]

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59 S. 7(2)

60 S. 8(3)

61 Federal Ministry of Health.

62 S. 29, NAFDAC Decree. For a discussion on the relationship between the Food and Drug Acts and the NAFDAC Decree, See p.76-79 infra

3.2.6 *Powers of Inspecting Officers*

The practical implementation of the provisions of the Act falls on the inspecting officers. To effectively achieve this, wide powers are conferred by section 10. The powers include, power to:

(a) enter any premises in which any regulated product is manufactured, prepared, preserved, packaged or sold;

(b) examine any article in the premises;

(c) take a sample or specimen of any article;

(d) examine any books, documents and other records found on the premises which may contain any information relevant to the enforcement of the Act; and

(e) seize and detain for such time as may be necessary for the purpose of the Act any article by means of or in relation to which any provision of the Act or regulation has been contravened.

It is the duty of the owner or the person in charge of premises entered into by an inspecting officer pursuant to the Act and every person found therein, to give all reasonable assistance to him and to make available to him, all such information as he may reasonably require for the purpose of the Act. An article seized by an inspecting officer in pursuance of the Act may be submitted to an analyst for analysis or examination.[63]

Powers of inspecting officers extend to imported products. By section 13(1), an inspecting officer has the right to examine any customs entries of any food, drug or cosmetic imported for use in Nigeria and, for the purpose of analysis or examination,

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[63] S. 10(5); an analyst means any person as a food and drug analyst or as a drug analyst under S. 9 of the Act.

take samples of any such food, drug, or cosmetic while still in any customs shed or government ware house in Nigeria. Where samples are taken by an inspecting officer, the batch, from which they are taken shall not be released to the importer except on production of an analyst's certificate or report certifying compliance with the Act and regulations. This provision, like the power of the Minister with respect to declaration by manufacturers, ensures that inferior or substandard products do not find their way into the country.

This investigation reveals that inspection of imported products is shared with other agencies such as the Nigeria Ports Authority Plc; the Standards Organisation of Nigeria; the National Drug Law Enforcement Agency; the Customs and representatives of the Army and the Navy. In fact by the Ports and Related Matters Decree 1996,[64] the primary responsibility for the inspection of imports is now conferred on the Customs and Excise Department. Other agencies can only act if invited.[65]

3.3 National Agency for Food and Drug Administration and Control (NAFDAC) Decree

Like the Food and Drugs Act, the National Agency for Food and Drug Administration and Control Decree deals with the importation, exportation, manufacture, advertisement, sale and distribution of food, drugs, cosmetics and medical devices. But unlike the former, the Decree extends to bottled water and chemicals.[66] The Agency created by this Decree is a body corporate with perpetual succession and may sue or be

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64 No. 12

65 See also the preshipment (inspection of Imports) Decree No. 11, 1996

66 Sections 5&24(5)(a)

sued in its corporate name.[67]

3.3.1 *Functions of the Agency*

The agency is conferred with functions similar to those performed by the Food and Drugs Department of the Federal Ministry of Health and Social Services under the Food and Drugs Act. The functions conferred by the Decree are, however, more extensive and wider in scope than those conferred by the Act. For the purpose of comparison, it is necessary to set out these functions in full. As provided in section 5, the functions are to:

(a) regulate and control the importation, exportation, manufacture, advertisement, distribution, sale and use of food, drugs, cosmetics, medical device, bottled water and chemicals;

(b) conduct appropriate tests and ensure compliance with standard specifications designated and approved by the council for the effective control of the quality of food, drugs, cosmetics, medical device, bottled water, chemicals and their raw materials as well as their production process in factories and other establishments;

(c) undertake appropriate investigation into the production premises and raw materials for food, drugs, cosmetics, medical devices, bottled water, chemicals and establish relevant assurance system including certification of the production sites and of the regulated products;

(d) undertake inspection of imported food, drugs, cosmetics, medical devices, bottled water, chemicals and establish relevant quality assurance system, including

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[67] S. 1

certification of the production sites and of the regulated products;

(e) compile standard specifications and guidelines for the production, importation, exportation, sale and distribution of food, drugs, cosmetics, medical devices, bottled water, and chemicals;

(f) undertake the registration of food, drugs, cosmetics, medical devices, bottled water, and chemicals;[68]

(g) control the exportation and issue quality certification of food, drugs, cosmetics, medical devices, bottled water, and chemicals intended for export;

(h) establish and maintain relevant laboratories or other institutions in strategic areas of Nigeria as may be necessary for the performance of its functions under the Decree;

(i) pronounce on the quality and safety of food, drugs, cosmetics, medical devices, bottled water, and chemicals after appropriate analysis;

(j) undertake measures to ensure that the use of narcotic drugs and psychotropic substances are limited to medical and scientific purposes;

(k) grant authorisation for the import and export of narcotic drugs and psychotropic substances as well as other controlled substances;

(l) collaborate with the National Law Enforcement Agency in measures to eradicate drug abuse in Nigeria;

(m) advise Federal, State and Local Governments, the private sector and other interested bodies regarding the quality, safety and regulatory provisions on food, drugs, cosmetics, medical devices, bottled water, and chemicals;

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[68] This function has already been implemented by the Drugs and Related Products (Registration etc) Decree 1993; No. 19.

(n) undertake and co-ordinate research programmes on the storage, adulteration,[69] distribution and rational use of food, drugs, cosmetics, medical devices, bottled water, and chemicals;

(o) issue guidelines on, approve and monitor the advertisement of food, drugs, cosmetics, medical devices, bottled water, and chemicals;

(p) compile and publish relevant data resulting from the performance of the functions of the agency under the Decree or from other sources;

(q) sponsor such national and international conferences as it may consider appropriate;

(r) liaise with relevant establishments within and outside Nigeria in pursuance of its functions; and

(s) carry out such activities as are necessary or expedient for the performance of its functions under the Decree.

The above functions, but for the extension of regulated products to include bottled water and chemicals, are similar to the functions of the Minister, the inspecting officers, the Food and Drugs Analysts and the Advisory Council under the Food and Drugs Act.[70]

But despite some similarities of functions, the NAFDAC Decree contains some provisions which can be regarded as definite extensions. These include the provisions on narcotic and psychotropic substances, compilation and publication of relevant data, sponsorship of national and international conferences and registration of regulated products.

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[69] The inclusion of this term here is clearly inappropriate.

[70] S. 4-15 of the Act.

3.3.2 *The Governing Council*

The Governing Council is the executive arm of the agency. The 12-member council made up of professionals in food, drugs and related matters has a chairman required to be appointed by the President on the recommendation of the Minister.[71] The composition of the council reflects a desire to achieve a measure of co-operation amongst persons and authorities charged with the execution of consumer related matters. Included in the membership are:

(a) the Director-General of the Federal Ministry of Health and Social Services or his representative;

(b) the Director and Chief Executive of the National Institute for Pharmaceutical Research and Development or his representative;

(c) the Director-General of the Standards Organisation of Nigeria or his representative;

(d) the Chairman of the National Drug Law Enforcement Agency or his representative;

(e) the Chairman of the Pharmacists Council of Nigeria or his representative;

(f) one person to represent the Pharmaceutical group of the Manufacturers Association of Nigeria;

(g) the Director-General of the National Agency for Food and Drug Administration and Control (NAFDAC); and

(h) three other persons to represent public interest to be appointed by the Minister.

This representation that cuts across related authorities and agencies can be used to counter the argument that the proliferation of agencies in food, drugs and related

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[71] S. 2(1)

matters could lead to role-conflict.

Many functions are conferred on the council. Among others, the council:

(a) advises the Federal Government generally on the national policies on the control and quality specifications of the regulated products;

(b) designates, establishes and approves quality specifications in respect of the regulated products;

(c) establishes relevant guidelines and measures for quality control of regulated products in conformity with the agency's standard specifications;

(d) appoints, promotes and disciplines employees as necessary for the proper discharge of the functions of the agency; and

(e) encourages and promotes activities related to the process, standard specifications, guidelines, importation, sale and distribution of regulated products.

Other functions include, appointment of relevant committees, establishment of appropriate programmes for the quality, safety and rational use of regulated products; utilization and promotion of research, experiments, surveys and studies by public or private agencies, institutions and organisations and promotion of training programmes for the employees of the agency. The council may also carry out any other activity connected with its other functions.[72]

An active council, no doubt, would achieve a lot given the enormity of the above powers. In fact the council has recorded some achievements in the area of regulation making. So far, 14 regulations covering food, drugs, cosmetics and bottled water have

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[72] S.6

been made by the Council.

3.3.3 *Functions and Powers of the Minister*

Like the Food and Drugs Act, the National Agency for Food and Drugs Administration and Control Decree confers important functions and powers on the Minister. Like the former case, the Minister in the latter case means the Minister or Secretary charged with matters relating to health.[74]

The minister plays active role in the appointment of key officers of the agency. The chairman of the Governing Council is appointed by the President on the recommendation of the Minister.[75] Other members are appointed by the Minister on the recommendation of the body, if any, which they represent.[76] The Minister also participates in the removal of appointed members of the Governing Council. This he can do either following a recommendation of the Council or on his own accord.[77] In the latter case, he may remove a member where he is satisfied that it is not in the interest of the agency for the person to continue in office. Other areas to which the functions of the Minister extend include financial matters and regulations.[78] As regards the latter, section 29 provides that the Council may, with the approval of the Minister, make regulations:

(a) to prescribe the methodologies for private-section payments into the fund of the

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74 S. 30 NAFDAC Decree

75 S. 2(1)(a)

76 S. 2(2).

77 S. 3(2).

78 See Ss. 22&29 respectively.

agency;

(b) to prescribe the fees to be paid for services rendered by the agency; and

(c) generally for the purpose of carrying out or giving effect to the provisions of the Decree.

It is not clear from this provision whether the approval required should come before or after the regulations have been made. A literal interpretation of the opening phrase of the section is to the effect that approval shall be sought and obtained before the making of the regulations. In practice, the approval of the minister is sought after a regulation has been drafted by the council.

Furthermore, the Decree confers on the Minister some powers which would enable him to exercise some measure of control and supervision over the agency. Thus it is provided that the Council shall submit to the Minister, not later than 31st October each year, its programme of work and estimates of its income and expenditure for the following year.[79] In addition, the agency prepares and submits to the Minister, not later than June 30, in each year, a report of its activities during the immediately preceding year, and includes in such report a copy of its audited accounts for that year and the auditors report thereon.[80] The overriding authority of the Minister under the Decree is buttressed by the power to give directives of a general or special character to the agency relating to the performance of its functions under the Decree.[81]

It is obvious that a strict adherence to these requirements would compel the agency to keep within the limits of its powers. In particular, it will ensure that the funds

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79 S. 18.

80 S. 20.

81 S. 27.

of the agency are expended on the stated purposes. This research has revealed these legal requirements are observed in practice. This is commendable.

A question that readily comes to mind is how the Minister is to perform the dual and similar functions conferred on him by the Food and Drugs Act and the National Agency for Food and Drug Administration Control Decree respectively. The determination of this issue is crucial since under each law the Minister is required to perform the same function in conjunction with different officials. For instance, under the Food and drugs Act, the power to make regulations is exercisable on the advice of the Advisory Council while under the NAFDAC Decree, the Governing Council makes regulations on the approval of the Minister. These and other conflicts shall be considered in the next section.

3.4 Relationship Between the Food and Drugs Act And the NAFDAC Decree

As earlier pointed out, apart from the extension of the meaning of regulated products in the NAFDAC Decree, both the Food and Drugs Act and the NAFDAC Decree deal with the same subject matters. Surprisingly, the NAFDAC Decree which is later in time does not mention the former Act in any of its provisions. The only references are those contained in section 28 and these relate to the Food and Drugs Department of the Federal Ministry of Health and its employees. Section 28 (1) provides that on the commencement of the Decree, the Food and Drugs Administration and Control Department of the Federal Ministry of Health and Social Services shall cease to exist. The Department is dissolved by subsection (2) which provides that the provisions of the second Schedule to the Decree shall apply in relation to the employees of the Department It is necessary to examine the schedule to see to what extent, if any, it affects

the Food and Drug Act.

Section 1 of the Schedule provides that there shall be vested in the agency immediately on the commencement of the Decree, without further assurance, all assets, funds, resources and other movable or unmovable property which immediately before the commencement of the Decree were vested in the Food and Drugs Administration and Control Department of the Federal Ministry of Health and Social Services. By section 2, all rights, interests, obligations and liabilities of the Department existing immediately before the commencement of the Decree under any contract or instrument, or at law or equity apart from any contract or instrument, shall be assigned to and vested in the agency. This section also empowers the agency to sue or be sued for contracts entered into by the Department prior to the Decree. Similarly, any proceedings or cause of action pending or existing immediately before the commencement of the Decree by or against the Department in respect of any right, interest, obligation or liability may be commenced, continued or enforced by or against the agency as if the Decree had not been made. Section 4 of the Schedule is on the employees of the Department. Any person who immediately before the date of commencement of the Decree held office in the Department shall be deemed to have been transferred to the agency on terms and conditions not less favourable than those obtaining immediately before the commencement of the Decree.

It can be noticed from the foregoing that the references in the NAFDAC Decree only relate to the Food and Drugs Department (which administered the Food and Drugs Act prior to the Decree) as well as its employees. No mention is made of the Food and Drugs Act itself. It is not stated whether the two laws are to operate concurrently or whether the latter repeals or modifies the former. Such clarification would have served

a very useful purpose especially as conflicting or similar functions are in some respects conferred on the same officers or other functionaries under the two laws. Evidence of conferment of the same function on different authorities under each law also abounds. Some examples may suffice. Under sections 15 and 16 of the Food and Drugs Act the power of making regulations is exercisable by the Minister on the advice of the Advisory Council. But under sections 6 and 29 of the NAFDAC Decree, the power is exercisable by the Governing Council on the approval of the Minister. Some conflicts can also be noticed in the area of penalties. Section 25 of NAFDAC Decree stipulates a fine of ₦5,000 for the offence of obstruction of an officer of the Agency. In contrast, by the combined effect of sections 12 and 17 of the Food and Drugs Act this offence carries a penalty of ₦1,000. The absurdity of this disparity becomes glaring when it is realised, as earlier pointed out, that by section 28(2) of NAFDAC Decree officers who carried out different functions under the Food and Drugs Act are now deemed to have been transferred to the agency.

It may be observed that some of the changes apparently made by the NAFDAC Decree may be regarded as mere redesignation. For instance, section 24 (1) which deals with power to enter premises for the purpose of ensuring compliance with the Decree is, but for the phrase "officer of the Agency", a reproduction of section 10 of the Food and Drugs Act. The latter Act uses the phrase "inspecting officer" but the functions conferred by both laws are the same both in nature and in scope.

By way of summary, it can be said that silence on the relationship between these two laws creates unnecessary confusion and uncertainty. It may be noted that the Food and Drugs Act deals with substantive issues such as offences and penalties. The NAFDAC Decree is, more or less, administrative in context. In the main, it deals with

functions and powers of the agency and its functionaries. It effectively addresses the issue of probity of the officers by making commendable disciplinary provisions. But no offences are created. On this ground it can be argued that the Decree cannot stand alone since offenders cannot be charged under any of its provisions. It is therefore suggested that the two laws be merged since, as disclosed by their respective provisions, one complements the other.[82]

3.5 Consumer Protection Council Decree

The Consumer Protection Council is a body corporate which can sue and be sued in its corporate name.[83] Unlike other statutes which make indirect provisions on consumer protection, the Consumer Protection Council Decree sets out to protect the consumer against hazardous products.[84] The term "Consumer" is defined as an individual who purchases, uses, maintains or disposes of products or services.[85] The extension to persons who use or maintain products can be supported since it takes care of the restriction affecting actions in contract. So an ultimate consumer who is injured by a product can sue since he is covered by the provision. The phrase "hazardous product" is not defined. It can be assumed that it relates to products which are capable of causing injury to person. This assumption is buttressed by the fact that the function of the Council is exercisable where a consumer has suffered a loss, injury or damage as

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82 It is to be noted that in practice the NAFDAC administers all Drug Laws including Food and Drugs Act.

83 S. 1

84 See in particular, S. 2-13.

85 S. 32.

a result of the use of any product or service.[86]

Functions and Powers

The organs set up to carry out functions under the Decree are the Consumer Protection Council and the State Committees. As provided in section 2, the functions of the Council are to:

(a) provide speedy redress to consumers' complaints through negotiations, mediation and conciliations;

(b) seek ways and means of removing or eliminating from the markets hazardous products and causing offenders to replace such products with safer and more appropriate alternatives;

(c) publish from time to time, list of products whose consumption and sale have been banned, withdrawn, severally restricted or not approved by the Federal Government or foreign governments;

(d) cause an offending company, firm, trade association or individual to protect, compensate, provide relief and safeguards to injured consumer or communities from adverse effects of technologies that are inherently harmful, injurious, violent or highly hazardous;

(e) organise and undertake campaigns and other forms of activities as will lead to increased public consumer awareness;

(f) encourage trade, industry and professional associations to develop and enforce in their various fields quality standards designated to safeguard the interest of consumers;

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[86] See S. 2-6

(g) issue guidelines to manufacturers, importers, dealers and wholesalers in relation to their obligations under the Decree;

(h) encourage the formation of voluntary consumer groups or associations for consumer well being;

(i) ensure that consumers' interests receive due consideration at appropriate forum and to provide redress to obnoxious practices or the unscrupulous exploitation of consumers by companies, firms, trade associations or individuals;

(j) encourage the adoption of appropriate measures to ensure that products are safe for either intended or normal use; and

(k) perform such other functions as may be imposed on the Council pursuant to the Decree.

In the exercise of its functions, the Council has power to;

(a) apply to court to prevent the circulation of any product which constitutes an imminent public hazard;

(b) compel manufacturers to certify that all safety standards are met by their products;

(c) cause as it deems necessary, quality tests to be conducted on consumer products;

(d) demand production of label showing date and place of manufacture of commodity as well as certification of compliance;

(e) compel a manufacture, dealer and service company where appropriate, to give public notice of any health hazards inherent in their products;

(f) ban the sale, distribution and advertisement of products which do not comply

with safety or health regulations[87]

By section 5, the State Committees shall, subject to the control of the Council;

(a) receive inquiry into the causes and circumstances of injury, loss or damage suffered or caused by a company, firm, trade association or individual;

(b) negotiate with the parties concerned and endeavour to bring about a settlement; and

(c) where appropriate, recommend to the Council the payment of compensation by the offending person to the injured consumer.

3.5.1 *Offences.*

Section 9(1) imposes a duty on a manufacturer or distributor of a product, on becoming aware of any unforeseen hazard, to notify the public and cause the product to be withdrawn from the market. Failure to do this attracts a penalty of ₦50,000 fine or imprisonment for five years or both.

By section 11, any person who issues or aids in issuing any wrong[88] advertisement about a consumer item is guilty of an offence and liable on conviction to a fine of ₦50,000 or to imprisonment for five years or both.

Failure to attend and testify before the Council or the State Committee or to answer any lawful enquiry is also an offence which attracts a penalty of ₦10,000 or five-year imprisonment.[89]

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87 S. 3.

88 The meaning of this term in this context is uncertain. Perhaps it relates to false advertisement.

89 S. 18.

Supply of false information is equally an offence attracting a penalty of ₦10,000 or imprisonment for three years.[90] Any person who violates an order of the Council or State Committee is guilty of an offence and liable on conviction to ₦10,000 fine or imprisonment for three years.[91]

The Decree does not provide specific defences for the offences created. But it appears from the text of the provisions that mens rea[92] is a relevant factor. For instance, a literal interpretation of section 9(1) is to the effect that an accused person can raise ignorance of the hazard as a defence. Similarly, a publisher of a false advertisement can exonerate himself by disclosing the name of the person who requested him to put up the advertisement. This can be inferred from section 20. While the existence of mens rea may be supported as regards the latter, it cannot as regards the former. A strict liability is to be preferred in such cases.

An obvious fact about this Decree is that most of the functions conferred on the Council and the State Committees are already being performed by some existing agencies. For instance, the Standards Organisation of Nigeria (SON) takes care of consumer complaints through negotiations, mediation and conciliation.[93] This agency also ensures compliance with quality standards through certification of products and

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90 S. 19.

91 S. 24.

92 Guilty mind; an evil intention, or knowledge of wrongfulness of the act. - Roger bird, Osborn's Concise Law Dictionary, 7th ed. (London: Sweet & Maxwell, 1983) p. 218.

93 Even though this is not a direct function under the Act it can be justified on s. 4(1)(c). See also Annual Reports of the organisation for list of consumer complaints handled each year.

routine factory inspections.[94] Both the NAFDAC and SON ensure the elimination of hazardous products from the market through the issuance of public alerts and closure of offending factories.[95] Furthermore, by section 17 of the Standards Organisation of Nigeria Act, officers of the organisation have power to make test purchases of products with a view to determining compliance with relevant standards.

Besides, some provisions in the Consumer Protection Council Decree are rather unrealistic. For instance it is not certain how the Council can compel an offending company to replace hazardous products with safer ones.[96] The same applies to the provision that requires the Council to compel manufacturers to give public notice of any health hazards inherent in their products.[97] The meaning of public notice in this regard is uncertain. Does it refer to warnings on the product labels or in the media? Above all, it can be argued that as presently constituted,[98] the Council cannot effectively carry out the functions conferred on it by the Decree. A case in point is the power to conduct quality tests on consumer products. A Council composed of persons who are not

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94 S. 4(1)(b)

95 See S. 5(i) NAFDAC: S. 4(1)(c) SON Act. See also Public alert on a consignment of unwholesome fish - The Guardian, Friday, March 18, 1994, p. 4; public alert on the use of poisonous chemicals in bread baking - Daily Champion, Monday, January 15, 1996, p. 16; closure of Bentex International Co. Ltd., Daily Champion, Wednesday, August 9, 1995, p. 12.

96 S. 2(b).

97 S. 3(e).

98 The Council is composed of a chairman, a person representing each State of the Federation and four persons representing the four state Federal Ministries. See S. 1(2).

necessarily professionals cannot carry out this function.[99] This contrasts with the position in some other existing agencies such as SON and NAFDAC where almost all the senior staff are experts in product matters.

In view of the foregoing, a possible argument is that the Consumer Protection Council is an unnecessary duplication. This argument can be supported by the fact that there already exist numerous statutory enactments for the protection of the consumer. What is, therefore, needed is an affective enforcement machinery and not a proliferation of agencies. But a counter argument is that many of the existing agencies are professional in character and are saddled with a lot of scientific works such as prescription of standards and analysis of suspected fake and sub-standard products. An agency solely concerned with practical implementation of consumer matters is, therefore, desirable.

So far, the activities of some State Committees set up under the Consumer Protection Council Decree tend to confirm the last argument. Under the wide powers conferred by section 5(a), the committees can veer into any area of consumer protection. For instance, the Enugu State Consumer Committee has, since inception, been playing active role in matters such as price control, restrictive trade practices and weights and measures malpractices. It is arguable that an agency such as the SON or NAFDAC engaged in routine laboratory analysis of products may not be in a position to carry out these functions which need constant surveillance and visits to markets and factories. It can, therefore, be argued that with proper co-operation, the apparent proliferation may not constitute much problems.

Lagos State is yet to set up a consumer protection committee as required by the law. It is recommended that action be taken in this regard to complement the efforts of other consumer protection agencies.

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[99] See S. 1(2); Cf. S. 15; also S. 22 and 23.

3.6 Trade Malpractices (Miscellaneous Offences) Decree

The Trade Malpractices, (Miscellaneous Offences) Decree deals with deceptive practices. By section 1(1) (a), any person who labels, packages, sells, offers for sale or advertises any product in a manner that is false or misleading or is likely to create a wrong impression as to its quality, character, brand name, value, composition, merit or safety, commits an offence. Advertisement or invitation for subscription for products that do not exist is also an offence.[100] In addition, the Decree prohibits various practices relating to weights and measures. Such practices include, use of false weighing or measuring instruments;[101] refusal to weigh a product intended for sale;[102] alteration of instrument;[103] delivery of a quantity less than that bargained for;[104] and use of instrument not stamped or marked as required by law.[105]

The justification for these latter provisions is not clear as they are already covered by the Weights and Measures Act.[106] However, section 1(1) of the Decree makes it clear that the provisions of the Decree apply notwithstanding anything contrary in any law. This means that the Decree prevails over any other law. But a conflict is created by the penalty provisions. While similar offences under the Weights and the Measures Act attract a maximum fine of ₦500 in the case of an individual and ₦50,000 in the case of a body corporate; a fine of ₦50,000 is imposed by the Decree. The penalty to be

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100 S. 1(1)(h).

101 S. 1(1)(b).

102 S. 1(1)(d).

103 S. 1(1)(e).

104 S. 1(1)(f).

105 S. 1(1)(c).

106 Cap. 469; Laws of the Federation of Nigeria, 1990.

imposed in each case, therefore, depends on the law under which an offender is charged. This disparity cannot be supported. In fact, the Trade Malpractices Decree is a mere surplusage. Section 1(1) (a) and (h) are covered by the Food and Drugs Act while the provisions on Weights and Measures are covered by the Weights and Measures Act. An upward review of the penalties imposed by the latter Act is however, necessary to make them proportionate to the offences created.

3.7 The Criminal Code

The Criminal Code Act is yet another statute that makes provisions on consumer protection. Section 243(1) provides that any person who sells as food or drink, or has in his possession with intent to sell it as food or drink, any article which has been rendered noxious, or is in a state unfit for food or drink, knowing or having reason to believe that the same is noxious or unfit for food or drink is guilty of a misdemeanour, and is liable to imprisonment for one year. It is further provided that any person who adulterates any article of food or drink with an intent to sell it is guilty of a misdemeanour, and is liable to imprisonment for one year.[107] By section 244, a dealing in diseased meat is an offence punishable with two years imprisonment. Section 248 prohibits the manufacture or sale of matches made of white phosphorus. A fine of twenty naira is stipulated for this offence.

It can be noticed from the above provisions that the Criminal Code Act duplicates some of the existing statutes already discussed particularly the Food and Drugs Act. This will invariably lead to problem of enforcement. It is suggested that the above provisions be expunged from the Criminal Code since they are adequately covered by other

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[107] S. 243(2).

consumer protection laws.

3.8 Summary

It is seen from the foregoing discourse that only selected products are regulated by the law. As already noted, the scope of the products covered by each law can be gathered from its provisions, The Trade Malpractices (Miscellaneous Offences) Decree and the Criminal Code cover what can appropriately be described as consumer products. With the exception of "chemicals" and "medical devices", the Food and Drugs Act and the National Agency for Food and Drug Administration and Control Decree also cover consumer products. The Consumer Protection Council Decree is more general in context. It prohibits the circulation of "hazardous products". As already explained, this phrase is wide enough to cover any product that is capable of causing injury to life or property.

It is seem from this chapter that the law makes adequate provisions on the control of regulated products. The main problem is that of implementation. Most of the provisions of the Food and Drugs Act can only derive efficacy from regulations to be made by the Minister. As already noted no regulations have been made under this Act and so the affected provisions have remained redundant.

Furthermore, implementation of the laws under consideration is rather unco-ordinated. The result of our field survey is to the effect that weak implementation is a major reason for the low level of consumer protection in Nigeria.[108]

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[108] See chapter nine.

CHAPTER FOUR

LEGAL RESTRICTIONS ON THE MANUFACTURE, SALE AND ADVERTISEMENT OF DRUGS

4.1 Introduction

To preserve the health of the nation, there is need for a strict control of the manufacture, sale and advertisement of drugs. This is because drugs are special products which could save or endanger the life of the consumer depending on how they are used. In realisation of this basic fact, governments all over the world usually put in place some degree of control over dealings in drugs[1].

As we have seen in the last chapter, drug is controlled alongside other products by some statutes. This chapter examines the laws which impose further restrictions on dealings in drugs. These laws are the Counterfeit and Fake Drugs (Miscellaneous Provisions) Act 1989; the Drug and Related Products (Registration etc.) Decree 1993; the National Drug Formulary and Essential Drug List Act 1989; the Pharmacists Council of Nigeria Decree 1992; the Dangerous Drugs Act 1935; and the National Drug Law Enforcement Agency Act 1989.

4.2 The Counterfeit and Fake Drugs (Miscellaneous Provisions) Act

4.2.1 *Offences*

Sections 1 and 2 deal with offences under the Act. While section 1 deals with dealings in prohibited drugs, section 2 deals with dealings in genuine drugs in prohibited places. Section 1 makes it an offence to produce, import, manufacture, sell, distribute,

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1 See for instance, the Medicines Act 1968 (U.K): The Pharmacy and Poisons Act 1933 (U.K) as amended by the Pharmacy and Medicines Act 1941.

be in possession of, or display for the purpose of sale, any counterfeit, adulterated, banned, fake, sub-standard or expired drug in any form whatsoever,[2] By section 2 any person who hawks or sells or displays for the purpose of sale, any drug or poison whatsoever in any market, kiosk, means of transportation or in any other place not duly licensed or registered for the purpose of sale and distribution of drugs or poison shall be guilty of an offence and shall be punished accordingly.

From these provisions, it is seen that the Act covers a wide range of offences. Besides sale, manufacture and distribution, merely being in possession of the prohibited drug is an offence. To display for the purpose of sale is equally an offence. In addition, the scope of the products covered is now enlarged. The Act which hitherto covered only counterfeit, adulterated, banned or fake drugs now covers, in addition, sub-standard or expired drugs.[3] The aim, it is assumed, is to cover the field and ensure that no offender is let off the hook on technical grounds.

This research, however, reveals that these provisions are not observed by drug dealers. In particular, sale of drugs in prohibited places still persists despite these legal restrictions. The greatest offence in this regard is with respect to sale in market places. In the course of this research nine markets were randomly visited in Lagos State. These were Oshodi, Idumota, Ojuwoye, Awolowo, Balogun, Ipedu, Mile 12, Ojota and Alade. The survey shows that sale of drugs takes place in all of them except Alade market. The

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2 See S. 10 for the meanings of fake or adulterated drugs. Other terms, namely, counterfeit, banned, sub-standard and expired are not defined. Perhaps the omission can be explained on the ground that these terms are self-explanatory and so are intended to bear their ordinary dictionary meanings.

3 See the Counterfeit and Fake Drugs (Misc provisions) (Amendment) Decree No. 99, 1992. S.2.

effect is that this law is not observed; an evidence of weak enforcement system.

4.2.2 *Penalties*

The penalty provisions have received an upward review. Fixed at a maximum of ₦2,000 or imprisonment for a term not exceeding two years or both under the repealed 1988 Decree,[4] penalty for the offence of dealing in drugs contrary to the Act is now ₦500,000 or an imprisonment for a term of between five and fifteen years.[5] In the case of offences relating to sale in prohibited places, the penalty is now ₦5,000 or imprisonment for a term not less than two years or both[6] as against the sum of ₦1,000 or imprisonment for a term not exceeding one year fixed by the 1988 Decree.[7] Also, by section 9A[8] of the Act, the penalty for the offence of obstruction of a member of the Task Force in the execution of his duties is ₦50,000. No penalty was stipulated for this offence under previous laws.

The upward review can be said to demonstrate the seriousness with which the government views drug offences. It is to be supported in view of the adverse consequences which fake and counterfeit drugs could cause. It is, however, doubtful whether the increased penalties have achieved the desired result. The Counterfeit and

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4 No. 21; S. 2 (1) (a).

5 Cap 73; S. 3(1) (a)

6 Ibid., S. 3 (1) (b).

7 No. 2; S. 2(1) (b).

8 Introduced by the Counterfeit and Fake Drugs (Miscellaneous Provisions)(Amendment) Decree 1992, No. 99.

Fake Drugs (Miscellaneous Provisions) Act came into force on July 15, 1988,[9] but this research shows that some prohibited drugs still circulate in this country.[10]

Trial of Offences

Trial of offences under the Act are conferred on the Special Tribunal.[11] Prosecutions are required to be instituted by the Attorney-General of the Federation or such officer in the Federal Ministry of Justice as he may authorise so to do. In addition, he may authorise the Attorney-General of any State of the Federation or any officer in the Ministry of Justice of that State to undertake the prosecution. Also, if the tribunal so directs or if contingencies so require, any other legal practitioner in Nigeria may undertake the prosecution.[12]

It is not clear why prosecution should be centred on the Attorney- General of the Federation or persons delegated by him. It would have been more expeditious to allow State Attorneys-General to prosecute cases arising within their jurisdictions.

The bureaucracy involved in this arrangement has been taken care of by a fiat granted to NAFDAC in 1997 by former Federal Attorney-General, late Chief Michael Agbamuche. By this fiat, the agency can now prosecute offences relating to any regulated product through its lawyers or private legal practitioners. The latter option is adopted by the agency.[13]

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9 S. 11(2).

10 See research findings; pp. 97&98 infra.

11 S. 4.

12 S. 4 (A).

13 NAFDAC Office, Federal Secretariat, Lagos.

The conferment of power of prosecution on NAFDAC can be supported since it will enable the agency to prosecute its cases expeditiously without having to wait for authorisation. The involvement of private legal practitioners can, however, be criticised as an unnecessary waste of funds. Apart from this, unnecessary delay may occur as private legal practitioners have other cases to attend to whereas staff of the agency will be expected to give their whole time and attention to the cases and thereby expedite matters. The agency should increase the staff strength of its legal unit to make it self-sufficient.

4.2.4 *Implementation by the Task Forces*

Task Forces are set up both at Federal and State levels to carry out the provisions of the Act. At the Federal level, the Task Force is composed as follows:

(a) a chairman who shall be an officer of the Federal Ministry of Health not below the rank of Assistant Director;

(b) two officers, one of whom shall be a military officer not below the rank of Lieutenant-Colonel and the other, a member of the Nigeria Police Force not below the rank of Chief Superintendent of Police;

(c) two inspectors not below the rank of Principal Pharmacist to be appointed by the Pharmacists Council of Nigeria;

(d) two inspection officers not below the rank of Principal Scientific Officer designated under section 9(1)(c) of the Food and Drugs Act; and

(e) other inspectors co-opted by the Federal Task Force.

It can be seen from the composition that persons knowledgeable in drug matters are members. The inclusion of a military and police officer can be justified on security

grounds in view of the nature of duties assigned to the Task Force. The Federal Task Force, currently headed by Mrs A Maduekwe, a senior staff of NAFDAC and a pharmacist, has all categories of persons as specified by the law and, in addition, a legal adviser who is also a staff of NAFDAC.

Each State Task Force is composed of :

(a) a chairman who shall be a military officer not below the rank of a major;

(b) three officers one of whom shall be a member of the Nigeria Police Force and the two remaining officers to be appointed by the Minister;

(c) an inspector appointed by the Pharmacists Council of Nigeria; and

(d) an inspecting officer designated under section 9(1) (c) of the Food and Drugs Act.

The Lagos State Task Force is composed of Lt. Col Budaye, a pharmacist and military officer as chairman; one police officer and other members as stipulated by the above provisions. The Task Force works in conjunction with the Inspectorate Division of the State Ministry of Health. Members convene when necessary and carry out their functions in an ad hoc manner. They are not full-time staff of the Ministry but are drawn from different sectors which they represent.[14]

4.2.5 *Functions of the Task Forces*

The Federal Task Force which was introduced by Decree Number 17 of 1989[15] is charged with overall responsibility of enforcing the provisions of the Act. Its

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[14] Lagos State Ministry of Health.

[15] Now cap . 173, Laws of the Federation of Nigeria 1990.

functions which are stated in section 6 include;

(a) co-ordinating the activities of the State Task Forces;

(b) directing and monitoring the activities of the State Task Forces;

(c) paying unscheduled visits to all ports of entry and border posts;

(d) entering at any reasonable time, (if need be by force) any premises in which there is reason to believe that the provisions of the Act are being contravened and examining any article found therein;

(e) taking sample or specimen of any article, and opening and examining, while on the premises, any container or package;

(f) examining any books, documents or records found on the premises, which are reasonably believed to contain any information relevant to the enforcement of the Act and causing copies to be made thereof or extracts made therefrom; and

(g) seizing any drug or poison which is counterfeit, adulterated, banned or fake.

In addition, the Federal Task Force has power to seal up any premises used or being used in connection with any offence under the Act until such time as appropriate action is taken.

The State Task Forces are empowered to;

(a) seize any drug or poison which is displayed for the purpose of sale in any premises not duly licensed, or registered for that purpose;

(b) enter any premises in which there is reason to believe that the provisions of the Act are being contravened and examine any article found therein;

(c) take sample or specimen of any article and opening and examining, while on the premises, any container or package;

(d) examine any books, documents or records found on the premises which are

reasonably believed to contain any information relevant to the enforcement of the Act and causing copies to be made thereof or extracts made therefrom; and

(e) seize any drug or poison which is counterfeit, adulterated, banned or fake.[16]

The State Task Forces also have power to seal up any premises used or being used in connection with any offence under the Act until appropriate action is taken.

From the foregoing, it can be noticed that but for paragraphs (a),(b) and (c) of section 6(1), the functions of the Federal and State Task forces are almost the same. The only difference is that of jurisdiction. The jurisdiction of the Federal Task Force extends throughout the Federation while the State Task Forces can only act within their respective States.

No doubt, the functions of the Federal and State Task Forces are wide and all-embracing. In particular, the power to enter and take samples and specimen from any premises in which an offence under the Act is suspected to be committed makes it possible for the Task Forces to get at the source of the illegal business.

So far, the Task Forces have recorded some achievements in the control of counterfeit and fake drugs. For instance, the Federal Task Force has in the last five years, seized counterfeit and sub-standard drugs worth ₦3,505m (three thousand, five hundred and five million Naira). Between March 1997 and March 1998, 50 offenders were arrested. Unscheduled visits are also paid to markets and other places suspected as outlets for illegal drugs.[17]

The foregoing notwithstanding, the Task Forces are yet to record much successes in the area of prosecution of drug offenders. A visit to the office of the Federal Task

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16 S. 8(1).

17 NAFDAC Office, Lagos.

Force, Lagos, discloses basins and other containers of drugs of all types (including ethical drugs)recovered from hawkers. A member of the Task Force explains that on sighting members of the unit, hawkers normally flee, abandoning their wares. This makes it impossible for many of them to be prosecuted. Only 16 cases have been prosecuted by the Federal Task Force since inception[18]

This research has also revealed that fake and substandard products still circulate in the country. Table 4.2.1 represents the responses of respondents to the enquiry on the existence of fake and substandard products in Nigeria.

Table 4.2.1: Have you ever bought any fake or substandard product?

	Frequency	**Percentage**
(a) Yes	386	64.0
(b) No	217	36.0
TOTAL	*603*	*100.00*

The above table shows that out of the 603 valid responses received, 386 or 64.0 percent indicated that they had bought fake products; 217 or 36.0 per cent indicated that they had never bought. This confirms the proposition that fake and substandard products still circulate in the country.

To determine the particular products that can be said to be fake or substandard, respondents were further required to indicate the products covered by their responses. The table below shows the result of this enquiry.

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18 NAFDAC Office, Lagos.

Table 4.2.2: Please indicate the products

	Frequency	Percentage
Drugs	216	53.9
Food Items	99	24.7
Cosmetics	73	18.2
Others	13	3.2
TOTAL	*401*	*100.00*

It is seen from the above table that out of 401 respondents interviewed, 216 or 53.9 percent indicated that they had bought fake or sub-standard drugs. This means that drugs probably top the list of fake products in this country. The implication is that the task forces are yet to make appreciable impact in the task of eradication of fake drugs in Nigeria.

4.3 Methods of Detecting Counterfeit, Adulterated and Fake Drugs

A great problem facing an average consumer is how to detect the genuineness of the drug he buys. In some cases, fake and adulterated drugs may present striking resemblance with genuine brands to the extent that a most cautious consumer may be deceived. In the light of this, it is necessary to examine the modes of detecting drugs that are not genuine. Some suggestions have been proffered by some experts.

Osibo[19] writes that if the label or package of a drug does not contain information such as batch numbers, name or address of the manufacturer, the drug should be shunned because if the need arises for its production history, the manufacturer cannot be traced. Such an omission is a clear evidence of the doubtful integrity of the manufacturer. The

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19 Osibo D., Spurious Drugs: Reading Between the Lines. (Lagos: Lanphram Laboratories and Scientific Service Ltd; 1990) p. 5-24.

learned author further advises that any discrepancy in the label should put the consumer on his enquiry. For instance, if the drug is in tablet form and the word "Capsule" is used on the label, the consumer should not purchase it as the discrepancy portrays the faker's ignorance. The use of a name closely resembling that of an existing drug is given as evidence of "pass-off"; for example, the use of the word"septrim" in place of the word "septrin" or "Bedylin" for Benylin". Osibo further observes that a manufacturer of a genuine drug will not choose a name so closely resembling that of an existing one if there is no fraudulent intention.

Obi and Okoro observe that the packaging of fake drugs may be poor and of low quality. The pack may not close firmly and may allow contents to slip off. According to the authors, colour finishes can easily give away fake products. In liquid preparation for example ,colour could be darker or lighter than normal but almost never consistent or the same as the genuine brand. Fake capsules may have the same colour as the genuine brand but usually do not have the special prints seen on genuine brands. Fake capsules may be filled with inactive substances such as starch, talcum powder or very low percentage of the active ingredients. The authors observe that genuine drugs have their batch numbers and expiry dates printed on the packets and\or labels. The use of ordinary ink pad and stamp is a common feature; fake and adulterated drugs are usually stamped with long shelf-lives. Other modes identified by the authors include, taste, nature of packs (example, blister packs), texture as well as inadequate, unprofessional, inconsistent or misleading information on the label and inserts. The authors warn that strange names and addresses should arouse suspicion.[20]

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[20] Obi, C.C. and Okoro, R., Current Guide to Good Pharmaceutical Whole-Saling in Nigeria, (Lagos:

(continued...)

"Words of Advice" accompanying the advertisement of the West African Drugs (WAD) products may also be stated. The advice is as follows:

> *"First, take a critical look at the pack. If the drug is genuine, it should have tamper-evident pack. Second, find out who is behind it. Reputable companies usually don't compromise quality. Last, ensure that the manufacturers and distributors have a long standing reputation for international standards and high quality."*

From the foregoing illustrations, it can be seen that the consumer has a very important role to play in the war against fake and adulterated drugs. The crux of the above suggestions is that the consumer should safe-guard his interest by being very diligent. He must conduct visual and physical examinations before making a purchase and report any suspected case of malpractice to the relevant authority. The authorities on their part should be above board. As stated by Osibo, the inspectors and other public servants including other professionals should think of the society first, profession second and self last.[21]

4.4 The Pharmacists Council of Nigeria Decree and the State Pharmacy Laws

The Pharmacists Council of Nigeria Decree deals with the control of the pharmacy profession. An examination of this Decree is necessary as members of the profession play a very important role in the manufacture, sale and distribution of drugs.[22]

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21 Osibo, op . cit. p.24

22 Registered pharmacists are the only persons that have the authority to mix and compound drugs and poisons. S. 14 (3).

The Decree which repealed and replaced the pharmacists Act, 1964[23] is supplemented by the Poisons and Pharmacy Laws of various States.[24]

4.4.1 *Functions of the Pharmacists Council*

The pharmacists Council of Nigeria is charged with the functions of:

(a) determining the standards of knowledge and skill to be attained by persons seeking to become registered members of the pharmacy profession and reviewing those standards from time to time as circumstance may require;

(b) securing, in accordance with the provisions of the Decree, the establishment and maintenance of registers of persons entitled to practice as members of the profession and the publication from time to time, of lists of those persons;

(c) reviewing and preparing from time to time, a statement as to the Code of Conduct which the Council considers desirable for the practice of the pharmacy profession;

(d) regulating and controlling the practice of the profession in all its aspects and ramifications; and

(e) performing such other functions as may be required of the Council under the Decree.

The above functions, apart from the provisions relating to Code of conduct, are similar to the functions of the dissolved Pharmacists Board of Nigeria. The 1992 Decree achieves a degree of continuity. By section 26, everything done under the previous laws

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[23] Cap 357, Laws of the Federation of Nigeria, 1990.

[24] See for instance , Poison and Pharmacy Laws, Caps. 118, 101 and 145 of Delta, Lagos and Anambra States respectively.

remains valid. Such matters include registration of members; approval of institutions as well as regulations. So far 8,110 (eight thousand, one hundred and ten) pharmacists have been registered by the Council.[25] Seven institutions have also been approved.[26]

4.4.2 *Persons Authorized to sell Drugs and Poisons*

By the combined provisions of the Pharmacists Council of Nigeria Decree and the Poisons and Pharmacy Laws, the following persons are authorised to sell drugs and poisons:

(a) a registered pharmacist;

(b) a holder of valid licence to import and sell part iv poison only;

(c) a holder of patent and proprietary medicine licence;[27]

(d) a body corporate whose business includes the sale and dispensing of drugs under the following conditions -

(i) the superintendent in charge of the premises must be a registered pharmacist;

(ii) the sale and dispensing of drugs and poison must be undertaken by the superintendent; and

(iii) the mixing and compounding must be done on behalf of the body corporate by the superintendent who must be a registered pharmacist.[28]

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25 This number represents the figure as at April 16,1988.

26 These are Faculties of Pharmacy, OAU, Ile -Ife; A.B.U. Zaria; UNN, Nsukka; University of Benin, Benin-City, University of Lagos; University of Ibadan, Ibadan; and University of Jos, Jos.

27 Such a person can only sell patent and proprietary medicine.

28 See Poison and Pharmacy law, Cap. 145, S.8; (continued...)

Section 14(3) of the Pharmacists Council of Nigeria Decree authorises every fully registered pharmacist[29] to import, mix, compound, prepare, dispense, sell and distribute drugs and poisons. It follows that any person not falling within any of the above groups cannot deal in drugs.

4.4.3 *Sale of Poisons*

Restrictions on sale of poisons were dealt with by the Poisons and Pharmacy Act, 1958.[30] The matter is now governed by State Laws.[31]

Each of the pharmacy laws enjoins every selling dispenser or chemist to keep "The Disposal of Poisons Book".[32] It is further provided that no selling dispenser or chemist shall sell or deliver any poison included in Part 1 of the first schedule to any person unless that person is known to him or is introduced by a person known to him as a person to whom poison could properly be sold. The seller must satisfy himself that the poison is required for the stated purpose and the purchaser must append his signature on the entry.[33] Further more, every container of any poison included in Parts 1 and 11 of the first schedule must be distinctively labelled and marked "poison".[34]

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[28] (...continued)
Pharmacists Council of Nigeria Decree, S. 14(3). See also Obi and Okoro, op .cit., p.11.

[29] See S. 10-12 for qualifications for registration.

[30] Cap.152, Laws of the Federation 1958

[31] See Pharmacy Laws, Caps. 118;101 and 145 of Delta, Lagos and Anambra States respectively.

[32] S.10, Caps 145 & 118.

[33] Ibid., S. 13(2).

[34] Ibid., S. 13(3).

Restrictions are also imposed on sale of poisons contained in Part 111. The poisons under this part include, all antibiotics, insulin and all compounds of arsenic, mercury and bismuth which are intended for administration by injection under the skin. For a sale of any poison in this category to be lawful, it must be effected on an order signed by a registered medical practitioner, registered or licensed dentist, or a qualified veterinary surgeon. The prescription must contain the name and address of the prescriber, name of the patient; the total quantity to be supplied and the dose to be taken. The prescription must not be dispensed more than once unless so directed.[35]

Similar restrictions are imposed on sale of Parts IV and V poisons. Poisons in this group include, izal, hydraulic acid, zinc chloride, medicines for the treatment of animals and preparations for the dyeing of the hair. In addition to other laid down conditions, such drugs must contain cautionary warnings.[36]

It is required that sale of poisons and other prescription drugs shall be "under the direct personal control and management of a superintendent who is a selling dispenser or a chemist".[37]

In the Pharmacists Board of Nigeria v. Adebesin,[38] the Supreme Court held that for a control to be meaningful and effective, it must be continuous. The respondent in that case had applied for renewal of registration of a pharmaceutical premises which was purportedly under the control of another registered pharmacist. The Board objected on

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35 Ibid., S. 15. See the section for other conditions.

36 Ibid., Part 5.

37 S. 20. This section applies specifically to bodies corporate but is implied in all cases of sale of poisons.

38 (1978) 5 S.C.43

the ground that the latter had earlier applied for registration of another premises. The Supreme Court held in favour of the Board.

As the law stands, registration of more than one pharmaceutical premises by an applicant is not an offence. The only requirement is that there must be a registered pharmacist in direct personal control of each premises.

This research has revealed that some pharmacists do not observe this requirement. Table 4.4.1 shows the result of our field survey.

Table 4.4.1: Availability of Pharmacist in Direct Personal Control

	Frequency	Percentage
Available	36	73.5
Not Available	13	26.5
TOTAL	*49*	*100.0*

The above table shows that out the 49 pharmacy shops visited 36 or 73.5 percent had pharmacists in direct personal control while 13 or 26.5 percent had no Pharmacists in control. This means that the legal requirement in this regard is being contravened by some pharmacists.

All the attendants in the pharmacy shops without pharmacists claimed that the controlling pharmacists were not on seat. This claim is untenable because the legal requirement in this regard does not admit of any exception. The effect of the requirement is that the shop should be closed any time the pharmacist is not available. This requirement is reasonable in view of the dangers inherent in wrong dispensation of prescription drugs which is an integral part of the pharmacist's business.

As noted above only registered pharmacists are allowed to sell prescription drugs. But for the sale to be lawful, it must be effected on an order signed by a registered medical practitioner, registered or licensed dentist, or a qualified veterinary surgeon. The degree of compliance with this requirement was investigated in the course of this survey.

The table below shows the result of this enquiry.

Table 4.4.2; Mode of Sale

	Frequency	Percentage
By prescription	2	4.1
Without Prescription	47	95.9
TOTAL	*49*	*100.0*

The above table shows that out of 49 pharmacy shops visited, only 2 or 4.1 percent sell by prescription while 47 or 95.9 percent sell without prescription .This means that only an insignificant number observes this legal restriction.

Many pharmacists found selling without prescription blamed the anomaly on the mode of medical practice in Nigeria. They allege that contrary to what obtains in the advanced countries where each professional keeps to his field, in this country, many medical doctors prescribe and dispense. According to them, almost all hospitals and clinics, both public and private, have pharmacy departments. The result of this is that doctors' prescriptions rarely get to them. Their own practice is, therefore, a child of necessity. They claim that they conduct appropriate interviews with prospective buyers before honouring their requests without prescription. This state of affairs calls for urgent action by the government to prevent the consumer from being a victim of professional rivalry.

4.4.4 Patent and Proprietary Medicine.

"Patent and Proprietary Medicine" is defined as any medicine held out by advertisement, label or otherwise in writing as efficacious for the prevention, cure or relief of any malady, ailment, infirmity or disorder affecting human beings and -

(a) which is sold under a trade name or trade mark to the use of which any person has or claims or purports to have any exclusive right; or

(b) of which any person has or claims or purports to have the exclusive right of manufacture or for the making of which any person has or claims or purports to have any secret process or protection by letters patent.[39]

No person shall sell or deliver any patent or proprietary medicine unless he is either

(i) a selling dispenser or chemist; or

(ii) a holder of a patent and proprietary medicines licence.[40]

The law requires that patent and proprietary medicine shall be sold intact in the box, bottle, parcel or other container in which it was imported, packed or made ready for sale. The container must bear the name or trade mark of the manufacturer. Also, no person other than a selling dispenser or chemist shall import in bulk and subsequently repack any patent and proprietary medicine. The summary of the requirements is that a patent and proprietary medicine must reach the consumer in the condition in which it left the manufacturer[41]

Patent and proprietary medicine dealers are only allowed to sell non-prescription drugs, otherwise known as over - the - counter (OTC) drugs. The Pharmaceutical Service Department of the Federal Ministry of Health and Social Services makes a list of patent

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39 S.2, Caps 145 and 118.

40 S. 34. The law requires that every applicant for patent proprietary medicines licence shall show evidence that he has attained the age of twenty-one years-S.34(2). There is no requirement as to minimum educational qualification. This cannot be supported in view of the nature of the business.

41 Ss. 36&35, Cap. 145&118 respectively.

medicines in consultation with the Pharmacists Council of Nigeria.[42] Drugs not contained in the list are not supposed to be stocked or sold by patent medicine dealers.

This research shows that the above requirements are not observed by patent medicine dealers. Table 4.4.3 : illustrates our findings as to mode of sale.

Table 4.4.3: Whether Observes Legal Requirements:

	Frequency	Percemtage
Do not observe requirements	50	100.0
TOTAL	*50*	*100.0*

The above table shows that none of the 50 patent medicine shops visited follows the legal requirements. The implication is that this law is not enforced by the law enforcement agents.

This research further discloses that patent medicine dealers stock and sell prescription drugs in disregard of the legal restrictions. The table below confirms this.

Table 4.4.4: Sale of Prescription Drugs by Patent Medicine Dealers.

	Frequency	Percentage
Sale of prescription drugs.	49	100.0
TOTAL	*49*	*100.0*

The above table shows that the 49 patent medicine dealers visited sell prescription drugs. This like table 4.4.3 above, is evidence of weak enforcement system.

The authority in charge of the control of patent medicine dealers is the Ministry of Health of each State. The Inspectorate Division of the Pharmaceutical Services of the

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[42] See Federal Republic of Nigeria: Approved Patent Medicines List 2nd ed. (Lagos: Federal Ministry of Health and Social Services, 1994).

Ministry is charged with the responsibility of monitoring the activities of these practitioners.

At present, the Inspectorate Division of the Lagos State Ministry of Health has only two pharmaceutical inspectors and two pharmaceutical technicians. The Division has only one staff vehicle. Above all, it has no laboratory and so is compelled to make use of outside laboratories when the need arises. Under this circumstance, it is impossible for the department to achieve an effective control of patent medicine dealers located all over the State.

There is urgent need for the government to instil sanity in this important sector. This can be achieved by the employment of more pharmaceutical inspectors, provision of adequate vehicles and establishment of a standard laboratory.

4.5 The Drugs and Related Products (Registration, Etc.) Decree

Another law that controls dealings in drugs is the Drugs and Related Products (Registration etc) Decree. Section 5(f) of the National Agency for Food and Drug Administration and Control (NAFDAC) Decree confers on the agency the function of undertaking the registration of food, drugs, cosmetics, medical devices, bottled water and chemicals. The Drugs and Related Products (Registration etc.) Decree can be regarded as a practical implementation of this provision. But this assertion may be faulted on the ground that the latter Decree is not made as a subsidiary legislation under the NAFDAC Decree but as a full fledged law. In addition, the latter Decree only deals with drugs, drug products, cosmetics and medical devices unlike the former which includes food, bottled water and chemicals on its list. Therefore, the logical conclusion is that the latter Decree stands on its own.

The Drugs and Related Products (Registration etc.) Decree makes it an offence for any drug, drug products, cosmetic or medical device to be manufactured, imported, exported, advertised, sold or distributed in Nigeria without being registered in accordance with the provisions of the Decree or regulation made thereunder.[43]Importation or manufacture for the purpose of registration or clinical trial is however allowed.[44] The Decree stipulates detailed requirements for registration. Among other things, the agency in charge[45] must satisfy itself that there is need for the product to be registered.[46] Issues such as quality standard, safety and efficacy must be taken into consideration.[47] To ensure adherence to the terms of registration, the Decree gives the agency power to cancel or suspend the registration of a product on any of the stated grounds.[48]

4.5.1 *Penalties:*

Penalties for contravention of any provision of the Decree or regulation are stipulated in section 6. In the case of an individual, he is liable to a fine not exceeding ₦50,000 or to imprisonment for a term not exceeding two years or both. In the case of body corporate the penalty is a fine not exceeding ₦100,000.

It can be observed that the penalties imposed by this Decree are less than those

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43 S. 1(1).

44 S. 1 (2).

45 The National Agency for Food and Drug Administration and Control.

46 S. 2(2) (b).

47 S. 4(1) (d).

48 S. 4.

contained in the Counterfeit and Fake Drugs (Miscellaneous Provisions) Act. The disparity can be justified since offences under the Decree relate to failure to register as against dealings in fake, adulterated or substandard products. If the product, particularly drugs, is found to be fake or adulterated, the offender can be prosecuted under the Fake and Counterfeit Drugs Act. The question of charging under the Drugs and Related Products (Registration etc) Decree may not arise in this circumstance as it is unlikely that a manufacturer of counterfeit and fake drug may seek registration.

4.6 The Dangerous Drugs Act and the National Drug Law Enforcement Agency Act

The Dangerous Drugs Act and the National Drug Law Enforcement Agency Act deal with dangerous and hard drugs respectively. Drugs covered by these Acts cannot be regarded as defective in the sense used in this thesis. It is, however, relevant to refer to them because by their nature they are likely to cause harm to the consumer if abused. Apart from the health hazards to which the consumer is exposed, numerous societal ills such as armed robbery, secret cult syndrome and reckless driving are associated with their consumption.

The Dangerous Drugs Act only applies to drugs defined in Parts 1 and 2 of the Act. These parts are to the effect that the Act applies to raw opium, coca leaves, Indian hemp, medicinal opium, any extract or tincture of Indian hemp, morphine and its salt, cocaine and the baine and its salt. A dealing in contravention of the Act attracts a penalty of ₦2,000 or imprisonment for a term of ten years or both.[49]

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[49] S. 19(2).

The National Drug Law Enforcement Agency Act controls the cultivation, processing, sale, trafficking and use of hard drugs. The phrase "hard drugs" is not defined but the text of the Act shows that it refers to narcotic drugs and psychotropic substances. Among other functions, the agency is charged with the responsibility of co-ordinating all drug laws and enforcement functions conferred on any person or authority including Ministries of the Government of the Federation.[50] The agency is enjoined to adopt measures to eradicate illicit demand for narcotic drugs and psychotropic substances with a view to reducing human suffering.[51] The agency is equally enjoined to collaborate with related governmental bodies both within and outside Nigeria.[52] Far-reaching powers are conferred on the agency including power to detect and prevent offences in violation of the Act: to prosecute offenders and to organise enlightenment campaigns.[53] Stiff penalties ranging from 15 years to life imprisonment are stipulated for offences under the Act[54]. Practical implementation and achievements under these Acts are outside the scope of this research.

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50 S. 3(b).

51 S. 3(d).

52 S. 3(p).

53 S. 4.

54 S.11.

4.7 Nature of Statutory Liability

The nature of liability for consumer offences can be inferred from the provisions of the statutes considered in this and the preceding chapters. Terminological differences are noticeable in the imposition of liability by these laws. While some impose liability on "any person" who does the prohibited acts;[55] others use the phrase "no person shall".[56] The Food and Drugs Act, for instance, consistently uses the latter phrase in relation to all offences.

Adubi[57] expresses the view that in law, the use of "Shall" indicates that the legal subject is under an obligation to act in accordance with the terms of the provision. This cannot, however, be considered a general principle. Judicial decisions show that the meaning of the word "shall" depends on the context in which it is used. In The State v Olori & Ors,[58] the appellant contended that section 191(3) of the 1979 Constitution, by using the word "shall", imposed a duty on the Attorney-General to have regard to the public interest, the interest of justice and the need to prevent abuse of legal process. He, therefore, challenged his action on the ground that it was contrary to this provision. The Supreme Court held that the provision conferred absolute discretion on the Attorney-General to institute or discontinue action instituted by him or a private person. Adopting

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55 See Ss. 11, 12 and 19, Consumer Protection Decree; S.25 NAFDAC Decree.

56 See Ss. 1-7, also 11 and 12, Food and Drugs Act; Ss. and 5(1), Drugs and Related Products (Regn etc.) Decree.

57 Adubi, C.O., Drafting and Conveyancing, (Lagos; Five Cowrie Publishing Company Ltd.; 1991), p.7

58 [1983]2 S.C. 155.

the reasoning in Julius v Lord Bishop of Oxford, [59] Eso, J.S.C., stated that such words are merely potential and never in themselves significant of any obligation.[60]

In Julius v. Lord Bishop of Oxford, [61] the word "shall" was used in section 3 of the Church Discipline Act (U.K) in relation to the powers of the bishop. It was held that the provision gave the bishop the power to the act or not to act. The court interpreted the word as merely permissible and enabling.[62]

The foregoing not withstanding, it is generally accepted that consumer offences are strict liability offences. It has been observed that " The crucial question is whether the elements of the prohibited act (the actus reus) have been committed, and it is irrelevant whether there is mens rea: that is intention, recklessness or negligence".[63] Furthermore, it has been argued that "where the subject matter of the statute is the regulation for the public welfare of a particular activity ...it can be and frequently has been inferred that the legislature intended that such activities should be carried out under conditions of strict liability".[64]

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59 (1880) 5 A.C. (H.L) 214.

60 (1983) 2SC.155, at p. 187; see also Layiwola & Ors v. The Queen, (1959) 4 FSC 119: Amaefule v. The State [1988]2 NWLR (pt.75) 156 where similar decisions were reached.

61 Supra.

62 See Earl Cairns, L.C. at p.222.

63 Rose Cranstan, Consumers and the law, (London: Weidenfeld and Nicolson, 1978) p. 234. Cf criminal offences where there is a presumption that mens rea is an essential ingredient.

64 Per Lord Evershed in Lim Chin Aik v. The Queen [1963] A.C.160 at p. 174.

Mens rea may, however, be relevant in certain cases. In Sweet v. Parsely ,[65] the court quashed the conviction of a defendant who was proved to be unaware of the offending act. Lord Pearce summarised the issues of mens rea as follows:

> *"But one must remember that normally mens rea is still an ingredient of any offence. Before the court will dispense with the necessity for mens rea it has to be satisfied that Parliament so intended. The mere absence of the word "knowingly" is not enough. But the nature of the crime, the punishment, the absence of social obloquy, the particular mischief and the field of activity in which it occurs, and the wording of the particular section and its context, may show that Parliament intended that the act should be prevented by punishment regardless of intent or knowledge."*[66]

But his Lordship admitted that "those who undertake various industrial and other activities especially where these affect the life and health of the citizen, may find themselves liable to statutory punishment regardless of knowledge or intent.[67]

This is the position under the American system. By section 402A of the Restatement of Torts, 2d (1965), a manufacturer is strictly liable for injuries caused by his product. Subject to the defences contained in section 4 (e), the Consumer Protection Act 1987 achieves this purpose in the United Kingdom. In summarising the effect of this Act, Atiyah writes that the basic principle of statutory product liability under the Act is that any person who suffers damage, which is caused by a defective product, is entitled to sue the producer (and various other possible parties) without being required to prove fault.[68] It follows that under this Act, mens rea is not a required ingredient. The principle

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65 [1970] A.C. 132

66 Ibid ., at p. 156

67 Ibid .,

68 Atiyah, P.S. The Sale of Goods, 9th ed., (London: Pitman publishing, 1995) p. 232.

is the same in all the Member States of the European Union which have adopted the E.U Council Directive on Product Liability.[69]

It is suggested that consumer statutes in this country be interpreted as imposing strict liability.[70] The defences discussed in this work should be regarded as sufficient mitigation.

An issue that worths mention is who bears responsibility under the statute. A reading through the various laws shows that liability is imposed on the person who perpetuated the prohibited act. Thus a person who manufactures, sells, advertises etc. or in whose possession the offending product is found bears responsibility. But as earlier noted, such a person can show that the offence was due to the act of another person. Under the English law, where such a defence is successfully raised, liability will be imposed on the actual offender. In Melias Ltd. v. Preston & Anor.[71] it was held that the words "actual offender" in section 12(b) of the Sale of Foods (Weights and Measures) Act, 1926 meant the person whose act or default brought about the particular circumstances that constituted the offence.[72] On this ground the servant of the appellants, being the actual offender, was held liable. The same reasoning was followed in Tesco Supermarket Ltd. v. Nattrass[73] where the defendants were held not liable for the unlawful acts of their manager.

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69 85/374/EEC. France is the only country yet to introduce legislation in line with the directive. See Atiyah, op .cit., at p. 231.

70 To the knowledge of this researcher there is no local decision on this point.

71 [1957] 2 Q.B. 380

72 Ibid., at p. 387.

73 [1972] A.C. 153

A contrary decision was reached in Coppen v. Moore (No.2)[74] involving false trade description. There the court emphasised that in the circumstances, the legislature intended to fix criminal responsibility upon the master for acts done by his servant in the course of his employment, although such acts were not authorised by the master, and might even have been expressly prohibited by him.[75] The same principle was followed in Quality Dairies (York) Ltd v. Pedley[76] where the appellants contended that their sub-contractors, being the actual offenders, should be penalised. This contention was rejected by the court. It was rightly observed that if the contention were right no limited company could ever be convicted of the offence since a limited company can only act through its servants.

Apart from judicial decisions, the issue of offences committed by bodies corporate is also dealt with by statutes. For instance, section 17(2) of the Food and Drugs Act provides that where an offence under the Act committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any other person purporting to act in any such capacity, he, as well as the body corporate, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.[77]

It is not clear why liability should be limited to the officers named by the

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74 [1898] 2 Q.B. 306.

75 Ibid., at p. 312.

76 [1952] 1 K.B. 275.

77 See Ss. 7&15 of the Drugs and Related Products (Regn. etc.)Decree and the Standards Organisation of Nigeria Act respectively for similar provisions.

provisions. It is common knowledge that offences in this case may be committed by junior officers of a body corporate. Perhaps the explanation can be found in the logic that the named officers, by their status, take decisions for the company. In the words of Denning, L.J., they are the "directing mind and will of the company".[78] But it is arguable that a better result will be achieved if liability is solely imposed on the body corporate irrespective of the status of the person whose act or default caused the offence. This will save the prosecution the burden of having to pinpoint the officer responsible for a particular offence. The body corporate on its part will not be prejudiced because laws on consumer protection are regarded "as creating vicarious criminal liability".[79] The effect of judicial decisions is that such liability may be imposed irrespective of the status of the officer concerned.[80]

4.8 Remedies

A breach of a statutory provision may result in injury to person or property. The question is whether a victim of such breach can recover damages for injuries suffered therefrom. The issue appears controversial particularly where there is no statutory provision in a particular case. In Square v. Model Dairies (Bournemouth) Ltd.,[81] the plaintiff and some members of his family were infected with typhoid fever as a result of the consumption of the milk supplied by the defendants. They sued for breach of the

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78 Bolton (Engineering) Co v. T.J. Graham & Sons [1959] 1 Q.B. 159; 172.

79 Ross Cranston, Consumers and the Law, (London Weidenfeld and Nicolson, 1978) p. 266.

80 Coppen v. Moore (No 2) ; Quality Dairies (York) Ltd . Pedley, p. 118 Supra.

81 [1939] 2 K.B. 365

Food and Drugs (Adulteration) Act, 1938 (U.K.). It was held that as the duty under that Act was enforceable by a fine exigible in criminal proceedings, and as it did not appear on the construction of the Act that that should not be the only available remedy, none of the plaintiffs could maintain a civil action for damages for breach of the statutory duty.[82]

It can be deduced from the judgement of Slesser, L.J. that the refusal to allow a claim for the breach was informed by the fact that the Sale of Goods Act 1893 adequately covered the plaintiffs' case. There is no doubt that a different decision would have been reached in a different situation. Thus the court in the instant case approved the principle applied in Groves v Lord Wimbourne[83] but distinguished the case from the present. In Groves the issue was the breach of section 82 of the Factory Workshop Act, 1878. As it were, no other statute provided remedy for an injured employee. The plaintiff's case succeeded as according to the court, the purpose of the statute was to compel an employer to perform certain statutory duties in favour of his employees.

The above controversy loses significance where there is specific statutory provision. This is the case with some statutes. Thus under the repealed Consumer Protection Act 1961 (U.K.), a breach of any of the provisions was actionable by the injured person.[84] The position is the same under the Consumer Protection Act 1987 (U.K.).[85] This contrasts with the Medicines Act 1968 and the Fair Trading Act 1973

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82 Monk v. Warbey [1935] 1 K.B 75, applied.

83 [1898] 2 Q.B. 402.

84 S. 3(1); See also S. 6(1), Consumer Safety Act, 1978.

85 See Ss. 2 & 5. This Act repealed and replaced the Consumer Protection act 1961 and the Consumer Safety Act 1978.

(U.K). Civil action in respect of any breach is prohibited by these Acts.[86]

In Nigeria, prior to the promulgation of the Consumer Protection Council Decree, the only statutes that provided remedy for an injured consumer were the Sale of Goods Laws of various States. Under these laws which had their origin in the English Sale of Goods Act of 1893, a consumer-purchaser could claim for the breach of any of the implied terms. This remedy was not available to a non-buyer whose only remedy was action in negligence.

The Consumer Protection Council Decree appears to have improved the position of the consumer. Under this Decree, one of the functions of the Council is to cause an offending company to compensate an injured consumer.[87] In addition, the State Committees are empowered to recommend to the Council the payment of compensation to an affected person.[88] It is further provided that the consumer shall, in addition to the redress which the State Committee, subject to the approval of the Council may impose, have a right of civil action for compensation or restitution in any competent court.[89]

Section 13(1) deals with compensation order. By this section a court by or before which a person is convicted of an offence may in addition to dealing with such person in any other way, make an order requiring the person to pay compensation for any personal injury, loss or damage resulting from that offence. This provision, which is equivalent to section 35 of the Powers of Criminal Courts Act 1973 (U.K.), is of

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[86] See Ss. 133(2) (a) & 26(a) respectively. On this point, see John Mickleburgh, Consumer Protection. (Abingdon, Oxon; Professional books, 1979). p.316

[87] S. 2(d).

[88] S. 5(c).

[89] S. 8.

immense benefit to a consumer who may not afford a civil action against an offender. It is not, however, certain whether the power of the courts in this regard is confined to offences under the Decree or can be exercised in other cases. Section 13(1) refers to "an offence" and not "an offence under the Decree". The former is wider in scope and can be used by a zealous court to grant compensation for offences outside the Decree.

The relationship between sections 8 and 13(1) is not clear. Is a person who has been compensated by virtue of section 8 also entitled to a compensation order under section 13? This could not have been the intendment of the legislature.

A question that may be asked is the nature of offences that may entitle a consumer to a claim. The Consumer Protection Council Decree is the only statute that makes relevant provisions in this regard. But some uncertainties are created. For instance, under section 8(a) a person can make a claim if his "right has been violated". The section does not say how a person's right may be violated. The issue is thus subjected to the discretion of the Council or State Committee. On the other hand, section 8(d) talks about a wrong "causing injury or loss to the consumer". The implication is that a consumer can only claim if there is injury to person or property. This is also the effect of section 13(1).

In the United Kingdom, injury to person or property is required. This can be inferred from sections 2 and 5 of the Consumer Protection Act 1987. Thus by section 2, a person is liable for a damage caused by his product. Section 5 defines damage as "death or personal injury or any loss of or damage to any property (including land)". But damage to the product itself is excluded.[90]

There is justification in confining compensation in consumer offences to cases involving injury to person or property. Statutory regulations are concerned with safety

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[90] Ibid ., S. 5(2).

of products. If a product is safe but otherwise substandard, a buyer should take up a civil action against the seller. There is little justification for seeking protection for a non-buyer in this case. In appropriate cases, action can be taken by the person from whom he got the product. At any rate, to extend liability to this area will create an unnecessary burden on the courts. This is because there is no contract which will serve as a yardstick for determining the rights of the parties.

4.9 Summary

The foregoing analysis reveals that the law adequately controls dealings in drugs. But like the case of laws considered in the preceding chapter, implementation of the statutory provisions remains a problem. Despite statutory prohibition, sale of drugs in prohibited places has continued unabated.

As regards patent and proprietary medicines, this research shows that dealers stock both over-the-counter and prescription drugs. Also, contrary to the law, prescription drugs are sold without prescription by most dealers including registered pharmacists.

The conclusion is that drug laws in the country are largely redundant.

CHAPTER FIVE

STANDARDIZATION OF PRODUCTS

5.1 Introduction

Most human activities involve one form of standardization or another. In most cases standards are applied unconsciously. A house wife who carefully selects her ingredients and determines the quantity of each may not know that she is applying a standard. In general terms, standards evolve from past experiences.

The International Standards Organisation (ISO) defines the term "standardization" as a process of formulating and applying rules for an orderly approach to a specific activity for the benefit and with the co-operation of all concerned, and in particular for the promotion of optimum overall economy taking due account of functional conditions and safety requirements.[1] The term has also been explained to mean a conscious effort of man to simplify things, reduce unwanted variety and create order.[2] From the above definitions, it can be deduced that standardization denotes a system of control of methods of production as well as products. Its major aim is to ensure that only good quality and safe products are put into the market.

In Nigeria, the body responsible for standardization of methods and products is the Standards Organization of Nigeria (SON). This body was established by Decree No. 56 of 1971,[3] which has witnessed successive amendments.[4]

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1. SON Journal, Vol. 1, No 5, July-Sept., 1990 at p .14.
2. Pollit R.G., SON Journal, op . cit., p. 15.
3. Now cap.412, Laws of the Federation of Nigeria, 1990.
4. See DN 20, 1976; DN 32,1984, DN 18, 1990.

5.2 Functions and Powers of the Organisation

Functions of the Nigerian Standards Organisation include the following:

(a) to organise tests and do everything necessary to ensure compliance with standards designated and approved by the Council;

(b) to undertake investigations as necessary into the quality of facilities, materials and products in Nigeria, and establish a quality assurance system including certification of factories.

(c) to ensure reference standards for calibration and verification of measures and measuring instruments;

(d) to compile an inventory of products requiring standardisation;

(e) to coordinate all activities relating to its functions throughout Nigeria and to co-operate with corresponding national or international organisations in such fields of activity as it considers necessary with a view to securing uniformity in standards specifications; and

(f) to undertake any other activity likely to assist in the performance of the functions imposed on it under the Act.

For an effective performance of the above functions, the Act confers some powers on the organisation and its functionaries. By section 13, the Director-General and any other authorised officer;

(a) shall have a right of access at all times to any building or other premises where an industrial or commercial undertaking is being carried on, and

(b) may by notice in writing served on any person carrying on an industrial or commercial undertaking require that person to furnish in such form as he may direct, information on such matters as may be specified by him.

The Director-General or any other officer of the organisation is also empowered to make test purchases of goods for the purpose of determining compliance with set standards.[5] The organisation equally enjoys the power to make rules not inconsistent with the Act for the general and efficient conduct of its functions.[6]

5.3 The Standards Council

The Standards Council of Nigeria is the governing body of the Standards Organisation of Nigeria (SON).[7] As provided in section 2 and the schedule, the Council consists of seventeen members appointed by the Minister [8] with the Director-General of the Federal Ministry of Industries as Chairman. Amongst others, the Council comprises one representative from the Federal Ministry of Agriculture and Water Resources; Defence; Health; Trade and Tourism; Transport; and Works and Housing. Other representatives are from the University Education and Research; Chambers of Commerce; Industries and Mines; Engineering Consultation Services; Processing and Manufacturing Industry; Construction Industries; Employers Associations and Consumer Associations. Right from inception, the composition of the Council has been in line with this statutory requirement.[9]

It is seen from this composition that the public and private sectors are duly represented. The wide representation ensures co-operation of related ministries. For

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5 S. 17.

6 S. 18(1).

7 S. 2.

8 Minister of Industries S.19

9 See Annual Reports of various years.

example, SON claims that publicity of its activities is aided by the fact that the representative of the Federal Ministry of Information normally serves as the chairman of the publicity committee.[10]

5.3.1 *Functions of the Council:*

Functions of the council as contained in section 3 of the Act are to:

(a) advise the Federal Government generally on the national policy on standards, standards specifications, quality control and metrology;

(b) designate, establish and approve standards in respect of metrology, materials, commodities, structures and processes for the certification of products in commerce and industry throughout Nigeria;

(c) provide the necessary measures for quality control of raw materials and products in conformity with the standard specifications;

(d) determine the overall policy of the organisation, in particular with regard to the financial, operational, and administrative programmes of the organisation and to ensure the implementation of the said policy; and

(e) carry out other functions imposed on it under the Act or any other written law.

5.4 Ministerial Control

The Minister of Industries exercises some measure of control over the activities of the Standards Organisation of Nigeria (SON). The Director-General who is the Chief Executive of the organisation is appointed by the president on the recommendation of the

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[10] SON Progress Report 1974, p. 11.

Minister.[11] In addition, the minister is empowered to give to the council directives of a general character or relating generally to particular matters with regard to the exercise of its functions. It shall be the duty of the council to carry out such directives.[12] Furthermore, the organisation is required to give to the Minister, such information and returns relating to its activities as he may from time to time, require.[13]

The Minister is equally empowered to declare some established standards mandatory. This power is exercisable on the recommendation of the council.

These ministerial controls serve as checks on the activities of the organisation. In particular, the duty to give information and returns makes it possible for the Minister to monitor the activities of the organisation. In practice, in addition to any other information or return that may be required during the year, the Standards Organisation of Nigeria participates in the Ministerial National Briefing. This is done along with other Federal Ministries and extra-ministerial departments.

5.5 Offences Under the Act

(a) Offences Relating to Standards:

Section 11(1) makes it an offence for any person, other than the permitted manufacturer,[14] to sell or expose for the purpose of sale or advertisement, any material or document on or in which is portrayed:

(i) an industrial standard in any way resembling or purporting to be any of the

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11 S. 1(4) DN 18, 1990.

12 S. 3(2).

13 S. 1A (2) DN 18, 1990.

14 A manufacturer permitted by the Council to use the special certification mark. Ss 10(1) & 19

Nigeria Industrial Standards established in pursuance of the Act; or

(ii) a certification mark resembling or purporting to be a certification mark issued in pursuance of the Act.

A breach of this provision attracts a fine not exceeding ₦1,000 or imprisonment for a period not exceeding one year or such fine and imprisonment.

It is seen from this provision that an offence is only committed where a standard or certification mark is falsely portrayed on a product exposed or advertised for sale. Non-compliance with an established standard per se is not an offence except where the standard is mandatory.

(b) Offences Relating to Mandatory Standards

Section 12(4)[15] imposes a duty on every manufacturer of any item in respect of which a mandatory standard has been declared, to ensure that the item complies with the said standard. A duty is also imposed on the seller. By paragraph (b), any person who sells, or is involved in the sale of an item knowing that it does not comply with such standard, shall be guilty of an offence under the Act.

Penalties for failure to comply are as follows: In the case of a manufacturer, a fine not less than ₦50,000 but not exceeding ₦100,000 or imprisonment for a term not exceeding five years or such fine and imprisonment. Penalty in the case of a seller is a fine not less than ₦5,000 but not exceeding ₦10,000 or imprisonment for a term not exceeding two years or both.[16]

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15 As amended by DN 18 of 1990.

16 Cf. the position before the amendment. Only the manufacturer was liable and the penalty was N10,000 or a term not exceeding one year or both.

(c) Offences Relating to Information

For the purpose of carrying out the functions of the organisation, the Director-General and any other authorised officer is empowered to request for information from any person carrying on an industrial or commercial undertaking in this country.[17] Failure to furnish the required information attracts a penalty of four hundred naira or imprisonment for a period not exceeding six months or both. Supply of false information is an offence attracting a penalty of two hundred naira or imprisonment for a period not exceeding three months or both.[18]

It is also an offence to wilfully obstruct, assault or resist any officer of the organisation in the lawful execution of his duty. A breach is punishable by a fine of two hundred naira or imprisonment for a period not exceeding three months or both.[19]

5.6 Defences

No defences are provided for the offences under the Act. The reason for this omission is not clear. A defence is in fact necessary especially as regards the seller. Thus if a seller proves ignorance of non-compliance and discloses the name of the manufacturer, he should be exonerated.[20] This will protect an innocent seller who may not have the necessary skill and expertise to determine the technical issue of compliance with standards. Perhaps, one can argue that the word "knowing" in section 12(4)(b)

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17 S. 13.

18 S. 14(1) 7(2)

19 S. 14(3), see also S. 15 for offences committed by bodies corporate.

20 This is the position under the Food and Drug Act. See S.18

stated above implies that lack of knowledge of non-compliance is a defence for the seller. To avoid uncertainty, an express provision on this is necessary. As regards the manufacturer, a defence is not necessary, since, being the actual offender, he cannot claim ignorance of the law.

So far, our findings are that no person has been convicted for non-compliance with mandatory standard. This may not be evidence of strict compliance by persons concerned. Rather, as disclosed by this research, it is a reflection of an ineffective enforcement system.

The table below shows the result of our survey on the extent of compliance with the Standard on Road Vehicles which is a mandatory standard.

Table 5.1 **The Standard on Road Vehicles:** Requirements for Passenger Cars specifies that the following accessories must be available in every passenger car. Kindly tick the ones available in your car.

Accessories	Yes	%	No	%
Fire extinguisher	65	63.7	37	36.3
Safety belt	80	78.4	22	21.6
Head rest	73	71.6	29	28.4
Adjustable front seat	94	92.2	8	7.8
Collapsible steering	12	11.8	90	39.2
Laminated windscreen	62	60.8	40	39.2
Windscreen Demister	29	28.4	73	71.6
Wind screen washer	85	83.3	17	16.7
Sun visor	90	88.2	12	11.8
Rear window sun visor	23	22.5	79	77.5
Fender flaps	25	24.5	77	75.5
Dual circuit braking system	78	76.5	24	23.5
Spare tyre	102	100	-	-
Warning triangular reflector	64	62.7	38	37.3

Accessories	Yes	%	No	%
Radio Set	80	78.4	22	21.6
Ash tray	89	87.3	13	12.7
Clock	55	53.9	47	46.1
Air Conditioning system	18	17.6	84	82.4
Insulation and ceiling	96	94.2	6	5.8
Cigarette Lighter	44	43.1	58	56.9
Tools	93	91.2	9	8.8
Collapsible choke	22	21.6	80	78.4
Floor covering	63	61.8	39	38.2
Engine sump protector	83	81.4	19	18.6
Parking brake system	81	79.4	21	20.6
Anti-rust protection	18	17.6	84	82.4
Bumpers	98	96.1	4	3.9
Registration number	100	98.0	2	2.0

The above table shows that out of the 28 accessories covered by this questionnaire, 100.0% compliance level was recorded with respect to only one accessory, namely, spare tyre. This is to be expected because many motorists regard spare tyre as imperative since they may be stranded without it. The next accessory in the order of compliance is registration number which recorded 98.0%. In fact the two negative responses concerned vehicles with old registration numbers. The high level of compliance in this case can be explained on the ground that cars without registration numbers are not allowed to ply the roads by the vehicle inspection officers. Other accessories that recorded high degrees of compliance are bumpers 96.1%, insulation and ceiling 94.2%, adjustable front seat 92.2%, tools - 9.2% and sun visor 88.2% These are accessories which motorists find absolutely necessary. The high degrees of compliance in these cases can, therefore, be explained on the ground of necessity and not as evidence of intention to comply with the legal requirements. A reverse argument can be made as

regards accessories with low compliance levels. Such accessories are seen as mere luxuries and not of absolute necessity. This explains why collapsible steering recorded the lowest level of 11.8%. This is followed by air conditioning system 17.6%, anti-rust protection -17.%, collapsible choke- 21.6; and fender flaps- 24.5%. The result of this survey is that the issue of compliance depends on the personal discretion of each motorist. Almost every motorist interviewed displayed ignorance of the existence of the standard under consideration. The implication is that the issue of compliance is not influenced by law but by other factors. Prominent reasons given by most respondents for non-compliance are inadequate funds and the luxury nature of some of the accessories.

The over-all result of this survey is that the mandatory standards of the Standards Organisations of Nigeria are not enforced. The average compliance level with the standard under consideration is 63.8 per cent. This is evidence of weak enforcement system. It is suggested that rather than specify excessive standards which will be impossible to comply with, the Standards Organisation of Nigeria should concern itself with accessories that make for safety of motorists. Accessories such as air- conditioning system and radio sets come under the former group. Those that make for safety should be enforced to the letter.

5.7 Standardisation Activities

As earlier noted, the main functions of SON are to standardise methods and products in industries throughout Nigeria and to ensure compliance with Government policy on standardisation. Specifically section 4(1)(d) enjoins the organisation to compile an inventory of products requiring standardisation. This provision implies that it is not

mandatory to standardise all products.

In carrying out the function of standardisation, the organisation is guided by some laid down rules and principles. First, there must be a strong conviction as to the significance of the proposed standard to the national economy. Also, "apart from ensuring that such standards meet the actual state of local domestic production capabilities...it is important that they do not tend to obstruct technological progress and the creative morale of the manufacturer or those engaged in the improvement of the products being standardised".[21] This agrees with the view of an ex-president of the International Standards Organisation (ISO), Mr. I. Yamashita[22] who stresses the importance of standards arriving neither too soon nor too late. "Experience has shown", he says, " that new technologies require a certain time to mature before standardization can serve a useful purpose, and that at certain stage the need for standardisation becomes a determining factor in further practical development". As observed by the SON's Director of Metrology, Mr. F. P. A. Obi,[23] standards are established to keep pace with industrial development as it would be both wasteful and futile establishing standards that would not be put into use by anybody.

In line with the above principles, SON has since inception, established many standards covering a wide range of products and methods. At present, there are a total of 300 standards in existence covering products from all sectors of the Nigerian

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21 Pollit R.G., SON Journal, Vol 1, No. 5, July-Sept ., 1990 pp.15&16.

22 Referred to in SON News_Bulletin , Vol 1, No. 1, March 1988 p. 28.

23 SON, Journal, Vol. 1 No. 7. Jan-March, 1993, p.9

economy.[24]

SON determines priority areas for standardisation through consumer complaints, company demands, council directives and safety considerations. Standards may also be established to aid manufacturers to attain excellence and satisfy public expectations. This is particularly the case where there is an unprecedented increase in demand with attendant temptation to undermine quality. An illustrative case is that of standard on motor vehicles. With the increase in demand for locally assembled cars, SON, in the early 1980s came out with various standards on motor vehicles.[25] In particular, the Road Vehicles: Requirements for Passenger Cars[26] was formulated in order to reduce the then existing wide variations in the number and quality of accessories installed in passenger cars.[27] The same consideration informed the establishment of some standards on cables.[28]

5.8 Procedures for Prescribing Standards

Prescription of standards follows laid down statutory provisions and practice evolved by the Standards Organisation of Nigeria (SON) over the years.

Section 8 provides that before establishing any industrial standards, the council shall:

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24 SON, catalogue, 1997, p. 10.

25 NIS 100; 1980; NIS 127 1981; NIS 128 1981; NIS 148 1982; NIS 145 1983.

26 NIS 127 1981.

27 SON Progress Report 1981, p. 11.

28 Standard on Raw Copper for Electrical Use; Standard on Conductors in Insulated Cables; and Standard on Wrought Aluminium for Use as Electrical Conductors in Insulated Cables.

(a) inform all parties having, in its opinion, substantial interests in the industrial standard in question;

(b) thereafter constitute a committee to inquire into all the relevant aspects of the matter and make report thereon.

In constituting the said committee, the council is obligated to ensure as wide a representation as possible.[29] The wide composition is to ensure a consensus and create a forum for the utilization of various skills and expertise.

SON follows the statutory provisions stated above and internationally accepted standards elaboration methods. In general, a request for a new standard may be made to SON by a manufacturer or any other interest group or individual. The SON on its own, may also initiate a standard.

Next the organisation considers the usefulness of the proposed standard to the national economy. SON technical officers then collate relevant data from technical literature, laboratory results and factory inspections. A comprehensive draft is prepared for deliberation of an elected technical committee.

In line with statutory requirement, SON tries to balance the membership of the technical committee. As noted by a one-time Director-General of the organisation, Col. R.G. Pollit, SON technical committees tend to comprise approximately one third of total membership from each of the following groups:

(a) producers and suppliers of the materials, product or equipment concerned;

(b) statutory authorities, government departments and private consumer interests; and

(c) the general interest, including research, academic as well as professional

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[29] S. 8(2).

bodies.[30]

After reviewing the preliminary draft, the technical committee prepares a draft which is circulated for public comments.[31] Thereafter, a final draft is prepared for councils's approval.

5.9 Contents of Standards

Contents of a standard depend on the nature of the subject matter involved. Matters such as weight, dimension, pressure, size, resistance, sampling and test methods, permitted additives and preservatives, labelling, storage conditions and level of relevant ingredients may be covered. Some ingredients specified may be declared mandatory while others may be optional. In all cases, the standard prescribed by SON is regarded as the minimum national quality requirement. A company standard may exceed this. In fact, in some advanced countries where patronage is determined by market forces, the ambition of an average manufacturer is to exceed the national standard. An examination of some standards will give an insight into the contents of standards.

(a) Paraffin Wax Candles: NIS 24: 1979.

The standard on paraffin wax candles which was first published in 1973 and revised in 1979 covers table and celebration candles. The standard specifies materials that shall be used for the manufacture of candles. These are paraffin wax, stearic acid, wick and dyes. Some general requirements are also specified. It is stated that candles

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30 SON Journal, Vol. 1, No. 5, July-Sept. 1990 p.17.

31 Investigation reveals that public comments in this regard take the form of circular letters to manufacturers of the product in question for comments.

shall be:

(a) glossy, white or coloured; shall not melt, stick together or crack in storage;

(b) free from air bubbles and moisture; and

(c) straight, each with a properly finished taper and with a flat-base which allows the candle to stand upright.

It is further provided that the base shall be whole without recess or hole; the wick shall be insulated from air and shall have no after-glow; and that celebration candles may be spirally fluted. Other requirements include, weight, wick size, candle diameter, solubility, deformation and burning time. Packaging, marking, sampling and test methods are also specified. Tables and appendices are used to denote the specifics of some vital requirements. For example, minimum burning time for table candles is between 1.25 and 5.75 hours depending on the size. That of the celebration candles is between 8 and 10 minutes.

b. Liquid Milk: NIS 31: 1974

The Nigerian Standard for liquid milk deals with fresh and condensed milk. Different requirements are stipulated but only those on condensed milk shall be considered here.

Condensed milk is defined as milk which has been concentrated by the removal of part of its water, with or without the addition of sugar.

It is required that the fat in condensed milk shall be milk fat; and the total sugar (sucrose and/or dextrose) content shall not be less than 42 per cent weight. The standard specifies the percentage of milk fat and milk solids to which condensed milk shall conform. Maximum levels of permitted stabilisers are also specified. Permitted additives are vitamins A and D and nutritional minerals such as calcium. Methods of sampling and

analysis are indicated. Labelling requirements are as follows;

(a) net weight of content;

(b) minimum milk fat content;

(c) equivalent volume of fresh milk;

(d) added vitamins and minerals and their respective quantities;

(e) appropriate designation, e.g. unsweetened full creamed condensed milk or evaporated milk; and

(f) date of manufacture.

c. Road Vehicles: Requirements for Passenger Cars: NIS; 127: 1981

The Road Vehicles: Requirement for Passenger Cars which is a mandatory standard covers specifications for all passenger cars imported, manufactured or assembled in Nigeria for general use on Nigerian roads.

It is required that all passenger cars shall be equipped with the following: fire extinguisher, safety belts, head rests, adjustable front seats, collapsible steering, laminated windscreen, demister, windscreen washer, sun visors, rear window sun visor, fender flaps, dual circuit braking system, spare tyre and warning triangular reflectors.

The following accessories are also specified, viz: radio set, ash trays, a built-in clock, an effective air-conditioning system, an insulating material up-holstered on to the ceiling and cigarette lighter.

Further, all passenger cars shall be equipped with a wheel replacement kit including a jack: service spanner for the battery; spark plug replacement tools; a set of screw drivers and combination pliers.

Other requirements include, collapsible choke, floor covering, engine sump protector, parking brake system, anti-rust protection; bumpers and registration number.

Lighting requirements such as driving beams, direction indicators, reverse lights, hazard lights, and rear view mirrors are also stipulated.

This standard uses the word "shall" with respect to all the above requirements. This in law may connote compulsion depending on the context in which it is used.[32] It is not however stated who is to fulfil the specified obligations. Perhaps common sense approach should be adopted to determine the accessories that are under the manufacturer's scope of duty to provide. The duty as regards others will then be borne by the owner of the vehicle. But it appears that with the exception of registration number, the manufacturer bears the primary duty of providing all other specifications.[33] The secondary duty of replacement is borne by the owner.

A reading through various standards reveals that while some are technical in nature and may only be comprehended by experts, others are less technical and may be comprehended by any literate person. But in almost all cases, the test method for compliance requires technical knowledge. It follows that the issue of compliance can only be determined by experts. This means that an interested consumer must seek the services of an expert. Because of the financial involvement, many consumers may not be keen to undertake such projects unless a personal interest is involved. The duty of enforcement consequently lies on SON or the affected manufacturer.

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[32] See Supra., pp. 114 & 115 for a detailed discussion of this principle.

[33] A person who buys a vehicle without some of the specified accessories can be taken to have assumed the duty of providing them. This means that he as well as the manufacturer should be held liable.

5.10 Review of Standards

Section 8(4) provides that the council shall, in order to ensure that any industrial standard established under the Act is still appropriate, have it reviewed from time to time and at least not less than once in every three years.

Review of standard may be prompted by consumer complaints, defects discovered through factory inspections and the need to keep abreast with technological advancement. Statistics of standards reviewed by SON for a selected period of seven years are as follows:

TABLE 5.2: Statistics of Standards Reviewed from 1989 to 1995.

Year	No. of Standards Reviewed
1989	None
1990	None
1991	57
1992	14
1993	None
1994	16
1995	14

Source: Son Annual Reports, 1989-1995

Despite statutory requirements, it does not appear essential that every standard must be reviewed at three-yearly interval. If a standard remains capable of fulfilling its intended purpose and continues to stand the test of time, there is no reason why it should be subjected to review within such a short period. The huge financial outlay and energy involved in financing and re-constituting the technical committee do not justify such effort. Review of standards should be based on the same reasons for standardisation, namely, consumer complaints, observed product defects and safety considerations.

Efforts of SON should be directed to areas where no standards exist as well as enforcement of existing standards.

In practice, the organisation generally adheres to the legal requirement on this issue. Standards are also reviewed as frequently as the need arises.[34]

5.11 Certification Marking Scheme

One of the methods used by SON in implementing established standards is the certification marking scheme.[35] This is a scheme whereby the Nigerian Industrial Standard (NIS) certificate is awarded to a manufacturer who has met the pre-requisites.[36] The scheme can be regarded as an implementation of the statutory obligation on SON "to undertake investigations as necessary into the quality of facilities, materials and products in Nigeria, and establish a quality assurance system including certification of factories, products and laboratories.[37]

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34 See SON Annual Report, 1995, p. 13.

35 According to the International Organisation for Standardisation (ISO) certification mark is a third party system of determining conformity with products through initial testing and assessment of a factory quality management system and its acceptance followed by surveillance that takes into account the factory management system and the testing of samples from the factory and open market. See Directory of Certified Quality Product 1990/91, p.13.

36 Similar schemes exist in other countries giving rise to the following foreign national marks: BSI (Kite mark) for Britain, DIN for Germany, K.B.S. for Kenya, S.A.S. for Saudi Arabia, JIS for Japan, BIS for India, K.S. for Korea, S.A. for Australia, G.S. for Ghana, S.L.S. for Sri Lanka (Ceylon), N.F. for France and ANSI/ASTM for U.S.A. - SON News Bulletin Vol.,1. No. 1, March, 1988, p.12.

37 S. 4(1)(b).

It is an offence for a person other than the permitted manufacturer to use the NIS certification mark.[38] It is equally an offence for any imported goods to carry the NIS logo. The logo is meant only for products manufactured in this country.

SON operates the third party certification system No.5 in assessing the quality of locally made goods. This involves type-setting and assessment of quality control and its acceptance, followed by surveillance that takes into account the audit of factory quality control and testing of samples from factory and open market.[39]

Product certification involves series of steps by both the manufacturer and the SON. First, the scheme is introduced to the product manufacturer by SON Quality Inspectors during normal routine factory inspection visits.[40] The manufacturer then voluntarily applies to SON for permit to use the mark on his product.

Next, SON engages in series of systematic inspections of the product factory and laboratory tests of product samples randomly selected. This is to determine whether the manufacturer uses acceptable production methods capable of producing products that will conform to relevant standards.

The final step involves surveillance inspections. Samples of the product are periodically [41] taken from either the production line, factory stores or the open market for laboratory investigation.[42] This is to ensure that certified products do not

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38 S. 11.

39 See SON Journal, Vol. 1, No. 6, July-Sept. 1992, p. 4.

40 This research reveals that a manufacturer may on its own apply without any prompting by SON.

41 This is done quarterly.

42 See "The NIS Certification Mark" a pamphlet published by SON for details of procedure for certification.

subsequently fall below standard.

A manufacturer to whom the NIS certificate is granted is free to display it on his product. It is valid for one year and renewable by the process of revalidation.

SON has formulated detailed requirements for the grant of the NIS certificate.[43] Among others, the manufacturer shall provide an inspection system capable of producing objective evidence that finished product meets the quality requirements of the Nigerian Industrial Standard. The system will be considered acceptable when, as a maximum, it provides for the detection and removal of non-conforming material, either prior to or at the latest stage of fabrication, manufacture or other processes where a characteristic[44] can be observed and measured.

Also, prior to the commencement of the work, the manufacturer must have and maintain a written inspection plan which describes his inspection system for each item. The plan shall include the following:

(a) a schedule showing anticipated dates and quantities of production;

(b) a flow chat illustrating each last point inspection[45] and its relative location in the production cycle;

(c) a description of the inspection methods for each last point inspection;

(d) qualifications of inspection personnel; and

(e) inspection records.

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43 SON: Requirements for the Certification Mark ('NIS' MARK), 1989.

44 Any measurable or observable property of material, product, procedure or process, Ibid., p. 4.2.2.

45 Inspection necessary to demonstrate conformance to SON requirement conducted prior to or at the latest stage of the production cycle at which characteristics can be observed and measured. Ibid., p. 4.2.6.

A duty is imposed on the manufacturer to make available to SON, documents for inspection, calibrated inspection equipment and a list of all contracted materials on which all pertinent quality characteristics cannot be inspected at the factory premises. The manufacturer is equally obligated to subject all finished products to final inspection to ensure compliance with SON requirements.

Given the stringency of the above requirements, it is arguable that only well-established companies may qualify for the award. This is because they are the only ones that may boast of such in-plant quality control system as described in the specifications. A manufacturer is, however, allowed to make use of his own or any other inspection facility and service acceptable to SON. This provides a valuable assistance to small-scale manufacturers who may not afford quality inspection equipment which invariably is capital intensive.

Strong argument against the use of external inspection facility is that such a procedure may be attended with practical difficulties. This is particularly so as regards the last point inspection. It would be extremely difficult for a manufacturer to organise external tests of all his materials, products and production process. In this situation, the temptation not to carry out the required tests is very high.

The leverage may well be justified on SON's policy to encourage enterprise and promote competition. This has an indirect bearing on one of the objects of standards which is to ensure fair competition and reduction of prices.[46] A contrary position would encourage monopolistic tendencies by the few privileged companies which can afford in-plant quality control system. Emphasis should therefore be placed on the finished

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[46] Directory of Certified Quality Products 1991/92, p. 14.

product. But as an additional requirement, every company without an in-plant quality control system but whose product is certified should be made to send samples from each batch to SON for analysis.

5.12 Attitude of Manufacturers to Certification Marking Scheme.

The implementation of the statutory obligation of certification of products was commenced by SON in 1976. That year, only one company, Lever Brothers Nigeria Limited won the award. The scheme has continued ever since.

The awards are categorised into three. These are Gold, Silver and Ordinary. The companies which have consistently won the award for ten years and above are categorised under "Gold NIS certificate winners". Those that have consistently won the award for a period of five to nine years are under the "Silver NIS Certificate". The "ordinary Certificate" is awarded to companies which have consistently won the award for a period of one to four years.[47] An award winner is free to display the "NIS logo on the winning products. Table 5.3 shows the list of award winners from inception to 1995

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47 See SON, Annual Reports from 1976 to 1995; also SON Directory 1996.

Table 5.3: List of Award Winners from Inception to 1995

Date	No of Companies	No. of Products
1976	1	2
1977	-	
1978	-	-
1979	-	-
1980	-	-
1981	6	not stated
1982	12	"
1983	28	40
1984	35	not stated
1985	76	132
1986	76	133
1987	-	-
1988	137	240
1989	157	250
1990	177	275
1991	149	197
1992	165	388
1993	206	362
1994	203	425
1995	177	321

Sources: **(1) SON Annual Reports from 1976-1995**

(2) Directory of Certified Quality Products, 1989-1995.

The above table shows an increasing enthusiasm towards the scheme by manufacturers. With the exception of 1991, 1993 and 1995 which recorded slight decreases, the number of award winners has been on the increase since inception.

5.13 Benefits of Certification:

Some of the benefits of certification as stated by SON are as follows.

(a) It is important in building up abroad the good reputation of products exported to foreign countries.

(b) Standardised and marked products enjoy a good reputation in general.

(c) Certification is sometimes a pre-requisite for export business required by either

the exporting or importing country; therefore the standards mark is usually a good selling point.

(d) It prevents the country from being used as a dumping ground for inferior foreign products.

(e) Once one factory in a certain product area is certified, competing factories will strive for the same official recognition to enable them stay in business. This consequently leads to accelerated development.

(f) It simplifies the choice of products for the consumer. This is particularly so where technical terms and specifications are involved. The standard mark then becomes the objective guideline for the consumer.

(g) It protects the manufacturer from unfair competition and facilitates the advertisement and marketing of his product.[48]

It cannot be denied that some of the above benefits are accruable from certification. For instance, as regards international trade, this research reveals that many importers from Nigeria usually insist on certified products. As pointed out by the Director-General of SON, Prof. J. A. Agbalaka, "many overseas buyers, especially of Nigerian textiles, include SON's certification as condition for release of letters of credit raised in their respective countries".[49]

Onwubuya[50] writes that a certification system can be an important factor in enabling a developing country like Nigeria secure access to foreign markets. He notes that one of the reasons why SON adopts the third party certification is export promotion.

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48 1989-90 Directory, of SON, pp. 16 & 17.

49 Son Journal, Vol. 1, No. 6, July-Sept. ,1992, p. 8.

50 Ibid., p. 4.

This system is beneficial for export promotion because it gives confidence to the recipient that the product conforms to identifiable standards.

The current move at the international level towards mutual recognition of certification system of member countries further buttresses the need for certification. Nigeria being a member of the International Standards Organisation (ISO) and the African Regional Standards Organisation (ARSO) will benefit immensely from certification of locally manufactured products.

At the local level, the benefit of certification has remained minimal. Many consumers are ignorant of the existence of SON and its activities including the certification programme. The table below shows the awareness level of consumers about the existence of the organisation.

Table 5.4: Awareness of consumer protection agencies as indicated by consumers.

Responses	**Frequency**	*%*
Price Control Board	18	2.9
Standards Organisation of Nigeria	21	3.4
NAFDAC	52	8.4
None	528	85.3
TOTAL	*619*	*100.0*

The above table shows that out of 619 respondents interviewed, 21 or 3.4 percent indicated knowledge of the Standards Organisation of Nigeria. This is indeed a very low figure.

The level of awareness about the certification marking scheme of the organisation

was also tested. The following table shows the result of this enquiry-

Table 5.5 Awareness of the certification marking scheme of the Standards Organisation of Nigeria as indicated by consumers.

Responses	Frequency	Percentage
Yes	238	50.5
No	233	49.5
TOTAL	*471*	*100.0*

The table shows that of 471 valid cases, 238 or 50.5 per cent indicated awareness of the certification marking scheme while 233 or 49.5 per cent displayed lack of awareness. This equally confirms the assertion that many consumers are unaware of the activities of the Standards Organisaation of Nigeria.

This research further shows that the Nigerian Industrial Standard (NIS) Logo has little or no influence on the purchasing pattern of consumers. The result of our field survey is as follows:

Table 5.6: What do you consider when buying a product?

Responses	Frequency	%
price	216	38.3
Reputation of the manufacturer	69	12.2
Nigerian Industrial Standard (NIS)	6	1.1
Quality of the product	272	48.2
others	1	12
TOTAL	*564*	*100.0*

The above table shows that out of the 564 respondents interviewed, 6 or 1.1 per cent indicated that they are influenced by the Nigerian Industrial Standard (NIS) symbol. This is simply insignificant. The implication is that consumers are not aware of the

symbolic value of the NIS mark. This buttresses the assertion that many consumers are ignorant of the role of the Standards Organisation of Nigeria in quality related matters. In fact many consumers feel that the certification marking scheme is of little or no practical benefit. The table below illustrates this.

Table 5.7: Assess the practical benefit of the certification marking scheme.

Responses	Frequency	%
High	136	38.3
Low	176	49.6
No benefit	43	12.1
TOTAL	*355*	*100.0*

It is seen from the above table that out of the 355 respondents covered, 136 or 38.3 per cent rate the benefit of the certification scheme as high; 176 or 49.6 per cent rate it as low: while 43 or 12.1 per cent see it as having no benefit at all. The cumulative result is that 61.7 per cent rate it as either low or of no benefit. This further confirms the assertion that the average consumer is yet to be conversant with the activities of the Standards Organisation of Nigeria.

5.14 Effect of Certification.

A question that may be posed is the right of the consumer with respect to certified products. If such a product turns out to be sub-standard or defective, can the consumer sue the SON? The answer to this question will depend on the legal effect of the NIS logo.

SON maintains that the display of NIS logo on any locally made product is an

indication that the product conforms with a specified NIS standard[51]. The organisation further posits that the NIS certificate guarantees excellent quality grade products and thus assures the consumer that he is getting good value for his money[52]. In addition, SON encourages consumers to "avail themselves of the tremendous benefits derivable from buying and using products that carry the NIS certification mark of quality especially... at this period when fake and adulterated products abound."[53]

Can SON's encouragement to consumers to buy products with the NIS logo be regarded as a guarantee in the legal sense? In law, "guarantee" means a collateral promise to answer for the debt, default or miscarriage of another, as distinguished from an original and direct contract for the promisor's own act.[54]

Cheshire, Fifoot and Furmston[55] explain that the essence of the contract of guarantee is that the guarantor agrees, not to discharge the liability in any event, but to do so only if the principal debtor fails in his duty.

Can SON's statement under consideration come under this principle? Can it be regarded as a guarantee to a potential consumer of a defective certified product? The answer is obviously in the negative. For one thing, there is no written agreement[56] between the organisation and any prospective consumer. Also, there is no promise to answer for

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51 SON 1991 Annual Report, p. 26.

52 SON Catalogue 1993, p. 10.

53 SON Directory of Certified Quality Products 1992/93, p. 12.

54 Bird, R., Osborn's Concise Law Dictionary, 7th ed., (London: Sweet & Maxwell, 1983) p.160.

55 Furmston, M. P. Cheshire, Fifoot & Furmston's Law of Contract, Ltd; 1986) p. 195.

56 A contract of guarantee must be in writing.

the liability of the product manufacturer. SON's statement can, at best, be regarded as a professional advice to prospective consumers.

Incidentally, the researcher has not come across any claim on defective certified product. As argued in the next chapter, if such a case arises, the court may not find it difficult to impose liability on the organisation and the defaulting manufacturer, at least, in negligence.

5.15 Consumer Complaints

Consumer complaint is one of the avenues through which SON enforces implementation of its standards. Consumers are encouraged to make reports of purchase of sub-standard products to the organisation. If the allegation is proved, the organisation issues appropriate directives to the manufacturer. Such directives include, compensation to the victim, imposition of penalty on the manufacturer and remedial actions to prevent future occurrence. It is only in extreme cases of low quality that the factory may be closed down. In other cases, apart from seeking redress for the consumer, a basic aim of the exercise is to assist SON to identify manufacturers of poor quality products, detect manufacturing defects; and thereafter offer practical suggestions that would help the manufacturer to correct such defects.[57]

In carrying out this exercise SON tries to balance the interest of the consumer with that of the manufacturer. The organisation maintains that it has both moral and legal obligation to protect the consumer just as it has the same obligation to protect the

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[57] SON 1992 Annual Report, p.27.

manufacturer from the consumer taking undue advantage.[58] In other words, SON, ensures that the privilege is not abused by the complainant.[59]

Consumer complaints often received by the organisation include, faking of products, adulteration, under weight, accelerated corrosion of panels of locally assembled automobiles, engine defects, and presence of foreign particles in products. The complaint in each case depends on the nature of the product in question. For example, the complaints on candles are mostly on easy deformation and low burning time; those on beer, malt and soft drinks are on sediments and foreign bodies. That of dry cell batteries is on short life span. Poor washing fastness and poor dimensional stability are the usual complaints in fabrics.

This research shows that consumers rarely make reports to the Standards Organisation of Nigeria. The table below shows the number received for a selected seven-year period -1989 to 1995.

Table 5.8: consumer complaints received by SON from 1989 to 1995.

Year	No. of consumer complaints
1989	12
1990	17
1991	19
1992	16
1993	9
1994	15
1995	30

Source: SON Annual Reports, 1989-1995.

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[58] SON Directory of Certified Quality Products 1992/92, p. 7.

[59] SON 1992 Annual Report, p. 27.

From the above table it is seen that consumer complaints received by SON for the selected period range between 9 and 30. This number is indeed low given the level of sub-standard products in circulation. But SON discloses that complaints indicated in the Annual Reports are those investigated. A significant number are not investigated. These include foreign products with neither the name nor the address of the manufacturer/distributor. Also locally manufactured products without relevant information that may assist in tracing the manufacturer. Many fake and adulterated products come within this group. In addition, investigation may not be carried out if the consumer has tampered with the product. This is because SON, as a matter of policy, does not investigate tampered products. This policy can be criticised on the ground that in many cases defects may not be discovered until a product is put into use. A better policy is to require the complainant to produce another product from the same batch.

On the whole, the overall low number of consumer complaints is a pointer to the fact that the average consumer is yet to recognise the role of SON in product related matters. Added publicity effort is expected of SON in order to make its activities relevant to the consumer.

5.16 Implementation Techniques

Implementation of product standards is effected through factory inspections; quality evaluation of finished products; investigation of consumer complaints, and product certification.

SON adopts a mixed approach in the implementation of its standards. This means that some standards are mandatory while others are not. The Minister of Industries is

empowered to declare some established standards mandatory. To date, only seventeen out of the existing three hundred standards have been declared mandatory.[60]

The mixed-approach adopted by SON can be supported. A contrary approach would have been counter-productive in view of the present state of our industrial advancement. SON's policy which is based on safety considerations can, therefore, be said to be in order.

The selective enforcement system does not, however, apply where a product is hazardous to health. Section 12A empowers the Director-General to take any appropriate action where he is satisfied that the quality, purity or potency of any product (whether or not the subject of a mandatory industrial standard) is such as to be detrimental or hazardous to life or property. By this section, the Director-General may apply to the magistrate court having jurisdiction in the area for an order-

(a) to seize, destroy or prohibit any person from selling or offering for sale such product; or

(b) seal up the premises where such product is manufactured or stored; or

(c) direct the manufacturer to rectify the deficiency in the case of low quality product.

This section was introduced by S.1 (f)(iv) of Decree No. 18 of 1990. The reference to S. 11A in this Decree is wrong since the section has been renumbered by cap. 412, Laws of the Federation of Nigeria, 1990.

Products seized and destroyed under the above provision include electric cables, electric irons, hurricane lamps, radio sets, motor vehicle tyres; paraffin wax candles;

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[60] See Mandatory Industrial Standards Orders 1978 and 1989 respectively; cap. 412, Laws of the Federation of Nigeria, 1990.

fruit juice; biscuits, matches, electric bulbs; dry cell batteries; chocolate, some wine and milk products.[61]

A look at the catalogue of standards reveals that some existing standards are rather redundant. These are those on multi-producer products. Examples are standards on garri,[62] maize,[63] oil,[64] and palm kernel oil.[65] Producers of these products are scattered all over the country and usually operate on small-scale basis. This makes enforcement impossible. It is only in cases of export that such standards may become relevant. At the local scene, both producers and consumers are largely ignorant of them.

5.17 Summary

This chapter reveals that the Standards Organisation of Nigeria is making some efforts in matters relating to product standards. Its various activities such as factory inspections, investigation of consumer complaints, technical assistance to manufacturers and prescription of product standards attest to this fact. But the organisation faces implementation problems. In particular, the non-mandatory nature of many of its standards makes the decision whether or not to adopt them voluntary.

It logically follows that such decision will normally involve a cost-benefit analysis. Thus a prudent manufacturer will weigh the cost of attaining the standard against the expected benefit. Consequently, in this country where the NIS logo (for

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61 SON Office, Lagos.

62 67 NIS 181: 1983.

63 67 NIS 253: 1989.

64 75 NIS 212: 1985: NIS 213: 1985.

65 67 NIS 230: 1987.

reasons such as illiteracy and ignorance) is not a strong selling symbol, it can be argued that many manufacturers may not strive to attain non-mandatory standards.

The reverse, however, appears to be the case in practice. Statistics of award winners stated above show that the demand for the NIS certificate is on the increase. This notwithstanding, consumer awareness in this regard remains minimal.[66] The increased demand for the NIS certificate can therefore be explained on the ground of competition within the manufacturing sector. But the fact remains that the average consumer is patently ignorant of the benefit of the certification marking scheme and in fact, the general role of the Standards Organisation of Nigeria in product matters.

[66] See Tables 5.3&5.4 above

CHAPTER SIX

CIVIL LIABILITY FOR DEFECTIVE PRODUCTS

6.1 Introduction

In the preceding chapters we have considered the various laws and agencies put in place for the protection of the consumer. In chapter four, we noted that apart from the Consumer Protection Council Decree, none of the existing statutes confers civil rights on individuals. The result is that an offender is only liable to the penalties stipulated by the relevant law. The victim of the offence derives no remedy under the statute.

This chapter is concerned with the civil liability of the offender to the victim of the offence. Issues to be discussed include, the meaning of product defect; who bears responsibility for product defects; possible defences and the nature of civil liability. The broader issue of civil enforcement for product defects shall be examined in the next two chapters.

6.2 What is Product Defect?

It is rather difficult to determine when a product may be said to be defective. This is because "defect" is a relative term. A product which poses some hazards to life or property is certainly defective. But even this is also relative. A poison, a chemical or an explosive is inherently dangerous; but if accompanied with appropriate label and warning it may not be construed as defective.

Products which are not dangerous to health but nonetheless unfit for their stated purposes may present some difficulties. Suppose that a skin lotion, contrary to its presentation, fails to tone the skin, can it be said to be defective? The same question can be extended to a machine which functions below expectation. These questions are

important because for a person to succeed in a product liability case he must show that the product is in fact defective. Thus in Fessok International Traders (Nig.) Ltd. v Onyemelukwe,[1] the defendant's allegation that a resuscitation trolley sold to him by the plaintiff was not functional was rejected by the court on the ground that he did not specify what was wrong with the machine. This decision is in consonance with the Evidence Law which requires that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.[2]

In the light of the foregoing, the precise meaning of the term "defect" is thus important. But the issue remains controversial. As noted by Clark, the problem of defining defectiveness has exercised the minds of legal scholars perhaps more than any other aspect of product liability law.[3]

The Black's Law Dictionary[4] defines "defect" as the want or absence of some

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1 (Unrep.) Suit No. E/436/83; Thursday June 12, 1986.

2 See S. 135(1) of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990. See also Leventis Motors Ltd. v. Steve Evuleocha. (Unrep.) Suit No. E/3A/78, delivered on March 26, 1980 by Justice Obiora Nwazota; Demuren v. Atlas (Nig.) Ltd. (1976) 12 CCHCJ 2709.

3 Clark, A.M., op. cit. p.25. Instances cited by the author include, Birhaum, "Unmasking the Test for Design Defect; from Negligence (to Warranty) to Strict Liability to Negligence" 33 Vand, L. Rev. 593 (1980): Keeton, "Manufacturers" Liability: The Meaning of Defect in the Manufacture and Design of Products", 20 Sycrause L. Rev. 559 (1969); Wade, "On Product Design and Their Actionability" 33 Vand L. Rev.

4 Black, H.C., Black's Law Dictionary, 6th ed. (St. Paul Minn: West Publishing Co. 1990), p. 418.

legal requisite; deficiency; imperfection; insufficiency. Quoting from Galloway v City of Winchester,[5] the term is further defined as the absence of something necessary for completeness or perfection; a deficiency in something essential to the proper use for the purpose for which a thing is to be used; some structural weakness in part or component which is responsible for damage.[6]

In Nigeria there is no statutory definition of "defect". The meaning of the term can, however, be gathered from judicial decisions. A distinction is made as to whether the term is invoked in contract or in tort.

6.2.1. *Defect in Contract*

The relativity of the term "defect" is glaring under the law of contract. In contract, "defect" is predicated on the bargain between the parties as well as terms implied under the statute. Terms of the contract (including samples provided, if any) show the obligations assumed by the parties with particular reference to the envisaged quality. The stated quality standard thus helps to determine the issue of defect. This is because the law of contract is concerned with "giving effect to the private autonomy of contracting parties to make their own legal arrangements".[7] Therefore, as rightly

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5 299KY.87, 187 S.I 2d 890, 892, 893

6 Quality terms implied into a contract of sale are fitness for purpose, merchantable quality, correspondence with description and with sample. See S. 14 - 16, Sale of Goods Law, Cap. 174, Laws of Lagos State of Nigeria, 1994.

7 Atiyah, P.S., "Contracts, Promises and the Law of Obligations (1978) 94 Law Quarterly Review, p. 193.

observed by Clark,[8] of fundamental importance are the terms of the agreement between the parties since in the event of any dispute these can be used as evidence of what the parties intended and expected from the bargain. The learned author notes that the test for defectiveness in contract is whether or not the product was "of merchantable quality" or 'fit for its purpose", both of which are interpreted in terms of consumer expectations, which can be ascertained from the terms of the bargain.[9]

In contract, the term "defect" cannot easily be distinguished from "merchantable quality". Atiyah notes that it never seems to have been doubted that under the original Sale of Goods Act defective goods were unmerchantable. The author observes that in the case of manufactured goods, quite trivial defects have occasionally been held to render goods unmerchantable.[10]

Similar inclination can be discerned from judicial decisions. The courts often equate the word "defect" with "merchantable quality".[11] In Grant v. Australian Knitting Mills Ltd., it was stated that a thing "is not merchantable ... if it has defects unfitting it for its only proper use but not apparent on ordinary examination"[12]

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8 op. cit., p. 26.

9 Ibid. p. 27.

10 Atiyah, P.S., The Sale of Goods, 6th ed. (London: Pitman Books Ltd., 1980), p. 110. Cases cited by the author in support of this view include: Jackson v. Rotax Motor & Cycle Co. Ltd. [1910]2 K.B. 937; Parsons (Livestock) Ltd. v. Uttley Ingham & Co. [1978] Q.B. 791; and Winsley v. Woodfield [1925] NZLR 480.

11 Similar equation with fitness for purpose is also observable. See Geddling v. Marsh [1920]1 K.B. 668.

12 [1936] A.C. 85; per Lord Wright at p. 100. The term "merchantable quality" shall be discussed in greater detail in the next chapter.

In Plastic Manufacturing Co. Ltd. v. Toki of Nig. Ltd.,[13] the plaintiffs manufactured and sold some plastic containers to the defendants. The containers were based on a sample which was made of polythylene. When the defendants' products (lotion and shampoo) were put in the containers, they changed colour after about one month. In a suit for the balance of the purchase price, the defendants counter-claimed for damages claiming that the containers were defective. The court decided the case on the implied condition of merchantable quality. According to Agoro, J:

> *"As I understand the word "merchantable" in relation to the plastic containers manufactured by the plaintiffs, it meant that the goods in the form in which they were delivered to the defendants company should be suitable for any purpose for which such plastic containers are normally used".*[14]

In arriving at the above decision, the court took into consideration the fact that the defendants did not disclose their purpose to the plaintiffs. It was also found that the containers were suitable for the general purpose for which they were made. They were equally found to be of the same quality as the sample. The counter-claim, therefore, failed.

Similarly, in Dumuren v. Atlas (Nig.) Ltd.,[15] the court refused a claim for the replacement of a machine which was alleged to have developed series of faults soon after delivery. According to the court, there was no suggestion either in the statement of claim or in the plaintiff's evidence that the machine was not merchantable.[16] It is, however, doutbtful whether an averment of this issue would have changed the court's decision.

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13 (1976) 12 CCHCJ 2701.

14 Ibid., at p. 2705.

15 (1976) 12 CCHCJ 2709.

16 Emphasis mine.

As stated by Agoro, J: "If there had been a breach of condition or warranty (which is denied) the only remedy of the plaintiff under section 53(1) of the Sale of Goods Law, Cap. 125 would be damages for breach of warranty, and not to reject the machine..."[17]

Perhaps, this decision was informed by the fact that the plaintiff had used the machine for ten months before attempting to reject it.

Khalil & Dibbo v. Mastronikolis[18] provides a further example. The appellants purchased a quantity of engine oil from the respondents. The oil was chosen from three samples which were presented to the appellants. The purpose for which it was needed was not disclosed. The appellants sought to repudiate the contract on the ground that the oil was not suitable for use in internal combustion engines. It was held that since there was no evidence that the oil was not of merchantable quality as engine oil, but merely that it was unsuitable for use in one particular type of engine, the case could not be brought within exception(2) to section 14 of the Sale of Goods Act 1893.

If a product is tainted with a latent condition which causes damage to the plaintiff, such product will be regarded as defective. In Nigerian Bottling Co. Ltd. v. Ngonadi,[19] a refrigerator which manifested some faults few days after delivery and eventually exploded after one month causing the plaintiff serious injuries was held defective and so unmerchantable. In Grant v. Australian Knitting Mills Ltd.,[20] the presence of a deleterious chemical in an undergarment was regarded as a defective

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17 Ibid., at p. 2714.

18 12 WACA 462. See also The British and Overseas Credit Ltd. v. Animashawun [1961] ANLR 343.

19 [1985]5 S.C. 313.

20 [1936] A.C. 85.

condition.[21] The same applied to the remains of a snail in an opaque bottle of ginger beer.[22] A similar decision was reached in Hardwick Game Farm v Suffolk Agricultural Poultry Products Association.[23] There the presence of a toxic substance in a compounded meal for pheasants, partridges and chicks caused the death of many of the chicks and the stunted growth of many others. In holding the sellers liable, Diplock, L.J. stated that: "In a contract for the sale of goods, a term dealing with "defects" is prima facie dealing with the event that the quality of the goods supplied falls short of the quality of the goods which the seller undertook a legal obligation to supply."[24]

A product which is otherwise safe can be regarded as defective if contained in a defective container. Thus in Geddling v. Marsh,[25] a plaintiff who was injured by a defect in a bottle which contained some mineral water succeeded. The court considered immaterial the fact that the accident arose not from any defect in the liquid contained in the particular bottle but from some defect in the bottle itself.[26] Similarly, in Morelli v. Fitch and Gibbons[27] a defect in a bottle which contained some ginger wine was held as one which rendered the wine not of merchantable quality.[28]

A lower standard is required in the case of second-hand goods. In Bartlett v.

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21 See Lord Wright at p. 97.

22 Donoghue v. Stevenson [1932] A.C. 562

23 [1966]1 WLR 287.

24 Ibid., at p. 344.

25 [1920]1 K.B. 668.

26 See Acton and Branson, J.J. at pp. 612&613 respectively.

27 [1928] All E.R. Rep. 610.

28 See Acton and Branson, J.J. at pp. 612&613 respectively.

Sidney Marcus,[29] Lord Denning, M.R. explained that a buyer should realise that when he buys a second-hand car, defects may appear sooner or later, and, in the absence of an express warranty, he has no redress.[30]

The Supreme Court in Leventis Motors Ltd. v. Agbajor[31] relying on the above decision, held that a second-hand car is reasonably fit for purpose, if it is in a road-worthy condition, fit to be driven along the road in safety, even though not as perfect as a new car.[32] The respondent had counter-claimed for damages on the ground that he had asked for a home-delivery car and not a second hand car. The court admitted that he spent some money to replace or repair some parts; but emphasied that what he bought was a second-hand car and so he must expect to repair or replace parts which had become worn out.

6.2.2. *Defect in Tort*

Defect in tort concerns product safety. This is akin to the meaning attributed to the term in a strict liability regime. Thus, while a safe but inferior product may be regarded as defective in contract, it may not be so regarded in tort.

For a product to be considered defective in tort it must be in such a condition as is capable of causing injury to health 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

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29 [1965]1 WLR 1013.

30 Ibid., at p. 1017.

31 (1971) N.S.C.C. 87.

32 See Fatai-Williams, J.S.C. at pp. 94&95

to guard against possible injuries. The scope of such duty was summarised by Lewis, J. in Daniels v. White and Sons.[33] He stated:

> *"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."*[34]

The above principle was reiterated in Boardman v. Guinness (Nig.) Ltd.,[35] where it was held that the defendants' duty was not to ensure that their products were perfect but merely to take reasonable care to see that no injury was done to the consumers of their products. According to the court, although there was evidence that the beer in issue contained bacteria, the plaintiff did not show that such bacteria were harmful and caused his illness.

Possibility of risk to health or property is thus the crux of the requirement. But subject to this restriction, the conditions that may render a product defective in tort are almost infinite. A review of decided cases shows that anything that could adversely affect the health of the consumer would bring a product within this group. This includes, presence of disgusting sediments,[36] nauseating foreign bodies,[37] explosive substances,[38]

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33 [1938]1 All E.R. 258.

34 Ibid., at p. 261.

35 (1980) NCLR 109.

36 Ebelamu v. Guinness (Nig) Ltd. FCA/1/101/82; Monday Jan. 24, 1993; Boardman v. Guiness (Nig) Ltd. (1980) NCLR 109.

37 Donoghue v. Steveson, supra; Okonkwo v. Guiness (Nig) Ltd. (1980)1 PLR 538; pp. 598 and 601. The plaintiff, however, lost his case because he could not prove

(continued...)

obnoxious ingredients;[39] and any other condition that is likely to cause injury to the consumer or his property.

6.2.3. *Defect Under the Statute*

Statutory definition of "defect" exists in some jurisdictions. Section 3(1) of the Consumer Protection Act 1987 (U.K) provides that there is a defect in a product if the safety of the product is not such as persons generally are entitled to expect; and for those purposes "safety", in relation to a product, shall include safety in the context of risks of damage to property, as well as in the context of risks of death or personal injury. In determining what persons generally are entitled to expect in relation to a product, all the circumstances shall be taken into account, including:

(a) the manner in which, and purposes for which, the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for, or warnings with respect to doing or refraining from doing anything with or in relation to the product;

(b) what might reasonably be expected to be done with or in relation to the product; and

(c) the time when the product was supplied by its producers to another.[40]

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[37](...continued)
other issues, namely, source of the product, source of the defect and a link between the defect and the alleged injury.

[38] Vacwell Engineering Co. Ltd. v. B.D.H. Chemicals Ltd. (1971) 1 Q.B. 88.

[39] George v. Skivington (1869) L.R. 5 Exch. 1.

[40] S. 3(2).

The Commission of the European Union notes that in the legal systems of many Member States the core definition of product defect is similar: the defect taken into consideration is one that diminishes the product's fitness for normal use or the use envisaged in the contract.[41]

By section 402A of the American Restatement (2d) of Torts, liability attaches where a product is "in a defective condition unreasonably dangerous to the user or consumer." Comment I to this section explains the provision as follows: "The article must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."

The definition of defect in the Consumer Protection Act 1987 (U.K) has generated some criticisms. The phrase "what persons generally are entitled to expect" lacks precision. People's expectation cannot be divorced from their knowledge of the characteristics of the product. Such knowledge is usually acquired from the product itself, that is to say, its general presentation, warnings, instructions, advertisements[42] and previous use, if any. It, therefore, follows that much depends on what is disclosed by the producer. But then consumer's expectation is a complex thing. Is a producer expected to assume certain degree of knowledge of his product; the likelihood of misuse; or storage under unfavourable conditions? These, we suppose, are questions of degree.

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41 See the Green Paper on Guarantees for Consumer Goods and After-Sale Services, (Brussels, 15 nov. 1993), p.27.

42 No doubt, frivolous advertisements will certainly add to consumers' expectation and increase the chances of liability of the producer. But such advertisements cannot be regarded as warranties. See Lambert v. Lewis [1980]2 WLR 289.

On the whole, the vagueness of the term "defect" wanes the value of the Act because it leaves many questions unanswered. For instance, it has been observed by Atiyah[43] that the definition is not of great help when the alleged defect is of an esoteric or complex nature as to which persons generally probably have no expectations at all. The same applies where the person injured is an innocent bystander who, undoubtedly, had no opportunity of expecting any particular standard. Clark[44] notes that the major difficulty with the definition of defect in the Act is that it fails to provide a readily ascertainable objective standard against which a manufacturer, or indeed a court, can measure the safety of a product.

Similar criticism has been extended to the phrase "defective condition unreasonably dangerous" in the American Restatement (2d) of Torts. In particular, the phrase "unreasonably dangerous" is devoid of precise meaning. The court in Cronin v. J.B. E. Olsen Inc.[45] rejected this phrase as a test for liability on the ground that it burdens the injured plaintiff with proof of an element which rings on negligence.

Despite controversies, a fact which emerges from the foregoing analysis is that defect is simply a condition which makes a product either injurious to health or property; unfit for use; or unmerchantable under a contract. Thus, in general, defect is wider in scope than the conventional commercial law terms - "fitness for purpose" and "merchantable quality". But like the latter term with which it shares close affinities, the meaning of defect depends on the branch of law in which it is invoked.

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43 Atiyah, Sale of Goods, op. cit., p.239 underlined supplied.

44 Clark, A.M., op. cit., p.29.

45 B. Cal. 3d. 121 . 501 p. 2d. 1153. Cited in A.M. Clark, op. cit., p. 30.

In contract, it is construed from a functional perspective based on the terms of the contract and statutory requirements. In the realm of strict liability as examplified by the positions in America and the United Kingdom where liability is predicated on the absence of "safety", the meaning of this term transcends functional utility. It relates to a condition which makes a product dangerous to health or property. "Defect" in tort is closely related to this; but different decisional models apply.[46]

For instance, Atiyah[47] suggests that in resolving the issue of defect, analysis of the risks versus the gains must be done. The learned author states that some balance must be struck between avoiding unnecessary risks and an over-cautious policy which only eliminates risk at huge cost. He writes that in some respects this raises similar questions as the law of negligence, and so it may appear that the new strict liability is not in practice likely to prove very different from negligence liability.

Montgomery and Owen[48] write that the supposed distinction between a strict liability decisional model and a negligence model is that in the latter, the costs and benefits to be balanced are subject to the foreseeability rule whereas in the former, the manufacturer is deemed to have had absolute prevision or pre-science of all the harm caused by the product.

It is unclear why the court has to engage in such complex issue as cost-benefit calculus. It is agreed that in both strict and tort liability regimes, the essential issue is the

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46 See Clark, op. cit., p. 32-41; Atiyah, Sale of Goods, op. cit., p. 244-248.

47 Atiyah, op. cit. p.242

48 Montgomery and Owen, "Reflections on the Theory and Administration of Strict Tort Liability for Defective Products". 27 S.C.L. Rev. 803 at p. 829 (1976); cited in Clark op. cit., p.32.

state of the product: Is the product capable of causing injury to health or property? If the answer is in the affirmative then the product is defective. Defect in this case is the totality of the dangerous propensity of the product as compared to its benefits. In the case of drugs, for example, it relates to the gravity of the side effects as compared with the therapeutic effects. This being so, in an action based on statute the only relevant question is whether the product is defective in the sense explained. No further question arises since liability is strict. In a tort-based action, a further enquiry is necessary to determine the conduct of the producer, that is, whether he was negligent. One sees no reason why an additional step should be taken to determine whether the burden of avoiding the injury is greater than the likely injury multiplied by the probability of the injury.[49]

6.3 Who is Liable for Product Defects?

The marketing of a product may involve a complex distribution chain. A product may pass from the manufacturer to the distributor and then to retailer before getting to the consumer. A question that often arises is who, in this chain, ought to bear responsibility for a product defect. A review of judicial decisions shows that different rules apply in contract and tort respectively.

6.3.1. *Liability in Contract*

Times without number, the courts have reiterated the basic principle of contract law that only a party to a contract can sue or be sued on it. This principle which has been

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[49] This test was propounded by Judge Learned Hand in United States v. Carroll Towing Co. 159F. 2d. 169 at p. 173 (2d. Cir. 1947); cited in Clark, op. cit., p. 31.

variously referred to as "fundamental,[50] "elementary",[51] and "general,"[52] constitutes a great clog to actions instituted by strangers to a contract. The main exceptions to this principle include, the doctrine of undisclosed principal;[53] negotiable instruments;[54] constructive trust;[55] the law of property with particular reference to leases;[56] insurance law[57] and banking transactions. Abusomwan v. Mercantile Bank Ltd. (No. 2)[58] illustrates the last exception. In an action to enforce the terms of a guarantee by a person

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50 Per Viscount Haldane, L.C. in Dunlop Pneumatic Tyre Co. v. Selfridge & Co. Ltd. [1915] A.C. 847 at p. 858.

51 Per Viscount Simonds in Scruttons Ltd. v. Midland Silicones Ltd. [1962]1 All E.R. 1, at p.6.

52 Per Lord Reid, ibid., at p. 10.

53 See Fridman G.H.L. Fridman's Law of Agency 4th ed. (London: Butterworths, 1976) p. 16; Furmston,M.P Cheshire, Fitoot and Furmston's Law of Contract, 11th ed.(London:English Language Book Soceity/Butterworths, 1986)p.15; Ezejiofor, Okonkwo and Ilegbune, Nigerian Business Law, (London: Sweet & Maxwell, 1982)p.2; also Crompton-Richman v. Attanda (1967) NMLR 383; (1967)2 A.L.R. Comm. 366.

54 See S. 38, Bills of Exchange Act, Cap. 35, Laws of the Federation of Nigeria, 1990.

55 Gregory and Parker v. Williams (1817)3 Mer 582, cited in Cheshire, Fifoot and Furmston, op. cit., p.442; Lloyd's v. Harper (1880) 16 ch. D. 290 at 321; Walford's Case (1919) A.C. 801. But there must be a clear intention to create a trust. See Green v. Russel [1959]2 All E.R. 525.

56 Tulk v. Moxhay (1848) 2Ph. 774, Smith & Snipes Hall Farm Ltd. v. River Douglas Catchment Board, [1949]2 K.B. 500.

57 See Ss. 53 and 54, Insurance Act, Cap. 183, Laws of the Federation of Nigeria, 1990; also S. 6(3), Motor Vehicles (Third Party Insurance) Act, Cap. 233, ibid.

58 [1987]3 NWLR (Pt. 60) 196 S.C.

not a party to the agreement, it was held by the Supreme Court that where a person sustains an injury from a contract between two persons, the third innocent party is not precluded from bringing action on the ground that he was not a party to the contract, the mis-performance or non-performance of which has resulted in the damage. Belgore, J.S.C. stated:

> *"While in few remaining cases, privity is still good law, the banking law and transactions are so vital to international maritime and commercial businesses that to apply principles of privity of contract would destroy initiative and sometimes make transactions impossible."*[59]

As regards insurance contracts, it is specifically provided that where a third party is entitled to a claim against an insured in respect of a risk insured against, he shall have a right to join the insurer of that risk in an action against the insured in respect of the claim.[60] Furthermore, section 6(3) of the Motor Vehicles (Third Party Insurance) Act[61] provides that notwithstanding anything contained in any written law, a person issuing a policy of insurance shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons.[62]

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59 Ibid at p. 212.

60 See S. 53, Insurance Act, Cap. 183, Laws of the Federation of Nigeria, 1990; Akene v. British American Insurance Co. (Nig) Ltd., (Unreported) high Court of Midwestern State, Ughelli Judicial Division, Ogbobine, J. Suit No. UHC/37/71 delivered on May 26, 1972. cited in Sagah, Nigeria Law of Contract (London: Sweet & Maxwell, 1985), p. 425.

61 Cap. 233, Laws of the Federation of Nigeria 1990.

62 See also Sule v. Norwich Fire Insurance Society Ltd. (Unreported) High Court of Western State, Ibadan Judicial Division, Johnson, J. Suit No. W/74/70

(continued...)

The above exceptions notwithstanding, in general, the courts prefer to stick to the rigidity of the principle of privity even where its application may lead to manifest injustice. Lord Reid put the issue thus in Scruttons Ltd. v. Midland Silicones Ltd:

> *"...I think it is necessary to have in mind certain established principles of the English law of contract. Although I may regret it I find it impossible to deny the existence of the general rule that a stranger to a contract cannot in a question with either of the contracting parties take advantage of provisions of the contract even where it is clear from the contract that some provision in it was intended to benefit him."*[63]

In the same vein, even though the respondent's claim in Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge Ltd.[64] was rejected on the ground that the contract was nudum pactum, the court stressed the fundamentality of the principle of privity. As stated by Viscount Haldane, one of the fundamental principles of the English law is that only a person who is a party to a contract can sue on it.[65]

Adherence to the rigidity of the principle of privity has been rationalised on

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[62] (...continued)
delivered on March 11, 1971, cited in Sagah, op. cit., p. 426.

[63] [1962] 1 All E.R. 1, at p. 10.

[64] [1915] A.C. 847.

[65] at p. 853; see also Price v. Eastern (1833) 4 B. & Ad. 433; Taddy & Co. v. Sterious & Co., [1904]1 Ch. 354; MaGruther v. Pitcher [1904]2 Ch. 306; Chuba Ikpeazu v. African Continental Bank [1965] N.M.L.R. 374; Alan Bojor Bros & Anor v. Grrek West African Line & Anor, [1971]/1 U.I.L.R. 9(Pt. 4) 488; Incar v. Ojomo [1986]5 NWLR 9Pt. 39)111 C.A.; Ekuma & Anor v. Silver Eagle Shipping Agencies (PH) Ltd., [1987]4 NWLR (Pt. 65) 472 C.A; Vee Gee (Nig) Ltd. v. Contact (Overseas) Ltd. & Anor. [1992]2 NWLR 9Pt. 266) \503 C.A.; Lagos State Development and Property Corpn. (LSDPC) & Anor v. Nigerian Land and Sea Foods Ltd. (NLSF) [1992]5 NWLR (Pt. 244) 653) 653 SC.

various grounds. Viscount Simonds,[66] in rejecting any view that impinged on the orthodox principle, stated that the first duty of the court is to administer justice according to law, the law which is established by the Act of Parliament or the binding authority of precedent. According to him, the law is developed by the application of old principles to new circumstances. Therein lies its genius. Its reform by the abrogation of those principles is the task not of the courts of law but of Parliament. He further stated: "I would cast no doubt on the doctrine of stare decisis without which law is at hazard".

A similar sentiment was expressed by Lord Guest in Beswick v. Beswick.[67] On the submission of plaintiff's counsel that section 56(1) of the Law of Property Act 1925 (U.K) had effected a fundamental change in the law so as to allow a third party, not a party to a contract, to enforce it, his Lordship stated:

> *"If this contention were sound, it would mean that by a side wind, a fundamental change in the law had been effected in a consolidating statute. It would subvert the law as set out in Tweddle v. Atkinson,[68] affirmed in Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd.,[69] and confirmed in Scruttons Ltd. v Midland Silicones Ltd.[70] that a person who is not a party to a contract cannot sue on it, even if it purports to be made for his benefit."*[71]

Adherence to the principle of privity may, perhaps, be further justified on the ground that it makes for certainty. This is moreso as regards a defendant. The principle

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66 Scruttons Ltd. v. Midland Silicones Ltd., [1962] 1 All E.R. 1, at p. 7.

67 [1968] A.C. 58.

68 [1861]1 B. & S. 393.

69 [1915] A.C. 847

70 [1962] A.C. 446.

71 [1915] A.C. 847.

creates a prevision of possible claimants and thus prevents a defendant from being taken unawares. But as shall be demonstrated in subsequent chapters, this reason is not a strong factor and it is not taken into consideration in a strict liability regime.

Product liability not being within the recognised exceptions, it is clear that the principle of privity applies very much to it. It therefore follows that in contractual claims, only the person in privity of contract with the claimant bears responsibility. Privity being the only requirement, such action can, however, be maintained against any person in such relationship irrespective of the origin of the product. Thus it can be maintained against the seller whether or not he is the manufacturer.

In Nigerian Bottling Co. Ltd. v. Ngonadi,[72] a buyer successfully maintained an action against a distributor. The Supreme Court applied section 15(a) of the Sale of Goods Law[73] and emphasised that it made no difference that the appellants were mere distributors and not the manufacturers of the refrigerator. A similar principle was applied in Solu v. Total (Nig) Ltd.[74] to hold the distributors of a defective gas cylinder liable.

In contrast, absence of privity will defeat a claim based on contract. In Otto Hamann v. Sen-Banjo & Anor,[75] plaintiff's claim against the second defendant was non-suited on the ground of lack of privity. As stated by the court, the plaintiff, being an agent of the first defendant could not in his own right maintain an action against the

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72 [1985]5 S.C. 313.

73 Cap. 150, Vol. VI of the defunct Bendel State.

74 (Unreported) Lagos State High Court, Suit No. ID 361/85; March 25, 1988.

75 [1962] All N.L.R. 1070.

second defendant. Similarly, in John Holt Ltd. v. Leonard Ezeafulukwe,[76] one of the grounds on which the respondent lost his case was that he could not establish a privity of contract between him and the appellants.

Principle of privity was equally emphasised by the Court of Appeal in Vee Gee (Nig) Ltd. v. Contact (Overseas Ltd. & Anor.[77] It was there held that an innocent third party could not be bound by the terms of a contract to which he was not a party.

Privity of contract thus constitutes a great limitation to actions instituted by non-buyer consumers. Such persons can only look to other branches of the law for remedy.

6.3.2. *Liability in Tort*

In the absence of privity of contract, a possible option open to a victim of product defect is an action in the tort of negligence.[78] Subject to laid down conditions, such action could be brought by a consumer against any person in the manufacturing or distribution chain. Persons against whom action in negligence may be brought include, the manufacturer, the distributor, the retailer and a dealer in second-hand goods.

The Manufacturer

It is common fact that many consumer goods reach the ultimate consumer in the condition in which they left the manufacturer. It is, therefore, generally assumed that any defect arising from negligence can only be attributed to the manufacturer. In view of

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[76] [1990]2 NWLR (Pt. 133) 520 CA.

[77] [1992]2 NWLR (Pt. 266) 503 CA.

[78] For the definition of negligence see Lord Alderson, B. in Blyth v. Birmingham Waterworks Co. Ltd., [1856]11 Exch. 781 at p. 784; Odinaka & Anor v. Moghalu [1992]4 NWLR (Pt. 233) 1 S.C. at p. 15.

this, a popular course of action adopted by consumers is to sue the manufacturer of the defective product. The locus classicus on this point is the case of Donoghue v. Stevenson.[79] Because of the fundamental effect on the common law and the consistent reliance by subsequent cases,[80] a detailed statement of the facts of this case is necessary. The appellant sought to recover damages from the respondent for injuries suffered as a result of the consumption of some contents of a bottle of ginger beer. She averred that the beer which was manufactured by the respondent contained the decomposed remains of a snail. She further averred that the bottle was made of dark opaque glass and that she had no reason to suspect that it contained anything but pure ginger beer; that after she had drunk some of the contents of the bottle her friend proceeded to pour out the remainder of the contents into the tumbler, thereupon a snail which was in a state of decomposition floated out of the bottle; that as a result of the nauseating sight of the snail in such circumstances, and in consequence of the impurities in the ginger-beer which she had already consumed, she suffered from shock and severe gastro-enteritis.

The ginger beer in issue was purchased, not by the appellant, but by her friend. There was, therefore, no privity of contract between her and the respondent. In consequence, she based her action on the tort of negligence.

The House of Lords noted that in the circumstances of the case only the manufacturer would be liable because there would be no evidence of negligence against

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79 [1932] A.C. 562.

80 Such reliance can be seen even in cases outside product liability. Examples include, banking Abusomwan v. Mercantile Bank of Nigeria Ltd [1973] 3 NWLR (Pt. 60) 196 SC nervous shock - Okeowo v. Sanyaola [1986]2 NWLR (Pt. 23) p.471 CA.

any one else.[81] Lord Atkin stated the principle guiding manufacturer's liability thus:

> *"... 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 product will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."*[82]

Implicit in the above statement are the conditions that the product must reach the consumer in the form in which it left the manufacturer and absence of possibility, or as explained in subsequent cases, absence of probability of intermediate examination.[83]

The last condition has been convertly applied by the courts to the effect that there must not be an intermediate interference. In Boardman v. Guinness (Nig) Ltd.,[84] the plaintiff brought an action for injuries resulting from the consumption of a beer alleged to have been brewed by the defendants. He averred that he opened the bottle of beer in an ill-lit room and drank part of the contents. He noticed that it tasted sour and shortly afterwards he became ill. One of his companions then examined the beer and discovered that it was cloudy and contained a considerable quantity of sediments. The laboratory reports revealed that the beer contained certain bacteria, but did not establish that such bacteria caused the plaintiff's illness. The action was dismissed on the ground, among others, that the plaintiff had failed to show that the beer was contamianted when it left

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81 [1932] A.C. 562 at pp. 582 & 583.

82 Ibid., at p. 599.

83 See Goddard, L.J. in Paine v. Colne Valley Electrical Supply Co. Ltd. [1938]A All E.R. 803, at p. 808; Boardman v. Guinness (Nig) Ltd. (1980) NCLR 109, at p. 126.

84 [1980]1 PLR 583.

the defendant's factory. According to the court, the defendants' responsibility for their product ended when they ceased to have control over it since it was possible that the bottle had been unlawfully tampered with, or that the bacteria found in the laboratory tests some days after the bottle was opened only entered the bottle when the plaintiff himself opened it.

In Okonkwo v. Guinness (Nig) Ltd.,[85] the court applied the same principle and dismissed the plaintiff's case on the ground that he could not establish that what he saw in the bottle of the stout beer was there when the bottle left the factory.[86] In Ebelamu v. Guinness (Nig) Ltd.,[87] the plaintiff's complaint was that he suffered from gastro-enteritis as a result of some sediments contained in the defendant's harp beer. It was held that since poor storage conditions could produce sedimentation, the plaintiff did not discharge the burden that the defendants were responsible for the defect.[88]

A case in contrast is Soremi v. Nigerian Bottling Co. Ltd.[89] The plaintiff bought a crate of mixed minerals bottled by the defendants and stored the bottles in his fridge. One afternoon, he drank a bottle of coco-cola, had his lunch and then took out a bottle of sprite from that fridge to drink. Floating in the bottle was an extraneous object which turned out to be a screwed up paper. The plaintiff claimed that the sight of the object made him vomit. He brought action for negligence against the defendants. It was held

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85 [1980]1 PLR 583.

86 Ibid.,

87 FCA/L/101/82; delivered on Monday Jan. 24, 1993.

88 See also Evans v. Triplex Safety Glass Co. Ltd. [1936]1 All E.R. 283; Drausfield v. B.I. Cables [1937]4 All E.R. 382.

89 [1977] 12 CCHCJ 2735.

that the defendants owed a duty of care to him as there was no reasonable possibility of examination before he took the bottle out of the fridge with the intention of consuming its contents.

This decision can be criticised on the ground that there was no link between the object in the bottle of sprite and the illness suffered by the plaintiff. The plaintiff neither opened nor drank from the said bottle. Apparently, the court was not influenced by these factors. As stated by Oguntoye, J: "Although the plaintiff before me had not even opened the bottle of sprite, he had taken another bottle of mineral water produced by the same manufacturers a little earlier, before eating.[90]

At any rate, the case illustrates a situation where there is no possibility of intermediate interference. In such a case only the manufacturer will be liable.

Other factors which may defeat a plaintiff's claim against a manufacturer include, lack of causal link between the act and the injury,[91] failure to establish that the product is that of the manufacturer[92] and inability to discharge the burden of proof of negligence.[93] These factors as well as the general principle of liability in negligence shall be discussed in the next chapter.

b. The Distributor

Where the merits of the case admit, a distributor of a defective product may be held liable in negligence. In Watson v. Buckley, Osborne, Garrett & Co. Ltd. &

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90 Ibid., at p. 2743.

91 Ebelamu v. Guinness (Nig) Ltd. Supra; p. 181.

92 Boardman v. Guinness (Nig) Ltd. Supra; p. 180.

93 Okonkwo v. Guiness (Nig) Ltd. Supra; p. 181.

Wyrovoys Products Ltd.,[94] the plaintiff had his hair dyed by the first defendant at her hair dressing establishment with a product which was manufactured by the third defendants and distributed by the second defendants. The product was intended to contain 4 percent acid but instead contained 10 per cent. As a result the plaintiff contracted dematitis. The distributors had advertised the hair dye as absolutely safe and harmless and needing no preliminary test before use. They were held liable in negligence since by their advertisement they had intentionally excluded interference with, or examination of the article by the consumer and hence had brought themselves into direct relationship with him.[95] Similarly, in Kubach & Anor v. Hollands & Anor,[96] a school girl was injured while carrying out a chemical experiment with chemicals supplied by the chemistry teacher. Ordinarily such experiment was perfectly harmless. The teacher had purchased the chemical labelled "manganese dioxide" from the second defendants. The latter in turn had purchased it from a third party. The third party's invoice included the following condition. "The above goods are secured as described on leaving our works but they must be examined and tested by the user before use". The second defendants did not carry out a test on the chemicals and did not advise the teacher that it was necessary to do so. They were held liable in negligence to the school girl.

The Nigerian Bottling Co. Ltd. v. Ngonadi and Solu v. Total (Nig) Ltd. already considered, provide further examples. In both cases, distributors of defective products were held liable to the consumer.

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94 [1940]1 All E.R. 174.

95 See Stable, J. at pp. 182 & 183.

96 [1937] K.B.D. 907.

c. The Retailer

Like the case of the distributor, a retailer of a defective product could be held liable in appropriate cases. In Clarks and Wife v. Army and Navy Co-operative Society, Ltd.,[97] the retailers of chlorinated lime were held liable for injuries sustained by a consumer. Their liability was based on their failure to communicate previous complaints about the product to the consumer.[98] Also in Burfitt v. A & E Kille[99] the defendants were held liable for selling a dangerous toy pistol to "an incompetent person". They had sold the "safety pistol" and some catridges to a boy of twelve years of age. In playing with it, the boy injured his playmate, the plaintiff. It was held that the pistol and the cartridges formed a dangerous combination in the hands of the boy, and that the defendants, having chosen to sell them to him could not be heard to say that they did not know that they might become dangerous in his hands.[100]

Conversely, in Gordon v. M. Hardy,[101] a retailer of tinned salmond was held not liable to an injured consumer since the tin was only expected to be opened immediately before use.

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97 [1940]1 All. E.R. 174.

98 See Collins, M.R. at pp. 164 & 165.

99 [1939]2 K.B. 743; see also Parker v. Oloxo, Ltd. & Senior [1937]3 All A.R. 524.

100 See Atkinson, J. at pp. 747 & 748.

101 [1903]6 F. 210, cited in Donoghue v. Stevenson supra at p. 604-622.

d. Dealer in Second-hand Products.

A dealer in second-hand products may also be held liable in negligence. In Andrew v. Hopkinson,[102] the plaintiff took a car on hire purchase from a dealer in second-hand cars who stated: "It's a good little bus, I would stake my life on it. You will have no trouble with it". A week after the transaction, the plaintiff was injured due to a defect in the steering. The defective condition was long-standing and, though probably not discoverable by an ordinary owner-driver, could have been simply discovered by any competent mechanic or a motor dealer. The dealer was held liable in negligence.

It can be inferred from the foregoing cases that the distributor, the retailer or a dealer in second-hand products need not be responsible for the defect. It is sufficient if the defect is such that ought to have been discovered by him with due diligence. But the cases of Nigerian Bottling Co. Ltd. v. Ngonadi and Solu v. Total (Nig) Ltd., did not apply this restraint. In these cases distributors were held liable notwithstanding the fact that the defects in question were of latent nature.

6.3.3 *Position Under the Statute*

In Nigeria, there exist some statutes which impose liability for product quality. The Food and Drugs Act 1974 prohibits dealings in food, drugs, cosmetics and devices in a manner contrary to its provisions. The duty is imposed on sellers, manufacturers, importers and advertisers.[103] Under the Standards Organisation of Nigeria Act 1971 (as amended) the main offences are in relation to standards. By section 10, any person other than the permitted manufacturer, who makes or sells or exposes for sale or uses for the

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102 [1957]1 Q.B. 229.

103 S. 1-7.

purpose of advertising, any material or document on or in which is portrayed a certification mark in any way resembling that issued in pursuance of the Act is guilty of an offence. By section 12, non-compliance with a mandatory standard is an offence.

Other statutes[104] on consumer protection also impose liability for contravention of their provisions. In each case, liability is imposed on the offender. But most of the statutes are criminal law based. They cannot be invoked in a civil law suit.[105] It follows that in private law suits, the issue of who bears liability for product defects remains governed by the case law.[106]

6.4 Defences

a. Warning

A person sued for product defect may raise the defence that he has warned against the danger in question. In most cases manufacturers are responsible for information defects. In view of this they usually accompany their products with literature inserts and manuals containing necessary instructions and warnings. A disregard of a clear warning will defeat a claimant's case.

It is a question of fact in each case whether adequate warning has been given. In Vacwell Engineering Ltd. v. B.D.H. Chemicals Ltd.,[107] the defendants supplied some chemicals in glass ampules to the plaintiffs. When the product came into contact with

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104 See supra; pp. 33 & 34

105 Cf. the Consumer Protection Council Decree No. 66, 1992 discussed in chapter three.

106 Imposition of liability is, however, without prejudice to the civil rights of individuals.

107 [1971]1 Q.B. 88.

water, it exploded killing a scientist who was working for the plaintiffs. It also caused a great damage to the plaintiff's factory. The glass ampule which contained the chemical had the following warning: "harmful vapour". There was no warning as to risk of explosion on contact with water. The defendants were not aware of this dangerous propensity but such facts were noted in some scientific journals. The court regarded the warning as inadequate and held the defendants liable.

A warning to a responsible intermediary absolves the manufacturer. It makes no difference that the warning is not communicated to the consumer. In Holmes v. Ashford & Ors,[108] a manufacturer of hair dye delivered some bottles of the product together with a brochure of instructions to a hair dresser. Both the label and the brochure contained a warning that the dye might be dangerous to certain skins and a recommendation that a test should be made before use. The hair dresser applied it on the plaintiff's hair without the necessary test. It was held that the hair dresser and not the manufacturer was liable to the plaintiff.[109] Similarly, a warning given to a doctor as regards the danger inherent in a prescription drug was held sufficient to absolve the manufacturer.[110]

Compliance with statutory duty to warn may absolve a person from liability. A local example of a statute requiring warning is the Tobacco Smoking (Control) Decree.[111] Section 2 of the Decree provides that no person shall advertise tobacco products to the general public unless the advertisement contains a warning that tobacco smoking is dangerous to health. By section 3, no package containing tobacco products meant for

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108 [1950]2 All E.R. 76.

109 See Tucker, L.J. at p. 80.

110 Mckee v. Moore 648, p. 2d.21 (Okla. 1982). cited in Clark, op. cit., p. 89.

111 No. 20, 1990.

smoking shall be sold in Nigeria, unless the following rotating warnings are inscribed on it:

(a) "The Federal Ministry of Health warns that tobacco smoking is dangerous to health", and

(b) "Smokers are liable to die young".

Even though it may be argued that the Decree is not meant to create civil rights,[112] it is equally arguable that a person may rely on a compliance with the above statutory requirements to escape liability. This was the principle applied in the American case of Cippolone v. Liggett Group Inc.[113] There some of the defendants were exculpated on the basis that the deceased had started smoking their brands of cigarette only after 1966 when warning became mandatory.[114] Her decision to smoke and to continue smoking even after the warnings appeared made her 80 per cent contributorily negligent.

Incidentally, no tobacco manufacturer in this country complies with the above requirements. The practice adopted by all of them is to insert only the first warning. This is not sufficient because the word "and" denotes conjuctiveness. So to absolve liability, the two warnings must be used conjuctively. If this is done, a smoker who persists in the habit will be deemed to have voluntarily assumed the risk. But a court may be right to

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112 The main purposes of the Decree as can be gathered from the provisions are (a) to protect the general public from the evil effects of smoking; (b) to penalise tobacco dealers who engage in the prohibited acts and (c) to punish smokers who smoke in prohibited places.

113 822 F.2d 335, 7 Fred. R. Serv. 3d. 1438 (3d. Cir. 1987) cited in Clark, op. cit., pp. 94 & 95.

114 See the Federal Cigarrette Labelling and Advertising Act 1965.

treat such assumption of risk only as contributory negligence.

A question that has exercised the courts in some jurisdictions is whether there is a duty to warn against unknown dangers. In Vacwell Engineering Ltd. v. B.D.H. Chemicals Ltd., it was established that the defendants were not aware of the dangerous propensity of the chemical on contact with water. But it was shown in evidence that this propensity had been indicated in chemical literature since the nineteenth century and was reported in leading textbooks. It was held that the duty to warn extended to known and knowable dangers.

In America, conflicting decisions exist on this point. In Beshada v. Johns-Manvill Prods. Corp.,[115] the Supreme Court of New Jersey held manufacturers of asbestos products liable for failure to warn against unforseeable dangers. But in Feldman v. Lederle Laboratories[116] the same court, two years later, refused to impose liability on manufacturers of drugs for failure to warn against unknowable danger. This decision was given without a reversal of the previous decision.

It can be argued that it may be unrealistic to require a person to warn against a risk that is undiscoverable by the state of scientific knowledge. A viable alternative is to widen the scope of strict product liability. This will shift emphasis from the conduct of the manufacturer to the safety of the product.

b. User's Negligence or Frolic

If a product is otherwise safe but causes harm as a result of misuse by the

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115 (O.N.J. 191 (1982)); also Re: Asbestos Litigation 628 F. Supp. 774 (D.N.J. 1986), see Clark, op. cit., pp. 80 & 84 respectively.

116 97 N.J. 429 (1984) op. cit., p.80.

consumer, the manufacturer or seller will not be liable. In the same vein, if a product is safe for its normal use but causes damage as a result of an experimental adventure embarked upon by the consumer, the manufacturer will not be liable. Misuse of product is dealt with in section 395 of the American Restatement (2d) of Torts 1965. Comment I to this section provides that "in the absence of a special reason to expect otherwise, the maker is entitled to assume that his product will be put to a normal use, for which the product is intended or appropriate; and he is not subject to liability when it is safe for all such uses, and harm results only because it is mishandled in a way which he has no reason to expect, or is used in some unusual or unforeseeable manner".[117]

A related principle is that of voluntary assumption of risk or volenti non fit injuria. Under this principle, if a person, knowing and comprehending the danger, voluntarily exposes himself to it, though not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom.[118] Also, as stated by Lord Wright in Grant v. Austrialian Knitting Mills Ltd., "the man who consumes or uses a thing which he knows to be noxious cannot complain in respect of whatever mischief that follows, because it follows from his own conscious volition in choosing to incur the risk of certainty of mischance".[119]

In the sphere of product liability, a manufacturer or seller will not be held liable for a risk voluntarily assumed by a consumer. In John Holt Ltd. v. Leonard

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117 See also comment h to s. 402A - a product is not in a defective condition when it is safe for normal use and consumption.

118 Black's Law Dictionary: 6th ed. Centennial Ed. (1891-1991) (St. Paul Minn. West Publishing Co.; 1990) p. 1575.

119 [1936] A.C. 85 at p. 105.

Ezeafulukwe,[120] the respondent admitted under cross examination that at the warehouse he noticed that some of the fish, the subject matter of the contract, were "blown up"; that he warned the appellants against being delivered with bad ones. He further admitted that when he noticed that the fish was going bad he changed the cartons before sending them to his customers in Cameroon. The whole consignment was later destroyed by the Health Authority which issued a certificate of destruction which was tendered in court. It was held by the Court of Appeal that since the respondent, quite aware of what he saw, went ahead to make his selection, he could not be heard to say that what he selected was of defective condition.[121] The same principle was upheld in Boshali v. Allied Commercial Exporters Ltd.[122]

As earlier noted, many products contain warnings. These may come in the form of caution or direction for use. In drugs and drug products, some warnings may take the form of contra-indications, side-effects and/or interactions. A consumer who takes any such drug without reading the instructions is guilty of contributory negligence. If he reads and chooses to disregard the warnings, he will be deemed to have voluntarily assumed the risk.

The duty of proving contributory negligence is on the person alleging it. He must prove the particular acts on the part of the consumer which will qualify as negligent. In Nigerian Bottling Co. Ltd. v. Ngonadi, the Supreme Court stated that "to establish contributory negligence, there ought to be evidence of what the plaintiff/respondent did

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120 [1990]2 NWLR (Pt. 133) 520 C.A.

121 See Olatawura, J.C.A. at p. 538; see also Fair v. Butters Bros. & Co. [1932]2 K.B. 606.

122 [1961] All N.L.R. 917.

or failed to do that either caused or contributed to the explosion".[123] The same principle was followed in United Bank for Africa Ltd & Anor v. Achoru.[124]

A plaintiff's contributory negligence will not absolve a defendant completely from liability. It will only reduce damages to such extent as the court thinks just and equitable having regard to the share of the claimant in the responsibility for the damage.[125]

c. Compliance with Statutory Standard.

A question may arise as to whether compliance with statutory standard will serve as a defence. In Nigeria the body responsible for prescribing standards for products is the Standards Organisation of Nigeria (SON). This organisation issues the Nigerian Industrial Standard (NIS) certificate to companies whose products are adjudged to comply with established standards. Such companies are allowed to affix the "NIS" label on the winning products.

A point of interest is who should bear responsibility if a certified product turns out to be defective. In other words, can a manufacturer raise the fact of compliance with the statutory standard as a defence?

To the best of our knowledge, there is no local authority on this point. A related issue was considered in the English case of Dunne & Anor v. North-western Gas Board & Anor.[126] There, the plaintiffs instituted a consolidated action against the defendant claiming damages for injuries suffered as a result of gas explosion occasioned by the

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123 [1985] SC 317 at P.335

124 [1990]6 NWLR (Pt. 156) 254 S.C.

125 See S. 11(1) Civil Liability (Misc. Provisions) Act 1961 (Lagos).

126 [1964]2 Q.B. 806.

breakage of defendant's gas main. It was held that the defendant, a statutory body, having merely carried out, without negligence, the statutory duty imposed upon it, could not be held strictly liable for injuries arising therefrom.

So the important question is whether the statutory duty was carried out without negligence. In Charing Cross Electricity Supply Co.[127] v. Hydraulic Power Co.[128] Lord Sumner stated: "If the Legislature has directed and required the undertaker to do that which caused the damage, his liability must rest upon negligence in his way of doing it, and not upon the act itself."[128] The same principle was applied in North-Western Utilities Ltd. v. London Guarantee and Accident Co. Ltd & Ors.[129]

The result of judicial decisions is, therefore, that there is no liability without negligence. This principle was put beyond doubt by Lord Blackburn in Goddis v. Proprietors of Bann Reservoir.[130] He stated:

> *"It is well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised if it be done with negligence."*[131]

It is uncertain whether the courts will apply the above authorities to a case of product liability. The two cases do not involve the same issues. One set involves the liability of a statutory body in the performance of its duties; the other involves the liability of a manufacturer in applying a standard set by a statutory body. Furthermore,

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127 [1914]3 K.B. 772.

128 Ibid., at pp. 781 & 782.

129 [1936] A.C. 108.

130 [1878]3 A.C. 430.

131 Ibid., at p. 455.

the issue in the latter case is not whether the act complained of was done with or without negligence, but whether liability can attach irrespective of negligence. In fact if there is negligence, the defendant will certainly be liable. But the question is whether compliance without negligence can afford a defence. In other words, can a manufacturer contend that the damage arose not from any default on his part but from the standard set by the statutory body. Can such a manufacturer invoke the defence of act of another?[132]

Inegbedion[133] writes that the liability of the Standards Organisation of Nigeria in such cases cannot be discountenanced especially within the realm of the law of negligence. It is suggested that if a case on this issue arises, both the manufacturer and the SON should be held jointly liable. The liability of the SON being based on negligent formulation of the said standard and that of the manufacturer on failure to detect the defect. This should be so because a manufacturer is not expected to play the role of a robot. He is expected to possess the necessary expertise and to apply same in his production techniques including matters relating to standards. In effect, such compliance should not afford a defence.

d. Exclusion Clauses

Subject to laid down conditions, a contractual defendant can rely on an exclusion clause.[134] The general rule was that an exemption clause could not protect a person guilty

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132 As we shall discuss presently, such a defence is available under the Consumer Protection Act 1987 (U.K). S. 4(1) (a).

133 Inegbedion, N.A. "Consumerism, Merchantability and the Standards Organisation of Nigeria", Edo State University Law Journal, 1993, Vol. 2, No. 1, p. 86.

134 S. 55, Sale of Goods Law, (Cap. 174 Lagos State 1994).

of breach of fundamental term[135] or in fundamental breach[136] of the contract. This rule which was applied in many cases[137] has now been reversed by the Supreme Court. In Akinsanya v. United Bank for Africa Ltd.,[138] and The Attorney-General, Bendel State & Ors. v. United Bank for Africa Ltd.,[139] the Supreme Court said, though obiter, that whether an exclusion clause could protect a party in breach of contract was a question of construction of the terms of the contract. This approach was confirmed in Niger/Benue Transport Co. Ltd. v. Narumal & Sons (Nig) Ltd.[140] There the Supreme Court following the decision of the House of Lords in Photo Production Ltd v. Securicor Transport Ltd,[141] affirmed its earlier approach on the rule of construction as

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135 Fundamental term is defined as "something which underlies the whole contract" per Devlin, J. (as he then was) in Smeaten Hancomb & Co. Ltd. v. Setty (Sassoon Sons & Co. [1953]1 W.L.R. 1468 at p. 1470.

136 Fundamental breach is defined as a breach "which goes to the root of the contract" per Denning, L.J. in Karsales (Harrows Ltd. v. Wallis [1956]1 W.L.R. 936 at p. 940.

137 See Smeaten Hancomb & Co. Ltd. v. Setty (Sassoon) Sons & Co.; Karsales (Harrow) Ltd. v. Wallis; U.G.S. Finance Ltd. v. National Mortgage Bank of Greece [1964]1 Lloyd's Rep. 446; Ogwu v. Leventis Motors Ltd. [1963] All N.L.R. 507; Amusan & Anor v. Bentworth Finance (Nig) Ltd. [1965] All N.L.R. 400.

138 [1986] 4 NWLR 273.

139 [1986] 4 NWLR 547.

140 [1989] C.L.R.Q. 28.

141 [1980] A.C. 827. Note that the rationale for this decision was that since Parliament had effectively intervened in the control of exemption clauses there was no longer need for a strained construction to achieve consumer protection. See Lord Diplock at p.

(continued...)

the applicable rule.

The adoption of the rule of construction has been criticised by some writers on the grounds of, among others, inequality of bargaining power; ignorance of the average consumer in the country; and above all, insufficient statutory protection as those offered by the English Unfair Contract Terms Act 1977.[142]

e. Exercise of Due Care.

A person sued for the tort of negligence can exenorate himself by showing that he had taken all reasonable care to ensure that his product was free of defects. The usual practice adopted by manufacturers is to demonstrate a fool-proof system of

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[141](...continued)
851; see also Atiyah, op. cit., p. 190 et seq. Cf. George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds [1983]2 A.C. 803; "late Dutch Special Cabbage Seed" was ordered; the seed supplied was not late cabbage seed and was unmerchantable. It was held that on their true construction, the conditions limited the liability of the defendants to a refund of the price paid or replacment of the seeds but in the circumstances of the case, reliance on them would not be fair or reasonable.

[142] See Sagay, I.E. Nigerian Law of Contract, (London: Sweet & Maxwell, 1985) p. 155; Olawale A, "Recent Trends in Fundamental Breach and Exclusion Clauses in the Consumer/Commercial Transactions", The Journal of Private and Property Law, Vols. 16, 17 & 18, April 1993, p. 37-49; Monye F.N., "The Need to Restrict the Scope of Application of Exemption Clause", Justice (A Journal of Contemporary Legal Problems, June 1991, Vol.2, No.6) p. 19-27; cf. Agomo CK; "Effect of the Demise of the English Doctrine of Fundamental Breach on the Nigerian Law of Contract", The Nigerian Journal of Contemporary Law, vol. 13, 1981-83, pp. 69-77. But the view of this writer on this issue appears to have changed. See "Exclusion Clauses in Contract and the Implications for Consumer Protection in the Nigerian Law of Contract". Unpublished.

manufacture.[143] If the system is acceptable to the court, the manufacturer will be exculpated.[144] The risk of over-reliance on manufacturer's claimed quality control system as a defence shall be examined in the next chapter.

f. The Act of Third Party

Another defence which may be raised by a defendant is the act of third party (novus actus interveniens). This doctrine implies that A is not liable for damage done to B if the chain of causation between A's act and B's damage is broken by the intervention of the act of a third person. In this case B's damage is said to be too remote.[145]

In The Shell Petroleum Development Company of Nigeria Ltd. v. Otoko & Ors.[146] the respondents claimed damages for injurious affection to and deprivation of the use of the Andoni River and Creeks as a result of the spillage of crude oil caused by the negligence of the appellants.[147] The latter contended that the spillage was caused by the act of a third party who removed a screw of bolt from the manifold. It was held that to

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143 See Grant v. Australian Knitting Mills Ltd. [1936] A.C. 85; Ebelamu v. Guinness (Nig) Ltd; Boardman v. Guinness (Nig) Ltd.

144 "If the system by which a manufacturer produced his commodity was as near perfection as human ingenuity could make it, the manufacturer in those circumstances would have proved that he had not been negligent". Per Iguh, J. in Boardman v. Guinness (Nig) Ltd., at p. 129.

145 See Roger Bird, op. cit., p. 236.

146 [1990]6 NWLR (Pt. 159) 693 C.A.

147 The court did not consider whether injurious affection to a river would have founded a cause of action. It is doubtful if this would have been so.

sustain an action for negligence, it must be shown that the negligence found by the court is the proximate cause of the damage and where the proximate cause is the malicious act of a third person against which precautions would have been inoperative, the defendant is not liable in the absence of a finding either that he instigated it or that he ought to have foreseen and provided against it.[148]

The same principle was stated in Dominion Natural Gas Co. Ltd. v. Collins & Perkins & Ors.[149] There, Lord Dunedin said that "If the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition, then he will not be liable. For against such conscious act of volition no precaution can really avail".[150]

But a plea of novus actus interveniens will not succeed if the act sought to be relied upon was occasioned by the negligent act of the defendant. In Stansbie v. Troman,[151] a decorator who left his client's door open and went away for about two hours was held liable for the theft of the client's jewelry[152]

The onus is on the party who pleads novus actus interveniens to prove it. In Duruji & Anor v. Azie,[153] the defendant pleaded that the damage in question was caused by the act of a third party, the Nigerian Breweries Ltd. He adduced no evidence in support of this assertion. It was held that where a defendant pleads novus actus

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148 See also Taylor v. Rover Co. Ltd. & Ors. [1966]2 All E.R. 181; see Baker, J. at p. 186.

149 [1909] A.C. 640.

150 Ibid., at pp. 646 & 647.

151 [1948]2 K.B. 48.

152 See also Haynes v. Harwood [1935]1 K.B. 146.

153 [1992] 7 NWLR (Pt. 256) 688 C.A.

interveniens the burden shifts to him to establish it in the same manner as one who pleads contributory negligence.[154]

g. Other Defences

In other jurisdictions, there are other defences which may avail a person sued for product defect. In the United Kingdom a person proceeded against under the Consumer Protection Act 1987 can raise any of the defences listed in section 4(1). The defences are:

(a) that the defect is attributable to compliance with any statutory or E.U. requirement;

(b) that the person proceeded against did not at any time supply the product to another;

(c) that the only supply was not in the course of the supplier's business;

(d) that the defect did not exist in the product at the relevant time;[155]

(e) that the scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control;

(f) that the defect -

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154 See Nigerian Bottling Co. Ltd. v. Ngonadi [1985]1 NWLR 9Pt. 4) 739; U.B.A. Ltd. Achoru [1990] 6 NWLR (Pt. 156) 254 at p. 275.

155 That is, time when the product was supplied to another by the producer. s. 4(2).

(i) constituted a defect in a product ("the subsequent product") in which the product in question had been comprised; and

(ii) was wholly attributable to the design of the subsequent product or to compliance by the producer of the product in question with instructions given by the producer of the subsequent product.

With the exception of paragraph (e) above, the development risks defence,[156] as it is popularly called, the above defences do not raise much difficulty. One can say with certainty when they can apply. Also their application may not pose any serious problem to consumer interest. On the contrary, they provide a reasonable compromise between the claimant's and the defendant's interests.

The reverse appears to be the case with the development risks defence. This defence which is similar to the "state of the art defence"[157] under the American system can be criticised on the ground of imprecision. In addition, it gives the producer an undue protection by enabling him to raise facts which may be difficult for the consumer to comprehend. It has been observed by Clark[158] that if this defence is given a lenient interpretation, a producer who shows that he has taken the steps which an average or reasonable producer ought to have taken will avoid liability. According to the learned author, this is simply a return to a negligence standard of liability, with the burden of

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156 Introduced by Art. 7(e) of the EEC Directive (85/374/EEC) and adopted in s. 4(1) (e) of the Consumer Protection Act 1987 (U.K).

157 First, raised and upheld in Day v. Barber-Colman Co. 10111 App. 2d. 494, 135 N.E. 2d. 231 (App. Ct. 1956; cf. Gelsomino v. E.W. Bliss & Ors., 1011, App. 3d. 604 295 N.E. 2d. 110 (1973) - both cited in Clark, op. cit., pp. 156 and 157 respectively.

158 op. cit., p. 155.

proof reversed. Similarly, Atiyah[159] comments that the effect of the defence is plainly to re-incorporate something very like a no-negligence defence into the statutory cause of action.

6.5 Summary

The foregoing discourse shows that a person whose product causes injury to the person or property of another is civilly liable to that other person. His liability is without prejudice to his liability under the criminal law.

Actions based on contract are less difficult to prove because the contractual and implied terms provide ready standards for comparison. Any deviation from the contractual or statutory requirements creates liability. As we shall see in the next chapter,liability in this case is strict. The main clog to a claimant's action in contract is privity of contract. In contrast, action in negligence provides a wider choice of parties for a claimant since he can sue any person in the chain. But his chances of success are greatly limited by the restrictive meaning accorded the term "defect" in tort law. Also, as shall be demonstrated in the next chapter, proof of negligence constitutes a great obstacle.

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[159] Atiyah, Sale of Goods, op. cit., p. 239 et seq. See also Lowe and Woodroffe, op. cit., pp. 70 & 71.

CHAPTER SEVEN

CIVIL ENFORCEMENT OF CONSUMER RIGHTS: ENFORCEMENT UNDER THE LAW OF TORT

7.1 Introduction

In the preceding chapter, we noted that a possible course of action open to a claimant who is not in privity of contract with the defendant is action in the tort of negligence. This chapter examines how a claimant can exercise this right.

Issues to be discussed include, the meaning of "negligence"; the concept of duty of care; consequential damage; burden of proof; standard of care; and recovery for pure economic loss.

7.2 Meaning of Negligence

The term "negligence" was defined by Lord Alderson, B. in Blyth v. Birmingham Waterworks Ltd.[1] as: "the omission to do something which a reasonable man, guided 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".[2]

A similar definition was proffered by Akpata, J.S.C. in Odinaka & Anor v. Moghalu.[3] His Lordship stated: "Negligence generally, is the omission or failure to do something which a reasonable man, under similar circumstances would do, or the doing of something which a reasonable and prudent man would not do".[4]

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1 [1856] 11 Exch. 781.

2 [Ibid]., at 784.

3 [1992]4 NWLR (Pt. 233) 1 S.C.

4 Ibid., at p. 15.

In order to accommodate the essential ingredients of negligence, what can be considered as functional definitions have been given by some writers. Winfield and Jolowicz[5] write that negligence as a tort is the breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff. Charlesworth and Percy[6] define the term as a tort which involves a person's breach of duty that is imposed upon him to take care, resulting in damage to the complainant. This functional approach can also be gleaned from the statement of Lord Wright in Lochgelly Iron and Coal Co. v. M'Mullen.[7] His Lordship stated that 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.[8]

The foregoing functional definitions appear preferable to the general definitions stated above. Decided cases show that a meaning based on such general definitions cannot serve a useful purpose. The definitions lack essential ingredients of actionable negligence. They can, more or less, be equated with carelessness and this, in law, cannot ground liability.

In effect, negligence can be defined as a breach of a legal duty of care which results in damage to the claimant.

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5 Op. cit., p.66.

6 Op. cit., p. 16.

7 [1934] A.C. 1.

8 Ibid., at p. 25.

7.3 Existence of Duty of Care

The first task before a person claiming in negligence is to establish that the defendant owes him a duty of care. This is because a duty does not exist in vacuum. It must relate to an obligation owed to another person, in this case, the claimant. The claimant must show that the defendant's act or omission was a breach of duty owed to him. It is irrelevant that if the defendant had acted the plaintiff's injury would have been averted or that the defendant was in a position to act. The crucial question is whether there was a duty of care in the circumstance. As noted by Lord Esher in Le Lievre v. Gould, "The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence ... A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them".[9] In Donoghue v. Stevenson,[10] Lord Thankerton quoting from Kemp & Dougali v. Darngauil Coal Co.[11] stated that it is necessary for a pursuer in an action in negligence to show that a duty of care was owed to him by the defendant because a man cannot be charged with negligence if he has no obligation to exercise diligence.[12] The same principle was applied in Bottomley v. Bannister.[13] There it was observed that English law does not recognise a duty in the air, so to speak: that is, a duty to undertake that no one shall suffer from one's carelessness.[14]

The word "duty" connotes the relationship between one person and another, imposing

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9 [1932] A.C. 562.

10 [1932] A.C. 562.

11 [1909] A.C. 1314; 1319.

12 See Donoghue v. Stevenson at p. 602.

13 [1932]1 k.B. 458.

14 Ibid., at p. 476.

on the one an obligation, for the benefit of that other, to take reasonable care in all the circumstances.[15] The term is defined by the Black's Law Dictionary as an obligation, recognised by the law, requiring the actor to conform to certain standard of conduct for protection of others against unreasonable risks.[16]

Before the decision of the House of Lords in Donoghue v. Stevenson, there were conflicting opinions on whether or not a duty of care could exist between non-contractual parties. In the line of cases ranging from Winterbottom v. Wright;[17] Blacker v. Lake & Elliot Ltd.;[18] Earl v. Lubbock;[19] Bates v. Batey & Co. Ltd;[20] Mullen v. Barr & Co.[21] to Longmeid v. Holliday,[22] the courts refused to recognise a duty where there was no privity of contract between the parties.[23]

What was then regarded as a general rule was stated by Lord Sumner in Blacker v.

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15 Charlesworth and Percy, op. cit., p. 19.

16 Op. cit., p.505.

17 [1842] 10 M & W 109.

18 [1912] 106 L.T. 533.

19 [1905]1 K.B. 253.

20 [1913]3 K.B. 351.

21 [1929] S.C. 461.

22 6. Ex. 761.

23 Cf. Dixon v. Bell 5 M & S 198; Elliott v. Hall (1885) 15 Q.B.D. 315; Oliver v. Saddler [1929] A.C. 58; Langridge v. Levy M. & W. 337; George v. Skivington L.R. 5 Ex. 1; Heaven v. Pender, 11 Q.B.D. 517; Dominion Natural Gas Co. Ld. v. Collins and Perkins, [1909] A.C. 640; In these cases actions by third parties were allowed for various reasons. Heaven v. Pender in particular contained a dictum that a duty of care could exist in non-contractual relationship.

Lake and Elliot, Ltd.[24] He said: "The breach of the defendant's contract with A to use care and skill in and about the manufacture or repair of an article does not of itself give any cause of action to B when he is injured by reason of the article proving to be defective".[25] According to Alderson, B. in Winterbottom v. Wright, "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".[26]

The recognised exceptions included cases involving fraud,[27] things dangerous in themselves,[28] and cases of invitation.[29] The courts did not see why a duty to take care should be extended to cases outside these exceptions. Particular reluctance was exhibited with respect to products not inherently dangerous. In Longmeid v. Holliday, Parke, B. stated:

> *"But it would be going too far 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 - a carriage for instance - 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."*[30]

The classification into dangerous and non-dangerous things for the imposition of duty of care was criticised in Donoghue v. Stevenson. The distinction was regarded by Lord Atkin

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24 106 L.T. 55.

25 Ibid., at p. 536.

26 10 M. & W. 109, 115, Cited in Donoghue v. Stevenson, at p. 568.

27 Langridge v. Levy, supra p.205.

28 Bell v. Dixon, supra

29 Heaven v. Pender, supra

30 Quoted in Donoghue v. Stevenson; [1932] A.C. 562 at pp. 590 & 591.

as "an unnatural one so far as it is used to serve as a logical differentiation by which to distinguish the existence or non-existence of a legal right".[31]His Lordship quoted with approval the statement of Scrutton, L.J. in Hodge & Sons v. Anglo-American Oil Co.[32] as follows:

> *"Personally, I do not understand the difference between a thing dangerous in itself, as poison, and a thing not dangerous as a class, but by negligent construction dangerous as a particular thing. The latter, if anything, seems the more dangerous of the two; it is a wolf in sheep's clothing instead of an obvious wolf".*[33]

One cannot but agree with the above reasoning. But it boils down to saying that each case depends on its particular merits. It is a question of fact whether a duty of care exists in a particular case. The nature of the subject matter and the likelihood of possible injury to person or property in the absence of due care will determine the existence or otherwise of duty of care. It is obvious that the greater the possibility of risk the higher the willingness of the court to impose a duty of care. Thus as observed by Lord Dunedin in Dominion Natural Gas Co. Ltd. v. Collins & Perkins,[34] "in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things ejusden generis, there is a peculiar duty to take precaution imposed upon those who send forth or install such article when it is necessarily the case that other parties will come within their proximity".

The principle of duty of care was exhaustively discussed in Donoghue v. Stevenson and the court came out with the view that, subject to certain conditions, a duty of care may be owed to a third party in certain circumstances. This duty is completely independent of any

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31 Ibid., at p. 595.

32 [1922]12 L.I.L. REp. 183, at 187.

33 See Donoghue v. Stevenson at pp. 595&596.

34 Per Lord Dunedin in Dominion Natural Gas Co. Ltd. v. Collins & Perkins [1909] A.C. 640, at p. 646.

contract between the plaintiff and the defendant. The case thus established the principle that a duty to take care arises wherever a reasonable man would foresee that if he does not take reasonable care he would cause injury to the person or property of another. He needs not foresee danger or injury to a particular person. It is sufficient if someone is likely to be injured if adequate care is not exercised. As can be gathered from the statements of their Lordships, the duty is owed generally to everyone within the class of those who are likely to be injured if reasonable care is not taken. Lord Atkin put the issue figuratively. He stated:

> *"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 omissions 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."*[35]

His Lordship adopted the principle of proximity laid down by Lord Esher (then Brett, M.R.) in Heaven v. Pender. There his Lordship had stated: "... under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property."[36]

Lord Atkin described the above principle as a correct statement of the law but with the proviso that "proximity be not confined to mere physical proximity, but be used ... to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless

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[35] at p. 580. Lord Atkin's test of foreseeability was re-echoed in Bourhill v. Young [1943] A.C. 92. See Lord Russel at p. 102.

[36] Cited in Donoghue v. Stevenson at p. 581.

act".[37]

The test of foreseeability, though a good general rule, has been criticised by writers. It has been shown by Charlesworth and Percy[38] that a strict adherence to this rule may lead to a flood-gate of litigations and also to absurdities in some circumstances. Salmond[39] notes that nobody has seriously suggested that the whole law of tort should be reduced to a question of what the defendant ought reasonably to have foreseen in the circumstances of the particular case. According to him, the foresight of the reasonable man is not the necessary and sufficient condition of liability in tort - not necessary, because it has no place in torts of strict liability; not sufficient, because even within the field of what is commonly thought of as negligence, there are cases in which the defendant will escape liability although it is clear that he must have foreseen the likelihood of harm to the plaintiff.

These criticisms are well founded. If duty of care were held to exist in all cases of reasonable foreseeability, the law will run the risk of explosion of litigations. Policy considerations demand that a limit be placed by way of compromise. This compromise represents a balancing of the interests of claimants and those of the society.[40]

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37 Ibid.,

38 See Charlesworth and Percy, op. cit. pp. 46-94; see also Winfield and Jolowicz, op. cit., pp. 76-86.

39 Houston, Salmond on the Law of Torts, (London: Sweet and Maxwell; 1977) p.199.

40 Such compromise can be seen in the various immunities conferred by the law. These include, immunities relating to trade competitions, failure to act in non-special relationships, an occupier as regards a trespasser and an examiner as regards his student. On the last point see Thorns v. University of London [1966]2 Q.B. 237 where it was held that an examiner owes no duty of care with respect to the assessment of

(continued...)

The fact remains that it may be difficult to formulate a concise principle as to where a duty relationship may exist. Each case must be considered according to its own merits. Lord Atkin himself admitted this much in Donoghue v. Stevenson. He said that "it is remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty. The courts are concerned with the particular relations which come before them in actual litigation, and it is sufficient to say whether the duty exists in those circumstances".[41] Lord MacMillan put the issue as follows:

> *"In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgement must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed."*[42]

It can be argued that in the sphere of product liability, the controversy as to the existence of duty of care no longer arises. It is settled that a duty of care is owed to the ultimate consumer by persons in control of products. The duty of the manufacturer in this respect was put beyond doubt in Donoghue v. Stevenson. Lord MacMillan had no hesitation in affirming that a person who for gain, engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he

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the latter's performance. For a detailed discussion of various immunities granted by the law see Salmond, op. cit., p. 199 et seq.

41 [1932] A.C. 562, at p. 579

42 Ibid., at p. 619; see also Lord Thankerton at p. 603; see further Lord Wilberforce in Anns v. Merton London Borough Council [1978] A.C. 728 at p. 751.

issues them, is under a duty to take care in the manufacture of the articles.[43] This principle was applied in Osemobor v. Nigeria Biscuits (Nig.) Ltd.[44] A manufacturer was there held liable to the ultimate consumer for injuries resulting from the presence of a decayed tooth in a biscuit.[45] Similarly, in Soremi v. Nigerian Bottling Co. Ltd.,[46] a case subject to criticisms on facts, a manufacturer was held liable to the ultimate consumer. The allegation was that the presence of a screwed up paper in a bottle of sprite manufactured by the defendants caused the consumer an unpleasant and uncomfortable experience.

Other cases decided after Donoghue v. Stevenson show that such duty is not limited to the manufacturer. In Watson v. Buckley, Stable, J. said: "I do not think that, it matters whether the man is a manufacturer or whether he is a distributor. It seems to me to be the same in the case of a person through whose hands there has passed a commodity which ultimately reaches a consumer to his detriment."[47]

The decisions in Nigerian Bottling Co. v. Ngonadi;[48] Solu v. Total (Nig) Ltd,[49] equally illustrate that a duty of care is owed by a distributor to the ultimate consumer.

Apart from the cases of the manufacturer and the distributor, it is clear, as discussed

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43 Ibid., at p. 620.

44 (1973) N.C.L.R. 382

45 See Kassim, J. at p. 386.

46 (1977) 12 CCHCJ 2735.

47 [1940]1 All E.R. 174 at p. 183.

48 [1985]2 N.S.C.C. 753.

49 (Unrep.) Suit No. ID/619/85 (Lagos State High Court); March 25, 1988, Discussed in the Bendel State University Law Journal, 1991/92 Vol. 1 No. 1: Apori K.A. at p. 3 - 44.

in the last chapter, that action can be brought against the whole-sale dealer, the retailer and a dealer in second-hand products. In fact this can be inferred from Stable, J.'s statement above. The phrase "a person through whose hands there has passed a commodity" can accommodate any person in the manufacturing and distribution chain. The implication is that each of these persons owes a duty of care to the ultimate consumer. In Stennett v. Hancock & Peters[50] such duty was extended to a repairer of a defective product. There, a motor repairer was held liable to a pedestrian for injuries resulting from his negligent repair of a vehicle. The court relied on Donoghue v. Stevenson and held that the repairer was in the same position as that of the manufacturer of an article sold by a distributor in circumstances which prevented the distributor or ultimate consumer from discovering by inspection any defect in the article.

The summary of judicial decisions is, therefore, that a duty of care is owed by any person whose acts or omissions in relation to a product cause injury to the person or property of another.

7.4 Breach of Duty of Care

A person seeking redress in negligence must show that the person sued is in breach of a duty of care owed to him. This he can do by showing that the defendant did not exercise reasonable care in the matter that is called to question. As stated by the Court of Appeal in Adeosun v. Adisa,[51] where negligence is alleged, the plaintiff must set out or give full particulars of the negligence. In arriving at a decision, the courts are often guided by the oft-

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50 [1938]2 All E.R. 578.

51 [1986]5 NWLR (Pt.40) 227 C.A.

quoted statement of Alderson, B. referred to above.[52] The bottomline is whether the defendant has acted reasonably in the circumstances of the case.

Specifically, in a product liability case, the claimant must show that the product in question is defective[53] and that the defect was caused by the negligence of the defendant. To satisfy the last requirement, the plaintiff will have to show the particular acts or omissions that could qualify as breach of duty of care. In Vacwell Engineering Co. Ltd. v. B.D.H Chemicals Ltd, manufacturers of a chemical which exploded on contact with water were held liable to the plaintiffs. Their negligence was based on their failure to warn against the dangerous propensity of the chemical on contact with water. In Watson v. Buckley, distributors of a hairdye were held liable in negligence. Their negligent acts were the various acts and omissions (such as the false advertisements, failure to carry out necessary tests and guarantees) which intervened between the manufacture of the article and its reaching the plaintiff. In Stokes v. Guest, Keen & Nettlefold (Bolts and nuts) Ltd.,[54] evidence showed that medical scientists had made various recommendations for periodic medical inspections of workers exposed to the risk of cancer and that specific warnings should be given. The defendants did not carry out these recommendations. They were held liable in negligence. In Fisher v. Harrods Ltd.,[55] failure of the defendants to test their product before putting it into the market was held to constitute breach of duty of care.

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52 Supra.; p.202.

53 See p. 159-172, supra. for the meaning of this term.

54 [1968]1 WLR 1776. Cf Brown v. Rolls Royce Ltd. [1960]1 WLR 210. There was no evidence that the alleged industry practice (supply of barrier cream) provided safer precautions than the defendants' methods.

55 [1966] Lloyds, L.R. 500.

Conversely, if the act complained of does not amount to negligence the defendant will be exculpated. In Stennett v. Hancock, a lorry owner who had entrusted his lorry to a competent repairer for repairs was held not under a duty to ascertain whether the latter had competently carried out the work. By entrusting the repairs of the lorry to a competent repairer, he had discharged the duty imposed on him. In Davie v. New Merton Board Mills, Ltd. & Ors.,[56] D was injured by a defect in a tool provided by his employers, the defendants. In an action for damages, it was held that the defendants, having obtained the tool from a reputable supplier, had discharged their duty of care. Lord Reid stated that an employer "is not liable for the negligence of the manufacturer of an article which he has bought, provided that he has been careful to deal with a seller of repute and has made any inspection which a reasonable employer would make".[57] The ratio decidendi of this case can be contrasted from Watson v. Buckley discussed above. There it was shown that the distributors had obtained the dye from "a gentleman who had emerged quite unexpectedly from Spain".[58] The manufacturer had gone into liquidation before the case came up for trial. The same principle was applied in Fisher v. Harrods Ltd. where it was found that the defendants had acquired the product in issue from a virtually unknown and inexperienced manufacturer.

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[56] [1959]1 All E.R. 346. cf. the Employers' Liability (Defective Equipment) Act 1969 (U.K) under which the duty of the employer for defective equipment is strict. But this is not the position in this country.

[57] Ibid., at pp. 367&368.

[58] [1940] 1 All E.R. 174 at p. 186.

7.5 Consequential Damage

In addition to proof of the existence of duty and breach of duty, the plaintiff must also show that the act complained of was the cause of his damage. In other words, the damage suffered must be the natural consequence of the wrongful act of the defendant. A finding on this point is essential because, as noted by Lord MacMillan in Donoghue v. Stevenson, "The law takes no cognizance of carelessness in the abstract ... The cardinal principle of liability 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".[59]

Proof of injury is, therefore, a pre-condition for the success of a claimant's case. In Donoghue v. Stevenson this requirement was satisfied by the plaintiff's averment which was accepted by the court that the presence of the decomposed snail in the ginger beer gave her shock and gastro-enteritis. This requirement was also satisfied in Chaproniere v. Mason[60] involving the presence of a stone in a bath bun. In Grant v. Australian Knitting Mills Ltd., the plaintiff's case succeeded because it was shown that his dermatitis was caused by the presence of free sulphite in the under-garment.

In contrast, plaintiff's case in Okonkwo v. Guinness (Nig) Ltd. was rejected because, even though there was evidence that he vomitted; that he had cramps and suffered from food

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[59] [1932] A.C. 562, at pp. 618&619; emphasis mine.

[60] [1905] 21 T.L.R. 633; Cf. Daniels v. White & Sons [1938]4 All E.R. 258 - Manufacturers' evidence that the presence of carbolic acid in their lemonade was not due to negligence was accepted by the court. This decision has been subjected to criticisms and the court refused to follow it in Hill v. James Crowe (Cases) Ltd, [1978]1 All E.R. 812.

poisoning, the medical witness did not ascribe the food poisoning to the stout consumed by him. It was not shown that the roots, leaves and bark of tree found in the bottle of stout caused the food poisoning or were capable of causing the same. Similarly in Boardman v. Guinness (Nig) Ltd., the allegation was that the beer brewed by the defendants and consumed by the plaintiff contained heavy sediments which were shown by laboratory analysis to have been caused by the presence of bacteria. The court noted that the plaintiff must not merely establish the facts of the defendant's negligence and of his own damage, but must also show that one was the effect of the other. Quoting from the case of J.R. Munday Ltd. v. L.C.C. (9),[61] the court stated that "Negligence alone does not give a cause of action, damage alone does not give a cause of action; the two must co-exist".[62] Since there was no proved link between the plaintiff's injury and the bacteria in the beer, the plaintiff's case was rejected. According to the court, although there was evidence that the beer contained bacteria, the plaintiff did not show that such bacteria were harmful and caused his illness.

In Ebelamu v. Guinness (Nig) Ltd.,[63] the allegation was that the sediments contained in the beer brewed by the respondents caused illness to the appellants. Three bottles of the said beer, two opened and half drunk and one unopened were taken to the Government analyst for analysis. Only the unopened bottle was accepted for analysis since according to the analyst, it was not their practice to accept opened bottles. The bottle analysed was found to contain poisonous sediments. It was held by the Court of Appeal that there was no proper nexus between the unopened bottle of beer which was analysed, and the other two bottles which had

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61 [1916]2 K.B. 331.

62 Ibid., at p. 334.

63 EEFCA/L/101/82, Monday January 24, 1993.

been opened and consumed.

7.6 Principle of Causation

It may be added that in general, in determining the issue of causation, a two-pronged test is applied by the courts. This involves causation in fact and causation in law. The question as regards the former is whether the plaintiff's damage was in fact caused by the defendant's wrongful act. A test which the courts employ in the determination of this issue is the "but-for" test. This test was explained by Denning, L.J. (as he then was) in Cork v. Kirby Maclean Ltd.[64] He said:

> *"subject to the question of remoteness, causation is a question of fact. If the damage would not have happened but for a particular fault, then that fault is the cause of the damage; if it would have happened just the same, fault or no fault, the fault is not the cause of the damage. It is to be decided by the ordinary plain common sense of the business."*[65]

The practical application of the test can be seen in some decided cases.[66] But there is no doubt that the test may encounter some problems especially where there is a controversy as to the cause of a particular damage.[67] It has, thus been rightly observed that the "but-for" test must not be regarded as a rule of thumb for determining causation in fact in every case; causation in fact can hardly be dealt with as a matter of general legal principle for too much

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64 [1952]2 All E.R. 402.

65 Ibid., at pp. 406&407.

66 See Barnett v. Chelsea and Kensington Hospital Management Committee [1969]1 Q.B. 428; Cf. The Empire Jamaica [1957] A.C. 386.

67 See Baker v. Willoughby [1970] A.C. 467; Cutler v. Vauxhall Motors Ltd. [1971] 1 Q.B. 418.

depends upon the circumstances and probability of each case.[68]

No doubt, proof of factual causation will constitute an up-hill task in many product liability cases. This will surely be the case where the defect in issue is one that produces a cumulative effect as opposed to an immediate effect. Thus if a person dies shortly after consuming a tinned food and the cause of death is given as food poisoning; much effort may not be needed to show a link between the breach and the damage. The reverse will be the case where a damage is manifested only after a prolonged use of the product. Here, the claimant may find it difficult to show that his damage was in fact caused by the alleged product and not any other one. A good illustration is a case of alleged damage caused by cigarette smoking. If a claimant alleges that his lung cancer was caused by the defendant's cigarette, he may be required to prove that he did not smoke any other brand within the period and that his problem was in fact caused by the defendant's brand and could not be attributed to any other cause. To the best of our knowledge, there is no local decision on this point. It is believed that a claimant may find it impossible to discharge this burden.

On the whole, as noted by Lowe and Woodroffe,[69] much depends on what inference the court is willing to draw from the facts of a case. The learned authors cite the case of Grant v. Australian Knitting Mills Ltd. There the plaintiff's contention that his dermatitis was caused by excess sulphite in the undergarment manufactured by the defendants was accepted by the Privy Council despite the fact that evidence had shown that more than four million of the garments had been sold without complaint. A similar decision was reached in Solu v. Total (Nig) Ltd. Despite copious expert evidence advanced to show that the defendant's cylinders

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[68] Winfield and Jolowicz, op. cit., p.114.

[69] Op. cit., at p. 76.

were made in conformity with international standards, the court accepted the plaintiff's expert opinion that the offending cylinder was in fact defective.

Causation in law simply refers to remoteness of damage. A defendant's wrongful act may lead to infinite consequences. As a policy, the law sets some limits on damage that may be compensated for. The defendant is only liable for damage that is not too remote.

A detailed review of literature on remoteness of damage may not be necessary in this work.[70] Suffice it to say that after much controversy,[71] the law is now settled that, just like the case of existence of duty, foreseeability of damage is the criterion for the determination of the issue of remoteness.[72] So in effect, each case depends on its particular merits. But in the area of product liability, the task of the court is lightened by the fact that the law has delineated some areas where compensation can be effected and others where compensation cannot be granted. A notable example of the latter is pure economic loss which shall be considered in this chapter.

7.7 Standard of Care

It is constantly stressed that the duty of a defendant in the tort of negligence is to exercise reasonable care. This means that the test is an objective one. Winfield and Jolowicz[73]

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70 See standard texts on the Law of Torts, e.g. Kodilinye, G., Nigerian Law of Torts (London: Sweet & Maxwell, (1982); Brazier, M. Street on Torts (London: Butterworths; 1993);Rogers, W.V.H., Winfield & Jolowicz on Tort, 13th ed. (London: Sweet & Maxwell 1989)

71 See Re Polemis [1921]3 K.B. 560.

72 See The Wagon Mound (No. 1) [1961] A.C. 388.

73 Op cit., p. 87.

74 Lowe and Woodroffe, op. cit., p.75. See also Qualcast (Wolverhampton Ltd. v. Hayness [1959] A.C. 743.

write that the standard is objective and impersonal in the sense that it eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. It has been equally noted that "whether a defendant has performed his duty of care is a pure question of fact and a decision on this point is not a binding precedent for any future case."[74]

But this does not mean that there are no guiding principles. The degree of care required tends to vary with the nature of the subject matter; the seriousness of the risk;[74a] the likelihood of injury;[75] the professed skill of the tortfeasor and the utility of the defendant's activity as well as the burden of taking adequate precaution.

If the subject matter is one that involves a high degree of risk, a higher degree of care will be expected of those in control. As noted by Winfield and Jolowicz, "No reasonable man handles a stick of dynamite and a walking-stick in the same way".[76] Judicial decisions adequately point to this assertion. In Read v. Lyons & Co. Ltd. Lord Macmillan said that "The law in all cases exacts a degree of care commensurate with the risk".[77] Denning, L.J. (as he then was) also noted in Lloyds Bank Ltd. v. Railway Executive, that "As the danger increases, so must the precaution increase".[78]

In the case of products, the nature of the product concerned will determine the degree of care. Products meant for oral consumption, it will appear, may call for a greater precaution.

74a Paris v. Stepney C. [1951] A.C. 367.

75 Bolton v. Stone. [1951] A.c. 850.

76 Op. cit; p. 89.

77 [1947] A.c. 156 at p. 173.

78 [1952]1 All E.R. 1248, at p. 1253.

This is because a defect is almost certain to cause injury to the consumer. This is not to undermine the dangerous propensities of some products meant for external use. Thus a defective machine or car is as dangerous as an orally consumable product. So it is safe to argue that in the case of any product that is inherently dangerous, a higher degree of care is to be expected.

In the case of persons who profess certain skill, the standard is that of the ordinary skilled man exercising and professing to have that special skill. Thus in Greaves & Co. Ltd. v. Baynham Meikle & Partners[79], the defendants, consultant structural engineers, were held bound to exercise the ordinary skill of competent structural engineers. But in Philips v. Whiteley[80] it was held that a jeweller who pierced ears for earrings was not expected to possess the level of skill of a surgeon.

Applying these principles to product liability, it can be said that a manufacturer would be expected to possess the degree of expertise of an ordinary skilled manufacturer in that field. A lower level will expose him to liability.

Another relevant factor in determining the degree of care is the utility of the activity in issue. If the activity is very beneficial to the society there may be justification for requiring a lower standard of care. But benefit in this regard does not relate to pecuniary rewards to the defendant but to overall social benefits to the public. As stated in Watt v. Herfordshire C.C.,[81] one must balance the risk against the end to be achieved and the commercial end to make a

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79 [1975]1 W.L.R. 1095.

80 [1938]1 All E.R. 566.

81 [1954] 1 W.L.R. 835.

profit is very different from the human end to save life or limb.[82]

The above aptly applies to the field of drugs and drug products. A manufacturer who engages in the manufacture of drugs for the treatment or cure of fatal diseases may be justified in risking some side-effects. Salmond's[83] opinion is relevant here. He writes that the reasonableness of the defendant's conduct will depend upon the proportion which the risk bears to the object to be attained.

It must be noted that even though the standard of care is an objective one, the personality of the judge plays a prominent role. The decision in each case will be based on the discretion of the presiding judge. In Glasgow Corporation v. Muir, Lord MacMillan said that "it is ... left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen'.[84]

But in all cases the standard is not an absolute one. As already noted, only a reasonable care is required. Lewis, J. stressed this point in Daniels & Daniels v. White & Sons Ltd. & Tarbard.[85] He said;"... and it seems to me a little difficult to say that, if people supply a fool-proof method of cleaning, washing and filling bottles, they have not taken all reasonable care to prevent defects in their commodity."[86]

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82 Ibid., at p. 838, per Denning, L.J.

83 Havston R.F.V., Salmond on the Law of Torts, 17th ed. (London: Sweet & Maxwell; 1977) p. 227.

84 [1943] A.C. 448, at p. 457.

85 [1938]4 All E.R. 258.

86 Ibid., at p. 262.

A similar comment was made by Iguh, J. in Boardman v. Guinness (Nig) Ltd.[87] He stated: "If the system by which a manufacturer produced his commodity was as near perfection as human ingenuity could make it, the manufacturer in those circumstances would have proved that he had not been negligent."[88]

The allegation in that case was that the beer brewed by the defendants contained some sediments which caused illness to the plaintiff. The court accepted the demonstrated fool-proof system of the defendants and held that their duty was not to ensure that their products were perfect but merely to take reasonable care to see that no injury was done to consumers of their products.

This approach, to say the least, does not advance the interest of the consumer. This buttresses the need to introduce a strict product liability regime.[89]

7.8 Burden of Proof

The burden of proving negligence is on the person who alleges it. In order to discharge this burden, it is usually necessary for the plaintiff to prove specific acts or omissions on the part of the defendant which will qualify as negligent conduct. More particularly in the context of liability for defective products, the consumer must establish that his damage resulted from defects in the product and was caused by the defendant failing in his duty to take reasonable care.[90]

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87 [1980] N.C.L.R. 109.

88 Ibid., at p. 129.

89 See our suggestions on p.370-372 infra.

90 Mickleburgh, Consumer Protection, op. cit; p.213

In general, the law is rather reluctant to allow a shift of the burden from the plaintiff to the defendant. The only exception is where the doctrine of res ipsa loquitur applies. This doctrine applies where the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. Once the plaintiff has proved the fact of the accident, the burden will then lie on the defendant to prove that it arose out of no negligence of his. In Audu v. Ahmed[91] it was held by the Court of Appeal that on a plea of res ipsa loquitur, the defendant has the evidential burden to show that he exercised all reasonable care to avoid the accident and that he could not do more in the agony of the moment.

The situation where the doctrine may apply was explained by Sir William Erie, C.J. in Scott v. London & St. Katherin Docks & Co. Ltd. He said:

> *"There must be reasonable evidence of negligence, but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."*[92]

The Supreme Court has also explained the conditions under which the doctrine of res ipsa loquitur will apply. In National Electric Power Authority v. Alli & Anor,[93] the court stated that the application of the doctrine of res ipsa loquitur rests on three conditions, namely:

(a) that the thing which causes the damage was under the care and control of the defendant;

(b) that the occurrence is such that it could not have happened in the absence of negligence; and

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91 [1990]5 NWLR (Pt. 150) 287 C.A.

92 [1965]3 H & C 596. The plaintiff was injured by some bags of sugar which fell on him whilst crossing doorway of the defendants' warehouse.

93 [1992]8 NWLR (Pt. 259) 279 S.C; see also Linus Onwuka & Anor v. Omogui [1992)3 NWLR (Pt. 230) 393 S.C.

(c) that there is no evidence as to how the occurrence took place.

A crucial point in the above statements is that the accident must be such which does not ordinarily happen in the absence of negligence. There is no doubt that this will be the case of many defective products especially where the allegation is that of presence of exterior substances. If it can be shown that the product reached the claimant in the condition in which it left the person being sued and that the defect was present all along, then a prima facie case would have been made out. A general principle was stated in Alao v. Inaolaji Builders Ltd.[94] There it was held that the court may infer negligence on the part of a defendant in an action for negligence if the plaintiff shows the resultant accident and that normally such act does not ordinarily occur. The onus will then shift on the defendant to show that he was not negligent by explaining the cause of the accident and the subsequent damage.[95]

But the question is whether the doctrine of res ipsa loquitur applies to product liability cases. Some writers take the application of the doctrine in this regard for granted. Lowe and Woodroffe[96] write that sometimes the facts themselves point to negligence; if a consumer loses a tooth through eating a bun containing a stone this suggests that the manufacturer had been negligent and, under the doctrine of res ipsa loquitur, the manufacturer will have to adduce evidence from which the inference of negligence can be rebutted. Mickleburgh[97] notes that whilst it has been said on high judicial authority that there is no justification for applying the

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94 [1990)7 NWLR (Pt. 160) 36 C.A.

95 Ogwugbu, J.C.A. at p. 49.

96 Op. cit., p.75.

97 Op.cit., p.215; referring to the statement of Lord MacMillan in Donoghue v. Stevenson [1932] A.C. 562 at p.622.

maxim in such cases, there can be no doubt that this statement is more honoured in the breach than the observance and that res ipsa loquitur has been applied in spirit if not in name.[98]

The above assertions notwithstanding, judicial decisions show that the issue is far from being settled. There exist conflicting decisions on the applicability of this doctrine. In Donoghue v. Stevenson, the inapplicability of the doctrine to product liability cases was stressed by Lord MacMillan. He said:

> *"The burden of proof must always be upon the injured party to establish that the defect which caused the injury was present in the article when it left the hands of the party whom he sues, that the defect was occasioned by the carelessness of that party, and that the circumstances are such as to cast upon the defendant a duty to take care not to injure the pursuer. There is no presumption of negligence in such a case as the present nor is there any justification for applying the maxim, res ipsa loquitur Negligence must be averred and proved."*[99]

A similar attitude can be inferred from local judicial decisions. In Ebelamu v. Guinness (Nig) Ltd., the plaintiff's attempt to rely on the doctrine was disallowed. According to Nnaemeka-Agu, J.C.A., "the principle of res ipsa loquitur has no place in a case of this nature".[100] Similarly, in Okonkwo v. Guinness (Nig) Ltd., it was held that "res ipsa loquitur does not apply and nothing is to be presumed in favour of the plaintiff".[101] An opportunity to consider this issue was missed in Osemobor v. Niger Biscuits & Anor[102] because the principle

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98 Op. cit., p. 215. The learned author cites Grant v. A.K.M; Malfoot v Noxal Ltd, [1935] 51 T.L.M. 55. etc. in support of his assertion.

99 [1932] A.C. 562 at p. 622 (emphasis mine).

100 FCA/L/101/82, delivered on Monday January 24, 1993; at p. 57.

101 (1980)1 PLR 583 at p. 584; see also Solu v. Total (Nig) Ltd. p.177. supra.

102 [1973] N.C.L.R. 382.

was not averred in the pleadings. Consequently, the court rejected the plaintiff's counsel's submission on it.[103]

Boardman v. Guinness (Nig) Ltd[104] appears to be the only local authority where a contrary view was expressed. Even though the doctrine was held inapplicable to the facts of the case, it was admitted that a plaintiff could be justified in invoking it in appropriate cases. Iguh, J. refused to accept the submission of the learned counsel for the defendants that the principle can never be applied to a case of product liability. He stated:

> *"To the extent that the plaintiff must aver and prove negligence against the defendant, I am in complete agreement. I am however unable to agree that the doctrine of res ipsa loquitur can never be applied by a plaintiff to prove negligence in this class of cases. In my view, proof of the presence of foreign or deleterious matter in a consumable or other product which irresistibly suggests negligence on the part of the manufacturer or other class of person is sufficient to establish a prima facie case of negligence founded on the doctrine of res ipsa loquitur."*[105]

The above statement is in accord with the decision in Grant v. Australian Knitting Mills Ltd. There it was stated:

> *"If excess sulphite were left in garment, that could only be because someone was at fault. The appellant is not required to lay his finger on the exact person in all the chain who was responsible, or to specify what he did wrong. Negligence is found as a matter of inference from the existence of the defects taken in connection with all the known circumstances."*[106]

It can be argued that since there is a Court of Appeal decision stressing the non-applicability of the doctrine, the High Court decision on the issue can be said to be of little or no effect. The same applies to the observations in Grant v. Australian Knitting Mills Ltd.

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103 Kassim, J. at p. 386.

104 (1980) NCLR 109.

105 Ibid, at p. 127.

106 [1936] A.C. 85 at 101.

Therefore, the position is that the principle does not apply to product liability cases in this country.

It is arguable that even if the doctrine were held applicable, the position of the consumer would not improve. This is because the major function of the doctrine is to shift the burden of proof to the defendant.[107] This principle was stressed by the Supreme Court in Linus Onwuka & Anor v. Omogui.[108] According to the court, the principle only shifts the onus of proof, which is adequately met by showing that despite the accident, the defendant was not in fact negligent. A defendant is not to be held liable because he cannot prove exactly how the accident happened; it is sufficient if he satisfies the court that he personally was not negligent.[109]

It is thus open to the defendant to show that the accident happened without negligence on his part. If this is successfully done, the burden shifts back to the plaintiff to show that the defendant was in fact negligent. As stated in Ballard v. N.B.Ry: "If the defenders can show a way in which the accident may have occured without negligence, the cogency of the fact of the accident by itself disappears, and the pursuer is left as he began, namely, that he has to show negligence".[110]

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107 See Ejisun v. Ajao [1975] N.M.L.R. 4 at p. 6; Moore v. Fox & Sons Ltd. [1956]1 Q.B. 596, Roe v Ministry of Health [1954]2 Q.B. 66; at pp. 87-88. Another function of the doctrine is to make it impossible for a defendant to succeed on a "no case" submission. see Cole v. De Trafford (No. 2) [1918]2 K.B. 523 at p. 528.

108 [1992]3 N.W.L.R. (Pt. 230) 393 S.C.

109 Ibid., at p. 445.

110 [1923] A.C. 43, at p. 45. Cited in Charlesworth & Percy, op. cit.; at p. 430.

Experience shows that the rebuttal of a prima facie presumption of negligence is not a serious burden on a defendant in product liability cases. The usual practice adopted by manufacturers is to demonstrate a fool-proof system of manufacture. A court may easily be misled by such evidence and a plaintiff may not be in a position to counter it. Even where expert witnesses are called by the plaintiff, chances are that the defendants' expert witnesses may be more conversant with the relevant manufacturing process. This point was made by Lord Davidson in North Scottish Helicopters Ltd v. United Technologies Corp., a case involving defective helicopter. His Lordship commented:

> *"As the proof progressed it became clear that the pursuers' experts laboured under serious disadvantages. Although they had considerable engineering ability, none of them had the detailed knowledge and familiarity with the subject that the defenders' various engineering witnesses could command. In addition, the defenders had ample opportunity to carry out tests on S.76 helicopters and other equipment. The purser's experts had no comparable facilities."* [111]

This observation points to the fact that the defendant is usually in a stronger position than the plaintiff in matters relating to proof and dis-proof of negligence. This research reveals that in all product liability cases decided in this country, the same practice was adopted by all the defendants, namely, to call the quality control officer to show the degree of care normally exercised by the company. In Onyejekwe v. Nigeria Breweries Ltd.,[112] the plaintiff sued for injuries sustained as a result of the intake of defendant's beer which contained some foreign bodies. In defence, the defendants gave evidence of processes of beer brewing from the moment malt, hops, sugar and water are mixed for a start to the time when the beer in the corked bottle is put into the carton ready for the market. The evidence showed several stages

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[111] (Unreported); cited in Clark, op. cit., at p. 149&150.

[112] (Unrep.) Suit No. E/129/72; June 1, 1974.

of washing of bottles by automatic machines in which highly concentrated solution of causatic soda and other chemicals are used; the filling of the bottles and corking by mechanical process and checking at various sighter stations by groups of sighters. Commenting on the defendants' evidence, Mr. Justice K.O. Anyah said:

> *"I am convinced by the evidence of this witness, that is, D.W.1, that the beer and the bottles undergo complete pasteurization and sterilization before the bottles leave the factory and that in these circumstances no living organisms can be found in the bottle unless afterwards tampered with."* [113]

Similar conclusions based on defendants' demonstrated care can be seen in other judicial decisions.[114]

The above contrast with the observation of Lord Wright in Grant v. Australian Knitting Mills Ltd.[115] Commenting on the result of an analysis which disclosed some percentage (.11%) of sulphite in a garment which had passed through a process described as fool-proof, His Lordship noted: "The significance of this experiment seems to be that however well designed the manufacturer's proved system may be to eliminate deleterious substances it may not invariably work according to plan. Some employee may blunder."[116]

A similar view was expressed in Tesco Supermarket Ltd. v. Nattrass where it was stated that if the courts "were to accept as sufficient a paper scheme and perfunctory efforts to enforce it, they would not be doing their duty - that would not be due diligence on the part of the

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[113] Ibid., at p. 7.

[114] See for instance, Okonkwo v. Guinness (Nig) Ltd., (1980) NCLR 109, at p. 130; also Boardman v. Guiness (Nig) Ltd. (1980) N.C.L.R. 109, at p. 129.

[115] [1936] A.C. 85.

[116] Ibid., at p. 101.

employer".[117]

The Nigerian courts do not appear to be influenced by the above views. They are strict with the requirement of proof of negligence. As can be seen from the above analysis and the cases discussed in the preceding chapter, many actions based on negligence did not succeed. In fact in one of the successful cases,[118] the plaintiff succeeded not because he was able to prove negligence but because there was no evidence of interference with the content of the bottle.[119]

7.9 Proof of Source of Defect

Proof of source of defect can be extremely difficult for a claimant. An examination of decided cases shows that many claims are lost on this ground. In view of this, a detailed consideration of this issue will be helpful.

As part of the burden of proof placed upon him, a claimant must show that the defect complained of emanated from the person being sued. The weight of this burden depends on the nature of the defect in issue. Defects are of three types, namely, design defect, information

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117 [1972] A.C. 153 at p. 174.

118 Soremi v. Nigerian Bottling Co. Ltd. (1977) 12 CCHCJ 2735.

119 Even though the decision in this case advances the cause of the consumer, it can be criticized on the ground that there was no link between the alleged injury suffered by the plaintiff and the screwed up paper seen in the bottle. This link is a pre-requisite in an action based on negligence. See Lord MacMillan in Donoghue v. Stevenson [1932] A.C. 562 at 618; applied in Ebelamu v. Guinness (Nig) Ltd. FCA/L/101/82; delivered on Monday Jan. 24, 1993.

defect and general defect.[120]

In the case of design defects, it is generally agreed that liability unquestionably attaches to the manufacturer since such defects cannot be attributed to any other person in the chain.[121] Except where there is reason to believe otherwise, this is also the case with information defects. The reverse is the case with general defects. These are defects which result from faulty manufacturing process; poor handling; unlawful interference; poor storage; undue exposure and any other adverse conditions. A popular example of this type of defect is the presence of foreign bodies in a product. Incidentally, this constitutes the bulk of allegations in product liability cases in this country.

If the presence of a foreign body is alleged, it is the duty of the plaintiff as stated in Okonkwo v. Guinness (Nig) Ltd. to show that the foreign body was present when the product left the manufacturer's factory. This is in recognition of the fact that "where a manufacturer has parted with his product and it has passed into other hands it may well be exposed to vicissitudes which may render it defective or noxious, for which the manufacturer could not in any view be held to be to blame".[122]

Proof of source of foreign bodies thus constitutes a great burden on the plaintiff. But although difficult, it appears imperative in view of the likelihood of possible manipulations by unscrupulous consumers. A contrary position might expose the manufacturer to a multiplicity of suits, the genuineness of which may be difficult to determine. An observation by Lord

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[120] Some writers refer to this class of defects as manufacturing defect. This term is rather restrictive since it cannot cover defects that emanate outside the manufacturing process.

[121] See generally, Apori, op. cit.

[122] Per Lord Macmillan in Donoghue v. Stevenson at p. 622.

Anderson in Mullen v. Barr & Co. involving a mouse in a bottle of ginger beer aptly buttresses this point. His Lordship stated:

> *"In a case like the present, where the goods of the defenders are widely distributed throughout Scotland, it would seem little short of outrageous to make them responsible to members of the public for the condition of the contents of every bottle which issues from their works. It is obvious that, if such responsibility attached to the defenders, they might be called on to meet claims of damages which they could not possibly investigate or answer".*[123]

Truthfulness of the plaintiff's averments is, therefore, the acid test. The court in Donoghue v. Stevenson placed premium on this point. Lord Atkin posed the crucial question thus: "Do the averments made by the pursuer in her pleading, if true, disclose a cause of action?"[124] In that case, the truthfulness of the plaintiff's averment was assumed by the court[125] probably because of its particular facts. There was an incontroverted evidence that the drink reached the plaintiff in the condition in which it left the manufacturer. But as explained in Grant v. Australian Knitting Mills Ltd., "The decision in Donoghue's case did not depend on the bottle being stoppered and sealed: the essential point in this regard was that the article should reach the consumer or user subject to the same defect as it had when it left the manufacturer".[126]

So the question in each case is whether the plaintiff has adduced sufficient evidence to show that the defect complained of was present when the article left the defendant. The evidence must unerringly show that the defect cannot be attributed to any other intermediary

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123 [1929] S.C. 461, 479; cited in Donoghue v. Stevenson at p. 578.

124 Ibid; emphasis mine.

125 See Lord Atkin at p. 578; Lord Thankerton at p. 601 and Lord MacMillan at p. 606.

126 [1936] A.C. 85 at p. 106.

or even to an unlawful interference by the plaintiff himself. This task is enormous as the court may not be willing to take this issue for granted. The court was emphatic on this point in Okonkwo v. Guinness (Nig) Ltd. Obi-Okoye, J. stated the position thus:

> *"In conclusion let me say this. Donoghue v. Stevenson did not create a magic for the recovery of damages against manufacturers of drinks by ultimate consumers of the drinks. A plaintiff in a case of this nature must realize that unless he has obtained admissions of certain facts from those he sues, the burden which he has assumed of establishing his case is enormous: no presumption exists in his favour: all the ingredients of the case must be proved by credible evidence at the trial. If therefore he is not in a position to discharge such burden, it is pointless instituting the action at all."*[127]

But the question remains as to where to draw the line. No doubt, extreme rigidity as examplified by the above statement will compound the case of the consumer just like extreme liberalism will prejudice the position of the defendant. There is, therefore, need to strike a balance between the interests of the consumer and those of the defendant. Short of making "a dangerous use of circumstantial evidence"[128] the courts should be prepared to make some reasonable assumptions in favour of the claimant.

Such assumptions will be appropriate where there are strong and reasonable circumstantial evidence against the defendant. Such evidence can be said to be present in Ebelamu v. Guinness (Nig) Ltd. and Boardman v. Guinness (Nig) Ltd. In the former, the facts of which have already been given, the court refused to base its decision on the unopened bottle of beer which was analysed and found to contain poisonous sediments. It was held that there was no link between the injury suffered and the poisonous sediments in the unopened bottle since the content of that bottle was not consumed by the appellant. In Boardman, the remnants

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[127] [1980] 1 PLR 583 at p. 603.

[128] Lowe and Woodroffe, op. cit., p. 74.

of the opened bottle were analysed and found to contain bacteria; the unopened bottle which also contained an incredible amount of heavy sediments was not analysed. The court placed no emphasis on the unopened bottle and accepted the defendants' contention that the opened bottle could have been contaminated after it was opened.

The result of these decisions is that a claimant's case will fail if there is any form of interference with the product since, as reasoned by the courts, the source of the defect cannot be determined. In the same way, a claimant cannot rely on a similar defective product from the defendant because, in this case, there will not be any link between his injury and the defect in that other product.

One would have thought that, just like the case of similar facts under the law of Evidence, evidence of similar defects in other products manufactured by the defendant should provide a strong prima facie case against the defendant. On this ground one tends to agree with the reasoning in the submission of learned counsel for the appellant in Ebelamu v. Guinness (Nig) Ltd. that on the balance of probability, the injury to the appellant must have been caused by sediments of a similar nature in another bottle of beer as in the unopened bottle. If the courts cannot make assumptions such as this, a case of negligence may never succeed.

Some inclination in favour of the claimant is necessary especially in this country where the pre-occupation of defendant's witnesses is, almost always, to paint an excellent picture of the care taken in the production process. This contrasts with the position in some jurisdictions where expert witnesses are rather objective in their approach. A case that comes to mind is Vacwell Engineering Co. Ltd. v. B.D.H. Chemicals Ltd. There, the technical development manager of the defendants who testified on their behalf admitted that the warning in question was inadequate. He was unaware of the explosion hazard in relation to baron tribromide in contact with water, and at one stage in his evidence he said: "What baffles me is why all the people whom

I regard as authorities missed it, as I did".[128a]

The witness who was described by the court as "a candid, experienced, learned and impressive witness" stated that in the light of what he knew after the accident, the proper warning to be attached to the chemical was "Reacts violently with water and explodes" and not just "harmful vapour".

Going by existing literature, it may not be an overstatement to say that such candid expert witnesses are difficult to come by in this country. A plaintiff's case will be compounded if he cannot afford his own expert witnesses.[128] In this case he will be saddled with the onerous task of having to prove the alleged deficiency in the manufacturing system which could have led to the defect complained of. A plaintiff who is ignorant of a given system of manufacture (and this is certainly the case in a majority of cases) cannot prove what went wrong. As observed by Harvey,[129] "in an increasingly complex technological age, this may involve an expensive investigation of the producer's system of work and testing, safety record with other goods and so forth".

In treating the evidence of experts the court should be very circumspect, taking into consideration possible personal interests of such experts which may influence their testimony. The court in Solu & Ors v. Total (Nig) Ltd. was mindful of this factor. Onalaja, J. was of the opinion that the evidences of the defence expert witnesses (who were four in number) should

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128a (1971) 1QB 88, at p. 97. It is not clear from the report whether this statement came in the course of evidence in chief or cross-examination; but the fact remains that this witness demonstrated sincerity by admitting the inadequacy of the warming.

129 Even where he may afford one, there is still the possibility that the defendant may be in a better position to engage the services of a better qualified expert witness as happened in Boardman v. Guiness (Nig) Ltd. Where this is the case it cannot be ruled out that the status of such witness may influence the weight to be attached to his testimony.

130 Harvey, B.W., The Law of Consumer Protection and Fair Trading ed., (London: Butterworths; 1978) p. 99

be treated with circumspect in that they all belonged to the gas cylinder manufacturing cartel and had their economic interests to protect as to the quality of their manufactured goods. The espirit de corps syndrome could not, therefore, be ruled out. On the other hand, the plaintiff's expert witness was, from all indications, a more independent witness. His interest appeared academic as a professional chemical engineering lecturer.

Based on the principle that where there are conflicting expert opinions, the court can reject one and accept the other without stating a reason,[131] the court in the instant case did not feel any constraint in accepting the plaintiffs' expert's opinion in preference to that of the defendants. The court noted that it was common ground that the cylinder was made of steel which needed a very high degree of heat to melt. Apparently referring to the defence expert opinion that the rupture on the cylinder which caused the explosion was due to external application of heat, his Lordship observed:

> *"From a layman's point, to melt steel you require the heat coming from a furnace like the furnace of the billets at ALAJA STEEL COMPANY WARRI or the furnace of SHADRACH, MESHACH and ABEDNEGO, and in my judgement to apply such a heat to a highly inflammable object is suicidal and just like a person jumping from the antenna of the NET Building to the floor."*[132]

The assessment of expert opinions in this case is quite objective and commendable.

In all cases of product liability, it is expected that the courts will be guided by the Supreme Court's injunction in Mogaji v. Odofin.[133] There it was advised that before reaching a decision on a case, the trial judge should set up an imaginary scale by putting up the evidence

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131 Bamiro v. SCOA [1941] WACA 150; Ozigbo v. C.O.P. [1976] 1 NMRL 273.

132 Solu v. Total (Nig) Ltd., (Unrep) Lagos State High Court, Suit No. ID/619/85. March 25, 1988, at p. 31.

133 [1978] 3/4 SC 91-98.

adduced by the plaintiff on one side of the scale and also that of the defendant on the other side of the scale. He should then weigh them together not by the number of witnesses called by the parties but by ascribing probative value to the pieces of evidence to find where the scale tilts.

It is suggested that in matters relating to proof or dis-proof of negligence, the courts should not lay much emphasis on a demonstrated fool-proof system. The issue in product liability cases is how an alleged defect occurred and not how perfect a claimed system of manufacture is. Attention should, therefore, be focused on the former issue. Thus apart from showing a good quality control system, a manufacturer should be required to give evidence in rebuttal of the negligence imputed to him. Such evidence may include a tender of some samples from the batch from which the defective product emanated; a proof that the product in question is not his but an imitation as shown in Boardman v. Guinness (Nig) Ltd; or a proof that the defect did not result from him but from an intermediary as happened in Ebelamu v. Guiness (Nig) Ltd.

It is suggested that no effort should be spared in the task of discerning a more credible witness. All in all, a modicum of common sense should play a prominent role.

7.10 Recoverable Damage

As a conscious public policy, the law sets some limits on the class of damage that may be compensated for in an action for negligence. This means that there are losses which may go without remedy even though they may be regarded as direct or indirect consequence of a wrongful act. Such losses are considered too remote to warrant compensaiton.[134] As noted by Lord Reid in Mckwe v. Holland Hannen & Cubits

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134 See Cattle v. Stockton Waterworks Co. (1875) L.R. 10 Q.B. 453.

(Scotland) Ltd., "a defender is not liable for a consequence of a kind which is not foreseeable. But it does not follow that he is liable for every consequence which a reasonable man could foresee".[135] In rejecting the action of the plaintiff he said that if such actions were allowed, the court would establish an authority for saying that, in such a case as that of Fletcher v. Rylands[136] the defendant would be liable, not only to an action by the owner of the drown mine, and by such of his workmen as had their tools or clothes destroyed but also to an action by every workman and person employed in the mine, who in consequence of its stoppage made less wages than he would otherwise have done.[137]

The general rule is, therefore, that the common law duty to take care to avoid causing injury to others is restricted to physical injury either to person or property. In general, the tort of negligence does not recognise a man's financial or pecuniary interests. The principle is that there is no liability for economic loss unless there is also proved loss to the plaintiff's person or property.

In Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.,[138] the defendants, highway contractors, negligently damaged a cable supplying electric power to the plaintiff's factory, thereby interrupting the supply for fourteen and a half hours. The cable belonged to a third party, an electricity supply corporation. To prevent damage to their furnace, the

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135 [1969]3 All E.R. 1621; at 1623

136 (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330.

137 Ibid., at p. 457.

138 [1972]3 All E.R. 557.

plaintiffs had to damage its contents on which they would have made a profit of £400. The destruction caused a deterioration in value amounting to £368. Plaintiffs claimed for these sums and in addition, £1,767 representing the profit they would have made from four melts which they were prevented from making by the interruption. A majority of the Court of Appeal re-affirmed the general principle stated by Blackburn, J. in Cattle v. Stockton Waterworks & Co. and held that the plaintiffs were only entitled to the first two sums. Lord Denning, M.R. explained the rejection of recovery of the last claim on grounds of public policy. He said:

> *"At bottom I think the question of recovering economic loss is one of policy. Whenever the courts draw a line to mark out the bounds of duty, they do it as matter of policy so as to limit the responsibility of the defendant. Whenever the courts set bounds to the damages recoverable - saying that they are, or are not too remote - they do it as a matter of policy so as to limit the liability of defendant."*[139]

His Lordship further observed that if claims were permitted for economic loss, there would be no end to claims. Some might be genuine, but many might be inflated, or even false. It would be impossible to check the claims. He suggested that rather than expose claimants to such temptation and defendants to such hard labour, it is better to disallow economic loss altogether, at any rate when it stands alone, independent of any physical damage.

But a contrary argument was put up some years later by Lord Roskill in Junior Books Ltd. v. Veitchi Co. Ltd.[140] He said:

> *"although it cannot be denied that policy considerations have from time to time been allowed to play their part in the tort of negligence since it first developed as it were in its own right in the course of the last century, yet today I think its scope is best determined by consideration of principle rather than of policy."*[141]

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[139] Ibid., at p. 561.

[140] [1983]1 A.C. 520.

[141] Ibid., at p. 539.

Reconciliation of the above opposing views may be difficult in practical terms. But there is no evidence that the courts set themselves the task of such reconciliation. But evidence from decided cases shows that an objective approach is preferred by the courts. A claimant's case will be rejected if it is such that may lead to a "floodgate" of litigation. In Weller & Co. v. Foot and Mouth Disease Research Institute,[142] the defendants negligently allowed some viruses to escape from their research institute thereby infecting cattle within the vicinity. This led to the closure of the cattle markets in the area. The plaintiffs sued for financial losses occasioned by the closure. Their claim was that the closure made it impossible for them to carry out their cattle auctioneering business in the markets. Their claim was rejected on the ground that to allow it would amount to acknowledging the rights of other numerous persons who were similarly affected by the closure.[143]

A claim may only be allowed where the financial loss can be linked to injury or potential injury to life or property. In Dutton v. Bognor Regis U.D.U.,[144] this condition was satisfied and so the English Court of Appeal allowed recovery. There, a subsequent purchaser of a defective building was allowed to recover economic losses from the local authority which approved the foundation of the building. Lord Denning reasoned that it would be absurd to allow a recovery for actual injuries caused by such a building and disallow it where the defect was discovered and rectified.[145]

A similar claim was also allowed by the House of Lords in Anns v. Merton London

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142 [1966]1 Q.B. 569.

143 See Widgery, J. at p. 577.

144 [1972]1 Q.B. 373.

145 Ibid., at p. 396.

Borough Council[146] a case involving a defective foundation of a dwelling house. This decision was in turn applied by the House of Lords in Junior Books, a case concerning defective flooring by sub-contractors.[147] The Court observed that there was sufficient relationship of proximity between the parties and also that there was evidence of reliance on defendant's skill. It was noted that the sub-contractors were nominated by the plaintiffs and so the relationship fell just below contractual relationship.

Some adverse comments have been passed on the decision in Junior Books. Some writers prefer to treat the decision as a case based on its special merits. Charlesworth and Percy[148] note that the true significance of the case is that it should be considered more as one which is closely akin to contract, rather than any development of the law of negligence. In D & F Estates Ltd. v. Church Commissioners for England,[149] the court preferred to regard Junior Books Ltd as a decision limited to its own special facts. It was stated that it "cannot be regarded as laying down any principle of general application in the law of tort".[150]

Echo Enterprises Ltd. v. Standard Bank of Nigeria & Anor[151] appears to illustrate that a claim for economic loss may be allowed in negligence actions. The plaintiffs claimed damages representing the commission which they would have earned from a transaction with

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146 [1978] A.C. 728.

147 The defect in question did not constitute any danger to life or property.

148 Op. cit., p. 63.

149 [1989] A.C. 177.

150 See also Nottingham Co-operative Society Ltd. v. Cementation Piling and Foundations Ltd. [1989] A.C. 177.

151 [1989]4 NWLR 509 C.A.

their overseas customers. The allegation was that due to the delay of the defendants in remitting the money paid to them to the said customers, an order placed with the latter was cancelled resulting in loss of commission. Plaintiffs' claim was rejected on the ground that they could not prove the alleged cancellation. But it appears from the judgement of the court that if the allegation had been proved a different decision would have been reached. Uwaifo, J.C.A. while conceding that a negligent act is not actionable per se observed that "the scope of damage now includes economic loss..."[152] In support of this assertion, his Lordship cited the case of Hedley Byrne & Co. v. Heller & Partners Ltd.[153] In the latter case, Lord Devlin said that he could find neither logic nor common sense in the proposition that the interposition of the physical injury makes a difference of principle.[154]

Despite some apparent deviations, the general approach remains the traditional principle that there is no recovery for economic losses which are not accompanied by physical damage. Such losses which only involve "damage to the pocket"[155] are regarded as pure economic losses. They can be contrasted with economic losses which are occasioned by physical loss to the person or property for which recovery can be awarded. Examples of the latter include, loss of earnings and medical expenses. These can be distinguished from financial losses caused directly by the breach.

It follows from the foregoing that the issue of recovery of damages for economic loss remains dicey. This is more so in product liability cases. Most of the cases discussed above

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152 Ibid.; at p. 515.

153 [1964] A.C. 465.

154 Ibid., at p. 517.

155 Per Lord Ruskill in Junior Books Ltd. v. Veitchi Co. Ltd. [1983]1 A.C. 520 at p. 546.

concerned subject matters outside "product". In fact majority of them dealt with defective buildings. Besides, Junior Books Ltd. and Anns v. Merton London Borough Council which are often cited as authorities for recovery of economic losses have been overruled by the House of Lords decision in D & F Estates v. Church Commissioners and Murphy v. Brentwood D.C.[156] In the latter case, Lord Brandon's dissenting judgement in Junior Books Ltd was largely adopted and the court reaffirmed the principle that there can be no recovery for pure economic loss.

It can equally be argued that the view expressed in Echo Enterprises Ltd. v. Standard Bank of Nigeria & Anor quoted above, being a statement made obiter, cannot be said to have achieved an overhaul of the law on this matter. A direct decision is needed to settle the controversy.

Some reasons have been advanced for courts' refusal to allow claims for economic losses. Atiyah rationalises this approach on the ground that it is simply easier and less costly if buyers look to their sellers for redress for defective goods.[157] Perhaps, a more cogent justification can be found in Lord Fraser's argument in Junior Books Ltd. He said:

> *"A manufacturer's duty to take care not to make a product that is dangerous sets a standard which is, in principle, easy to ascertain. The duty is owed to all who are his `neighbours'. It is imposed on him by the general law and is in addition to his contractual duties to other parties to the contract. But a duty not to produce a defective article sets a standard which is less easily ascertained, because it has to be judged largely by reference to the contract."*[158]

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156 [1990]3 W.L.R. 415; See Atiyah, op. cit., p. 226.

157 Op. cit., p. 227.

158 [1983]1 A.C. 520, 533.

The attitude of the courts in this area is quite in order. This is because the tort of negligence specifically deals with injury to person or property. Pure economic loss is adequately covered by the law of contract. For instance, a consumer who is also the buyer can sue in contract for any observed deficiency. The action can be conveniently disposed of based on the terms of the contract. But one sees no reason why such a right should be extended to a non-contractual consumer. In the first place, it cannot be seriously argued that he has suffered some economic loss since he did not give consideration for the subject matter. Where money is actually expended to remedy a defect, such claim can be made in contract through the buyer.

7.11 Summary

It is seen from the above discourse that a victim of product defect may maintain an action in the tort of negligence against anyone in the product chain. But to succeed, it must be proved that the person being sued was responsible for the defect in issue. The plaintiff bears the burden of proving negligence against the defendant. His case is compounded by the refusal of the courts to extend the principle of res ipsa loquitur to product liability cases.

We suggest that as a way of getting round the onerous problem posed by proof of negligence, a strict product liability regime be adopted as is the case in many other jurisdictions.

CHAPTER EIGHT

CIVIL ENFORCEMENT OF CONSUMER RIGHTS: ENFORCEMENT UNDER THE LAW OF CONTRACT

8.1 Introduction

As noted in chapter six, a consumer who is also a buyer can sue in contract for any defect in the product. Such action can be based on breach of any express terms of the contract or any of the terms implied by law. This chapter examines the various terms implied by the law; nature of contractual liability; limitations of contractual rights; remedies available to a claimant and measure of damages.

In view of the fact that this work is concerned with matters relating to health and safety of consumers, remedies of the buyer - consumer as regards other matters such as specific performance, damages for non-delivery and action for implied condition as to title shall not be discussed. For the same reason, remedies of the seller are excluded.

8.2 Classification of Terms of Contract

Terms of contract are made up of express terms and terms implied by the law. Express terms refer to terms expressly inserted by the parties in the agreement. They are terms specifically agreed upon by the parties and incorporated into their agreement. Terms implied by the law are of three categories, namely, those implied by (a) custom and usage; (b) statute and (c) the courts. Effort will be concentrated on quality terms implied by statute since they are the ones most relevant to this work. In the light of this, only brief references will be made to other implied terms.

8.2.1 *Terms Implied by Custom and Usage*

Terms implied by custom and usage are terms which are sanctioned by the custom or usage in question. They are terms which are generally accepted by members of a particular trade or profession. It is well established that extrinsic evidence is admissible to prove that a particular custom was intended to apply to a contract. This principle was clearly stated by Park, B. in Hutton v. Warren.[1] He stated:

> *"It has long been settled, that, in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent .....; and this has been done upon the principle of presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages."*[2]

This common law position has now been given statutory approval. Section 15(c) of the Sale of Goods Law provides that an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.[3]

8.2.2 *Terms Implied by Courts*

Terms implied by courts refer to terms which the courts imply into a contract in order to give it business efficacy. A term will only be implied by the court if it is obvious that if the parties had adverted their minds to it at the time of contract they would have adopted it unanimously. The test guiding the implication of terms by the

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1 (1836) 1 M & W, 466

2 Ibid. at p. 475; see also, Produce Brokers Co. Ltd v. Olympia Oil & Cake Co. Ltd. [1916] 1 A.C. 314 at pp. 330 & 331.

3 See also S. 25(4) of the Sale of Goods Edict of Plateau State.

court was stated by Mackinnon, L.J., in Shirlaw v. Southern Foundaries Ltd.[4] He said:

> *"Prime facie that which in any contract is left to be implied and need be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common, `Oh, of course".*[5]

A breach of any term, whether express or implied entitles the innocent party to a remedy. The nature of the remedy, however, depends on the nature of the term in question since terms of contract are of varying degrees. This has led to a further classification into conditions, warranties, innominate terms and fundamental terms. For a proper understanding of these terms it is necessary to treat them in some detail.

8.3 Condition

Like the English Sale of Goods Acts of 1893[6] and 1979 respectively, the Sale of Goods Law, Lagos State does not define the term condition. This is also the position under Sale of Goods Laws of other Southern States. In contrast, the term is defined by the Sale of Goods Edicts of the Northern States. For instance, section 3(1) of the Sale of Goods Edict of Kaduna State provides that -

> *"Condition means a term which goes directly to the substance of the contract for the sale of goods and so essential to its very nature that its non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all and so gives him the right to repudiate the contract and reject the goods, in addition to a claim for damages".*[7]

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4 [1939] 2 K.B. 206 C.A.

5 Ibid. at p. 277

6 Repealed and replaced with the Sale of Goods Act 1979.

7 See also S. 2(1), Sale of Goods Edict of Plateau State which has a verbatim definition.

This definition can be supported because it clearly shows that a condition is a vital term of a contract, a meaning reflected in many judicial decisions.[8]

Some definitions have also been proffered by some writers. Atiyah[9] writes that a condition is a term which, without being the fundamental obligation imposed by the contract, is still of such vital importance that it goes to the root of the transaction. He further explains that if a term is strictly a condition, this means that its full performance is a condition of the other party's obligations.

With due respect, this explanation appears contradictory. A term which does not form the fundamental obligation of a contract cannot be of such vital importance as to go to the root of the transaction. Indeed, the fact that a breach of condition entitles an aggrieved party to repudiate the contract, shows that a condition is a fundamental obligation of a contract. This argument is in line with section 3(1) of the Sale of Goods Edict, Kaduna State quoted above.

The explanation given by Uvieghara[10] is more to the point. He writes that a condition is a term which is essential to the main purpose of the contract so that if it is not performed it may be said that the contract has not been performed.

Even though the Sale of Goods Law of Lagos State does not define the term condition, it states the effect of breach of this term. Section 12(2) provides that whether a stipulation in a contract of sale is a condition the breach of which may give rise to a right to treat the contract as repudiated or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as

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8 See cases on breach of implied terms, Infra; p.258-295

9 op. cit., p.56.

10 op.cit.; p.25

repudiated, depends in each case on the construction of the contract, and a stipulation may be a condition though called a warranty in the contract.

It is clear from this provision that a condition is a crucial term of a contract. This provision confirms the assertion that a condition is of more importance than a warranty. Commenting on an equivalent provision,[11] Sagay[12] writes that this prescription of remedies for breaches of conditions and warranties demonstrates that while a condition which attracts the remedies of repudiation and damages must be a major term, a warranty which attracts the remedy of damages only must be a relatively minor term.

What can be gathered from the foregoing analysis is that a condition is an essential term of a contract, a non-performance of which gives the other party the right to repudiate the contract and claim for any other appropriate remedy such as refund of price or damages for any loss suffered.

8.4 Warranty

Unlike the term condition, "warranty" is defined by the Sale of Goods Law. Section 2(1) provides that -

> *" 'Warranty' means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated".*

It is obvious from this provision that a warranty is of less importance than a condition. But contrary to the impression created by this provision, a warranty is a term

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11 Section 11(1) (b) of the Sale of Goods Act 1893 (U.K).

12 Op. cit. p. 100.

of the contract and not something collateral to it. Atiyah[13] notes in this regard that the term "collateral", though hallowed by usage, is not very happily chosen, for it may give the impression that a warranty is a term which is somehow outside the contract, whereas it is in fact a term of the contract.

As seen from section 12(2) stated above, the Law states the effect of a breach of a warranty. By this section, a breach of warranty gives rise to a right to claim for damages but not to a right to repudiate the contract.

8.5 Innominate Term

The traditional classification into conditions and warranties has been eroded by some recent decisions which have introduced a third category of terms known as innominate terms.

Under this category, the court looks at the consequences of the breach in order to determine the appropriate remedy. As explained by Sagay, if the breach is so devastating as to deprive the injured party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract, then the remedy would be repudiation; otherwise, it would be damages. In Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha,[14] the defendants who chartered a ship from the plaintiffs for 24 months sought to repudiate the contract on the ground that the ship was unseaworthy. It was shown that due to the state of the ship the first voyage undertaken by her was delayed for five weeks. On arrival at her destination, it was discovered that another 15 weeks was required for necessary repairs. The charter party had 20 months to run. It was

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13 Op. cit. p. 63.

14 [1962]2 Q.B. 26.

held that even though the ship was unseaworthy, this breach did not give the defendants the right to repudiate the contract. It was noted by the court that the breach did not deprive the defendants of substantially the whole benefit which they were intended to obtain from the contract.

This approach was approved in Cehave NV v. Bremer Handelsgesells-chaff.[15] The English Court of Appeal stated that the classification into conditions and warranties was not exhaustive. Lord Denning, M.R. said that such classification left out of account the vast majority of stipulations which were neither "conditions" nor "warranties", strictly so called, but were intermediate stipulations, the effect of which depended on the breach.

The contract in the instant case was for the sale of citrus pulp pellets for use in animal feeds. The terms of the contract required that the goods should be "in good condition". The goods supplied were slightly damaged but were reasonably fit for purpose and in fact were eventually used for the stated purpose. Price having fallen, the buyers sought to repudiate the contract. The court while admitting that there was an implied condition of merchantable quality, held that this condition was not broken. It was further held that the express term that the goods should be "in good condition" was an innominate term the consequences of which depended on the gravity of the breach. In the circumstance it was held that the buyers were not entitled to reject the goods.

In Reardon Smith Lines Ltd v. Hansen Tangen,[16] the House of Lords approved the decision in the Cehave case. Lord Wilberforce described some of the cases on the

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15 [1976] Q.B. 444

16 [1976]3 All E.R. 570

implied condition as to description such as Re Moore & Co. and Landauer & Co.[17] as excessively technical. His Lordship preferred to treat the consequences of a breach as something to be settled after the occurrence of the breach. He preferred to treat contracts of sale of goods in a similar manner to other contracts generally so as to ask whether a particular item in a description constitutes a substantial ingredient of the identity of the thing sold, and only if it does, to treat it as a condition. His Lordship stressed the observation made in Hong Kong Fir Shipping Co. Ltd. that the general law of contract has developed along much more rational lines in attending to the nature and gravity of a breach or departure rather than accepting rigid categories which do or do not automatically give a right to rescind.[18]

A possible defect in this approach is that it may lead to uncertainty. Thus unlike the traditional approach which ensures certainty,[19] parties will have to wait for the consequences of the breach before they can determine their legal rights. But then, as regards express terms of the contract, this is not a novelty because under the traditional classification, the nature of a term is a question of construction;[20] a construction done by the court after the occurrence of the breach. The only difference is that while the traditional approach is based on the construction of the contract, the innominate term approach is based on the consequences of the breach. The end result is the same and the enquiry is the same; that is; is the term so fundamental as to deny the innocent party of the substantial benefit under the contract or is the consequence so devastating as to deny

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17 [1921] 2 Q.B. 519.

18 [1976] 3 All E.R. 570 at pp. 576 & 577.

19 See The Mihalis Angelos [1971] 1 Q.B. 164.

20 See S. 12(2) discussed above.

him of substantial benefit under the contract? Since the end result is the same, the law should adopt the innominate term approach which is a more rational approach. This will take care of technicalities and help the courts to achieve a rational result based on the merits of each particular case.

Evidence of such rational decision can be seen in Reardon Smith Lines Case. There, evidence showed that by the time the tanker was ready for delivery the market had collapsed owing to the oil crisis of 1974, so that the charterers' interest was to escape from their contract by rejecting the vessel. The court held that by building the ship at another yard, the respondents had not provided any ground on which the charterers could claim that their bargain had not been fulfilled.

The result of this approach will be that in cases such as Re Moore & Co. Ltd and Landauer & Co. Ltd and Arcos Ltd. v. E.A. Ronaasen & Son, [21] where the breach of condition did not occasion any significant loss, the claimant should not be allowed to repudiate the contract. Damages will provide an adequate remedy.

Section15A of the Sale of Goods Act 1979 (UK) has introduced some significant modifications to the consequences of breach of a contract. Under this provision, the legal position as regards consumer sales remains unchanged. This means that a party can repudiate for any breach of condition. But in the case of non-consumer sale, the buyer cannot repudiate a contract if the breach is so slight that it will be unreasonable to do so. Thus, by this section, where a buyer does not deal as a consumer, and the breach is so slight that it will be unreasonable for him to reject the goods, he cannot reject. The limitation of right to reject relates to implied conditions of compliance with description, fitness for purpose,

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21 [1933] A.C. 470.

merchantable quality and compliance with sample. Other implied conditions such as time stipulations and right to sell remain unaffected.

To the best of our knowledge, the issue of innominate term has not been considered in any local case. It is hoped that our courts will adopt this approach since it leads to more rational results.

8.6 Fundamental Term

In addition to conditions, warranties and innominate terms, a further classification recognised by the courts is the fundamental term. In Smeaton Hanscombe & Co. Ltd v. Sassoon I. Setty Sons & Co. (No. 1),[22] a fundamental term was defined as something which underlies the whole contract, so that, if not complied with, the performance becomes totally different from that which the contract contemplates.[23] In Chanter v. Hopkins, Lord Abinger stated that "If a man offers to buy peas of another, and he sends him beans, he does not perform his contract".[24]

Sagay[25] writes that a fundamental term is a term of greater importance than a condition. It is a term which constitutes the main purpose of the contract, and failure to comply with it is equivalent to not performing the contract.

Atiyah, in his definition of condition considered above, impliedly suggests that a fundamental term is of greater importance than a condition.

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22 [1953] 1 W.L.R. 1468.

23 Ibid. at p. 1470

24 (1838) 4 M & W. 399 at 404; cited in Cheshire, Fifoot and Furmston, Law of Contract, 11th ed. (Edinburgh, Butterworth & Co. (Publishers) Ltd; 1986) p. 164.

25 op. cit; p. 105

Despite the above decisions and opinions, it would appear that there is no substantial difference between a condition and a fundamental term. Almost all cases used by writers to illustrate the principle of fundamental term are in fact cases of fundamental breaches.[26] These include supply of adulterated copra cake in place of pure copra cake contracted for;[27] destruction of a factory by fire deliberately started by an employee engaged to guard it;[28] supply of broken down piece of ironmongery in a contract for the supply of a car;[29] and the supply of cabbage seed only suitable for bird seeds in place of cabbage seeds for the purposes of cultivation and harvesting for sale.[30]

These illustrations, are no more than examples of fundamental breaches. They are breaches which take the guilty party outside the terms of the contract. They are fundamental in the sense that they constitute a complete deviation from the terms of the contract. Before the adoption of the rule of construction[30a] by the courts, they were particularly relevant with respect to the issue of exemption clauses. Explaining the effect of a fundamental breach in this context, Lord Wilberforce in the Suisse Atlantique case[31] said: "A shipowner, who deviates from an agreed voyage, steps out of the contract, so

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26 Cf. Smeaton Hanscomb & Co. Ltd. v. Sassoon I. Setty Sons & Co. (No. 1).

27 Pinnock Bros. v. Lewis & Peat Ltd. [1923]1 K.B. 690.

28 Photo Production Ltd v. Securicor Transport Ltd [1980]. AC 827. Though what he did was deliberate, it was not established that he intended to destroy the factory.

29 Karsales (Harrow) v. Wallis [1956]1 W.L.R. 936.

30 George Mitchel (Chesterhall) Ltd. v. Finney Lock Seeds [1983]2 A.C. 803. See Sagay op. cit. p. 105 for these and other illustration.

30a For the positions before and after the adoption of the rule of construction, see Infra.; 8:12.

31 [1967] 1 A.C. 361

that clauses in the contract, (such as exemption or limitation clauses) which are designed to apply to the contracted voyage are held to have no application to the deviating voyage.[32]

It is doubtful whether any useful purpose is served by a further classification into fundamental term. Judicial decisions show that the effect of a breach of condition is the same as that of breach of fundamental term. In both cases, the effect is a right of repudiation. In view of this, one sees no rational in classifying some terms as conditions and others as fundamental. The same result will be achieved by regarding all important terms as conditions. In this connection one agrees with the view of Ezejiofor, Okonkwo and Ilegbune[33] that "A fundamental term is the same as a condition, and therefore breach of a fundamental term is the same as breach of a condition".

Following this argument, it is better to classify all terms of contract, both express and implied, into conditions and warranties. The next question will then be whether to apply the rule of construction to the terms of the contract or the consequences of the breach. Based on the result of some decided cases where parties were allowed to repudiate on technical breaches,[34] we believe that a better result will be achieved by applying the rule of construction to the consequences of the breach. Thus if the breach is such as would deny the aggrieved party of the whole or substantial benefit, then repudiation should be allowed, otherwise only damages.

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32 Ibid; at pp. 433 & 434.

33 Ezejiofor, Okonkwo & Ilegbune, Nigerian Business Law, (London; Sweet & Maxwell; 1982) p. 45.

34 See Arcos Ltd v. E.A. Ronaasen & Son; also Re Moore & Co. Ltd and Landauer & Co. Ltd.

8.7 Terms Implied by Statute

The Sale of Goods Laws/Edicts of various States imply certain terms into every contract of sale. The provisions of these laws are substantially the same. Unless otherwise indicated, all references in this work are to the Sale of Goods Law of Lagos State.[35] Terms implied by this Law are the right to sell; compliance with description; fitness for purpose; merchantable quality and compliance with sample. For the purpose of this work, only the implied terms relating to quality shall be discussed. These are terms which a consumer - buyer can resort to in the event of a supply of defective goods.

8.8 Implied Condition as to Description

Section 14 provides that where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description, and if the sale be by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

8.8.1 *Meaning of Sale by Description*

A vital requirement in section 14 is that the sale must be one by description. It follows that for a consumer to rely on this provision he must show that he bought the goods by description. The meaning of sale by description has received due judicial attention. In Varley v. Whipp,[36] Channell, J. held that the term "sale of goods by description" must apply to all cases where the purchaser has not seen the goods, but is

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35 Cap. 174, 1994.

36 [1900]1 Q.B. 513.

relying on the description alone."[37] In that case, the defendant bought a reaping machine by description. Shortly after delivery, he wrote complaining that it did not correspond with the plaintiff's statement. The sale was held a sale by description and the defendant was held entitled to reject the machine.

The decision in Joseph Travers & Sons Ltd v. Longel Ltd,[38] shows that the phrase also applies to sale of all future and unascertained goods. There, the plaintiffs ordered for some pairs of boots from the defendants. During the discussions about the boots before the contract was entered into, the word "waders" was used. The plaintiffs claimed to recover from the defendants the loss which they had suffered on the resale, contending that the word "waders" was a description of the boots implying that they were waterproof. It was held that neither party had in mind that the boots would be waterproof in the sense that they could be worn in water without letting water in, and that accordingly there was no sale by description. Sellers, J. quoting from Benjamin on Sale (7th ed. p. 641) stated:

> *"It is clear that there can be no contract for the sale of unascertained or future goods except by some description. It follows that the only sales not by description are sales of specific goods as such. Specific goods may be sold as such when they are sold without any description, express or implied, or where any statement made about them is not essential to their identity; or where, though the goods are described, the description is not relied upon, as where the buyer buys the goods such as they are."*[39]

It used to be doubtful whether the phrase "sale by description" could extend to sale of specific goods which the buyer has seen. This doubt was laid to rest in Grant v.

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37 Ibid; at p. 516.

38 [1947] 64 T.L.R. 150.

39 Ibid.; at P. 153.

Australian Knitting Mills Ltd[40] where a sale of an undergarment bought by a buyer from a shop was held a sale by description. Lord Wright pointed out that:

> *"There is a sale by description even though the buyer is buying something displayed before him on the counter; a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but as a thing corresponding to a description, e.g., woollen under-garments, a hot water bottle, a second-hand reaping machine, ..."* [41]

An examination of the goods by the buyer does not prevent the sale from being one by description. In Beale v. Taylor,[42] following an advertisement of a car, the plaintiff went to the defendant, inspected the car; had a test run of it and bought it. He later sought to reject it on the ground that it was unsatisfactory and did not correspond with its description. It was shown that contrary to the advertisement, the car was made up of two models. It was held that there could be a sale by description of a specific chattel even where the chattel was displayed to and inspected by the buyer so long as it was sold not merely as a thing, but as a thing corresponding to a description. The plaintiff was held entitled to reject it. Sellers, L.J. while conceding that there was good authority for saying that, if the buyer had not seen the goods, the contract in the ordinary case would be one by description said that sale by description might, however, apply where the buyer had seen the goods if the deviation of the goods from the description was not apparent. He further said: "I think that on the facts of this case the buyer when he came along to see this car was coming along to see a car as advertised, that is, a car

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40 [1936] A.C. 85.

41 Ibid.; at p. 100

42 [1967] 1 W.L.R. 1193.

described as a Herald Convertible, white, 1961."[43]

It can be inferred from the above cases that the courts favour a liberal interpretation of the phrase "sale by description". In effect, the phrase covers the sale of all unascertained and future goods; all specific goods not seen by the buyer; and, in addition, all specific goods seen by the buyer but described or expected to conform to a particular description or a description of goods of a particular generic name.

Section 13(3) of the Model Sale of Goods Act (Draft) appears to have impliedly approved the extension to goods seen by the buyer. It provides that a sale of goods is not prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer.

8.8.2 *Compliance with Description*

Another important issue in section 14 is the meaning of the phrase "compliance with description". Description refers to the language which the parties have used to identify the goods which are the subject-matter of the contract.[44] It is important to know the correct import and scope of a contractual description since a consumer-buyer will only be entitled to reject if the description is not complied with. The courts appear to favour a strict interpretation of this requirement. This means that any deviation irrespective of degree may constitute a breach. Such strict interpretation can be seen in some decided cases. In Arcos Ltd v. Ronaasen & Sons, the contract was for the supply of some staves of ½ inch thickness. About five per cent of the staves supplied complied

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43 Ibid. at p. 1196; see also Taylor v. Combined Buyers Ltd (1924) NZLR 627; T.E. Demuren v. Atlas (Nig) Ltd (1976)2 CC HCJ 2909.

44 Ibid at p. 1197.

with this specification while others suffered slight deviations. It was held that the buyers were entitled to reject. Lord Atkin summarised the issue thus:

> *"If a written contract specifies conditions of weight, measurement and the like, those conditions must be complied with. A ton does not mean about a ton, or a yard about a yard. Still less when you descend to minute measurements does half an inch mean about an inch. If a seller wants in margin, he must, and in my experience does stipulate for it."*[45]

In Re Moore & Co. and Landauer & Co.[46] the contract was for the supply of 3100 cases of canned fruit to be delivered in cases of 30. Some of the cases had 24 while others had 30. Altogether, the contractual quantity was delivered. It was held that the buyers were entitled to reject. In Ogwu v. Leventis Motors,[47] a four - year old lorry was supplied in place of the one - year old lorry bargained for; the buyer was held entitled to reject. The same principle was applied in Olajide Odunbo Stores and Sawmill Ltd. v. Omotayo Agencies (Nig) Ltd,[48] which involved the supply of planks described as "seasoned wood, grooved and finished". The planks supplied were grooved and finished but not seasoned. The plaintiffs were held in breach of the condition as to description.

In Reardon Smith Lines Ltd v. Hansen Tangen.[49] the House of Lords appeared to cast some doubts on the rigid interpretation of the meaning of compliance with description. There, a ship which was required to be built at a particular yard was in fact built at another yard. It was held that this requirement was of no significance. This case

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45 [1933] A.C. 470 at p. 479 See the argument of the Counsel to the respondents in Ashington Piggeries v. Christopher Hill [1972] A.C. 441.

46 [1933] A.C. 470.

47 [1963] N.R.N.L.R. 115.

48 (1978)4 CCHCJ 625.

49 [1976] 1 W.L.R. 989.

involved a charter party and not a sale of goods contract so it can be argued that it does not resolve the controversy as to the meaning of compliance with description in a sale of goods contract.

One conclusion that can be drawn from the foregoing cases is that a strict interpretation is applied to the meaning of the phrase "compliance with description". But Achike[50] stresses that "microscopic deviations may be disregarded". This agrees with a rider stated by Lord Atkin in Arcos Ltd v. Ronaasen & Sons that there may be microscopic deviations which business men and therefore lawyers will ignore.[51] This reasoning can be seen in the decision in Peter Darlington Partners, Ltd v. Gosho Co. Ltd[52] involving a contract for the supply of some quantity of pure canary seed. The quantity supplied was of a quality of about 98 per cent. It was shown that there was nothing as 100 per cent purity. The buyers were held liable for wrongful rejection.

It follows that minor deviations from contracted description may be disregarded particularly where the quality of the goods is unimpaired. In fact, writers are generally agreed that the de minimis rule is applicable in this area. Uvieghara[53] writes that there is no doubt that the general rule of de minimis applies in these cases. Atiyah[54] notes that it is quite clearly the law that any non-conformity with the contract description (so long as it is a part of the description which constitutes a term of the contract) is a breach of contract, subject only to the de minimis principle.

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50 Op. cit.; p. 225

51 [1933] A.C. 470 at p. 480.

52 [1964] Lloyd's Rep. 149.

53 Op. cit.; p. 38.

54 Op. cit.; p. 126, emphasis mine

If our earlier argument that construction of terms of a contract be based on the consequences of the breach is followed, then the controversy as to the effect of minor deviations will cease to be relevant. In this case the effect of the breach will be determined by the consequences of the breach. In fact this is the position under the English system. By the new section 15A of the Sale of Goods Act, 1979, a non-consumer cannot reject if the breach is so slight that it will be unreasonable for him to reject.[55]

It is pertinent to note that the issue of description is based on the terms of the contract and not on the quality or utility of the goods supplied. Thus if the goods are found to be in conformity with the contractual description, the claimant cannot rely on the implied condition of description merely because the goods are of inferior or injurious quality. He can only rely on any other relevant condition such as fitness for purpose or merchantable quality. This point was emphasised by the House of Lords in Ashington Piggeries case. There, the 'herring meal' supplied was contaminated with a substance which made it unfit as food for mink. The court equated description with identity and held that the goods supplied could still appropriately be described as 'herring meal'. Lord Wilberforce said that the Sale of Goods Act was not intended to provoke meta-physical discussions as to the nature of what was sold. The question whether the goods correspond with their description is intended to be a broader, more commonsense test of a mercantile character. The question whether that is what the buyer bargained for has to be answered according to such tests as men in the market would apply, leaving more delicate questions of condition, or quality, to be determined under other clauses of

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[55] See generally, Atiyah, op. cit.; pp 449 & 450.

contract or sections of the Act.[56]

This approach is appropriate since a contrary position would lead to a strained interpretation of the clear wording of the statutory provision. Thus section 14 should be confined to what it is meant for, namely, compliance with description. As rightly pointed out by Uvieghara,[57] the section is concerned with the identification of goods sold rather than their quality. The objective test is applied to resolve the issue of compliance with description. The question is whether the goods supplied can correctly be said to be of the same kind as those bargained for.

There is no doubt that a restricted approach restricts the scope of application of section 14. This notwithstanding, it is submitted that the section is still very useful where the requirements for the application of other sections of the Law are not met. Unlike other implied terms provisions, the only requirement under this section is that the goods must be sold by description. Thus a claimant can rely on it in sales by private individuals; also, where the goods are of merchantable quality or fit for purpose in the general sense, and where the contract contains a clause excluding liability for matters relating to quality.

8.9 Fitness for Purpose and Merchantable Quality

A consumer-buyer can equally rely on the implied conditions of fitness for purpose and merchantable quality: The opening sentence of section 15 which restates the common law rule of caveat emptor (let the

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56 [1972] A.C. 441, at p. 489; also Lord Guest at p. 473. cf. Pinnock Bros. v. Lewis and Peat Ltd., [1923] IKB 690; the contracted copra cake was mixed with castor beans. It was held that the copra cake did not correspond with its description.

57 Op. cit. p. 36.

buyer beware). It provides that subject to the provisions of the law, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale.

Sub-sections (1) and (2) constitute exceptions to this general principle. But in practice, they can be regarded as general rules since the caveat emptor rule is rarely invoked. To the best of our knowledge there is no decided case where a seller has sought to rely on the rule of caveat emptor.

8.9.1 *Fitness for Purpose*

By section 15(a), where the buyer, expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that he relies on the seller's skill or judgement, and the goods are of a description which is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose. This section contains a proviso which excludes goods bought in their patent or other trade names from the application of the provision.

The following requirements must be fulfilled before a buyer can rely on the above subsection:

(a) he must make known his purpose to the seller either expressly or by implication;

(b) he must rely on the seller's skill or judgement; and

(c) the goods must be of a description which is in the course of business of the seller to supply.

Once these requirements are satisfied, it will not matter that the seller is not the

manufacturer.

a. Making Known the Purpose to the Seller

The first requirement that must be satisfied by the buyer under section 15(a) is to show that he made known the particular purpose for which the goods were required to the seller either expressly or by implication. Particular purpose has been interpreted to mean specified purpose.[58] Uvieghara[59] writes that particlar purpose means the purpose communicated expressly or impliedly to the seller by the buyer for which the goods are required. Igweike[60] explains that the phrase "particular purpose" refers to the specified or usual purpose.

Where a product is used for only one purpose, that purpose will be regarded as the particular purpose. This principle which was applied in Priest v. Last[61] was further explained by Lord Wright in Grant v. Australian Knitting Mills Ltd. He said:

> *"There is no need to specify in terms the particular purpose for which the buyer requires the goods, which is nonetheless the particular purpose within the meaning of the section, because it is the only purpose for which anyone would ordinarily want the goods."*[62]

A point that emerges from the foregoing is that any disclosed or sole purpose of a product will form the particular purpose. It is a question of fact whether the buyer has sufficiently communicated his particular purpose to the seller. This point was stressed

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58 Kendall v. Lillico [1969]2 A.C. 31 at p. 123 per Lord Wilberforce.

59 Op. cit. p. 38.

60 Igweike, K.I. Commercial Law: Sale of Goods, (Jos; Fab Education Books, 1992) p. 46.

61 [1903] 2 K.B. 148, see Collins, M.R. at p. 153.

62 [1936] A.c. 85, at p. 99.

by Lord Morris in Henry Kendall v. William Lillico. According to his Lordship, "there is no magic in the word 'particular'.... A communicated purpose, if stated with reasonably sufficient precision will be a particular purpose. It will be the given purpose".[63]

Where the buyer has expressly made known his purpose to the seller, no problem arises since the implied condition will normally apply. But where there was no express indication of purpose, it will then be a question of fact whether the seller could be said to be aware of the intended purpose. Judicial decisions show that in ordinary consumer transactions the courts will readily hold the buyer to have impliedly made known his purpose to the seller. This is particularly the case where the purpose is obvious. For instance, it is obvious that articles of food are for human consumption. In Frost v. Aylesbury Dairy Co. Ltd,[64] the defendants who were milk dealers, supplied the plaintiff with milk which was consumed by himself and his family. The milk supplied contained germs of typhoid fever; and the plaintiff's wife was infected thereby and died. It was held that the purpose for which the milk was supplied was sufficiently made known to the sellers by its description. The sellers were, therefore, held liable for breach of implied condition of fitness for purpose.

The same principle was appled in Priest v. Last. The plaintiff bought a hot water bottle from a shop. When put into use, it burst and injured his wife. It was held that the particular purpose was impliedly made known to the seller since the purpose was obvious. Collins, M.R., stated:

"Where the description of the goods by which they are sold

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63 [1968]2 All E.R. 444, at p. 465.

64 [1905]1 K.B. 608.

> *points to one particular purpose only, it seems to me that the first requirement of the sub-section is satisfied, namely, that the particular purpose for which the goods are required should be made known to the seller."*[65]

In the case of goods used for many purposes, it is required that for a buyer to rely on the condition of fitness for purpose, he must disclose the particular purpose to the seller. In Priest v. Last, it was observed that in the case of a purchase of goods of many purposes, in order to give rise to the implication of fitness for purpose, it is necessary to show that, though the article sold was capable of general use for many purposes, in the particular case it was sold with reference to a particular purpose.[66]

In D.I.C. Industries Ltd v. Jimfat Nigeria Ltd[67] the defendants contended that the wire coils supplied to them by the plaintiffs were not suitable for the purpose for which they were needed. It was shown that the particular purpose was not disclosed to the plaintiffs. Evidence showed that the coils were fit for a variety of purposes. The plaintiffs were held not liable. The same principle was applied in Khalil & Dibbo v. Mastronikolis.[68] The appellants bought some quantity of engine oil from the respondent. The oil was required for use in internal combustion engine but this was not disclosed to the respondent. He was held not liable. Similarly, in Adeola v. Henry Stephens & Sons Ltd,[69] the flour supplied was unsuitable for bread but suitable for biscuits. The purpose

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65 [1903]2 K.B. 148, at p. 153 See also Henry Kendall v. William Lillico & Sons Ltd & Ors [1968]2 All E.R. 44; Grant v. Australian Knitting Mills Ltd [1936] A.C. 85 at p. 99; Opia Ijoma v. Mid Motors (Nig) Ltd, CCHCJ/9/74 p. 1325.

66 Ibid at p. 153.

67 (1975) CCHCJ 175.

68 [1949] 12 WACA 462.

69 [1975] 7 CCHCJ/1023.

was not disclosed to the sellers at the time of contract. Johnson, J. observed that the plaintiff's disclosure of the purpose was belated since it only came after she had taken delivery and sold some of the quantity to bread makers who found it unsuitable for bread making.[70] The sellers were held not liable.

Another issue relating to particular purpose is peculiarity about the purpose. There is no direct statutory provision on this. Judicial decisions are, however, to the effect that any peculiarity about the intended purpose must be disclosed before the sub-section can apply. In Griffiths v. Peter Conway Ltd.,[71] the plaintiff who bought a fur coat from the defendants contracted dermatitis due to the sensitive nature of his skin. The peculiarity about his skin was not disclosed. The sellers were held not liable.

The same principle was applied in Plastic Manufacturing Co. Ltd v. Toki: of Nigeria Ltd.[72] The contract was for the sale of plastic containers which the buyers required for their products. When the products (lotion and shampoo) were put in the containers, they changed colour due to chemical reaction. Evidence showed that the containers were suitable for general purposes for which plastic containers are normally used. The chemical compositions of their products were not disclosed to the sellers. The sellers were held not liable.

On the contrary, if it is shown that the seller is aware of the peculiar nature of the particular purpose for which the goods are required, then his duty is to supply goods which will satisfy that peculiar nature. On this ground, the court in Griffiths v. Conway

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70 [Ibid.; at PP. 1030 & 1031.

71 [1939] 1 All E.R. 685.

72 [1976] 12 CCHCJ 270.

Ltd distinguished the case of Manchester Liners Ltd v. Rea Ltd.[73] In the latter, the plaintiffs ordered from the defendants, coal merchants, some quantity of coal for their steamship. The coal supplied was unsuitable for the plaintiffs' ship. In an action for damages for breach of the condition of fitness for purpose it was held that the plaintiffs were entitled to judgement. Lord Buckmaster observed that "the order was expressed for the use of a particular steamship, and it must, therefore, be assumed that the respondents knew the nature of her furnances and the character of the coal she used, for it was this coal they contracted to supply".[74]

If the buyer is expected to carry out certain acts before consuming the goods, failure to do this will defeat his claim. In Heil v. Hedges,[75] the plaintiff contracted trichinosis after eating some pork chops bought from the defendant. It was shown that the plaintiff did not cook the chops properly. The seller was held not liable.

b. Reliance on Seller's Skill or Judgment.

The law requires that the purpose be made known so as to show that the buyer relies on the seller's skill or judgement.[76] A literal interpretation of this provision is that the purpose of disclosing the purpose is to show reliance on seller's skill or judgement.

No problem arises where reliance on seller's skill or judgement is expressly stated. Experience, however, shows that in many cases, reliance is rarely expressed. But like the case of making known the purpose to the seller, the courts are readily inclined

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73 [1922] 2 A.C. 74.

74 Ibid at p. 79, see also Lord Atkinson at pp. 84&85.

75 [1951] 1 T.L.R. 512

76 Emphasis Mine.

to imply reliance in consumer sales.[77] Thus the general trend of judicial decisions is that if the purpose is disclosed, reliance on seller's skill or judgement will be implied. In Manchester Liners Ltd v. Rea Ltd, Lord Buckmaster said:

> *"If goods are ordered for a special purpose, and that purpose is disclosed to the vendor, so that in accepting the contract he undertakes to supply goods which are suitable for the object required, such a contract is, ... sufficient to establish that the buyer has shown that he relies on the seller's skill and judgement."*[78]

The same principle was stated by Lord Wright in Grant v. Australian Kitting Mills Ltd. He said:

> *"The reliance will seldom be express; it will usually arise by implication from the circumstances; thus to take a case like that in question, of a purchase from a retailer, the reliance will be in general inferred from the fact that a buyer goes to the shop in the confidence that the tradesman has selected his stock with skill and judgement."*[79]

Other cases where reliance on seller's skill or judgement was implied on account of disclosure of purpose include, Frost v. Aylesbury Dairy Co. Ltd; Priest v. Last; and Christopher Hill Ltd v. Ashington Piggeries. In fact, judicial approach in this regard is summed up in the statement of Lord Pearce in Hardwick Game Farm v. Suffolk Agricultural Poultry Producers Association.[80] He said that "The whole trend of authority has inclined towards an assumption of reliance wherever the seller knows the particular purpose".[81]

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77 See Frost v. Aylesbury Dairies Co. Ltd; Grant v. Australian Knitting Mills Ltd; Priest v. Last supra p.267-269.

78 [1922] 2 A.C 74 at p. 79

79 [1936] A.C. 85 at p. 99

80 [1969] 2 A.C. 31.

81 Ibid at p. 115.

The foregoing notwithstanding, it does appear that affirmative evidence of reliance may be necessary in some cases. In other words, it may not be sufficient that the purpose was disclosed; there must be evidence of reliance. The view of Igweike[82] is opposite. He writes that "section 14(1)[83] of the Sale of Goods Act 1893 will not apply unless the indication that the buyer requires the goods for a particular purpose was not only given but given in such circumstances as to show that the buyer relied on the skill or judgement of the seller or his agent." This principle was emphasised in Opia Ijoma v. Mid Motors (Nig) Co. Ltd.[84] The plaintiff bought a Nysa Zuk minibus from the defendants which he put into commercial transport service. The bus developed serious problems soon after delivery. In an action brought by the plaintiff for damages, the issue was whether there was breach of section (14(1). It was held that the sellers were not liable since the plaintiff did not communicate his purpose so as to show reliance on seller's skill or judgement. Dosumu, J., said:

> *"It is not enough to show that the defendants deal in particular type of vehicle bought by the plaintiff. What has to be established is the fact that the buyer expressly or by implication made known to the seller the particular purpose for which the goods are required so as to show that he relies on his skill or judgement that it was reasonably fit for the purpose and that reliance made him buy it."*[85]

The implication of this decision is that there must be an explicit evidence of reliance. This point was succintly made by Lord Wright in Cammell Laird & Co. Ltd v. Manganese Bronze & Brass Co. Ltd. He said: "Such a reliance must be affirmatively

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82 Op. cit. p. 48.

83 This is the same as section 15(a) under consideration.

84 (1974) CCHCJ/9/1325.

85 Ibid.

shown, the buyer must bring home to the mind of the seller that he is relying on him in such a way that the seller can be taken to have contracted on that footing. The reliance is to be the basis of a contractual obligation."[86]

A similar opinion was expressed by Lord Reid in Henry Kendall v. William Lillico.[87] Explaining the decision in Manchester Liners Ltd. v. Rea, his Lordship said: "I do not think that (Manchester Liners v. Rea ...) is any authority for the view which has sometimes been expressed that if the seller knows the purpose for which the buyer wants the goods it will be presumed that the buyer relied on his skill and judgement."[88]

Lord Reid's statement was in turn explained by Lord Guest in Ashington Piggeries case to the effect that "the question is whether in the whole circumstances the reasonable inference can properly be drawn that a reasonable man in the shoes of the seller would realise that he was being relied on".[89]

The above conflicting opinions show that the issue of reliance on seller's skill or judgement remains controversial. This is more so as none of the existing decisions can be regarded as an express reversal of other decisions on the principle. To the best of our knowledge, the Supreme Court of Nigeria has not had an occasion to pronounce on the issue. The High Court decision in Ijoma v. Mid Motors (Nig) Ltd, appears realistic since it balances the interests of the seller and those of the buyer. The requirement that there must be an express reliance which induced the buyer to purchase the goods ensures that the seller is not taken unawares. Such express reliance will enable him to give a reasoned

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86 [1934] A.C. 402 at p. 423.

87 [1969] 2 A.C. 31.

88 Ibid. at p. 81.

89 [1972] A.C. 441 at 477.

opinion on the suitability of the goods for the disclosed purpose.

Reliance on skill or judgement need not be exclusive. It is sufficient if the buyer relied on the seller on the aspect complained of. Thus in Cammel Laird's Case, the specifications for the propellers were supplied by the buyers. It was held that areas not covered by the specifications were left to the skill and judgment of the sellers. Lord Wright quoted with approval, the statement of Lord Macaughten in Drummond v. Van Ingen that "in matters exclusively within the province of the manufacturer, the merchant relies on the manufacturer's skill."[90] The same principle was followed in Ashington Piggeries case involving a contract for the supply of mink food. The sellers were held liable despite the fact that the formula for the food was supplied by the buyers.

c. In the Course of Business

For the condition of fitness for purpose to apply, it must be shown that the goods are in the seller's course of business to supply. A strict interpretation of this requirement means that the seller normally deals in goods of that description. Thus if a seller who deals in drugs supplies drugs of the kind he normally supplies, it will be taken to be in the course of his business. It is obviously not in his course of business to supply building materials. But the courts have favoured a broad interpretation of this provision. Thus if the dealer in this example supplies drugs of a description he has never supplied, the sale will be taken to be in the course of his business. Thus in Christopher Hill Ltd v. Ashington Piggeries Ltd, a supply of mink food by sellers who dealt in animal feeds but had never dealt in mink food was held to be in the course of business. There, the House of Lords applied a liberal interpretation to the term "description" to mean "kind". Lord

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90 [1887] 12 A.C. 284; 297.

Wilberforce stated that "it is in the course of the seller's business to supply goods if he agrees, either generally, or in a particular case, to supply the goods when ordered."[91]

The same principle was applied in the earlier case of Spencer Trading Co. Ltd v. Devon.[92] The contract was for the supply of a particular type of gum. The sellers who dealt in gums had never supplied gum of that particular type. This notwithstanding, they were held liable.[93]

The broad interpretation given to this requirement means that all sales by wholesale dealers, retailers and manufacturers are covered. But private sales such as sale of second-hand goods by persons who do not deal in such goods are not covered. This broad interpretation is to be supported because it prevents a seller from denying liability on the technical ground that he had never supplied such goods.

d. Goods Bought Under Their Patent or Trade Names

Goods bought under their patent or trade names are excluded from the application of section 15(a). If a buyer buys an article under its patent or trade name, he will be deemed to have relied on the reputation of the manufacturer rather than on the skill or judgement of the seller. In Wilson v. Ricket Cockerel & Co.[94] the contract was for the supply of "coalite". The sellers were held not liable since the product was supplied in its trade name. In Daniels Daniels v. R. White & Sons Ltd & Anor,[95] the plaintiffs sued the

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91 [1972] A.C. 441 at p. 875.

92 [1949] 1 All E.R. 285.

93 See further Kendall v. Willaim Lillico & Sons Ltd [1969] 2 A.C. 31; see Lord Pearce at p. 115.

94 [1920] 1 K.B. 668.

95 [1938] 4 All E.R. 258.

manufacturers and the retailer of a bottle of lemonade for damages for injuries received by reason of the fact that the drink was contaminated with carbolic acid. It was held that the retailer was not in breach of the condition of fitness for purpose. Lewis, J. noted that the first plaintiff did not rely on the seller's skill or judgement since he asked for and obtained exactly what he wanted. He said: "If a man goes in and asks for a bottle of R. White's lemonade, or somebody's particular brand of beer, he is not relying upon the skill and judgement of the person who serves it to him".[96]

But the proviso will not apply if the name in question is not a recognised trade name but a name framed by the parties to identify the subject matter. In Bristol Tramways Carriage Co. Ltd v. Fiat Motors Ltd.[97] the plaintiffs bought from the defendants, "the 24140 h.p. Fiat Omnibus" and "six 24/40 h.p. Fiat Omnibus Chassis" which they had inspected. They sued on the ground that the goods were not fit for their intended purpose. Evidence showed that the industry was in a tentative stage, and the order was really for the particular Omnibus and the chassis to be completed and made respectively by the Fiat company on such lines and pattern as that company should find expedient for the purpose. It was held that the proviso did not apply. Farewell, L.J., put the issue thus:

> *"It is one thing to order an article known as a Fiat Omnibus, an order which is intelligible only if there be such an article known to the public or the trade; it is quite another thing to order an Omnibus to be made by the Fiat company, although in the latter case that company might adopt patterns and devices which were its own exclusive property; the former is within the proviso, the latter is not. An Omnibus made by the fiat Company may well be described as a Fiat Omnibus, but such nomenclature does*

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96 Ibid. at p. 263.

97 [1910] 2 K.B. 831

not necessarily constitute a trade name within the Act ....."[98]

Evidence of reliance on seller's skill or judgement displaces the application of this proviso. So if the buyer can show that he in fact relied on the seller's skill or judgement in selecting the particular brand of product, the seller will be liable. In Baldry v. Marshall,[99] the plaintiff applied to the defendants, motor car dealers, and stated that he wanted a comfortable car which was suitable for touring purposes. The defendants recommended a "Bugatti car", a type of car in which they specialized. The car delivered proved uncomfortable and unsuitable for touring purposes. The plaintiff sued for the refund of the purchase price. He was held entitled to his claim as the proviso did not apply. The court explained that the mere fact that an article is sold under its trade name, in the sense that the trade name forms part of the description of the thing sold, does not necessarily bring the case within the proviso so as to exclude the implication of the condition of fitness. If the buyer, while asking to be supplied with an article of a named make, indicates to the seller that he relies on his skill and judgment for its being fit for a particular purpose, he does not buy it "under its trade name" within the meaning of the proviso.

Atkin, L.J. explained that the real object of the proviso was to meet a case such as that in Chanter v. Hopkins[100] where the defendants sent to the plaintiff, who was the patentee of an invention, the following order: "send me your patent hopper with your smoke consuming furnace," and upon the plaintiff supplying what was ordered it was found to be unsuitable for brewery. There the defendant took the risk of the apparatus

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98 Ibid. at pp. 839 & 940.

99 [1925] 1. K.B. 260.

100 (1838) 4 M & W 399.

being suitable for his particular purpose, and having got what he ordered he was held bound to pay for it. The Lord Justice further explained the import of the proviso as follows:

> *It appears to me that the right view of the matter is that when the proviso speaks of "the sale of a specified article under its patent or other trade name", it means an article specified by the purchaser as being the article which he wishes to buy. If he so specifies the article and it is sold to him under its trade name it seems clear that the condtion is excluded, even though he made known to the seller the purpose for which he intended to use it. But if on the other hand he buys the article in reliance on the seller's assurance that it will answer his purpose, the fact that it is described in the contract by its trade name will not have the effect of excluding the conditions.*[101]

e. Goods to which the Condition of Fitness for Purpose Applies

An issue that has been considered by the courts is whether the condition of fitness only applies to goods bought under the contract of sale or whether it extends to other goods supplied with those bargained for. In Geddling v. Marsh,[102] the bottle which contained the mineral supplied to the plaintiff burst due to a latent defect. The plaintiff sued for the resultant injury. Evidence showed that the sum paid for the bottle was refundable on the bottle being returned. It was held that even though the bottles containing the mineral water were not sold but only hired by the defendant to the plaintiff, they were nevertheless "supplied under a contract of sale" within the section, and therefore that there was an implied condition that they, as well as their contents, should be reasonably fit for the purpose for which they were required by the plaintiff.[103]

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101 [1925] IK.B. 260; see also Banke, L.J., at p. 267.

102 [1920] 1 K.B. 668.

103 See Bray, J. at p. 672.

The same principle was applied in Wilson & Anor v. Ricket Cockerell & Co. Ltd.[104] The defendants sold to the plaintiffs a ton of coalite. The consignment contained a piece of coal containing an explosive substance. This resulted in an explosion. Plaintiffs sued for the resultant damage. It was held that the consignment of coalite was delivered as a whole and must be considered as a whole; that the goods supplied under the contract of sale" for the purposes of section 14[105] was the whole consignment of coalite, including the offending piece of coal; that the piece of coal made the whole consignment not fit for burning, and accordingly, it did not satisfy the implied condition imposed by section 14. Evershed, M.R., said:

> *"The whole of that load, to my mind, was defective because, by reason of the hidden presence of the explosive somewhere in it, all of it was potentially dangerous. The whole, in other words, was infected by the dangerous part; and it matters not that the dangerous part was not in fact a piece of some other fuel sent with the coalite and in response to the order for coalite."*[106]

Lord Denning's reasoning was equally unequivocal. In answer to the contention that the section applied to "goods supplied under a contract of sale" and to no other goods, his Lorship said:

> *"In my opinion that means the goods delivered in purported pursuance of the contract. The section applies to all goods so delivered, whether they conform to the contract or not; that is, in this case, to the whole consignment, including the offending piece, and not merely to the coalite alone."*[107]

The courts' approach in this area is realistic. No reasonable distinction can be made between a product and its container or any exterior substances contained therein. All

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104 [1954] 1 Q. B. 598.

105 S. 14 of the Sale of Goods Act 1893 (U.K).

106 [1954] ID.B. 598 at p. 609; see also Chaproniere v. Mason (1905) 21 T.L.R. 633.

107 [1954] 1 A.B. 598 at p. 607

these make up the product for the purpose of liability.

f. Extent of Seller's Obligations

The meaning of the phrase "reasonably fit for purpose" is not defined by the Law. Does this mean that the product must be in perfect condition? The issue appears a question of fact. The nature of the goods; terms of the contract and any other relevant matter will be taken into consideration in determining this issue. Thus a higher degree is required in the case of new products than in the case of second-hand products. In Onotu v. Adeleke & Anor,[108] a new car which developed disturbing noise five days after delivery, was held unfit for its purpose.

It is obvious that if a product is injurious to health, it will be regarded as unfit for purpose. If it is merely defective but not injurious, then it will be a question of fact whether it is reasonably fit for purpose. This point was clearly explained by Lord Pearce in Henry Kendall & Sons v. William Lillico & Sons Ltd. He said:

> *"In deciding the question of fact, the rarity of the unsuitability would be weighed against the gravity of its consequences. Again, if food is merely unpalatable or useless on rare occasions it might well be reasonably suitable as food. But I should certainly not expect it to be held reasonably suitable if even on a very rare occasion it killed the consumer."*[109]

In Nigerian Bottling Co. Ltd v. Ngonadi,[110] the Supreme Court appeared to have hinged the issue of fitness for purpose on defectiveness. In an action for breach of the implied condition of fitness for purpose under section 15(a) of the Sale of Goods Law of the defunt Bendel State, it was held that all the plaintiff needed to prove was that the

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108 [1975] N.N.L.R. 130.

109 [1969] 2 A.C. 31 at 115.

110 [1985] 1 N.W.L.R. 739 S.C.

commodity was defective; there was no need to plead that the defect was latent or patent. It was further held that where the defect in the commodity was an open one that the plaintiff ought to have discovered, there would be no need for oral warranty and the caveat emptor rule would apply.

A point that emerges from this judgement is that the issue of reasonable fitness for purpose is a question of fact. This point was stressed by the Supreme Court which accepted the decisions of the courts below on this issue. Oputa, J.S.C., said:

> *"What is more important is that the court of trial and the Court of Appeal both made concurrent findings of fact with regard to the defective nature of the refrigerator sold to the plaintiff/respondent by the defendant/appellant. Both courts held that in the peculiar and surrounding circumstances of this case, the defendant/appellant was negligent in selling a defective refrigerator to the plaintiff/respondent. The principle that has been stated times without number in this court is that it will not generally interfere with the concurrent findings of fact of both the trial court and the Court of Appeal."*[111]

This decision, therefore, puts the issue beyond doubt that whether a product is reasonably fit for purpose is a question of fact. We believe that this is a right approach because the issue of reasonable fitness is a relative one. Each case should, therefore, be based on its particular merits.

8.9.2 *Merchantable Quality*

Section 15(b) provides that where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality. The proviso to this provision excludes examined goods as regards defects which such examination ought to have revealed.

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[111] Ibid at p. 746.

The phrase "where goods are bought by description from a seller who deals in goods of that description" is a reproduction of section 14(2) of the Sale of Goods Act 1893 (U.K.) This phrase has now been replaced in the United Kingdom with the phrase "where the seller sells goods in the course of a business".[112] The latter Act does not require that the goods must be bought by description. The only requirement is that they must be sold in the course of business. Furthermore, the English Act no longer requires that the seller must deal in goods of that description. It is sufficient if he sells goods in the course of business. The implication is that a sale by a seller who has never dealt in goods of a particular description will come under the subsection as long as he sells in the course of a business. Therefore, the only transactions not covered by the provision are those carried out by private individuals not engaged in business.

The position under the Sale of Goods Law is the same as the repealed section 14(2) of the English Sale of Goods Act 1893. This means that for a buyer to succeed he must fulfil the two conditions stated in the subsection. These are:

(a) the goods must be bought by description; and

(b) the seller must deal in goods of that description.

The meaning of the phrase "sale by description" considered in relation to section 14 equally applies to the provision under consideration.[113] The meaning of the second requirement appears controversial. A strict approach was adopted by the court in British & Overseas Credit Ltd. v. Animashawun.[114] It was held by a Lagos High Court that for the phrase to apply, it must be shown that the seller regularly deals in goods of the

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112 See S. 14(2) of the Sale of Goods Act 1979 (U.K.) as amended by the Sale and Supply of Goods Act 1994.

113 See p.258-261. supra.

114 [1961] 1 All N.L.R. 343.

description of goods sold. Since there was no evidence that such was the case, the provision was held inapplicable.

The meaning of "goods of that description" was considered by both the English Court of Appeal and the House of Lords in Ashington Ltd v. Christopher Hill Ltd.[115] The Court of Appeal preferred to restrict the phrase to the contract description. On appeal, the House of Lords held by a majority that being dealers in animal feeding stuffs, they dealt in "goods of that description," which words should not be restricted in their scope to the contractual description of the goods. Lord Guest stated that to restrict the phrase to the contractual description would amount to a strict construction which would lead to absurd results. He said:

> *"Suppose a customer goes to a tobacconist's shop and orders a box of laranage cigars in which the tobacconist had not previously dealt. If the cigars were not fit for smoking, there would be no liability on the tobacconist as he had not previously dealt in goods of that particular description, namely, laranage cigars. I cannot believe that the section bears such a restricted meaning".*[116]

Quoting Lord Reid in B.S. Brown & Son Ltd v. Craiks Ltd,[117] his Lordship said that the phrase "goods of that description" may mean of the same precise and detailed description, or may mean of the same general description. He concluded that in most of the authorities, the latter meaning seemed to have been adopted.[118]

In contrast, Lord Diplock in his dissenting judgement said that the words "that description" refer to and mean the actual description by which the goods which are the

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115 [1972] A.C. 441.

116 Ibid j. at p. 473.

117 [1970] 1 WLR 752; 755.

118 [1972] A.C. 441 at 473.

subject - matter of the contract were bought. "Not only is it impossible to ascribe any other meaning to it grammatically but also ... it makes good commercial sense."[119]

The effect of the majority decision is that the meaning of the phrase goods of that description is the same as the phrase "a description ...." under subsection (1). Lord Wilberforce explained that the words in section 14(1) and the phrase "the goods are of a description which it is in the seller's business to supply" cannot mean more than "the goods are of a kind ...." He equated this phrase with the phrase "goods of that description" appearing in subsection (2) and said that in both cases the words mean "goods of that kind" and nothing more.[120]

The majority view adopted in Ashington Piggeries Ltd advances the cause of the consumer since it widens the scope of the phrase under consideration. But this notwithstanding, this approach can be regarded as a strained interpretation of the clear wording of the provision. The decision of the Court of Appeal adopted in the dissenting judgement of Lords Hodson and Diplock appears a more accurate interpretation of the phrase. It is suggested that the provision be amended to include goods of the general description as those contracted for. Under the English Law, the phrase "where goods are bought by description from a seller who deals in goods of that description" has been replaced with the phrase, "where the seller sells goods in the course of a business". We believe that this is a more rational approach. So once it is proved that the goods were sold in the course of business, it should be irrelevant that the seller had never dealt in goods of that description.

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119 Ibid at p. 506

120 Ibid at p. 518.

a. Meaning of Merchantable Quality

Like the English Sale of Goods Act 1893 on which section 15(2) was modelled, the Sale of Goods Law does not define the meaning of the phrase "merchantable quality". This has necessitated diverse judicial interpretations.

Much difficulty is not encountered with respect to goods which are injurious to health. Judicial decisions show that they are normally held unmerchantable. Thus in Wilson v. Rickett, Cockerell & Co. Ltd,[121] a consignment of `coalite' which exploded owing to the presence of an explosive substance was held unmerchantable. In Nigerian Bottling Co. Ltd v. Ngonadi,[122] the plaintiff bought an Evercold kerosene refrigerator from the defendants. The fridge exploded after about one month and caused serious injuries to the plaintiff. It was held unmerchantable. Also in Henry Stephens Engineering Ltd v. Complete Home Enterprises Ltd,[123] the crane supplied under the contract developed some faults soon after delivery. The faults continued throughout the guarantee period. The crane was held unmerchantable and unfit for its purpose. The same principle was applied in Wren v. Holt[124] and Godley v. Perry[125] involving injurious beer and defective catapult respectively.

In contrast, a greater problem arises where the complaint is that the goods supplied are of a low quality. This problem is compounded where the goods, though of inferior quality, are nevertheless, fit for a purpose or some purposes. A test which has

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121 [1954] 1 Q.B. 598.

122 [1985] 5 S.C. 313.

123 [1987] 1 N.W.L.R. (Pt. 47) 40 S.C.

124 [1903] 1 K.B. 610.

125 [1960] 1 W.L.R. 9

been applied by the courts is that of reasonable fitness for purpose. In Cammell v. Manganese Bronze and Brass Co. Ltd., Lord Wright explained "merchantable quality" to mean that "the goods in the form in which they were tendered were of no use for any purpose for which such goods would normally be used and hence not saleable under that description". In interpreting section 14(2) of the Sale of Goods Act 1893 (U.K.) He said: "What sub-section (2) now means by "merchantable quality" is that the goods in the form in which they were tendered were of no use for any purpose for which such goods would normally be used and hence were not saleable under that description".[126]

In Grant v. Australian Knitting Mills Ltd., his Lordship also stated another version of this test. He said:

> *"What else merchantable may mean, it does mean that the article sold, if only meant for one particular use in ordinary course, is fit for that use; merchantable does not mean that the thing is saleable in the market simply because it looks alright; it is not merchantable in that event if it has defects unfitting it for its only proper use but not apparent on ordinary examination."*[127]

The test of fitness for purpose was applied in Plastic Manufacturing Co. Ltd. v. Toki, of Nigeria Ltd.[128] The contention was that the plastic containers supplied under the contract were not merchantable. Evidence showed that when the defendants put their products (shampoo and lotion) into the containers, they changed colour due to chemical reaction with the products. It was further shown that the containers could safely be used for any other purpose for which plastic containers are normally used. It was held that in the form in which they were delivered, they should be suitable for any purpose for which

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126 Ibid at p. 430.

127 [1936] A.C. 85 at pp. 99-100

128 [1976] 12 CCHCJ 2701.

plastic containers are normally used. The containers were held merchantable.

The test of fitness for purpose has been criticised on the ground that in many cases, "unmerchantable goods" could be used for some purposes. In Kendall v. William Lillico, Lord Reid said that Lord Wright's definition in Cammell Laird could not be taken as a test of universal application. He proffered a modified definition of the phrase thus: "What sub-section (2) now means by merchantable quality is that the goods in the form in which they were tendered were of no use for any purpose for which goods which complied with the description under which these goods were sold would normally be used, and hence were not saleable under this description."[129]

His Lordship explained that this is an objective test and that "were of no use for any purpose..." means would not have been used by a reasonable man for any purpose... [130]

This modified version of Lord Wright's definition thus ties the fitness for purpose test to the contract description. If the goods tendered can be reasonably used for any purpose for which goods of that contract description can be used, then they are merchantable. So the scope of the contract description is the crucial factor. This point was emphasised by Lord Reid in Henry Kendall. He said:

> *"If the description in the contract was so limited that goods sold under it would normally be used for only one purpose, then the goods would be unmerchantable under the description if they were of no use for that purpose. But if the description was so general that goods under it are normally used for several purposes, then goods are merchantable under that description if they are fit for any one of these purposes."*[131]

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129 [1969] 2 A.C. 31 at p. 451

130 Ibid at p. 451.

131 Ibid at p. 430; see also Uvieghara, op.cit, for a detailed discussion of the various arguments

An inference that can be drawn from his Lordship's statement is that the meaning of merchantable quality cannot be divorced from the contract description. As he noted in the judgement, if goods are sold under the description commonly used to denote a high quality and the goods delivered are not of that high quality but are of a lower quality which is commonly sold under a different description, then it could not possibly be said that the goods in the form in which they were tendered were of no use for any purpose for which those goods would normally be used. They would readily be saleable under the appropriate description of the lower quality.[132]

The test of fitness for purpose was equally criticised by Lord Guest who noted that if the test is based on fitness for purpose, then few goods would be unmerchantable because use can always be found for goods at a price.[133]

What could be regarded as a test of reasonable expectation was propounded by Farewell L.J. in Bristol Tramways Carriage Co. Ltd v. Fiat Motors Ltd.[134] He defined the phrase "merchantable quality" as meaning that the article is of such quality and in such condition that a reasonable man acting reasonably would after a full examination, accept it under the circumstance of the case in performance of his offer to buy that article whether he buys for his own or to sell again".[135]

This test was adopted by Dixon, J. in Grant's case. He explained that the condition that the goods are of merchantable quality requires that "they should be in such an actual state that a buyer fully acquainted with the facts, and therefore, knowing what

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132 Ibid.

133 Ibid at p. 108

134 [1910] 2 K.B. 831

135 Ibid at p. 841;

hidden defects exist and not being limited to their apparent condition, would buy them without abatement of the price obtainable for such goods if in reasonably sound order and condition.[136]

The above test was apparently approved by a majority of the House of Lords in Henry Kendall v. William Lillico.[137] But in B.S. Brown & Sons Ltd. v. Craiks Ltd[138] where the issue was reconsidered by the House of Lords, the inherent limitations of price differential as a test were pointed out by the court. But their Lordships admitted that a wide disparity in price could be a relevant factor. According to the court: "..... But if the contract price was so far above the price that the goods would have fetched if sold for another purpose as to indicate that the goods for that other purpose were unsaleable at anything approaching the contract price, then it might be held that the goods were not of merchantable quality."[139]

A fact which emerges from the various judicial definitions considered above is that there is no single satisfactory definition of the phrase "merchantable quality". This difficulty stems from the fact that the phrase is a complex concept which can only be determined on the merits of each particular case.

In this country, the issue remains controversial since the Supreme Court has not had occasion to discuss it exhaustively. In Nigerian Bottling Co. Ltd. v. Ngonadi, the court based its decision on breach of condition of merchantable quality without considering what merchantable quality means. Also in Henry Stephens v. Complete

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136 [1933] 50 CLR 387 at 418

137 [1969] 2 A.C. 31

138 [1970] 1 W.L.R. 750

139 Ibid at p. 760.

Home Comfort Enterprises, the court treated the issue of merchantable quality as a question of fact.

The meaning of this phrase, therefore, remains a relative term. As noted by Igweike,[140] the concept of merchantability is a flexible one. It can neither be said to be objective nor subjective. The contract description; the suitability of the goods for the contract purpose; the price of the defective goods; the knowledge or intention of the buyer or the parties; the reasonableness of allowing the buyer to reject, are all matters which may be relevant at one point or another.

Under the English law, apparently due to the difficulty in forging a single acceptable definition of 'merchantable quality', an attempt was made to define the phrase under the Supply of Goods (Implied Terms) Act 1973. This definition was re-enacted in section 14(6) of the Sale of Goods Act 1979 (U.K.) with minor amendments. The new section is as follows: "Goods of any kind are of merchantable quality within the meaning of sub-section (2) above if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect, having regard to any description applied to them, the price (if relevant) and all other relevant circumstances)".

It is seen that this definition adopts all judicial tests considered above. In addition, by using the phrase "all other relevant circumstances", it creates a leverage for judicial discretion. The effect is that the provision does not achieve any novelty. It is, therefore not surprising that it has been suggested that the common law position should continue to play a prominent role.[141] In fact up-till recently, judicial decisions were still

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140 Op. cit. pp. 62 & 63.

141 Atiyah, op. cit pp. 129 & 130

influenced by the case law. In Bernstein v. Pamson Engineering Motors (Golders Green) Ltd,[142] a case involving the issue of merchantability of a car, Rogiers, J. observed that the statutory definition was deliberately left in the widest possible terms in order to cater for the great variety of situations which may occur. He said; "Any attempt to forge some exhaustive, positive and specific definition of such a term applicable in all cases, would soon be put to mockery by some new undreamt set of circumstances."[143]

The term merchantable quality has now been replaced under the English system with the phrase "satisfactory quality". The new section 14(2) as amended by the Sale and Supply of Goods Act 1994 (U.K.) provides that where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality. By section 14(2A), goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances. By section 14(2B), the quality of goods includes their state and condition and the following (among other things) are in appropriate cases aspects of the quality of goods -

(a) fitness for all the purposes for which goods of the kind in question are commonly supplied;
(b) appearance and finish;
(c) freedom from minor defects,
(d) safety; and
(e) durability.

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142 [1987] 2 All E.R. 200

143 Ibid at p.222;see also Aswan Engineering Establishment Co. v. Lupdine Ltd. [1987] 1 W.L.R. 1; cf Rogers v. Parish (scarborough) Ltd. [1987] Q.B 933. The English Court of Appeal insisted that the issue of merchantable quality should be confined to the satutory provition.

This provision is more comprehensive and embracing than the previous statutory definitions discussed above. This attempt to achieve comprehensiveness notwithstanding, it is doubtful whether the definition has taken care of all issues of quality that may arise in a given case. The author of the ninth edition of Sale of Goods by Atiyah has expressed the view that the old cases will have some relevance to the interpretation of the new provisions. The learned author writes that in all events, extensive treatment of the old cases may be justified in the absence of a body of case law on the new provisions.[144]

Some local statutes have followed the English position by giving a defintion of "merchantable quality". By section 16(6) of the Kaduna State Sale of Goods Edict, 1990, goods of any kind are of merchantable quality if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable for a buyer fully acquainted with the condition of the goods to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances.[145]

This provision is, in terms, equivalent to the one considered above. To say the least, it is far from being precise. The implication is that the term is so elastic that it cannot be en-compassed in a single definition. This being the case, it is suggested that as held by the supreme court in Henry Stevens v. Complete Home Comfort Enterprises, the issue of merchantable quality should be treated as a question of fact.

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144 Op cit at p. 132

145 See also S. 15 (6) of the Sale of Goods Edict of Plateau State, 1988 which has a verbatim provision.

8.10 Implied Condition in a Sale by Sample

Section 16 contains three conditions which are to be implied in a sale by sample. But before these conditions can be implied, it must be shown that the sale is one by sample. Section 16(1) provides that a contract of sale is one by sample where there is a term in the contract, express or implied, to that effect.

It follows from this provision that the parties' intention as revealed by the terms of their contract is the determining factor. If the terms of the contract show an intention to sell by sample, then the sale will take effect as such. But a supply of a sample during or after the making of the contract does not make a sale one by sample. At best, such specimen will be regarded as evidence of description of the goods. This reflects the common law position that where terms of contract are reduced to writing, parol evidence will not be admissible to prove that the transaction is a sale by sample.[146] In Boshali v. Allied Commercial Exporters Ltd,[147] the contract was for the supply of some textile materials described as "Quality AS 1,000 grey cloth foreign origin". A specimen referred to as "Quality AS 1,000" was sent to the buyers along with one of the letters embodying the terms of the contract. Nothing was said in the contract about the sample. It was held that the sale was not a sale by sample. The same principle was upheld in Friedrisdorf & Co. v. Fuja[148] As Slade, J., illustrated in Champanhac & Co. Ltd. v. Waller & Co.

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146 Ginner v. King [1890] 7 TLR 140. See also Union Bank of Nigeria Ltd. v. Ozigi [1994] 3 NWLR[1990] 5 NWLR [pt. 148] 24; Macaulay v. Nal Merchant Bank [1990] 4 NWLR [pt. 144] 283; s. 131 [1] of the Evidence Act.

147 [1961] All NLR 917.

148 [1967] LLR 115.

Ltd.,[149] such a sample would amount to an alternative way of describing the goods. So rather than give expression to their colour, class, quality, nature or type, one can say in effect; I am not very good at expressing myself, and in any case I may leave something out. This is the type of goods that I am offering to sell to you - producing a sample.[150]

If a sale is proved to be one by sample, the implied conditions in section 16(2) will apply. These are as follows:

(a) correspondence of the bulk with sample in quality;

(b) reasonable opportunity of comparing the bulk with the sample; and

(c) absence of defect not discoverable on reasonable examination of sample.

It is a question of fact whether there is correspondence of the bulk with the sample. In West African Import and Export Co. v. Paul Jassar,[151] the goods contracted for where based on a particular sample. The defendant sought to reject on the ground that the appearance of the goods delivered was inferior to that of the sample. He did not call any expert in the trade to attest to this fact. His case failed.

If there is a discrepancy between the sample and the bulk, it will not avail the seller to argue that the defect can easily be remedied. This principle was emphasised in R. & S. Ruben Ltd. v. Faire Brothers & Co. Ltd. Hilbery,[152] J. in reply to the argument that the faults in question could have been corrected by warming the rubber and pressing out the crinkles, said: "It is, however, no compliance with a contractual obligation for an article to be delivered which is not in accordance with the sample but which can by

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149 [1948] 2 K.B.D. 724.

150 Ibid at p. 725

151 15 N.L.R. 21

152 [1949] 1 K.B. 254.

some simple process, no matter how simple, be turned into an article which is in accordance with the sample on which the contract was made."[153]

The same decision was reached in Grant v. Australian Knitting Mills Ltd. Lord Wright after observing that the defect in question could be removed by the process of washing noted that: ...the statute requires the goods to be merchantable in the state in which they were sold and delivered; in this connection a defect which could easily be cured is as serious as a defect that would not yield to treatment."[154]

An important condition in a sale by sample is the absence of defect not discoverable on reasonable examination of sample. A reasonable examination is an examination which a reasonable man will conduct under the circumstance. In Godley v. Perry,[155] involving the sale of toy catapult, Davis, L.J., said that "reasonable" examination does not mean "practical" examination and that the test made by pulling back the elastic of the sample was all that could be reasonably expected of a potential purchaser. Referring to the submission of ~~the~~ learned counsel for the defendants of some practical tests which would have revealed the defect, Davis, J., said:

> *"But, looking at the matter realistically, as one must, in my judgement none of these tests is called for by a process of "reasonable examination", as that phrase would be understood by the common-sense standards of everyday life. All these suggested tests were doubtless practicable, but the Act speaks not of a "practical", but of a "reasonable" examination. In my judgement, to pull back the elastic ... was all that could be reasonably expected of any potential customer."*[156]

The position, therefore, is that a buyer will not be bound if the defect is such that

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153 Ibid at p. 260.

154 Ibid at p. 100.

155 [1960] 1 All E.R. 34.

156 Ibid at pp 40 & 41.

could not be discovered by a reasonable examination of the sample. This means that a buyer will not be bound if the defect is latent in nature. In Wren v. Holt[157] the beer which was supplied to the plaintiff contained some arsenic acid which caused illness to him. The defendant was held liable since the defect was latent. In Grant v. Australian Knitting Mills Ltd, the presence of a deleterious chemical in a garment was regarded as a hidden and latent defect which could not be detected by any reasonable examination. Lord Wright in holding the defendants liable observed that "no examination that the buyer could or would normally have made would have revealed the defect".[158]

In this connection, Atiyah[159] notes that the use of a sample does not protect the seller from liability in respect of defects not reasonably discoverable on examination of the sample, although the bulk may in fact correspond perfectly with it. So once it is proved that the sample has a latent defect it will not avail the seller to show that the bulk corresponds with the sample. The buyer will not be bound by any defect which is not discoverable by a reasonable examination of the sample. The position was explained by Lord Macnaughten in Drummond v. Van Ingen.[160] He stated:

> *The office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject matter of the contract which, owing to the imperfections of language, it may be difficult or impossible to express in words. The sample speaks for itself. But it cannot be treated as saying more than such a sample would tell a merchant of the class to which the buyer belongs, using due care and diligence, and appealing to it in the ordinary way and with the knowledge possessed by merchants of that class at the time. No doubt the sample might be made to say a great deal more. Pulled to pieces and examined by unusual tests which curiosity or suspicion might*

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157 [1903] 1. K.B. 610

158 [1936] A.C. 85 at p. 100

159 op. cit. p. 178

160 [1887] 12 App. cas 284.

> *suggest, it would doubtless reveal every secret of its construction. But that is not the way in which business is done..*[161]

If a contract contains a clause to the effect that the goods are sold subject to any defects in the sample, effect will be given to it by the courts. In Champanhac & Co. Ltd. v. Waller & Co. Ltd., the goods were sold "as sample taken away" and "with all faults and imperfections". On delivery, it was found that the goods were perished and unmerchantable. It was held that the inclusion in the contract of the words "with all faults and imperfections" meant that, providing the bulk corresponded in type and quality with the sample, it would be accepted with whatever faults and imperfections it had.

The court's decision is to the effect that such a clause will exonerate the seller from liability with respect to defects in the sample; but not with the basic requirement of correspondence with the sample. As explained by Slade, J., the words "with all faults and imperfections", would be apt to relieve the seller in a sale by sample of the requirement that he should be liable for any defects in the sample which were not apparent on a reasonable examination, but not to exonerate him from the additional liability of delivering goods which themselves correspond with the sample.

A clause such as the one under consideration will amount to an exclusion of seller's liability. If a buyer accepts the clause, it will be presumed that he has waived his right to complain about latent defects in the sample. He will thus contract himself out of the implied condition as regards defects not discoverable on reasonable examination of the sample.

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[161] Ibid at p. 297.

8.11 Nature of Liability Imposed by the Sale of Goods Law

It is clear from the provisions of the Sale of Goods Law that where there is a breach of any of the implied conditions the seller will be liable irrespective of fault. This view is buttressed by the fact that the law imposes liability in absolute terms. The relevant provisions do not contain terms such as "knowingly", "wilfully" or like terms implying intent. Besides, no defences are provided for offences of breach of implied terms. The literal interpretation, therefore, is that the offences are strict liability offences requiring no mens rea.

This follows the common law principle established before the Sale of Goods Act 1893 (U.K.) in Randall v. Newson.[162] There the defendant sold to the plaintiff a carriage pole which caused injury to the plaintiff's horses. The plaintiff was held entitled to recover the value of the pole and also for damages to the horses. The court rejected the argument that the defendant was not liable since the defects could not be discovered by reasonable care. Brett, J.A., put the principle thus:

> *"The governing principle, therefore, is that the thing offered and delivered under a contract of purchase and sale must answer the description of it which is contained in words in the contract, or which would be so contained if the contract were accurately drawn out ..... if the article or commodity offered or delivered does not in fact answer the description of it in the contract, it does not do so more or less because the defect in it is patent or latent, or discoverable."*[163]

The above reasoning was followed in Frost v. Aylesbury Dairy Co.[164] involving the supply of milk which was infested with typhoid germs. The sellers were held liable even though it was found that the defect was not discoverable at the time of sale. Collins,

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162 [1876] 45 LJCB 364.

163 Ibid at p. 409.

164 [1905] IK.B 608.

M.R., in an answer to the contention that the buyer could not be said to rely on the skill or judgement of the sellers in a case in which no amount of skill or judgement would enable them to find out the defect in the milk supplied said that, that amounted to a contention that a seller of goods could not be answerable for a latent defect in them unless upon a special contract to that effect.[165] He regarded the principle of absolute liability established in Randall v. Newson as a conclusive authority on this point.

The principle of strict liability of the seller is based on policy. This was clearly stated by Blackburn, J. in Randall v. Newson at the court of first instance. He said:

> *"If there was a defect in fact, even though that defect was one which no reasonable skill or care could discover, the person supplying the article should nevertheless be responsible, the policy of the law being that in a case in which neither of the parties were to blame, he, and not the person to whom they were supplied, would be liable for the defect."*[166]

The issue of policy as the basis of strict seller's liability was equally stressed in Kendall v. Lillico. There it was stated by Lord Reid that:

> *If the law were always logical one would suppose that a buyer who has obtained a right to rely on the seller's skill and judgement, would only obtain thereby an assurance that proper skill and judgement had been exercised, and would only be entitled to a remedy if a defect in the goods was due to failure to exercise such skill and judgement. But the law has always gone further than that. By getting the seller to undertake to use his skill and judgement the buyer gets ..... an assurance that the goods will be reasonably fit for his purpose and that covers not only defects which the seller ought to have detected but also defects which are latent in the sense that even the utmost skill and judgement on the part of the seller would not have detected them.*[167]

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165 Ibid at pp. 612 & 613.

166 [1876] LJ Q.B. Vol. 45, 364 at p. 365; adopted by Brett, J.A., on retrial.

167 [1968] 2 A.C. 31 at 84.

The Supreme Court's decision in Nigerian Bottling Co. Ltd. v. Ngonadi,[168] reveals that the court also favours a strict liability approach. It was held that in an action for breach of implied condition of fitness for purpose, all that the plaintiff need do is to plead that the commodity was defective. There is no need to plead that the defect is latent or patent.[169] The implication of this decision is that the seller is liable for defects in his products irrespective of fault.

The policy of strict seller's liability is justified. A contrary position would give the seller the opportunity to raise the issue of utmost care as a defence. This will blur the distinction between contractual and tortious claims. It will also be antithetical to the current trend of strict product liability.

8.12 Exemption of Express and Implied Terms

It is not uncommon to find in a contract, a clause or some clauses exempting one party from liability for stated breaches. In some cases such clauses may not exclude liability altogether but may limit it to a stated degree. In other cases, the effect of the clause may be to exclude liability for all breaches however caused.

This practice which is common in contractual transactions is now noticeable in some enabling statutes particularly those dealing with public utilities. A clear example in this regard is section 12(2) of the National Electric Power Authority Act[170] which provides as follows: "The Authority shall in no case be under any obligation to pay damages or compensation for loss, damage or inconvenience caused to any consumer

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168 [1985] 1 N.W.L.R. (pt. 4) 739 SC.

169 See Oputa, J.S.C. at p. 746.

170 Cap. 322, Laws of the Federation of Nigeria, 1990.

8.12 Rules Governing the Interpretation of Exemption Clauses

A review of judicial decisions shows that the courts view exemption clauses with disfavour. Consequently, a number of rules have been evolved to restrict the application of these clauses. These rules are that the clause must be incorporated into the contract;[175] it does not cover a case of negligence;[176] it does not protect a third party,[177] and the rule of cantra proferentem.[178]

By far, the most significant rule is the rule of fundamental breach. In applying this rule, the courts are faced with two competing interpretative rules. These are the rule of law and the rule of construction. According to the rule of law, where a fundamental breach of contract occurs, then automatically, an exemption clause will not protect the party who inserted it. The rule of construction on the other hand states that where a fundamental breach occurs, the courts will interpret the exemption clause to determine whether it covers the breach that has occurred. Thus while the former presupposes that an exemption clause no matter how wide cannot cover a breach that goes to the root of the contract, the latter is to the effect that a breach can be protected if the exemption clause is wide enough to cover it.

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175 L'Estrange v. Gaucob [1934] 2 K.B. 394.

176 This however depends on the construction of the cluase. See Rutter v. Palmer [1922] 2 K.B. 87; Aldersalde v. Hendon Laundry [1945] 1 All E.R. 18; Narumal & Sons (Nig) Ltd. v. Niger/Benue Transport Co. Ltd. [1989] 2 NWLR 730 S.C.

177 Considerable in-roads have been made into this rule by judicial decisions. See Abusomwan v. Mercantile Bank (Nig) Ltd. [1973] 3 NWLR (pt. 60), 196 S.C.; Alfotrin Ltd. v. A.G. of federation [1996] 44 LRCN 2376.

178 See Walls, Son & Wells v. Pratt and Haynes [1911] A.C. 394; Baldry v. Marshal [1925] IK.B 260.

In the past, the rule of law was generally accepted as the applicable rule. This rule was effectively used by the courts to water dawn the effects of wide exemption clauses. Thus if an exemption clause would have the effect of excusing the non-performance of contractual obligation or a performance substantially different from what the contract envisaged, it would be held ineffective.

In Boshali v. Allied Commercial Exporters Ltd,[179] the contract was for the sale of cloth of a specified description. The appellant sought to reject on the ground that the cloth delivered did not conform with the description. The respondents attempted to rely on the following exemption clause: "For goods not of United Kingdom origin we cannot undertake any guarantee or admit any claims beyond such as are admitted by and recovered by the manufacturers."

They were held not entitled to rely on the clause since the breach was a fundamental breach. The Privy Council, reversing the Supreme Court decision stated that "an exemption clause can only avail a party if he is carrying out the contract in its essential respects. A breach which goes to the root of a contract disentitles a party from relying on an exemption clause."[180]

The court in the above case relied on the decision of the English Court of Appeal in Karsales (Harrow) Ltd. v. Wallis,[181] to arrive at its decision. In this case, the car delivered to the buyer was so seriously damaged that it could not move. The contract contained the following clause: "no condition or warranty that the vehicle is road worthy or as to its condition or fitness for any particular purpose is given by the owner or

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179 [1961] All N.L.R. 917.

180 Ibid at p. 922.

181 [1956] 2 All E.R. 866.

implied therein" It was held that this clause could not protect the sellers since they were in fundamental breach of the contract. Denning, L.J., stated:

> *"It is now settled that exemption clauses - no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. He is not allowed to use them as a cover for mis-conduct or indifference or to enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of a breach of which goes to the root of the contract."*[182]

The same principle was applied in Ogwu v. Leventis Motors Ltd.[183] The relevant clause purported to exclude liability for "any warranty, implied or otherwise as to description, state, quality, fitness and road worthiness or otherwise". A one-year old lorry was contracted for; but the one delivered was five years old. It was held that the clause did not protect the sellers.

The rule of law was affirmed by the Supreme Court in Niger Insurance Ltd. v. Abed Brothers.[184] The respondents insured their lorry with the appellants. In 1967, the lorry was involved in an accident. The appellants did not complete the repairs of the lorry until 1971. The respondents sued for loss of profits contending that the appellants were in fundamental breach of the contract, which imposed a duty on them to repair within a reasonable period. The appellants sought to rely on a clause exempting them from liability for loss of profits and consequential loss. On appeal to the Supreme Court, the question was whether the appellants could rely on the clause despite the breach. It was held that they could not. The court stated:

> *"Now the question in the case in hand is therefore this. Was appellant guilty of a fundamental breach which brought the (insurance) policy to an end? ..... This is a question of law, and*

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182 Ibid at p. 869.

183 [1963] N.N.L.R. 115.

184 [1976] 6 U.I.L.R. (pt. 1) 64.

> *this court is therefore entitled to construe the terms of the policy. We accordingly hold that the implied term to repair the vehicle within a reasonable time was a fundamental term of the policy and that having committed a breach of that fundamental term, the appellant cannot rely on limitation of liability and exception clauses under the policy to absolve itself from the consequences of the breach."*[185]

The Supreme Court has now changed its position. In both Akinsanya v. United Bank for Africa Ltd.[186] and The Attorney-General, Bendel State & Ors. v. U.B.A.,[187] the rule of construction was applied by the court. In the latter, the appellants' application for the establishment of a letter of credit contained a clause which read thus: "We agree to hold you and your correspondents harmless and indemnified in all respect of any loss or damage that may arise in consequence of error or delay in transmission of your correspondents' messages, or misrepresentations thereof, or from any cause beyond your or their control".

The court held that it is not the law that before one could claim reliance on the exemption clause of contract one must first comply diligently with conditions of the contract. This in effect is the rule of construction. The court then applying this rule held that the clause could not avail the respondent in that the loss which occured was not beyond their control for they could and were at liberty to refuse to re-imburse the confirming bank.

The appellants' appeal was, however, dismissed on the ground of undue delay in

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185 Ibid at p. 69. This decision was not referred to in the subsequent case of Narumal & Sons Ltd. v. Niger Benue Transport Co. Ltd. Infra; p.307. see also Amusan & Anor v. Benworth Finance (Nig) Ltd. [1965] 1 All N.L.R. 400.

186 [1986] 4 N.W.L.R. 273 S.C.

187 [1986] 4 N.W.L.R. 547 S.C.

instituting the action.

The effect of a fundamental breach on an exemption clause was exhaustively considered by the Supreme Court in Narumal & Sons (Nig) Ltd v. Niger Benue Transport Co. Ltd. The respondents sued the appellants for the sum of N89,356.45 being total of charter fees owing to them in respect of a vessel let to them. The latter counter-claimed for the sum of ₦407,911.20 being damages suffered when its goods, conveyed for valuable consideration in the respondents' vessel became soaked with sea water and got damaged as a result of the said vessel springing a leak. The appellants contended that the said vessel was unseaworthy and that that, constituted a fundamental breach. The respondents denied this allegation and in addition, sought to rely on the following exemption clause: "Niger Benue Transport Co. accepts no responsibility or liability for any damage or loss however caused to goods carried on their crafts or vessels towed by their tugs either during transit or when loading or off-loading . Hirers are responsible for insurance of goods on their vessels and cost of insurance is for cost of hirer".

Having found as a matter of fact that the vessel was seaworthy and therefore, that there was no fundamental breach, the court went on to consider what the position would have been if there had been a fundamental breach and came to the conclusion that the decision would have been the same. Nnamani, J.S.C. observed that the clause showed an intention to grant the respondents escape from liability irrespective of the state of the vessel or the nature of the breach. His Lordship said: "This must be so for "however caused" must in its wide sense include loss or damage caused because the vessel was unseaworthy."[188]

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[188] Ibid at p. 50.

In arriving at this decision, the court relied heavily on the House of Lords decision in Photo Production Ltd. v. Securicor Transport Ltd.[189] where the rule of construction was firmly established. The clause in question in the instant case was as follows: "Under no circumstances shall the company be responsible for any injurious act or default by any employee of the company unless such act or default could have been foreseen and avoided by the exercise of diligence on the part of the company...."

It was held that the words of the exemption clause were clear and their true construction covered deliberate acts as well as negligence so as to relieve the defendants of responsibility.

It is to be noted that before the House of Lords decision in Photo Production Ltd the issue of exemption clause in a case of fundamental breach remained unsettled under the English system. In U.G.S. Finance Ltd. v. National Mortgage Bank of Greece,[190] Pearson, L.J., in an obiter dictum, expressed a preference for the rule of construction. This was adopted, also by obiter, in Suisse Atlantique Societe D' Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale.[191] Before these decisions the applicable rule under the English system was the rule of law.[192] Atiyah writes that over a period of years, a number of Court of Appeal decisions laid it down that there was a general principle of the law of contract that a party could not rely on an exemption clause,

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189 [1980] A.C. 827.

190 [1966] 2 All E.R. 61 at pp. 67 & 68

191 [1967] 1 A.C. 361.

192 See Karsales (Harrow) Ltd v. Wallis [1956] 1 W.L.R. 936; Alexander v. Railway Executive [1951] 2 K.B. 822; Thorely v. Orchis SS Co Ltd. [1907] 1 K.B. 660; Lilley v. Double Day (1881) 7 Q.B.D. 510; Smeaton Hanscob & Co. Ltd. v. Sassoon I. Setty Sons & Co. [1953] W.LR. 1468.

however widely drawn if he was guilty of a fundamental breach of contract.[193]

The apparent change signified by U.G.S. Finance Ltd v. National Mortage Bank and the Suisse Atlantique case did not command wide acceptability. In fact the conflicting statements[194] contained in the latter decision in particular created opportunity for judicial manoeuvring. Thus in Farnworth Finance Facilities v. Attryde[195] and Harbutts Plasticines Ltd. v. Wayne Tank and Pump Co.[196] Lord Denning, M.R., in purported adoption of the rule of construction stated in the Suisse Atlantique case, applied what could, in effect, be regarded as a rule of law. In the Harbutt's Plasticines case, his Lordship explained that the decision in the Suisse Atlantque case "affirms the long line of cases in this court that when a party has been guilty of a fundamental breach of the contract, that is, a breach which goes to the very root of it, then the guilty party cannot rely on an exemption or limitation clause to escape from his liability for the breach."[197]

This uncertainty was resolved in Photo Production Ltd which firmly established the rule of construction and reversed the Court of Appeal decisions in the above cases.

The uncritical adoption of the decision in Photo Production Ltd. by the Supreme Court has attracted strong criticisms by writers in this country.[198] Among other things,

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193 Op. cit p. 196.

194 See for instance Lord Wilberfoce' statements at pp. 93 and 94.

195 [1970] 2 All E.R. 774.

196 [1970] 1 All E.R. 225.

197 Ibid at p. 235.

198 See Agomo, C.K., "Exclusion Clauses in Contract and the Implications for Consumer Protection in the Nigerian Law of Contract", Obilade, (ed.) A Blue Print

the criticisms centre on the inequality of bargaining power; ignorance of the average consumer in the country; and above all, insufficient statutory protections as those offered by the English Unfair Contract Terms Act 1977.

These criticisms are well founded. In fact as explained in Photo Production case, the rationale for the decision in the case was that since Parliament had effectively intervened in the control of exemption clauses, there was no longer need for a strained construction to achieve consumer protection.[199] The House of Lords subsequent decision in George Mitchell (Chesterhall Ltd v. Finney Lock Seeds[200] buttresses this rationale. In this case, "Late Dutch special Gabbage Seeds" were ordered for. The seeds supplied were not late cabbage seeds; but were inferior and unmerchantable resulting in total crop failure and a huge financial loss to the buyers. The contract contained a clause which limited the liability of the sellers to the price or replacement of the seed. It was held that on its true construction the clause covered the breach that occurred but that it was void under the Unfair Contract Terms Act 1977, being unreasonable.

8.13 The Current Position Under the English System

From the foregoing analysis it is clear that the issues of exemption clauses under the English system is now largely governed by statute. Under the Unfair Contract Terms Act 1977, certain clauses cannot be inserted in a contract. By section 3 which applies to

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for Nigerian Law, (University of Lagos, 1995) p. 15; Uvieghara, E.E.., Sale of Goods (And Hire Purchase) Law in Nigeria, op. cit. p. 29; Monye F.N., "The Need to Restrict the Scope of Aplication of Exemption Clauses;" Justice (A Journal of Contemporary Legal Problems), June 1991, Vol. 2, No. 6. pp. 19-27.

199 See Lord Diplock at p. 851; Lord Wilberforce.

200 [1983] 1 All E.R. 108, affirmed [1983] 2 A.C. 803.

all contracts, where one party deals as a consumer or on the other's written standard terms of business, the other party cannot exclude or restrict any liability of his in respect of the breach; or claim to be entitled to render a contractual performance substantially different from that which was reasonably expected of him; or to render no performance at all except if the contractual term satisfies the requirement of reasonableness.

The test of reasonableness is explained in section 11. By subsection (1), in relation to a contract term, the requirement of reasonableness is that the term shall have been a fair and reasonable one to be included, having regard to the circumstances which were, or ought reasonably to have been known to or in the contemplation of the parties when the contract was made.

A party to a contract `deals as a consumer' in relation to another party if, among other things;

(a) he neither makes the contract in the course of a business nor holds himself out as doing so; and

(b) the other party does make the contract in the course of a business[201]

The phrase "deals on the other's written standard terms of business" is not defined. But the English Court of Appeal's decisions in St. Albans City and District Council v. International Computers Ltd.[202] illustrates that some form of negotiation between the parties will not defeat a claimant's claim. In this case, the contract was based on the negotiations between the parties as well as some standard terms of the suppliers. It was held that subsection (I) merely requires that the complainant 'deals on'

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201 S. 12(1)

202 [1996] All E.R. 481; discussed in Goode, Consumer Credit Legislation Issue 51, (London; Butterworths 1997) v/536 LJ, AT P. 491.

standard terms, not that these formed the only basis of the contract.

Section 6 specifically deals with exemption clauses in a sale of goods contract. By subsection (2), as against a person dealing as consumer, liability for breach of the obligations arising from seller's implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose (section 13 - 15 of the Sale of Goods Act 1979) cannot be excluded or restricted by reference to any contract term. As against a person dealing otherwise than as consumer, the liability specified in subsection (2) above can be excluded or restricted by reference to a contract term; but only in so far as the term satisfies the requirement of reasonableness.[203] By section 11(2), in determining whether a contract term satisfies the requirement of reasonableness, regard shall be had in particular to the matters specified in schedule 2 to the Act. Under this schedule, the matters to which regard is to be had are any of the following which appear to be relevant:

(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things), alternative means by which the customer's requirement could have been met;

(b) whether the customer received an inducement to agree to the term, or in accepting it has an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;

(c) whether the customer knew or ought reasonably to have known of the existence and extent of the term, having regard, among other things, to any custom of the trade and any previous course of dealing between the parties;

(d) where the term excludes or restricts any relevant liability if some condition is not

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[203] S. 6(3).

complied with, whether it was reasonable, at the time of the contract to expect that compliance with that condition could be practicable; and

(e) whether the goods were manufactured, processed or adapted to the special order of the customer.

In addition to prohibiting the exclusion of liability for contractual obligations, the Act also deals with negligence liability. By section 2(1), a person cannot by reference to any contract term or to a notice given to persons generally or to particular persons, exclude or restrict his liability for death or personal injury resulting from negligence. In the case of other loss or damage a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.[204] Where a contract term or notice purports to exclude or restrict liability for negligence, a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk.[205]

Furthermore, the Act prohibits the imposition of obstacles on the legal rights of the consumer. Section 13(1) prevents:

(a) making the liability or its enforcement subject to restrictive or onerous conditions;

(b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy.

It is seen from the above provisions that the Act has a very wide ambit. It prevents the exclusion of both negligence and contractual liabilities. It places a complete

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204 S. 2(2)

205 S. 2(3)

ban on the exclusion of terms implied by the Sale of Goods Act. As regards express terms of contracts, an exemption clause will only be allowed as against a person dealing as a consumer or on the other's standard term, if it satisfies the test of reasonableness.

The Sale of Goods Act 1979 (U.K.) shows a departure from the position under the repealed 1893 Act on exemption clauses. By section 55(1), where a right, duty or liability would arise under a contract of sale of goods by implication of law, it may (subject to the Unfair Contract Terms Act 1977) be negatived or varied by express agreement, or by the course of dealing between the parties or by such usage as binds both parties to the contract. Thus unlike the 1893 Act which allowed parties to vary or exclude any terms implied by the law, the 1979 Act is subject to the 1977 Act discussed above.

The Consumer Protection Act 1987 which implemented the Council of the E.U. Directive on Liability for Defective Products,[206] also deals with the issue of exemption clauses. As summarised by Atiyah,[207] the basic principle of liability under this Act is that any person who suffers damage, which is caused by a defective product, is entitled to sue the producer (and various other possible parties) without being required to prove fault. Section 7 of the Act provides that the liability of a person to a person who has suffered damage caused wholly or partly by a defect in a product, or to a dependent or relative of such a person, shall not be limited or excluded by any contract term, by any notice or by other provision.

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206 85/374/E.E.C., 25 July 1985.

207 op. cit p. 232.

The Unfair Terms in Consumer Contracts Regulations 1994[208] also restricts parties' freedom to insert exemption clauses in their contract. These Regulations apply to any term in a contract concluded between a seller or supplier and a consumer where, the said term has not been individually negotiated.[209] A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has not been able to influence its substance.[210] By the Regulation, an unfair term in a contract concluded with a consumer by a seller or supplier, shall not be binding on the consumer. Regulation 4 defines "unfair term" as any term which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. In determining whether a term satisfies the requirement of good faith, regard shall be had in particular to -

(a) the strength of and the bargaining positions of the parties;

(b) whether the consumer had an inducement to agree to the term;

(c) whether the goods or services were sold or supplied to the special order of the consumer; and

(d) the extent to which the seller or supplier had dealt fairly and equitably with the consumer.[211]

Schedule 3 contains an indicative and non-exhaustive list of the terms which may be regarded as unfair.

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208 These Regulations implemented the E.C. Directive on Unfair Terms in Consumer Contracts; Council Directive 93/13/E.E.C.

209 Regulation 3(1)

210 Regulation 3(2).

211 Regulation 4(3) and Schedule 2.

It is seen from the foregoing analysis that under the English system there exist sufficient statutory safeguards against obnoxious exemption clauses. This makes strenous judicial interpretation unnecessary. Atiyah[212] writes that in practice, the Unfair Contract Terms Act and E.U. Directive implemented by the Unfair Terms in Consumer Contracts Regulations render the common law rules concerning exemption clauses of much less importance.

8.14 The Position in Nigeria

Unlike the English system, Nigeria lacks adequate statutory safeguards against onerous exemption clauses. The Sale of Goods Laws of the Southern States allow parties to exclude terms implied by the Law. For instance, section 55 of the Sale of Goods Law of Lagos State[213] provides as follows:

> *"Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties or by usage, if the usage be such as to bind parties to the contract".*

This provision is the same as section 551 of the contract law of Anambra State.[214] In contrast, the Sale of Goods Edicts of the Northern States prohibit the exclusion of implied terms. Thus while it is possible to exclude some rights, duties and liabilities which would arise under a contract of sale, it is impossible to exclude implied conditions and warranties. Section 65 of the Sale of Goods Edict of Plateau State[215] provides as

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212 op. cit.; p. 188.

213 Cap. 174; Laws of Lagos State 1994.

214 Cap. 30, Laws of Anambra state, 1986.

215 Edict No. 14 of 1988.

follows:

(1) Where a right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by such usage as bind both parties to the contract.

(2) Nothing in subsection (1) of this section shall be construed to permit the exclusion by express agreement or otherwise of any condition or warranty implied by this Edict.[216]

It is seen from this provision that while subsection (1) permits the exclusion of other obligations implied by the Law such as duty to deliver the right quantity; compliance with time stipulations; and payment on delivery, implied conditions and warranties cannot be excluded. It, therefore, follows that the issue of the effect of exemption clauses on implied conditions and warranties maybe said to be settled in the Northern States although (as far as we know) there are no reported cases on the provision. But in the southern States where the Sale of Goods Laws are modelled on the English Sale of Goods Act 1893, the controversy remains.

With the adoption of the rule of construction by the Supreme Court, the position of the consumer in Nigeria has arguably become precarious. This is generally the case with respect to terms other than implied conditions and warranties. But as regards the latter, consumers in the Northern States enjoy a relative advantage because such terms cannot be excluded. In the Southern States, a carefully drawn exemption clause can exclude all forms of liability including implied conditions and warranties.

The position of the consumer is complicated by the fact that with the exception of the Consumer Protection Council Decree 1992 whose provisions are yet untested, all other statutes on consumer protection are criminal law based. This means that victims cannot claim under them. It is, therefore, clear that it is premature to dispense with judicial discretion in the interpretation of exemption clauses. The so-called freedom of contract on which the rule of construction is based is still a mirage in this country

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[216] See also s. 66(2) of the Kaduna State Sale of Goods Edict 1990 which contains an identical provision.

because, almost always, the seller is in a stronger bargaining position. Commenting on the adoption of the rule of construction by the Supreme Court, Agomo writes that the glaring implication of this trend is to give the classical freedom of contract theory a completely free hand under circumstances where there is a glaring inequality of bargaining strength.[217]

There is, thus, urgent need for comprehensive statutory enactment to control oppressive use of exemption clauses. Pending such statutory intervention, there is need for a clarification of the exact import of the rule of construction as adopted by the Supreme Court. Does it mean that parties are allowed to exclude liability for any breach including wilful acts and non-performance? A literal interpretation of the statements of their Lordships in Narumal & Sons Ltd. will lead to this conclusion.[218] Furthermore, does the rule of construction apply to all contracts including those involving consumers? In Photo Productions Ltd., the court's decision was rationalised on the ground that Parliament had by the Unfair Contracts Terms Act 1977 effectively taken care of consumer and standard form contracts thereby making a strained judicial construction of exemption clauses unnecessary.

The Supreme Court's approach, if not confined to contracts involving commercial enterprises of equal bargaining power will undermine the interest of the consumer. It will also deny the courts the opportunity of deciding cases on their particular merits.

So in applying the rule of construction the courts should take into consideration the relative bargaining strengths of the parties. In addition, attempt should be made to discover the real intention of parties at the time of contract. Then, guided by the principle of reasonableness, give effect to this intention. In this way, a reasonable and realistic result will be achieved. This is because parties could not have intended that one party could

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217 Agomo, C.K. "Exclusion clauses in Contract and the Implications for Consumer Protection in Nigeria", (ed.) A Blue Print for Nigerian Law, (University of Lagos, 1995) p. 15.

218 See Nnamani, J.S.C., at p. 50; Oputa, J.S.C., at p. 64.

disregard his obligation with impunity. As observed by Lord Wilberforce in the Suisse Atlantique case:

> *"One may safely say that parties cannot, in a contract, have contemplated that the clause (exclusion clause) should have so wide an ambit, as in effect to deprive one party's stipulations of all contractual force; to do so would be to reduce the contract to a mere declaration of intent."*[219]

Judicial activism in this area is highly recommended. Such activism is still noticeable under the English system in the application of the reasonableness requirements.[220]

8.15 Remedies of the Buyer

If a seller is in breach of a contract of sale, a consumer-buyer can sue for any appropriate remedy. The main remedies are specific performance, repudiation and damages for breach of warranty. Attention shall be focussed on the last two since they are the ones most relevant to this work.

8.15.1 *Repudiation*

The most popular remedy available to a buyer is repudiation of the contract. This

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219 [1966] 2 All E.r. 61 at p. 92.

220 See for instance, Stagline Ltd v. Tyne Repair Group Ltd ('The Zinna') (1984) 2 Lloyd's Rep. 211; Rasbora Ltd. v. JCL Marine [1976] 2 Lloyd's Rep. 645; R.S. Customs Brokers Co. Ltd v. United Dominion Trust [1988] 1 All E.r. 847; Phillips Products v. Hyland and Hamstead Plant Hire [1985] 4 T.L. 98 - all discussed in Atiya, op. cit. pp. 214 - 216). For instance, in St. Albans City and District Council v. International Computers Ltd. to determine the issue of reasonablness, the court had to consider which of the two parties was the better loss bearer.

remedy is exercisable where the seller is in breach of a condition. If the breach relates to a warranty the buyer will only be entitled to damages.

Section 12(2) provides that whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract, and a stipulation may be a condition though called a warranty in the contract.

It is clear from this provision that a breach of condition entitles a party to reject the goods and repudiate the contract. Thus in Henry Stephens Engineering Co. Ltd v. Complete Home Enterprises (Nig.) Ltd,[221] a crane which developed series of faults soon after delivery was held unmerchantable entitling the buyer to reject. In Onotu v. Adeleke & Anor,[222] a new car which developed disturbing noise five days after purchase was held unfit for its purpose giving the buyer the right to reject.

Loss of Right to Reject

A buyer may lose his right to reject under the circumstances specified by the Law. By section 12(1), where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or may elect to treat the breach of such condition as a breach of warranty and not as a ground for treating the contract as

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221 [1987] 1 NWLR (PT. 47) 40 SC.

222 [1975] N.N.L.R. 130. See also Amadi v. Thomas Aplin Co. Ltd. [1972] 1 ALL N.L.R. 409; B.E.O.O Industries Ltd v. Maduakor & Anor (1974) CCHCJ/10/74 at P. 1517; Associated Press of Nigeria Ltd. v. Phillips West African Ltd (1979) CCHCJ/9/79; p. 17.

repudiated. This means that a buyer is not bound to reject the goods for breach of condition. He can waive the breach altogether by refraining from suing the seller. He can also elect to treat the breach of condition as a breach of warranty by retaining the goods and suing for damages. Any election made by him binds him. In Olajide Odumbo Stores and Sawmill Ltd. v. Omotayo Agencies (Nig.) Ltd.,[223] the contract was for the supply of planks described as "seasoned wood, grooved and finished". The planks supplied were grooved and finished but not seasoned. The plantiffs were held in breach of the condition. However, the defendants, by accepting an offer of lower price were held to have lost their right to reject. Similarly, in Long v. Lloyd[224] an attempt to reject a lorry after a compromise agreement freely reached by the parties following the discovery of the defects in the lorry was turned down by the court.

Futhermore, a buyer may lose his right in the circumstances stated in subsection (3). Under this subsection, where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or when the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term in the contract, express or implied, to that effect.

It is a question of fact whether a contract of sale is severable. But as a general rule, a contract is severable if the goods are to be delivered by instalments and the instalments are to be separately paid for.[225] In Jackson v. Rotax Motor & Cycle Co.

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223. (1978) CCHCJ/4/78, 625.

224. [1958] 2 ALL E.R. 402.

225. See Atiyah, op. cit., p. 473.

Ltd,[226] a contract for the supply of some motor accessories provided for "deliveries as required". It was held that the contract was severable. In Nigerian Sweet & Confectionary Co. Ltd. v. Tate & Lyle (Nig.) Ltd,[227] where the goods were to be supplied by monthly instalments, the issue of whether the contract was severable was not considered but the decision of the Supreme Court was to the effect that the contract was severable. Non-acceptance of two instalments by the buyers which was condoned by the sellers was held not to entitle the sellers to repudiate the contract. This implies that the contract was treated as severable.

The buyer may also lose the right to reject where he is deemed to have accepted the goods. Section 36 provides that the buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.

The effect of this provision is to deny the buyer the right to reject the goods in the stated circumstances. Judicial decisions show that once a buyer is deemed to have accepted under this section, he can no longer reject even where he has not exercised the right of examination guaranteed by section 35(1). Acts which have been held to deny the buyer the right to reject include a resale,[228] intimation of acceptance[229] and lapse of

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226. [1910] 2 K.B. 937.

227 [1965] A11 N.L. R. 68.

228 Ajayi v. Eburu (1964) NMLR 41; Hardy & Co. Ltd. v. Hillerns & Fowler [1923] 2 K.B. 190; E.S. Ruben Ltd. v. Faire Brothers & Co. Ltd. [1949] 1 K.B. 254.

229 Bendel Steel Structures Ltd. V. Ogbene & Sons Ltd. (unrep.) Suit No. W/22/75;

reasonable time.[230]

The combined effect of sections 12(3) and 19, Rule 1 constitutes a further restriction on the buyer's right to reject. By section 19, Rule 1, where there is an unconditional sale of specific goods in a deliverable state, property passes at the time of contract. By section 12(3), where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated. A literal interpretation of these provisions is that a buyer will lose his right in many cases of sale of specific goods because property would normally pass at the time of contract. This is a serious restriction on the right to reject.

But it can be argued that even as the law stands, a buyer is entitled to reject defective goods irrespective of transfer of property. In this case, the transfer of property will only be a provisional one which will be subject to due performance of the contract by the seller.[231]

8.15.2 *Damages for Breach of Warranty.*

A buyer is entitled to sue for damages in three instances:

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[229](...continued)
West African Import and Export Co. v. Paul Jassar 15 NLR 221.

[230] Bendel Steel Structures Ltd. v. Ogbene and Sons Ltd. Supra; D.I.C. Industries v. Jimffant (Nig) Ltd. (Unrep.) Suit No. LD/916/73

[231] See Chao v. British Traders & Shippers Ltd.[1954] 1 All E.R. 779; Henry Stephens Engineering Ltd v. Complete Home Comfort Enterprises Ltd., Supra,p.320 Nigerian Bottling Co. Ltd. v. Ngonadi supra. p.301.

(a) where the seller is in breach of warranty;[232]

(b) where he elects to treat a breach of condition as breach of warranty;[233] and

(c) where he is compelled to treat a breach of condition as a breach of warranty.[234]

Remedies for breach of warranty are provided for in section 53. By this Section, where there is a breach of warranty by the seller, or where the buyer elects, or is compelled to treat any breach of a condition on the part of the seller as breach of warranty, the buyer is not by the reason only of such breach of warranty entitled to reject the goods, but may:

a. set up against the seller the breach of warranty in diminution or extinction of the price; or

b. maintain an action against the seller for damages for breach of warranty.

The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events from the breach.[235] In the case of breach of warranty of quality, such loss is prima facie the difference between the value of the goods at time of delivery to the buyer and the value they would have had if they had answered to the warranty.

The phrase "breach of warranty of quality" has been interpreted by Igweike[236] as referring to breach of condition treated as warranty by the buyer in circumstances where he elects or is compelled to do so. According to the learned author, this interpretation is

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232 S 12(2)

233 S. 12(1)

234 S. 12(3)

235 S. 53(2)

236 op. cit., p. 173.

based on the fact that all terms as to quality under the Sale of Goods Act are conditions. The explanation by Uvieghara[237] is to the same effect. He writes that breaches of the implied conditions as to fitness for purpose, merchantable quality and compliance with sample will seem, clearly, to fall within the category of warranty of quality. He, however, doubts whether a breach of the implied condition as to description will similarly come within this category.

To obviate any problem of interpretation, it is suggested that the word "quality" be deleted and replaced with the phrase "condition treated as warranty". The provision will then apply to any case of breach of condition which is treated as a breach of warranty.

8.15.3 *Remoteness of Damage and Measure of Damages*

The phrase "remoteness of damage" is often confused with the phrase " measure of damages". In reality, there is a clear distinction between these phrases and it is important to keep the distinction in mind. While remoteness of damage refers to the type of damage for which the plaintiff can be compensated; measure of damages refers to the amount of damages that may be awarded to a plaintiff for a damage considered not too remote. In other words, measure of damages refers to the monetary compensation that can be awarded to a plaintiff for a compensable damage.

The principle of remoteness of damage, just like the principle of causation in tort discussed in the last chapter, helps the courts to delimit the scope of liability of the defendant. As stated by the Supreme Court in Oseyomom & Anor v Ojo[238]

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237 op. cit., p. 135.

238 [1997] 52 LRCN 2068.

> *"It is a recognised principle of law that no person is answerable indefinitely for each and every consequence that flows from his conduct.... some where, a line has to be drawn between the consequences for which a wrong-doer is liable and those for which he cannot conceivably be liable."*[239]

This is a deliberate judicial policy to prevent a defendant from being saddled with liability for every remote consequence of his breach. The court in the instant case quoted with approval, Lord Wright's statement in Liebosh Dredger (owners) v S.S Edison (owners).[240] "The law cannot take account of every thing that follows a wrongful act; it regards some subsequent matters as outside the scope of its selection, because "it were infinite for the law to judge the cause of causes, or consequences of consequences."

It is a question of fact whether a particular consequence is too remote. As noted by Blackburn, J. in Hobbs v. London & S.W. Railway:[241] "It is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day; but though you cannot draw the precise line, you can say on which side of the line the case is".

A conclusion that can be drawn from the above analysis is that the determination of the question of remoteness of damage may be difficult in some cases; but with due diligence, a rational decision can be made.

8.15.4 ***Measure of Damages for Breach of Warranty***

By section 53(2), the measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of

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239 Per Iguh, J.S.C. at p. 2101.

240 [1933] A.C. 449 (H.I.) at 460.

241 [1875] L.R. 10 Q.B. 111.

warranty. This rule is treated by the courts as a statutory adoption of the first rule in Hadley v. Baxendale.[242] There, the plaintiffs engaged the defendants to carry a damaged shaft to a third party for repairs. The defendants delayed in carrying out this obligation and as a result, the plaintiffs' milling operation was stalled for that period. They sued claiming loss of profit for the period of delay. It was held that since the circumstance necessitating the closure was not disclosed to the defendants, they were not liable for the loss. Alderson, B., stated the governing principle thus:

> *"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such a breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i.e. according to the natural course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach, of it....."*[243]

The implication of the first rule which is re-enacted in section 53(2) stated above is that the loss must be the natural or direct result of the breach. In other words, the loss must be a natural consequence of the breach. Thus if a seller failed to deliver the goods bargained for and the buyer had to buy an equivalent quantity at an increased prevailing market price, the difference between the contract price and higher price eventually paid for the goods will constitute a natural consequence of the seller's breach. In Mann Poole & Co Ltd v. Salami Agbaje,[244] the defendant failed to deliver some quantity of cocoa bargained for and the plaintiffs were compelled to obtain supply at an extra price in order to fulfil a contract with their customers. It was held that the extra price was a loss

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242 [1854] 9 Ex. 341.

243 Ibid at p. 465.

244 [1922] 4 N.L.R. 8.

naturally resulting in the ordinary course of events from the breach.

Section 54 allows recovery for special damages. It provides that nothing in the law is to affect the right of the buyer to recover special damages in any case where, by law, special damages may be recovered. This provision is generally regarded as allowing the recovery of special damages in accordance with rule 2 in Hadley v. Baxendale.[245] By this rule, if an extra loss arises as a result of a special circumstance known or ought to be known to the seller at the time of the contract then the buyer can claim. In Victoria Laundry Winsor Ltd. v. Newman Industries,[246] the plaintiffs bought from the defendants a boiler for use in their laundry business. The delivery which was supposed to be made in June was in fact made in November. The plaintiffs sued claiming (1) loss of profit for the period of the delay and (2) loss of a highly lucrative contract which they could not take because of the delay. They were held entitled to the first but not the second claim which was considered not foreseeable at the time of contract.

In Koufos v. Czarnikow Ltd (The Heron II),[247] the House of the Lords explained the rules in Hadley v.Baxendale as creating one rule in essence. According to the court, the question in every case is whether on the information available to him at the time the contract was made, the seller should, or a reasonable man in his position would have realised that such loss was sufficently likely to result from the breach of contract to make it proper to hold that loss flowed naturally from the breach, or that the loss of that kind should have been within his contemplation.[248] In Parson (livestock) Ltd v. Uttley

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245 See Uvieghara, op. cit., p. 135.

246 [1949] 2 K.B. 528.

247 [1969] 1 A.C. 350

248 See Lord Reid at p. 386.

Ingham & Co Ltd,[249] the semblance of the two rules in Hadely v. Baxendale was emphasised by the English Court of Appeal. There the defendants who supplied and installed a large feeding hopper for the plaintiffs failed to open a ventilator at the top. This caused the pignuts to become mouldy. This in turn resulted in illness to the pigs many of which consequently died. The plaintiffs claimed the value of the pigs and the loss of profit which they would have made on them. It was held that they were entitled to the former but not the latter.

From the judgement of Lord Denning it can be inferred that it is important to show that at time of the contract the defendant had the "very kind" of breach in mind. It is not necessary that he would have foreseen the specific breach.[250]

It is not clear whether the two rules in Hadley v. Baxendale are treated as disjunctive or conjunctive by our courts. In Swiss Nigeria Wood Industries v. Bogo,[251] the Supreme Court quoted with approval the dictum of Alderson B., in Hadley v. Baxendale quoted above. The same principle was also applied in Wilford Omonuwo v. B.A Wahabi & Sons.[252] This principle was adopted by the Court of Appeal in Oladiti v. Sungas Co. Ltd.[253] Salami, J.C.A delivering the lead judgment said: "In any case of breach of contract, the contract breaker is only liable for loss suffered by the aggrieved party actually flowing as was, at time of the contract, reasonably foreseeable as liable to

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249 [1978] 1 All E.R. 525.

250 Ibid at p. 532.

251 [1970] A.L.R. Comm. 423

252 [1976] 4 SC 37 at pp. 41 & 42.

253 (1994) INWLR (pt. 321) 433

result from the breach.[254]

The same principle was applied in Artra Industries Ltd. v. The Nigerian Bank for Commerce and Industries,[255] where it was held that in ascertaining damages for breach of contract, the principle is that, subject to the rule of remoteness of damage:

(a) the damage must flow naturally and proximately from the breach and so is presumed to have been in the contemplation of both parties at the time of contract; and

(b) the damage must be in the contemplation of the parties. This is deducible from the terms of the contract.

The court emphasised that by this principle the categorisation of damages into "general" and "special" is inapt in cases of breach of contract.[256]

What one gathers from the above decisions is that the concern of our courts is the foreseeability of the loss that has arisen. The implication is that the two rules are treated as one in effect. Thus if the loss can be said to have been foreseen or ought reasonably to have been foreseen by the defendant, then he will be liable.

Additionally, these cases disclose that the terms "foreseeability" and "contemplation" are used synonymously in contract by our courts. In Oladiti v. Sungas Co. Ltd., the Court of Appeal explained that the test as to the loss caused to a party aggrieved or supposed to be within the reasonable contemplation or foreseeability of the parties is that the court has to look not at what this particular defendant contemplated or foresaw but what a reasonable person in his shoes would have foreseen [257].

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254 [1994] 1 NWLR (pt. 321) 433 CA., at p. 458

255 [1997] 1 NWLR (pt. 483) 574 CA..

256 Ibid

257 [1994] 1 NWLR (pt. 321) 433 CA. at p. 456

The requirement of foreseeability or contemplation can be justified on the ground that it may be improper to saddle a defendant with a loss which a reasonable man could not have contemplated or foreseen as a likely consequence of the breach of the contract. If this is allowed, a plaintiff may bring up claims for unusual losses that could never have been imagined by any reasonable man as a likely consequence of such breach. This will amount to an unnecessary extension of seller's liability.

8.15.5 ***Measure of Damages for Breach of Warranty of Quality***

By section 53(3),the measure of damages in the case of breach of warranty of quality is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

The text of this subsection shows that it applies where there is a difference in value between the goods delivered and those contracted for. It will normally apply where there is a deficiency in the goods delivered. Where this is the case, the buyer will be entitled to the difference between the value of the goods contracted for and that of the defective goods. But a question that can be asked is the mode of determining the value of defective goods. In Beggin & Co. Ltd v.Permanite Ltd,[258] Devlin, J. pointed out that there is rarely any market price for damaged goods since their value depends on the extent of the damage.[259]

Commenting on an equivalent subsection of the English Sale of Goods Act, Atiyah[260] observes that what it means is that if the goods are so seriously defective as to

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258 [1951] 1 K.B. 422.

259 Ibid at p. 438.

260 Op. cit., p. 493.

have no value at all, the buyer will be entitled to recover the full value which the goods should have had.

A conclusion that can be drawn from the foregoing principles is that the measure of damages depends on the nature and extent of the damage or defect. If the defect is such that can be remedied, then the measure of damages will be the cost of the remedial action. In this case the seller will be liable for the cost of repairs. Thus in Beco Ltd v. Alfa Laval,[261] a heat exchanger which was supplied to the plaintiffs by the defendant was found to have a crack. The plaintiffs were held entitled to the repair costs and loss of production on the day of the repair.

If the goods can be used for their intended purpose without any remedial action, the buyer will nevertheless be entitled to the difference between the contracted quality and the lower quality delivered. It will make no difference that the buyer has resold the goods to a sub-buyer who accepted and paid the price for the higher quality. In Slater v.Hoyle & Smith,[262] the buyer ordered for a specified quality of unbleached cloth. Some of the quality delivered were of inferior quality. He sold some of them to a sub-buyer who paid the full contract rate. This notwithstanding, the buyer was held entitled to the difference between the value of the goods bargained for and that of the goods actually delivered.

If the defects are so serious that the goods are rendered valueless, then the buyer will be entitled to the refund of his money or replacement of the goods. We suggest that even where property has passed or where the buyer has done an act adopting the contract, his right to reject should remain intact so long as the rejection is done within a reasonable

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261 [1994] 4 All E.R. 464.

262 [1920] 2 K.B. 11.

time.

If the deficiency in value occasions damage to person or property the buyer can claim for such further loss. This right is guaranteed by section 53(4) which provides that the fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

As can be seen from judicial decisions, the measure of damages in a case involving damage to property is the same as that applied in the tort of negligence. In Cross Lines Ltd . v. Thompson,[263] it was held by the Court of Appeal that measure of damages in an action for negligence is founded on the principle of restiutio in intergrum. The court further held that where goods are destroyed by the wrongful act of a defendant, the measure of damages is the value of the goods at the time of their destruction and, in a proper case, plus such further sum as would compensate the owner for the loss of use or earnings and the inconvenience of being without the goods during the period reasonably required for their replacement. Applying the decision of the Supreme Court in L.C.C v. Unachukwu,[264] the court further held that in the case of damage to goods, the measure of damages is the cost of repairs or the difference between their market value at the time of their damage and, in proper cases, plus loss of use or earnings during the reasonable period of repairs or replacement.

In the case of non-pecuniary damage to person, the measure of damages rests on the discretion of the court. In Soremi v. Nigerian Bottling Co. Ltd,[265] the court adopted

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263 [1993] 2 NWLR (pt. 271) 74 CA

264 [1978] 3 SC 199 at 202.

265 [1977] 12 CCHCJ 2735.

the view of the learned author of MC Gregor on damages, 13th edition, paragraph 113 that:

> *Non-pecuniary loss is a very different field. Little can be stated with certainty as to the amount of damages awardable for such loss caused by personal physical injury. Indeed full compensation cannot be given in the sense that no amount can fully compensate for the serious physical injury. Beyond this, no yardstick exists for measuring in money the compensation to be accorded a given amount of physical pain or mental suffering because, as far as money goes, the loss is imponderable, and any amount awarded must be in the nature of conventional sum. The difficulty then is in deciding what proportions the conventional sum should take, for there is no reason, in logic or economics, why for a specified period of suffering the award should be $10, rather than $1,000 or indeed any other figure. Here a solution can only be found by taking as the test what our particular society would deem to be a fair sum, such as would, in the words of Lord Devlin in West v. Shephard allow the wrong-doer to hold up his head among his neighbours and say with their approval that he has done the fair thing. While on this basis different societies are likely to end up with different figures, within any particular system the level of awards should show a measure of internal consistency.*[266]

Applying the above principle, the court held that based on the facts of the case, the sum of ₦10,000 claimed by the plaintiff was manifestly excessive. His general damages were assessed at ₦500.00.

In Solu. v. Total (Nig.) Ltd, involving a claim of six million Naira for serious injuries sustained by the plaintiffs through the explosion of a defective gas cylinder supplied by the defendants, the court reiterated the basic principle that the award of general damages is at the discretion of the court, but emphasised that the court must act judicially based upon the principle that damages are awarded to compensate the injured person and not to punish the wrong doer. The claims of the plaintiffs were rejected as being speculative and shrouded in sentimentalism which a court of law frowns upon. The court awarded the sum of ₦45,000 (forty five thousand Naira) as damages for personal

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266 Ibid at p. 2741.

injuries to the plaintiffs.

In Nigerian Bottling Co. (Nig) Ltd. v. Ngonadi where serious bodily injuries were sustained by the plaintiff as a result of the defendants' breach of contract, the Supreme Court affirmed the sum of ₦30,000 (thirty thousand Naira) awarded by the courts below and further noted that in assessing damages for personal injury in cases of negligence, the trial court is bound to consider the pain and suffering the injured party underwent, whether she had permanent disability or disfigurement, the period spent in the hospital and other relevant matters. Oputa, J.S.C., said:

> *On the above medical evidence, I wonder how it can be seriously contended that the award of ₦30,000 general damages was fantastic or excessive. What would be the cost in Naira and kobo of pain and suffering, of loss of muscular flexibility, of inability to breast feed one's children, of permanent disfigurement of one part of the body, of possible major mental disturbances? The court of first instance took account of all these and arrived at the figure of ₦30,000. ... The defendant/appellant is just fortunate that the plaintiff/respondent did not appeal against the award of only ₦30,000.*[267]

It is clear from the above analysis that the amount to be awarded in each case depends on the discretion of the court. But such discretion must not be exercised arbitrarily. It must be based on what is considered reasonable under the circumstance. If this requirement is met, an appellate court will not upset the award.

In Ojini V. Ogo Oluwa Motors (Nig) Ltd[268] the facts of which are not relevant to the issue being discussed, the Supreme Court reiterated the guiding principles thus:

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[267] [1985] 1 NWLR (pt. 4) 739 at 747.

[268] [1998] 55 LRCN 2867 at p. 28880; see also Flint v. Lovel [1935] IK.B. 354 at p. 360. Sodipo & Co. Ltd. v. The Daily Times of Nigeria Ltd. [1972] 11 SC 69 at 77; Uwa Printers (Nig) Ltd. v. Investment Trust Co. Ltd. [1988] 1-9 NSCC [PT. 3] 195at 202; and Agaba v. Otalbusi [1961]1A llNLR299at30[approval in the instant case.

> *"An appellate court is not justified in substituting a figure of its own for that awarded by the lower court merely because it would have awarded a different figure if it had tried the case at first instance. Before it can properly intervene, it must be satisfied either that the judge, in assessing the damage, applied a wrong principle of law such as taking into account some irrelevant factor or leaving out of account some relevant factor, or that the amount awarded is either so ridiculously low or so ridiculously high that it must have been a wholly erroneous estimate of the damage".*

The summary of judicial decisions is that in cases involving non-pecuniary damage to person, there is no laid down yardstick. Each case depends on the discretion of the court. Experience so far shows that the Courts are rather conservative in the exercise of this discretion. Some examples can be given.

1. Osemobor v. Niger Biscuits (decayed tooth which caused nausea and vomiting) - ₦300.00
2. Nigerian Bottling Co. (Nig) Ltd. v. Ngonadi (Serious personal injuries and permanent disfigurement) - ₦30,000.00
3. Solu v. Total (Nig.) Ltd (death of a member of a family and permanent disability of another member) - ₦5,000.00 and ₦45,000.00 respectively.
4. Soremi v. Nigerian Bottling Co (Nig) Ltd. (physical discomfort) - ₦500.00.
5. Technoplastic (Nig) Ltd v. Salejatau[269] (loss of three fingers) - ₦10,800.00
6. Nigeria Airways Ltd v. Solomon Olu Abe[270] (compound fracture of fibula and tibia) - ₦20,000.00

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269 [1968] 4 NWLR (pt. 38) 771 C.A.

270 [1988] UNWLR (Pt. 90) 524 C.A.

7. Bello & Ors v. A.G Oyo State[271] (execution of a convict while appeal was pending) - ₦7,400.00

Conservative figures[272] such as these cannot compensate the rigours of litigation. Much as one is not advocating a windfall[273] for a plaintiff, it is only proper that where serious personal injury or death is caused by a defect in a defendant's product, the plaintiff should receive a substantial amount which will be commensurate with his damage.

8.15.6 ***Exemplary Damages***

There is no authority as to whether exemplary damages can be awarded in product liability cases. Exemplary damages are damages which are in nature awards made with a possible secondary object of punishing the defendant for his conduct in inflicting harm on the plaintiff.

Judicial decisions are to the effect that such damages are only awardable in tort-based actions subject to laid down conditions. The only exception as regards contractual actions is that of breach of promise to marry.[274] In Allied Bank of Nigeria v. Akubueze,[275] the Supreme Court held that exemplary damages properly so called, may only be

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271 [1986] 5 NWLR (pt. 45) 828

272 These figures should however be viewed in relation to the value of the Naira at the respective dates of awards. For instance the sum of N30,000.00 awarded in Nigerian Bottling Co. (Nig) Ltd. v. Ngonadi in 1985 could be said to be quite substantial at the time.

273 See Alele-Williams & Ors v. Sagay & Anor (1995) 5 NWLR (Pt. 396) 441 CA.

274 See Kenny v. Preen [1962] 3 All E.R. 814 C.A.

275 [1997] 51 LRCN 1648 at p. 1661.

awarded, in actions in tort but only in three categories of cases, namely;

(i) oppressive, arbitrary or unconstitutional action by the servants of the Government. See Rookes v. Barnard [1964] A.C. 1129 at 1223 and 1224.

(ii) where the defendant's conduct has been calculated by him to make profit for himself which may well exceed the compensation payable to the plaintiff, see Rookes v. Barnard suprat at 1226; and

(iii) where exemplary damages are expressly authorised by statute. See Rookes v. Barnard, Supra at 1227.[276]

The question is whether this principle can be extended to product liability cases. It can be argued that if a case is based on the tort of negligence, the question of award of exemplary damages will not arise. This is because such a case cannot come under any of the categories stated above. Following this argument, if the basis of a case is that a defect in a product was caused by negligence, then exemplary damages cannot be awarded. This assertion is premised on the fact that negligent conduct, by its nature is deviod of mens rea. This means that it cannot come under the second category. By its nature, it is equally outside the first and third categories.

On the other hand, it can be aruged that where action is brought against a faker of a product, the demerits of the case may justify an award of exemplary damages. Thus if it is proved that a person was engaged in deliberate adulteration or faking of products, the deterrent effect of the law will be strengthened by an award of exemplary damages. In fact this is the essence of exemplary damages. In Allied Bank of Nig. v. Akubueze,

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[276] See also Alele Williams & Ors. v. Sagay & ors, Supra,p.337. Chief F.R.A. Williams v. Daily Times of Nigeria [1990] 1 NWLR (pt. 124) where this principle was applied.

it was stated by the Supreme Court that a claim for exemplary damages postulates that the action of the defendant is such that the damages awarded against him are intended to punish him and to vindicate the strength of the law and not merely as compensation for the injured plaintiff.[277] It must be added that in all product cases discussed in this work, exemplary damages were neither sought nor awarded. We suggest that in appropriate cases, such damages should be awarded to victims of product defects. This will go a long way to deter offenders.

8.15.7 Summary

It is seen from the foregoing analysis that a consumer who is also the buyer of the defective product is entitled to maintain civil action in contract against the person in breach. Such a consumer can sue for any term of the contract or for the breach of any of the terms implied by the law. This work has revealed that some pre-requisite conditions for the application of these implied terms are so stringent that it is often difficult for the plaintiff to prove his case. The principle of privity of contract constitutes a further limitation. By this principle, only a party to a contract is entitled to bring action against the offender. This means that an injured non-contractual consumer has no remedy under this branch of the law.

On the whole, if a case is successfully made out, the aggrieved consumer will be entitled to repudiate the contract or to sue for damages. His ability to claim damages is, however, limited by the principle of remoteness of damage. He is only entitled to claim for a damage which is not too remote. As regards measure of damages, section 53 lays down the general rules which have been interpreted as having the same effect as

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[277] Ibid; at p. 1661.

the rules in Hadley v. Baxendale. In addition, a plaintiff is allowed to claim damages for any consequential loss. The measure of damages in this case depends on the discretion of the court.

Finally, this chapter reveals that liability for contractual obligations is strict. This means that due diligence will not absolve a defendant from liability.

CHAPTER NINE

ANALYSIS OF RESEARCH FINDINGS

9.1 Introduction

The bulk of our research findings has been analysed in the appropriate sections of this work. In this chapter we analyse a residue of our findings which could not be analysed under the previous chapters without an unnecessary digression from the legal principles being discussed.

9.2 Questionnaire Distribution and Returns

The tables below show the questionnaire distribution and returns from five groups of respondents covered.

Table 9.2.1: Questionnaire Distribution and Returns (consumers)

L.G.A.	*No. Distributed*	*No. Returned*	*(%)*
Surulere	126	122	96.8
Ikeja	126	123	97.6
Mushin	126	125	99.2
Agege	126	124	98.4
Ojo	126	125	99.2
TOTAL	*630*	*619*	*98.3*

The above table shows that out of the 630 questionnaires distributed, 619 or 98.3 per cent were returned. 126 were distributed in each Local Government Area. 122 or 96.8 per cent were returned from Surulere; 123 or 97.6 per cent from Ikeja; 125 or 99.2 per cent from Mushin; 124 or 98.4 per cent from Agege and 125 or 99.2 percent from Ojo.

This high return rate was made possible by the mode of distribution adopted. House to house visit was adopted and respondents were requested to complete the questionnaires while we waited. Those who could not do so requested us to come back which we did. Only few disappointments were experienced.

Table 9.2.2: Questionnaire Distribution and Returns (motorists)

Vehicles	*No. Distributed*	*No. Returned*	*%*
private	51	51	100
commercial	51	51	100
TOTAL	*102*	*102*	*100*

The above table shows that a total of 102 questionnaires were distributed to motorists. Of this number 51 were distributed to private and commercial vehicles respectively. The questionnaires were distributed at petrol filling stations during the fuel scarcity. At each station, the distribution was made to as many motorists as were willing to oblige our request. This process continued until we achieved our sample size.

Table 9.2.3: Questionnaire Distribution and Returns (manufacturers)

Product	*No Distributed*	*No Returned*	*%*
Food	4	3	75
Drug	4	4	100
Cosmetics	4	3	75
TOTAL	*12*	*10*	*83.3*

The above table shows that of the 12 questionnaires distributed to this group of respondents, 10 or 83.3 per cent were returned, Four manufacturers representing each product group were covered. Three or 75 per cent were returned from manufacturers of food; four or 100 per cent from drug manufacturers and three or 75 per cent from the cosmetics sector.

Of all the respondents covered in this research, manufacturers proved most difficult. Many of them were simply unwilling to grant us interview or fill our questionnaires. Some claim that as a matter of policy they do not let researchers into their system for fear of being misrepresented. It took many visits for us to retrieve our questionnaires from those who eventually agreed to fill them. We had to abandone two after many futile visits.

Our observation is that the hostile attitude of this group to enquiries on consumer protection is a reflection of a lukewarm attitude to this issue. This attitude impedes an objective assessment of the role of the manufacturer in the protection of consumer rights.

Table 9.2.4: Questionnaire Distribution and Returns (Voluntary Consumer Associations)

Voluntary Consumer Associations	*No Distributed*	*No Returned*	*%*
CPCON	1	1	100
CON	1	1	100
PILO	1	1	100
TOTAL	*3*	*3*	*100*

The above table shows that three questionnaires were distributed; one each to each association. In each case, the questionnaire was completed by the president or secretary of the association. We did not deem it necessary to give to other members since the desired information were on the associations and not on the members.

Table 9.2.5: Questionnaire Distribution and Returns (Law Enforcement Agencies).

Law Enforcement Agencies	*No Distributed*	*No Returned*	*%*
SON	1	1	100
NAFDAC	1	1	100
PC	1	1	100
SMH	1	1	100
TOTAL	*4*	*4*	*100*

It is seen from the above table that a total of four questionnaires were distributed to the enforcement agencies. One questionnaire was administered to each agency based on the same reason as in 9.2.4 above.

9.3: Respondents' Profile

Age of Respondents	*Frequency*	*%*
Less than 18 yrs	12	2.0
18-30yrs	251	40.9
31-40yrs	209	34.0
41-50yrs	93	15.1
50+	49	8.0
TOTAL	*614*	*100.00*

Level of Education of Respondents	*Frequency*	*%*
High	230	38.7
Medium	179	30.1
No / Low	185	31.2
TOTAL	*594*	*100.0*

Sex of Respondents	*Frequency*	*%*
Male	338	57.2
Female	253	42.8
TOTAL	591	100.0

9.4: Level of Consumer Protection in Nigeria

This work proceeded on the assumption that there is a low level of consumer protection in Nigeria. To ascertain the accuracy or otherwise of this assumption, questions were posed to consumers, law enforcement agencies and voluntary consumer associations. The tables below illustrate our findings.

Table 9.4.1: Are consumers protected in Nigeria?

Responses	*Frequency*	*%*
Very well	18	3.1
Some how	263	44.7
Not at all	307	52.2
TOTAL	*588*	*100.0*

The above table shows that out of the 588 respondents (consumers) interviewed, 18 or 3.1 per cent stated that consumers are very well protected; 263 or 44.7 per cent said that consumers are somehow protected, while 307 or 52.2 per cent said that they are not protected at all.

The term "somehow" can be taken to mean insufficient or low protection. This being the case, the percentage of respondents who perceive the level of protection as low can be obtained by summing up the responses in the second and third columns in the above table. This gives 570 or 96.9 per cent. The result is that 570 or 96.9 per cent of the 588 valid responses received perceive the level of protection as low.

The same enquiry was carried out as regards the law enforcement agencies and voluntary consumer associations. The table below shows the result of our findings.

Table 9.4.2: Responses on the level of consumer protection as revealed by law enforcement agencies and voluntary consumer associations.

Level of consumer protection	Frequency	%
High	-	
Low	7	100.0
TOTAL	7	100.0

The above table shows that the level of consumer protection is seen as low by all respondents. As can be seen from this table, this group of respondents comprises law enforcement agencies and voluntary consumer associations. These respondents, being persons versed in consumer matters, their responses can be said to be very objective and reliable. Consequently, the proposition that there is low level of consumer protection in Nigeria is confirmed.

Indeed this proposition can further be tested by the level of fake and sub-standard products in circulation. As shown in chapter four, out of the 603 respondents interviewed, 386 or 64.0 per cent indicated that they had bought fake or sub-standard products. Since the supply of products of the right quality is the hallmark of consumer protection, the presence of sub-standard and fake products in circulation can be said to signify low level of protection.

9.5: Reasons for the Low Level of Protection

To determine the reasons for the low level of consumer protection in Nigeria, questions were directed to the law enforcement agencies and voluntary consumer associations. These groups were chosen on the basis of their expertise in consumer protection matters. The following results were obtained.

Table 9.5.1: Reasons for the low level of consumer protection in Nigeria as indicated by law enforcement agencies and voluntary consumer associations.

Responses	*Frequency*	*%*
Ignorance and apathy of the consumer	6	85.7
Inadequate commitment of the government	7	100.0
Media Apathy	1	14.3
Lack of Publicity	4	57.1
Inadequate enforcement personnel	5	71.4

The above table shows that inadequate commitment of the government is a prominent reason for the low level of consumer protection experienced in the country today. All respondents indicated this as a major reason for the low level of protection.

This is followed by ignorance and apathy of the consumer. 85.7 per cent of the respondents gave this as a reason for the low level of protection.

Inadequate enforcement personnel is seen by 71.2 per cent of the respondents as a reason for the low level of protection.

The next reason is lack of publicity of the activities of the law enforcement agencies, 57.1 per cent of the respondents perceive this as a reason for the low level of protection.

Media apathy is seen by 14.3 per cent as responsible for the low level of protection.

The result of this investigation is that inadequate governmental commitment and ignorance or apathy of the consumer constitute the strongest reasons for the level of protection.

9.6 Sufficiency of Existing Laws on Consumer Protection and Areas Requiring Amendments.

As discussed below, the result of the enquiry on the sufficiency of laws on consumer protection is to the effect that the existing laws are fairly sufficient. 85.7 per cent of the respondents perceive the laws as sufficient. The result of our literature review of the existing laws also confirms this relative sufficiency. As can be seen from chapter three to five, almost every aspect of consumer protection is covered. Chapter six to eight show that in addition to criminal liability imposed by existing statutes, an offender is equally exposed to civil action by a victim of his offence. The summary of the legal position is that the consumer is fairly protected, at least on paper.

There are, however, some areas where protection is either inadequate or non-existent. One such area is the law relating to exemption clauses. There is no statutory provision on this issue. Consequently the case law applies. The Supreme Court has now firmly established the rule of construction as the applicable rule. This means that once an offender can show that the exemption clause covers the breach that has arisen, the victim will be left without a remedy. This greatly affects the level of consumer protection since consumers in this country are in a weaker bargaining position as compared to the other contracting party.

Another loophole in the substantive law is the absence of provisions for compensation order to a victim of product defect. With the exception of the Consumer Protection Council Decree whose provisions are yet untested, no other existing Law makes provisions for a compensation order. This means that a victim is restricted to his civil rights. In a situation where he cannot take advantage of this option, he goes without a remedy.

Furthermore, the penalties stipulated by some existing statutes are too low to deter offenders. Some examples can be given. The Food and Drugs Act stipulates a maximum penalty of one thousand Naira for all offences created therein. Under the Standards Organisation of Nigeria Act, the offence of unlawful use of industrial standard attracts a penalty of one thousand Naira. Some offences relating to patent and proprietary medicine attract as little as twenty Naira.

The law makers should take care of these observed deficiencies by way of amendments.[1]

9.7 Ways of Improving the Attitude of the Consumer to the Enforcement Of His Rights.

As noted above, a major reason for the low level of consumer protection in Nigeria is ignorance and apathy of the consumer. This being the case, respondents were requested to suggest possible ways of improving the attitude of the consumer to the enforcement of his rights. The following results were obtained.

9.7.1 Ways of improving the attitude of the consumer to the enforcement of his rights.

Responses	*Frequency*	*%*
Education	372	61.2
Creation of consumer court	189	31.1
Improvement of out-of-court settlements	39	6.4
Others	8	1.3
TOTAL	*608*	*100.0*

[1] See Suggestions in chapter ten.

The above table shows that education is perceived by 372 or 61.2 per cent of the respondents as a factor that can improve the attitude of the consumer to the enforcement of his rights. This is followed by creation of consumer court which recorded 189 or 31.1 per cent. Improvement of out-of-court settlements recorded 39 or 6.4 per cent; while other reasons recorded only 8 or 1.3 per cent.

The result of a related enquiry directed to the law enforcement agencies and voluntary consumer associations further reveals that education of the consumer is a major factor. All the respondents indicated this as the main solution to the low level of protection.

It, therefore, follows from these findings that education is a key solution to the ignorance and apathy exhibited by many consumers in the country. This research shows that education in this case is not restricted to formal education but also extends to critical awareness. As revealed by this work, many educated members of the public are ignorant of consumer protection laws. This signifies lack of critical awareness. The result of the second hypothesis (HO_2) discussed below confirms this assertion.[2]

9.8 Ways of Improving the Participation of Voluntary Consumer Associations in the Enforcement of Consumer Rights.

As noted in chapter one, in some countries, voluntary consumer associations play very prominent role in the protection of consumer rights. The reverse is the case in this country. The impact of these associations is hardly felt by members of the public. The result of our enquiry is as follows.

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[2] See p.364. infra.

Table 9.8.1: Impact of voluntary consumer associations.

Rating	*Frequency*	*%*
High	6	1.6
Average	118	30.9
Low	258	67.5
TOTAL	*382*	*100.0*

The above table shows that only 6 or 1.6 per cent of the respondents perceive the impact of these associations as high, 118 or 30.9 per cent perceive it as average, while 258 or 67.5 per cent perceive it as low. This means that voluntary consumer associations are yet to make their impact felt by members of the public.

In fact great apathy is displayed by many respondents interviewed in the course of this work. Many of them are not members of any such associations even though they responded positively to the question on the necessity for these associations. The following results were obtained.

Table 9.8.2 Are you a member of any voluntary consumer association?

Responses	*Frequency*	*%*
Yes	19	4.6
No	395	95.4
TOTAL	*414*	*100.0*

This table shows that 19 or 4.6 per cent of the respondents indicated that they are members of voluntary consumer associations, 395 or 95.4 per cent do not belong to any such association. This shows lack of enthusiasm by members of the public.

The above not withstanding, many respondents believe that voluntary associations are essential to the protection of consumer rights. The following table reveals our findings.

Table 9.8.3: Are voluntary consumer associations essential to consumer protection?

Responses	*Frequency*	*%*
Yes	315	78.8
No	85	21.2
TOTAL	*400*	*100.0*

The above table shows that 315 or 78.8 per cent of the respondents see voluntary consumer associations as essential to consumer protection while only 85 or 21.2 per cent perceive them as not essential. The implication is that these associations are essential to the protection of consumer rights.

The enquiry on the ways of improving the participation of these associations produced the following results.

Table 9 .8.4: Ways of Improving the participation of voluntary consumer associations in the protection of consumer rights as indicated by consumers

Responses	*Frequency*	*%*
Funding by Government	237	40.5
Increased membership	206	35.2
Affiliation to International Organisations	38	6.5
Full-Time membership	90	15.4
Others	14	2.4
TOTAL	*585*	*100.0*

The above table shows that funding by the government is a major way of improving the participation of these associations. 237 or 40.5 per cent of the 585 respondents interviewed indicated this as a possible factor. 206 or 35.2 per cent indicated

increased membership; 38 or 6.5 per cent, affiliation to international organisations; 90 or 15.4 per cent, employment of full-time staff while 14 or 2.4 per cent gave various other reasons. This means that funding by government is essential to effective participation of these associations.

At present, all the voluntary consumer associations in the country are funded by contributions and donations by members. This financial burden explains why many people are reluctant to join. Funding by government is necessary particularly in the area of enlightenment campaigns.

9.9 The Role of the Judiciary in the Enforcement of Consumer Rights

The judiciary is a secondary enforcer of consumer rights. This means that the judiciary cannot come in unless a case is initiated by a consumer or a law enforcement agency. It is not the duty of the court to conduct investigations into infringements of consumer rights. Rather, it behoves the consumer or the law enforcement agency to initiate actions in the court. This being the case, the judiciary can only be active if the initiators of suits are active.

This research has revealed that consumers are reluctant to seek legal redress when their rights are infringed. As noted above, 386 or 64.0 percent of the 603 respondents interviewed indicated that they had ever bought fake or sub-standard products. Out of this number only 14 or 3.4 percent took legal action. This implies that consumers in this country are not litigation conscious. This greatly affects the development of consumer law through the judicial process since the courts are denied the opportunity of pronouncing on relevant legal issues.

The attitude of the judiciary to consumer rights can be gleaned from the few cases that have gone to court so far. A review of these cases discloses a mixed-attitude. While some of the cases show evidence of judicial activism, others display evidence of conservatism. Instances of the former include the decisions in Osemobor v. Niger Biscuits Co. Ltd; Solu v. Total (Nig) Ltd and Ngonadi v. Nigerian Bottling Co. Ltd., discussed in the previous chapters.

Contrarily, some judges prefer to insist on some legal principles which abridge judicial discretion. Such principles include, caveat emptor (let the buyer beware); privity of contract; and proof of negligence. As noted in chapter one, adherence to these principles makes it almost impossible for a victim of product defect to get redress. In fact cases discussed in this work show that proof of negligence constitutes an almost insurmountable task. The consumer's case is worsened by the refusal of our courts to extend the principle of res ipsa loquitur to product liability cases. Some degree of judicial dynamism is required for an effective protection of the consumer.[3]

9.10: The Role of the Manufacturer in the Protection of Consumer Rights

A manufacturer is a person who by labour, art or skill transforms materials into some kind of finished product or article of trade.[4] It is seen from this definition that the manufacturer occupies a prime position in product matters. It is he who sets the ball rolling by introducing products into the market. His role, admittedly vital, may expose the

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3 See Court of Appeal decision in Ebelamu v. Guinness (Nig) Ltd; also Iguh, J. in Boardman v. Guinness (Nig) Ltd, Supra, Chapter seven p.223-245.

4 Black's Law Dictionary op . cit; p.965

consumer to danger. In realization of this fact, the law imposes liability on him for defects in his products. As discussed in the preceding chapters, this liability takes the forms of civil and criminal actions.

To determine the consciousness of the manufacturer to his legal obligations, some questions were directed to select manufacturers. The result of this investigation is as follows.

Table 9.10.1: How do you ensure the protection of the consumer?

N=10 i.e number of respondents

Mode	*Frequency*	*%*
Provision of good quality control system	10	100
Routine sample analysis of finished products	7	70
Internal consumer complaints Unit	6	60
Adherence to statutory requirements	3	30

The above table shows that all the respondents claim to protect the consumer by the provision of good quality control units. Routine sample analysis of finished products is adopted by seven or 70 per cent of the respondents; internal consumer complaints units, six or 60 per cent; and adherence to statutory requirements, three or 30 per cent. It follows from these responses that provision of good quality control system is adjudged by all respondents as the best way of ensuring the protection of the consumer.

In the course of this study some respondents conducted us round their quality control units. But others declined to do so on "policy" grounds. The authenticity of their claims could, therefore, not be ascertained.

One sees no policy reason behind allowing researchers access to quality control units of manufacturing firms. We believe that a manufacturer who is confident of his system will not be reluctant to show it off to any accredited researcher.

It must be added that in practice, manufacturers are allowed to make up any deficiency in their system by sending samples of their raw materials and finished products for external analysis by public analysts. Certificates of such analysis are required to be kept and shown to the law enforcement agents on request. This practice ameliorates the legal requirement as to internal quality control units.

This research has revealed that establishment of internal consumer unit is at the discretion of each manufacturer. There is no legal requirement compelling each manufacturer to maintain such units. Those who do so are influenced by other factors such as sustained patronage of their customers. There is need for the law to compel every manufacturer to maintain a consumer complaints unit. This will enhance out-of-court settlements of product disputes.

As can be seen from the above table, adherence to statutory requirements recorded the least percentage. This is contrary to our expectation. To our surprise, some manufacturers interviewed are not conversant with some consumer protection laws. Many of them do not have copies of the relevant laws neither are they familiar with their provisions. It is suggested that as part of the requirements for registration, every prospective manufacturer be compelled to purchase copies of all consumer protection laws applicable to his product field. This will serve as a constant reminder of the legal requirements.

This research has further revealed that a lot of problems are experienced by manufacturers in their efforts at ensuring the protection of the consumer. The problems

indicated by our respondents are as follows:

Table 9.10.2: What are the problems militating against your consumer protection efforts: (Multiple responses)

N=10 i.e number of respondents

Problems	*Frequency*	*%*
Passing-off/faking	6	60
Long process of prosecution	3	30
Weak legal penalties	4	40
High cost of quality control units	3	30
Ignorance of the consumer	4	40
None	2	20

The above table shows that six or 60 per cent of the respondents indicated passing-off/faking as a problem militating against their efforts. This was followed by weak legal penalties and ignorance of the consumer which recorded four or 40 per cent each; long process of prosecution and high cost of quality control units recorded three or 30 per cent respectively. Two or 20 per cent of the respondents claimed that they do not have any problem.

The result of this analysis is that passing-off and faking constitute the greatest problem. In fact out of the 10 manufacturers interviewed, eight or 80 per cent admitted that their products are faked by other manufacturers. This is a further confirmation of the low level of consumer protection in this country.

To ascertain the extent of monitoring of manufacturers by enforcement agencies, the following question was posed to manufacturers.

Table 9.10.3 What is the frequency of visits of law enforcement agencies to your firm?

N = 10 i.e number of respondents

Frequency of Visits	*Frequency*	*%*
Annually	3	30
Semi-annually	4	40
Quarterly	2	20
No visits	1	1

It is seen from the above table that on the average, visits are paid to manufacturing firms by the law enforcement agencies about twice a year. The highest number of visits is thrice a year. Only one respondent or 10 per cent claimed not to receive any such visits. The result of these figures is that the enforcement agencies can be said to be relatively active as regards monitoring of manufacturers. But the fact remains that this exercise has not yielded much practical results as some fake and sub-standard products still find their way into the markets.

Perhaps it may be argued that the fake and substandard products are the handiwork of fakers who normally operate in hide-outs. This notwithstanding, it remains a truism that fakers can easily be traced through the sellers of their products. The presence of fake and sub-standard products in the country is, therefore, evidence of weak enforcement system.

9.11 Effectiveness of the Existing Enforcement Machineries.

Implementation of consumer laws is conferred on the agencies discussed in this work. These are the National Agency for Food and Drug Administration and Control (NAFDAC); the Standards Organisation of Nigeria (SON); the Pharmacists Council of Nigeria (PCN); the Consumer Protection Council (CPC) and the State Ministries of

Health.

As shown in the previous chapters, the functions of these agencies are hindered by many factors . Such factors include finance, conflicts with similar agencies, insufficient manpower/ infrastructure and inadequate motivation of staff. Staff vehicles are either insufficient or non-existent. This makes it impossible for the agencies to keep up with routine and unscheduled visits to firms. It also hinders surveillance visits to markets.

Prosecution has remained a major problem. Since inception, only 16 cases have been prosecuted by NAFDAC. SON focuses on out-of-court settlements of consumer complaints. Attention is not directed to prosecution, although a firm may be closed down in extreme case of poor quality. The State Ministries of Health have no power of prosecution and so are compelled to report cases of breach to the police. As revealed by this study, many of such cases end up at investigation stages. The result is that many offenders go scot-free. The deterrent effect of the law is thus lost.

The Consumer Protection Council is supposed to serve as a full-time overseer of consumer protection. The Decree which established this council came into force on November 23, 1992, but uptill now the Council is yet to be inaugurated. This adds to the enforcement problem since other agencies are saddled with professional regulatory matters.

Presence of fake and sub-standard products which has been alluded to in previous chapters provides further evidence of weak enforcement system. Other areas that display evidence of weak enforcement include illegal dealings in drugs and non-compliance with mandatory standards. The result of the first hypothesis (HO_1) tested below is a further confirmation of the weak enforcement system. One would have thought that the existence of sufficient laws on consumer protection would make for a high level of consumer

protection. But as shown below, the reverse is the case. Despite the existence of sufficient laws, the level of consumer protection has remained low. This is a clear evidence of a weak enforcement system.

9.12 Possible Solutions to the Low Level of Consumer Protection

On our enquiry on the possible solutions to the low level of consumer protection, the following results were obtained.

Table 9.12.1: Possible Solutions to the low level of consumer protection as indicated by law enforcement agencies and voluntary consumer associations (multiple responses)

N=7 i.e number of respondents

Possible Solutions	*Frequency*	*%*
Creation of consumer awareness	7	100
Enhanced government commitment	6	85.7
Adequate enforcement personnel	5	71.4
Enhanced motivation of staff	4	57.1
Independent consumer body	1	14.3

It is seen from the above table that creation of consumer awareness through enlightenment campaigns ranks highest in the responses received. All the seven respondents interviewed indicated this as a possible solution to the low level of consumer protection.

This is followed by enhanced government commitment, six or 85.7 per cent; adequate enforcement personnel, five or 71.4 per cent; enhanced motivation of staff, four or 57.1 per cent and establishment of an independent consumer body which recorded one or 14.3 per cent.

Consumers' views were also sought on the possible solutions to the low level of protection. The following results were obtained.

Table 9.12.2: Possible solutions to the low level of consumer protection as indicated by consumers (multiple choice)

Possible Solutions	*Frequency*	*%*
Additional Laws	288	48.8
Improved Enforcement system	231	39.2
Increased penalties	71	12.0
TOTAL	*590*	*100.0*

The above table shows that additional laws rank highest as a possible solution to the low level of protection. Out of the 590 respondents interviewed, 288 or 48.8 per cent indicated this factor as possible solution. This is followed by improved enforcement system which recorded 231 or 39.2 per cent. Increased penalties recorded the least frequency of 71 or 12.0 per cent.

It can be seen from these statistics that additional laws and improved enforcement system are perceived by a majority of consumers as the main solutions to the low level of protection.

But one doubts the reliability of responses by this group of respondent as regards additional laws. This doubt is premised on the fact that responses to related questions directed to this group display abject ignorance. For instance, as shown in chapter four, out of the 619 respondents interviewed, only 34 or 5.5 per cent showed awareness of consumer protection laws. Given this degree of ignorance, the indication of additional laws as possible solution to the problem can be treated with suspect. The fact is that since these respondents are ignorant of the existing laws, they cannot assess their adequacy or otherwise.

Responses by the law enforcement agencies and voluntary consumer associations can be said to be reliable in view of the expertise of these groups in consumer matters. The summary of this investigation is, therefore, to the effect that possible solutions to the low level of consumer protection are consumer awareness campaigns; enhanced government commitment; adequate enforcement personnel; enhanced motivation of staff, and establishment of an independent consumer body.

It can be argued that the establishment of an independent body may not improve the level of protection. An independent body in the form of a tribunal is only necessary where cases arising from a particular field are so numerous that congestion of the regular courts may lead to delayed justice. Such an upsurge of cases has not been experienced in consumer protection field. But a contrary argument is that the existence of such a body will encourage consumers to bring up cases, confident that such cases will be treated with utmost despatch.

In addition to the above possible solutions, it can be added that the dedication of the enforcement personnel is indispensable to the reversal of the low level of protection.

9.13 Test of Hypotheses

Ho_1: *Level of Consumer protection does not depend on sufficiency of consumer protection laws.*

Table 9.13.1: Responses on sufficiency of consumer protection laws in Nigeria as revealed by enforcement agencies and voluntary consumer associations.

Sufficiency of Consumer Protection Laws	*Frequency*	*%*
Sufficient	6	85.7
Insufficient	1	14.3
TOTAL	*7*	*100.0*

The above table shows that six or 85.7 per cent of the respondents perceive the existing consumer protection laws as sufficient while one or 14.3 per cent perceives them as insufficient.

TABLE 9.13.2 **Responses on the level of consumer protection as revealed by law enforcement agencies and voluntary consumer associations.**

Level of Consumer Protection	*Frequency*	*%*
High	-	-
Low	7	100.0
TOTAL	*7*	*100.0*

The above table shows that all the seven respondents perceive the level of consumer protection as low.

It can be seen from table 9.13.1 and 9.13.2 that all the six respondents who perceive the existing laws as sufficient, perceive the level of protection as low. Similarly, the only respondent who perceives the existing laws as insufficient, perceives the level of protection as low. The conclusion that can be drawn from these data is that the level of protection is obviously low. The above hypothesis does not, therefore, require a statistical test. Consequently, there was an automatic acceptance of the null hypothesis.

Ho_2: *Awareness of consumer protection laws does not depend on level of education.*

Table 9.13.3 Responses on awareness of consumer protection laws by level of respondents' education.

Level of Education	*Observed and Expected Frequencies*		*Row Total*
	Aware	Not Aware	
High	24 (16.89)	199 (206.11)	223
Medium	14 (13.33)	162 (162.67)	176
No/Low	6 (13.78)	176 (168.22)	182
Column TOTAL	*44*	*537*	*581*

The chi-square test was applied to the data in the above table in order to test the second hypothesis (HO_2). The test statistic gave a Chi-square value of 8.032. The degree of freedom is as follows:

df = (R-1) (C-1) = (3-1) (2-1) = (2) (1) = 2

Based on the above degree of freedom, the table value at 0.05 level of significance (ie 95 per cent degree of confidence) is 5.99. Since the chi-square value (8.032) is greater than the table value (5.99), we conclude that the difference in awareness level of the different educational groups is statistically significant. We therefore reject the null hypothesis and conclude that awareness of consumer protection laws depends on level of education.

Ho_3: *Awareness of consumer protection laws does not depend on place of residence.*

Table 9.13.4: Awareness of laws on consumer protection by respondents' place of residence.

Place of Residence	*Observed and Expected Frequencies*		*Row Total*
	AWARE	Not Aware	
Surulere	10 (10.03)	102 (101.97)	112
Agege	11 (8.96)	89 (91.04)	100
Ikeja	9 (4.21)	38 (42.79)	47
Mushin	8 (7.61)	77 (77.39)	85
Ojo	4 (11.19)	121 (113.81)	125
Column total	*42*	*427*	*469*

The Chi-Square value was also applied to the data in the above table in order to test the third hypothesis (HO_3). A Chi-Square value of 11.59 was obtained. The degree of freedom is as follows:

$$df = (R-1)(C-1) = (5-1)(2-1) = 4 \times 1 = 4.$$

The table value at four degrees of freedom and at 0.05 level of significance is 9.5. Thus Chi-Square (calculated) value is higher than the table value. Therefore we reject the null hypothesis and conclude that awareness of consumer laws depends on place of residence.

CHAPTER TEN

SUMMARY, RECOMMENDATIONS AND CONCLUSION

10.1 Summary

This work has revealed that statutory enactments on consumer protection are fairly adequate. Almost every aspect of consumer protection is taken care of by existing laws. Thus, dealings in regulated products are strictly controlled by the law. As shown in chapter three, the phrase "regulated products" refers to food, drugs, cosmetics, bottled water, medical devices; and chemicals. These products are controlled by the various statutes discussed in this work. In addition, the Sale of Goods Law extends to goods which cannot come under the definition of regulated products. Thus any transaction for sale of any chattel personal other than things in action is covered by this law. The implication is that, baring the loop holes highlighted in this work, all consumer goods are duly controlled by the law.

Despite this fair statutory protection, this research has revealed that the level of consumer protection has remained low. Fake and sub-standard products still circulate in the country. Prohibited practices such as sale of drugs in illegal manner have continued unabated.

As revealed by this study, recognised actors in consumer protection are the consumer, the manufacturer, the government and its agencies, the judiciary and voluntary consumer associations. This study reveals that efforts of these groups are militated by many factors.

As regards the consumer, an abject lethargy is noticeable. The average consumer is reluctant to enforce his rights. This is evident from the low number of reports made to

the law enforcement agencies.[1] The dearth of judicial cases in the area of consumer protection is a further illustration of this apathy.

Many factors account for this apathy. Prominent among them is the ignorance of the average consumer. Many consumers are ignorant of the existence of laws on consumer protection. This ignorance is due partly to illiteracy and partly to lack of critical awareness. As regards the illiterate consumer, this investigation shows that he is simply ignorant of the existence of laws on consumer protection. He also lacks the necessary sophistication to differentiate between fake and genuine products. For the literate and enlightened consumer, reluctance is due mainly to the huge expenses involved in litigation coupled with attendant delays. The demands of litigation may not be considered worthwhile especially where the amount involved is not very high.

Furthermore, economy plays a very important role in the issue of consumer protection. Many consumers lack the financial capacity to make rational choice. Thus even where the difference between a genuine product and a fake brand is clear, some consumers may choose to purchase the fake ones due to financial reasons. This in turn cannot be divorced from ignorance as regards the possible adverse effects of such products. On the whole, the insensibility of both the illiterate and literate consumers to their rights is a reflection of the cultural attitude not to complain about problems.

As regards the manufacturer, the problems are varied. A prominent problem is that of huge cost of quality control system. Some manufacturers interviewed claim that the huge cost compels them to make use of external units. This according to them, is inconvenient and naturally pushes up the prices of the end products. Another problem is that posed by fakers. This puts the reputation of manufacturers of genuine products at

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[1] 1. see n. 153 - 155, chapter Five

stake since consumers may not be able to detect the difference until the product is put into use.

On the part of the government and its agencies, the main problem is that of implementation. Although almost all aspects of consumer rights are covered by existing statutes, only little impact is felt by the consuming public. For instance, the Food and Drugs Act has been in force since 1974, yet evidence of breaches of its provisions can be seen in the circulation of adulterated and sub-standard products. The same applies to the Standards Organisation of Nigeria Act which came into force in 1971.

Reasons disclosed by this study for the ineffective enforcement of consumer rights by governmental agencies include, insufficient funds; inadequate personnel; and above all, insufficient facilities particularly laboratory and transport facilities. Inadequate publicity of the activities of the enforcement agencies is also an additional problem. This denies consumers the necessary awareness that will spur them to take an appropriate action in the event of a breach .

This research has further revealed that since the judiciary is a secondary enforcer of consumer rights, it cannot act unless an action is initiated by an aggrieved party. This is because the role of the judiciary is adjudicatory and not inquisitorial. It follows that where apathy is exhibited by other operators, the judiciary cannot act.

Furthermore, the judiciary acts under strict legal principles and this constitutes an impediment in some cases. For instance, action in contract can only be brought by a person who is a party to the contract. The court cannot disregard this principle to entertain action by a non-contractual victim. The same applies to the principle of proof of negligence. The principle is that he who avers, proves. Consequently a person who alleges negligence on the part of the other party must prove it. This requirement greatly restricts

the discretion of the court.

This study has further revealed that voluntary consumer associations have not made any appreciable impact in the area of consumer protection. Many consumers interviewed displayed ignorance of their existence. The associations on their own part claim that their efforts are hindered by many factors. A prominent problem is the difficulty in mobilizing membership. The Consumer Protection Organisation of Nigeria (CPON) which is the oldest consumer association in this country has only 250 members. The Consumer Organisation of Nigeria (CON) has 250 while the Public Interest Law Organisation (PILO) has only 207. The low membership constitutes an impediment since activities of these associations are funded by members' subscription.

10.2 Recommendations

10.2.1 *Education of Consumers*

As can be seen from the preceding chapter and other parts of this work, the most recurring reason for the low level of consumer protection in Nigeria is the ignorance of the consumer. This ignorance stems from lack of formal education as well as insufficient critical awareness of the educated consumers. Quite expectedly, the responses on the possible solutions to the low level of consumer protection produced a 100 per cent frequency in favour of education. This proves beyond reasonable doubts that education of the consumer is a sine qua non to an improved consumer protection in Nigeria.

It is obvious that if consumers are aware of their rights, they will be spurred to take appropriate action to remedy any breach. This will put manufacturers on their alert and in turn spur them to strive to attain excellence.

Since this work has revealed that both illiterate and literate consumers are largely ignorant of the extent of protection accorded by the law, intensive enlightenment campaigns are imperative. This will make the average consumer aware of his rights; expose him to channels of redress; and pave way for informed choice of products, consequently forcing sub-standard and fake products out of the market. In addition, the fear of litigation engendered by a crop of enlightened and vibrant consumers will create added safety consciousness on the part of the manufacturer.

10.2.2 *Adoption of Strict Product Liability*

This study has revealed that a prominent problem in the area of consumer protection is that of enforcement. The problems associated with contractual and tortious claims were highlighted in chapters seven and eight. These chapters reveal that none of these branches of the law offers adequate protection to the consumer. A viable solution, therefore, is the introduction of strict product liability.

According to the Black's Law Dictionary[2], strict liability is a concept applied by the courts in product liability cases in which the seller is liable for any and all defective hazardous products which unduly threaten a consumer's personal safety. The Osborn's Concise Law Dictionary[3] explains that strict liability arises where a man acts at his peril and is responsible for accidental harm, independently of the existence of either wrongful intent or negligence. It follows from these definitions that strict liability is a principle under which a person is held liable for the consequences of his acts irrespective of fault.

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[2] Black H.C 6th ed. (St Paul Minn. West Publishing Co. 1990) p. 1422.

[3] Roger Bird, 7th ed. (London: Sweet & Maxwell, 1983) p.313.

The imposition of strict liability is often justified on policy grounds. In the American case of Escola v Coca Bottling Co of Fresno,[4] the court noted that:

> *"....public policy demands that responsibility be fixed where-ever it will most effectively reduce the hazards of life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot.Those who suffer injury from defective products are unprepared to meet its consequences."*[5]

Explaining the notion of strict enterprise liability as applied by the court in Solu v. Total (Nig.) Ltd, Apori,[6] observes that the calculations underlying such a theory are purely economic. According to the learned writer, the entrepreneur is deemed to be an efficient risk-bearer whose calculations should normally include such risk as the risk of injury from use of his goods by the consumer.

Clark[7] explains that the effect of strict product liability would be to create an economically motivated safety consciousness amongst all product sellers. Product sellers and distributors would have an incentive to monitor the safety aspects of products which they stock, and would cease to deal with unreliable producers, thus furthering policy aims.

Other reasons advanced for strict product liability include the fact that the seller,[8] by his skill and position, is in a better position to prevent risks; he is also in a better position to insure against possible risks. In addition, the seller, by putting his product in the market impliedly guarantees the quality of such products. He should therefore be held

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4 24 Cal. 2d. 453, p. 2d. 436 (1994).

5 Cited in Clark, op. cit., p. 15.

6 op. cit., at p.42.

7 Op. cit,. pp.74 & 75.

8 Seller in this case includes the manufacturer.

liable for any harm that may arise therefrom. Comment c to section 402A of the American Restatement (2d) of Torts 1965 puts these reasons beyond doubts. It states:

> *On whatever theory, the justification for strict liability has been said to be that the seller, by marketing his product for use or consumption, has undertaken and assumed a special responsibility towards any member of the consuming public who may be injured by it, that the public has the right to expect and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods, that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of consumption against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum protection against injury at the hands of someone and the proper persons to afford it are those who market the products.*

There is no doubt that the above reasons are convincing. Any contrary position will place the consumer at the mercy of the manufacturer. Since the latter reaps the financial benefits of his enterprise, he should also be made to take the burden of compensating any victim of his default.

10.2.3 *Safety Consciousness of the Manufacturer*

This research shows that in consumer protection the buck stops at the doorsteps of the manufacturer. He bears the ultimate responsibility of product defects. Thus even where the seller or any other person is sued, the manufacturer may be joined as a party. It is, therefore, obvious that he has much at stake in product suits.

In the light of this, it is suggested that manufacturers should safeguard their interests by watching out for fake brands of their products. Fakers should be traced through the sellers of the fake products and appropriate action taken.

Tamper-proof devices should also be adopted. Any noticed lapse in the mode of corking or sealing of products should be taken care of by the manufacturer. Failure to do

liable for any harm that may arise therefrom. Comment c to section 402A of the American Restatement (2d) of Torts 1965 puts these reasons beyond doubts. It states:

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Tamper-proof devices should also be adopted. Any noticed lapse in the mode of corking or sealing of products should be taken care of by the manufacturer. Failure to do so should be regarded as a breach of duty. On this ground one doubts the morality, or perhaps, the legality of the defendants' defence in Boardman v Guinness (Nig.) Ltd which

was hinged on the easiness of opening and corking back of the bottle of beer with out detection. A manufacturer who notices any such lapse should take reasonable steps to rectify it or face the wrath of the law.

10.2.4 *Establishment of Legal Units in Each Agency.*

This work has revealed that one of the banes of consumer protection is the non-prosecution of many product cases. This problem had its origin in the enabling statutes which did not make specific provisions on prosecution. The practice adopted by all agencies was to refer any suspected case to the police for investigation and possible prosecution. The result was that many of such cases ended up at investigation stages.

The position has now changed as regards SON and NAFDAC. As discussed in chapter five, by section 1(2) of the Standards Organisation of Nigeria Act as amended, the organisation can now sue and be sued in its name. By the fiat granted to NAFDAC in 1997 by the then Minister of Justice, Chief Michael Abgamuche, the agency can also prosecute cases which come within its jurisdiction. It is only the State Ministry of Health that is still to receive such power.

Despite the above improvement, SON and NAFDAC are yet to take absolute control over prosecutions. The former still refers cases to the police while the latter refers its cases to external legal practitioners for prosecution.

It is suggested that each enforcement agency should have a full-fledged legal unit which should handle all cases under its jurisdiction. This will help the agencies to minimise cost. It will also help them to prosecute as many cases as possible.

10.2.5 *Review of Penalty Provisions*

As noted in this work, the penalties for some product offences are too low to have any deterrent effect. Apart from the Counterfeit and Fake Drugs (Miscellaneous Provisions) Act and the Trade Malpractices Decree, the penalties stipulated by other statutes are patently low. As noted in chapters four and five, penalties for offences under the Food and Drugs Act and the Standards Organisation of Nigeria attract a maximum penalty of ₦1,000. Some offences relating to patent and proprietary medicines attract as little as N20.00. Certainly, these penalties are not commensurate with the gravity of the offences in question. The need for an urgent review of these penalties cannot be over-emphasised.

10.2.6. *Enhanced Commitment of the Government*

The responses to our enquiry on possible solutions to the low level of consumer protection indicated enhanced commitment of the government as a possible solution. Our interactions with some personnel of the enforcement agencies have further revealed that the government has not shown sufficient commitment in the area of consumer protection. Thus even though numerous laws have been enacted and many agencies established, the agencies lack adequate tools to work with. Basic facilities such as laboratories and staff vehicles are lacking. Enforcement personnel are not sufficiently motivated. Much cannot be expected under this dispensation.

Evidence of laissez-faire attitude is equally afforded by the non-inauguration of the Consumer Protection Council, six years after the commencement of its enabling Decree. This Decree which came into force on November 23, 1992 provides for a Consumer Protection Council at the national level and Consumer Protection Committees at State levels. While some States have inaugurated their own committees, the Federal Government

is yet to inaugurate the council at the national level. This constitutes a serious set-back because, as discussed in chapter four, some powers of the state committees are merely recommendatory. Since the council to which recommendations are to be made is yet to be inaugurated, such powers will remain redundant.

The government should expedite action on the council to pave way for benefits highlighted in chapter four.

10.2.7 *Compensation to the Victim*

This study has revealed that with the exception of the Consumer Protection Council Decree, the object of all other Consumer Protection Laws is to punish the offender and not to compensate the victim. There is no provision requiring payment of compensation to a victim of product defect. The effect is that a victim is left with his civil rights against the offender. As noted in this work, civil actions are associated with many problems particularly strict legal rules and huge cost of litigation. To ameliorate the burden of litigation, a person convicted of breach of statutory provision should be compelled to compensate the victim. This will save the victim the problem of having to institute a civil suit. It will also save the offender the problem of defending two suits, namely, action for the breach of the statutory provision and civil action by the victim. It is suggested that all existing consumer protection laws be amended to make provision for compensation to the victim.

10.2.8 *Prohibition of Exemption of Liability*

It has been noted that the law allows a contracting party to exempt himself from

certain breaches including breaches of terms implied by the law. The risks involved in this approach have been highlighted in this work. This study has further revealed that the freedom of contract which forms the basis of the principle of exemption of liability is illusory in the face of inequality of bargaining powers between the buyer and the seller. The effect is that this freedom is often exercised by the seller to the detriment of the buyer.

With the adoption of the rule of construction by the Supreme Court in Narumal & Sons Ltd v. Niger/Benue Transport Co., the buyer is left at the mercy of the other contracting party. The short-comings of this judicial approach have been highlighted.

It is suggested that the Sale of Goods Laws of the Southern States be amended in line with those of the North. This will make it impossible for terms implied by the law to be excluded.

10.2.9 *Strict Inspection of Imports*

This research has shown that some fake products in circulation are imported. This is evidence of weak inspection system. As noted in chapter three, the function of inspection of imports is carried out by the Customs and Excise Department; the NAFDAC; the SON and other agencies. Hitherto, the jurisdiction of each agency was determined by the nature of product involved. For instance, all drugs and drug products were inspected by NAFDAC; many other products were under the jurisdiction of SON while the Customs and Excise Department was primarily concerned with import duties. This arrangement led to considerable overlaps which in turn resulted in role-conflicts.

By the Ports and Related Matters Decree 1996,the Customs and Excise Department now bears the primary duty of import inspections. Other agencies can only

come in if invited. This requirement was aimed at removing the then existing role-conflicts. Much as one appreciates the policy reasons behind this law, one doubts if it can serve the interest of the consumer. The conferment of primary duty on the Customs and Excise Department may be counter-productive in the long-run. Unlike SON and NAFDAC, this department lacks the necessary expertise for an effective determination of the issue of product quality.

To avoid a repeat of the role-conflicts hitherto experienced by these agencies, a clear delineation of functions is necessary. A list of products coming within the jurisdiction of each agency should be made. If an imported product is found to be fake or substandard, the agency in charge should be held responsible.

10.3 Conclusion

As noted in chapter one, supply of products of the right quality is the hallmark of consumer protection. This research has revealed that some fake and sub-standard products still circulate in the country. The implication is that the consumer is not adequately protected. This confirms our findings which indicated the level of protection as low.

In varying degrees and in different respects, this low level of protection poses serious problems to the consumer, the manufacturer, voluntary consumer associations and the government and its agencies. The worst effect is seen in the area of drugs. Steps taken so far by the government to curb the circulation of fake drugs have proved abortive. Illegal dealings in drugs have continued unabated despite upward reviews of penalty provisions. The result is that consumers have remained at the mercy of illegal dealers. The field of drugs presents the most devastating effect. As disclosed by some medical personnel who granted interviews to us, administration of fake drugs leads to treatment failure and

negative response expectation. This constitutes serious worry and frustration to health workers. The nation as a whole loses in terms of the health of its citizens and external reputation. For instance, following the adulterated paracetamol episode of 1990, some West African countries banned the importation of drugs from Nigeria.[9]

Reasons for the prevalence of fake and sub-standand products and attendant low level of protection have been identified by this work. Possible solutions to this problem have also been identified. If these solutions and recommendations are adopted, the level of protection will definitely improve.

Above all, this research has revealed that the issue of consumer protection is rather technical. Some degree of expertise is required to determine the issue of product quality. Much therefore depends on the dedication and intergrity of enforcement officers. To achieve a meaningful protection, it is imperative that all enforcement officers should see their roles beyond financial rewards. They should consider themselves custodians of public health and safety. As repositories of vantage knowledge of product matters, they should keep to the terms of their employement by carrying out their functions with the utmost sense of responsibility. If this is done, manufacturers will be left with no option other than compliance with legal requirements.

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[9] Obi, and Okoro, op. cit., p.55.

A SELECT BIBILIOGRAPHY

BOOKS

Achike, O., Commercial Law in Nigeria, Enugu, Fourth Dimension Publishing Co. Ltd.; 1985

Adetiba, S., et al., Compensation and Remedies for Victims of Crime in Nigeria. Lagos: Federal Ministry of Justice; 1990.

Asika, N., Research Methodology in the Behavioural Sciences, Ikeja: Longman Nigeria, Plc; 1991.

Atiyah, P.S., & Aubrey, L.D. The Consumer, Society and the Law, England: Penguin Books Ltd.; 1981.

Atiyah, P.S. & Adams J.N. The Sale of Goods 9th ed.. London: Pitman Publishing,1995

Bailey, K.D., Methods of Social Research, New York: The Free Press; 1982.

Black, H.C. Black's Law Dictionary, 6th ed., St. Paul Minn. West Publishing Co.; 1990.

Brazier, M., Street on Torts, 9th ed., London: Butterworths; 1993.

Burrows, A.S., Remedies for Torts and Breach of Contract, 2nd ed., London: Butterworths; 1994.

Burrows, A.S., The Law of Restitution, London: Butterworths; 1993.

Cheshire,Fifoot & Furmston, Law of Contract 12th ed., London: Butterworths & Co. (Publishers) Ltd.; 1991.

Clark, R., Product Liability Modern Legal Studies, London: Sweet and Maxwell; 1989.

Collins, H., The Law of Contract, 2nd ed. London: Butterworths; 1993.

Cranston, R., Consumer and the Law, London: Weidenfeld and Nicolson; 1978.

Diamond, A.L., Commercial and Consumer Credit: An introduction, London: Butterworths; 1982.

Egbo, A.A., Pharmacy Laws and Practice in Nigeria, Lagos: Tropic Interpharm Services Ltd.; 1992.

Epstein, D.G., Consumer Law in a Nutshell, 2nd ed., St. Paul Minn. West Publishing Co.; 1981.

Ezejiofor, et al., Nigerian Business Law, London: Sweet & Maxwell; 1982.

Franklin, M.A., Injuries and Remedies: Cases and Materials on Tort Law and Alternative, Mineola, New York: The Foundation Press Inc.; 1971.

Gasiokwu, M.O.U., Legal Research and Methodology: The A-Z of Writing Theses and Dissertations in a Nutshell, Jos: Fab Educational Books; 1993.

Goode, R.M. Consumer Credit Legislation, London: Butterworths; 1996.

Haemmel, W.E. Paul et al., Test Cases and Materials on Consumer Law, St. Minn: West Publishing Co.; 1975.

Harold, L., Assessment of Damages for Personal Injury and Death, 2nd ed. London: Butterworths; 1983.

Harris, D., Remedies in Contract and Tort, London: Weidenfeld and Nicolson Ltd.; 1988.

Harvey,B.W. & Parry, D.L., The Law of Consumer Protection and Fair Trading, London: Butterworths; 1987.

Hewitt, W.S Manufacturers Liability for Defective Goods Oxford: BSF Professional Books; 1987.

Igweike, K.I., Nigerian Commercial Law: Sale of Goods, Jos: Fab Educational Books Ltd.; 1992.

Jones, M.A. Textbook on Torts, London: Financial Training Publishings Ltd.; 1986.

Kent, P., European Community Law, London: Pitman Publishing; 1992.

Keston,P. & Shapo,M.S. Products and the Consumer: Deceptive Practice, Mineola, New York: The Foundation Press Inc.; 1972.

Langer, J., Consumer in Transition: Indepth Investigations of Changing Lifestyles, New York: AMA membership Publishings; 1982.

Leder, J., Consumer Law, Plymouth: MacDonald; 1980.

Levin, R.I. Statistics for Management, 2nd ed. Prentice Hall International, Inc; 1981.

Lowe, R. & Woodroffe, G., Consumer Law and Practice, 4th Ed., London: Sweet & Maxwell; 1995.

Lyndon, O.B. Leland, L.B. Marketing Research and Analysis, 4th ed. New York: The Ronald Press Company; 1969.

Macleod, J.K., Consumer Sales Law, London: Butterworths; 1989.

Mickleburgh, J., Consumer Protection: Abingdon: Professional Books Ltd.; 1979.

Mocall, R.J., Consumer Protection: Cases, Notes and Materials, St. Paul Minn. West Publishing Co.; 1977.

Munkman, J., Damages for Personal Injuries and Death, 9th ed. London: Butterworths; 1993.

Nwabuzor, A.M. Business Government Relations in Nigeria, Lagos: Macmillam (Nig.) Publishers Ltd., 1990.

Obi, C.C. & Okoro, R., Current Guide to Good Pharmaceutical Whole-Saling in Nigeria, Lagos: Chris & Robins Nigeria Ltd.; 1992.

Oppenheim,S.C. & Weston,E., Unfair Trade Practices and Consumer Protection; Cases and Comments, 3rd ed., St. Paul Minn.: West Publishing Co.; 1974.

Osibo, O., Spurious Drugs: Reading Between the Lines, Lagos: Lanpharm Laboratories and Scientific Services Ltd.; 1990.

Osuala, F.C. Introduction to Research Methodology, Onitsha: African-Fep Publishing Ltd.; 1987.

Percy, R.A. Charlesworth and Percy on Negligence, London: Sweet & Maxwell; 1990.

Ramsay, I., Consumer Protection: Text and Materials, London: Butterworths; 1994.

Rogers, W.V.H., Winfield and Jolowicz on Tort, 13th ed., London: Sweet & Maxwell; 1990.

Rogers, W.V.H., Fundamental Principles of Law: The Law of Tort, London: Sweet & Maxwell; 1989.

Sagay, I.F., Nigerian Law of Contract, London: Sweet & Maxwell; 1989.

Samuel. G.H., Cases in Consumer Law, Plymouth; MacDonald & Evans Ltd.; 1979.

Stapleton, J., Product Liability, London: Butterworths; 1994.

Swartz, E.M., Hazardous Product Litigation, New York: The Lawyers Co-operative Publishing Co.; 1973.

Treitel, G.H., An Outline of the Law of Contract, 4th ed., London: Butterworths; 1989.

Unegbu, m.O. Handbook on Research Projects for Law Students, Aba: Deeplaw Professional Publihers Ltd; 1997.

Uvieghara, E.E., Sale of Goods (And Hire Purchase) Law in Nigeria, Lagos: Malthouse Press Ltd.; 1996.

Wright, G.J., Product Liability, The Law and Its Implication for Risk Management, Great Britain; Blacksone Press Ltd.; 1989.

JOURNALS:

Agomo, C.K., "Exclusion Clauses in Contract and the Implications for Consumer Protection in the Nigerian Law of Contract" Obilade (ed) A Blue-print for Nigerian Law, University of Lagos, 1995.

Agomo, C.K., "Effect of the Demise of the English Doctrine of Fundamental Breach on the Nigerian Law of Contract", The Nigerian Journal of Contemporary Law, Vol. 131 p. 69-77,1981-83 (Lagos: Nigerian Society of Contemporary Law, Faulcty of Law, University of Lagos, Akoka, Lagos).

Agomo, C.K., "Protection, Liability and Compensation Laws Relating to Occupational Diseases", Business and Property Law, Vol. 3, No. 13 p. 63-69, Jan., 1990.

Ajai, O., "Recent Trends in Fundamental Breach and Exclusion Clauses in the Consumer/Commercial Transactions",

Journal of Private and Property Law, Vol. 16, No. 16, p. 37-49, April 1992-April 1993.

Akande, J.C. "Consumer Protection", Paper Presented at the Anambra State Law Conference held at Enugu, 10-12 Dec. 1986.

Apori, K.A., "Towards a Strict Liability Standard in Defective Product Law", Bendel State University Law Journal, 1991/92. Vol. 1. No.1, p. 33-46.

Badaiki, D.A., "Towards an Internal Legal Regime of Consumer Protection for Developing Countries: Nigeria as a case study", Justice, Vol. 6, No. 4, p. 43-61, July 1993.

Beale, H., "Inequality of Bargaining Power", Oxford Journal of Legal Studies", Vol. 6, No. 1. p. 123-136, Spring 1986.

Cayne, D., "Market Consideration in the Formulation of Consumer Protection Policy", University of Toronto, Law Journal Vol. 23, No. 4, p. 396-430, Autumn 1973.

Clark, A.M., "Products Liability: Oklahoma's Defective Test Limitations", 39 Okla, Law Review, 318 (1986).

Fogan, P.K, "Legal Regulation of Consumer Credit Transactions in Nigeria: An Appraisal", Essays on Nigerian Law, Vol. 11, Lagos, July 1990, p. 31-52.

Keeton, P., "Manufacturer's Liability: The meaning of Defect in the Manufacture and Design of Products" 20 Syracuse Law Review 559 (1969).

Leitan, F.H., "Strict Tort Liability for Unfinished Products", American Business Law Journal, Vol. 19, W.A. p. 407, Winter, 1982.

Mcinturff, P.S.J., "Product Liability: The Impact on California Maufacturers", American Business Law Journal Vol. 19, No. 3, p. 343, 1982.

Monye, F.N., Adultertion of Goods and Consumer Protection, Unpublished, LL.M. Degree Dissertation, University of Nigeria, Nsukka, September, 1986.

Monye, F.N., "Legal Restrictions on the Manufacture, Sale and Advertisement of Drugs in Nigeria", Modern Practice Journal of Finance and Investment Law, Lagos: Law and

Economioc Development, Vol. 2, No. 1, 1998 p. 152-164.

Monye, F.N., "Liability for Defective Products" The Nigerian Juridical Review, Faculty of Law, University of Nigeria, Enugu Campus. Vol. 6, 1994-1997 p.137-157.

Monye, F.N., "Standards of Products: A case study of the Organisation of Nigeria", accepted for publication in the Current Jos Law Journal, Faculty of Law, University of Jos.

Monye, F.N., "Strict Product Liability, The Only Solution to Proof of Negligence and Strict Contract Rules", accepted for publication in the Nigerian Current Law Review, Nigerian Institute of Advanced Legal Studies, Lagos.

Monye, F.N., "The Need to Restrict the Scope of Application of Exemption Clauses", Justice, (A Journal of Contemporary Legal Problems) Lagos: Federal Ministry of Justice. Vol. 2, No. 6, p. 19-27, 1991.

Onwuchekwa, G.M., "Consumer, Protection Against Defective Goods Under Nigerian Law", Nigerian Bar Journal, Vol. 11, p. 98-117, 1973, Lagos: Nigerian Bar Association.

Powel, D., "Sale of Goods: Sale by Description - A New Development", Business Law Review, Vol. 11, Nos. 8 & 9, p. 203-205, August/September, 1990.

Sagah, I.E., "Food Legislation in Nigeria", Nigerian Law Journal, Vol. 9, p. 175-185, Enugu Fourth Dimension Press, 1975.

Stevens, L.L, "Negligent Acts Causing Pure Financial Loss: Policy Factors at Work", University of Toronto Law Journal Vol. 23, No. 4, p. 431-467, Autumn, 1973.

Uzodike, E.N.U., "Monetary Compensation in respect of Personal Injury to Victims of Road Accidents - A case study for Reform of the Nigerian System", The Journal of Private and Property Law, Vol. 5, p. 9-27, (April 1986) (Lagos: Dept. of Private and Property Law, Faculty of Law, University of Lagos.

Westherill, S., "Unsafe Goods" Protecting the Consumer and Protecting the Diligent Trader", The Journal of Business Law, pp. 36-47, January, 1990.

Yerokun, O., "The Nigerian Food Laws and Consumers", Nigerian Current Law Journal, p. 152-165.

APPENDIX

Respondent's Identification No.....

Dear Sir,

A CRITICAL EXAMINATION OF CONSUMER PROTECTION LAW AND PRACTICE IN NIGERIA.

I am a Ph.D student researching into Consumer Protection in Nigeria. The purpose of this questionnaire is to assess the practical implementation of consumer laws and the level of consumer awareness in matters relating to consumer protection. The overall aim is to evolve a means of improving the level of consumer protection in Nigeria.

Kindly answer the following questions. Your responses will be treated in strict confidence.

Thank you for your anticipated co-operation.

F.N. MONYE (Mrs)

QUESTIONNAIRE

Module 1: **For All Respondents**

Section A

1. *Age*:
   (a) Less than 18 years
   (b) 18 years - 30
   (c) 31 " - 40
   (d) 41 - 50
   (e) 50 +

2. *Qualification*:
   (a) Below First School Leaving Certificate
   (b) First School Leaving Certificate
   (c) West African School Certificate/G.C.E.
   (d) N.C.E.
   (e) Diploma and Other Professional Certificates
   (f) HND/First Degree
   (g) Masters Degree
   (h) Ph.D

3. *Sex*:
   (a) Male
   (b) Female

4. *Marital status*:
   (a) Married
   (b) Single
   (c) Divorced
   (d) Widowed

5. *Place of Residence* . . . . . .
   . . . . . .
   . . . . . .

6. *Place of Work* . . . . . .

7. ***Occupation*** . . . . . .

8. ***Position held at place of work*** . . . . . .

9. ***Annual income*** . . . . . .

10. ***Are you aware of the existence of any Consumer Protection Agency in Nigeria?***

    (a) Yes

    (b) No

11. ***If yes, please indicate the ones you are aware of:*** . . . . . .
. . . . . .

12. ***Are you aware of any consumer protection law in Nigeria?***

    (a) Yes

    (b) No

13. ***If yes, indicate the ones you know.*** . . . . . .
. . . . . .

14. ***Are consumers protected in Nigeria?***

    (a) Very well

    (b) Somehow

    (c) Not at all

15. ***If your answer is (b) or (c), what are the possible reasons for the low level of protection?***

    (a) Inadequate consumer laws

    (b) Ineffective implementation by law enforcement agencies

    (c) Ignorance of the consumer

16. ***What are the possible solutions to the low level of Consumer Protection?***

    (a) Additional laws on Consumer Protection

    (b) Increased penalties

    (c) Improved enforcement system.

17. ***What are the possible ways of improving the attitude of the consumer to the enforcement of his rights?***

(a) Education

(b) Creation of Consumer Courts that can handle Consumer Cases promptly.

(c) Improvement out- of-court settlement system

(d) Others, please specify:.....

18. ***Have you ever bought any fake or substandard product?***

(a) Yes

(b) No

19. ***Please indicate the product(s)***

(a) Drug

(b) Food item

(c) Cosmetics

(d) others.....

20. ***If the answer to question 18 is yes, what was your reaction?***

(a) Took legal action

(b) Returned the product to the seller

(c) No action

21. ***Are you aware of the existence of any voluntary consumer association in Nigeria?***

(a) Yes

(b) No

22. ***If yes, please indicate the ones you know.***. . . . . .

. . . . . .

23. ***How did you get to know about these associations?***

(a) Activities of the associations

(b) Newspaper publications

(c) Members of the associations

(d) Through aggrieved consumers

(e) Court cases.

24. ***How would you rate the impact of the voluntary consumer associations in Nigeria?***

(a) High
(b) Average
(c) Low

25. ***Are you a member of any voluntary consumer association?***

(a) Yes
(b) No

26. ***If no, what is your reason for not being a member?***

(a) Financial reasons
(b) Lack of interest in consumer matters
(c) Others.....

27. ***Do you regard voluntary consumer associations essential to the protection of consumer rights?***

(a) Yes
(b) No

28. ***What are the ways of improving the activities of voluntary consumer associations?***

(a) Increased membership
(b) Funding by the Government
(c) Affiliation to similar voluntary or associations outside Nigeria
(d) Employment of full-time staff
(e) Others,specify.....

Section B

A major function carried out by the Standards Organisation of Nigeria (SON) is the certification of products manufactured in Nigeria. The Nigerian Industrial Standard Certificate (NIS certificate) is awarded to a manufacturer who has satisfied the stipulated requirements, Kindly answer the following questions:

1. ***Are you aware of the certification marking scheme?***
   - (a) Yes
   - (b) No.

2. ***If your answer is yes, indicate the source of your knowledge***
   - (a) Publicity given to SON's activities
   - (b) Personal observation of products
   - (c) Through advertisements that carry the NIS logo.

3. ***What do you consider when buying a product?***
   - (a) Price
   - (b) Reputation of the manufacturer
   - (c) Nigerian industrial standards logo
   - (d) Quality of the product
   - (e) others,specify.....

4. ***Have you ever bought any substandard product with NIS logo?***
   - (a) Yes
   - (b) No

5. ***If yes, what action did you take?***
   - (a) Legal action
   - (b) Report to son
   - (c) Out-of-court settlement
   - (d) Return of the product to the seller
   - (e) No action
   - (f) Others, specify.....

6. ***How do you rate products that bear the NIS logo?***

   (a) Good

   (b) Fair

   (c) Poor

7. ***How do you assess the practical benefit of the certification marking scheme?***

   (a) High

   (b) Low

   (c) No benefit

Module 2: **For Motorists**

The Standard on Road Vehicles: Requirements for passenger cars, specifies that the following accessories must be available in every passenger car. Kindly tick the ones available in your car.

(a) Fire extinguisher
(b) Safety belts
(c) Head rest
(d) Adjustable front seat
(e) Collapsible steering
(f) Laminated windscreen
(g) Windscreen demister
(h) Windscreen washer
(i) Sun visors
(j) Rear window sun visor
(k) Fender flaps
(l) Dual circuit braking system
(m) Spare tyre
(n) Warning triangular reflectors
(o) Radio set
(p) Ash trays
(q) Clock
(r) Airconditioning system
(s) Insulation and ceiling
(t) Cigarette lighter
(u) Tools
(v) Collapsible chock
(w) Floor covering
(x) Engine sump protector
(y) Parking brake system
(z) Anti-rust protection
(a a) Bumpers
(a b) Registration number

1. *If you lack any of the accessories specified above what are your reasons for non-compliance?*

   (a) Inadequate funds
   (b) Ignorance about requirements
   (c) Do not find them absolutely necessary
   (d) Others, specify.....

2. *If your answer to the above question is (c), state the requirements covered by your response*: . . . . . .
   . . . . . .
   . . . . . .

Module 3: **For Manufacturers**

1. *Name of firm*:.....

2. *Is your firm a winner of the NIS certificate?*

   (a) Yes
   (b) No

3. *What is your attitude to the certification marking scheme?*
   . . . . . .

4. *Have you ever applied for the NIS certificate?*

   (a) Yes
   (b) No

5. *If your answer is no, do you have any such plans?*

   (a) Yes
   (b) No

6. *Are you aware of the requirements for the award? (See appendix 1)*

   (a) Yes
   (b) No

7. ***How do you see the requirements for the award?***

   (a) Too stringent

   (b) Too liberal

   (c) Appropriate

8. ***How would you regard your firm?***

   (a) consumer-centred

   (b) profit-centred

9. ***If your answer is (a), how do you ensure the protection of the consumer?***

   (a) By provision of good quality control system

   (b) Routine sample analysis of finished products

   (c) Internal consumer complaints unit

   (d) Others, specify.....

10. ***How does your firm ensure compliance with statutory requirements on consumer protection?***

    (a) .....

    (b) .....

11. ***Are your product faked by other manufacturers?***

    (a) Yes

    (b) No

12. ***If yes, what is your reaction?***

    (a) Use of tamper - proof device

    (b) Enlightenment campaign

    (c) Report to enforcement agencies

    (d) No action

    (e) Others, specify.....

13. ***What are the problems militating against your consumer protection effort?***

. . . . . .

. . . . . .

. . . . . .

14a. ***Have you ever received complaint(s) on any of your product(s)?*** . . . . . .

14b. ***If yes, what was the nature of the compliant(s)?***

. . . . . .

14c. ***What action(s) did you take?***

. . . . . .

. . . . . .

. . . . . .

15. ***Please indicate some of your products.***

. . . . . .

. . . . . .

16. ***What is the frequency of visits of law enforcement agencies to your organisation?***

. . . . . .

17. ***General remarks on how best to protect the interest of the consumer.***

. . . . . .

. . . . . .

. . . . . .

. . . . . .

. . . . . .

Module 4: **For Law Enforcement Agencies**

1. *Name of Agency:* . . . . . .

2. *Functions*: . . . . . .

3. *Number of enforcement/personnel*: . . . . . .

4. *Has the recent increased penalty led to an improved observance of consumer laws?*

   (a) Yes
   (b) No

5. *Does your agency receive complaints from consumers?*

   (a) Yes
   (b) No

6. *If yes, state number received since inception; stating number For each year:*

Year	No

7. *Please supply the following information*:

Item	No.
(a) No. of cases prosecuted	
(b) No. of arrests	
(c) No. of factories closed down	
(d) No. of laboratories at the disposal of your agency	

8. **List the products seized by your agency in the last five years:**

Product	Value (₦)

9. ***List the products banned or restricted by your agency:***

Product	Action

10. ***Have you ever had any role-conflict with related agencies***

(a) Yes

(b) No

11. ***If yes indicate as follows:***

Agency	Nature of Conflict

12. *How does your agency ensure protection of consumer rights?*

. . . . . .

. . . . . .

. . . . . .

13. *State the major achievements of your agency:*

. . . . . .

. . . . . .

. . . . . .

14. *What are the major constraints of your agency?*

. . . . . .

15. *How do you rate the level of consumer protection in nigeria?*

(a) High

(b) Low

16. *Are there sufficient consumer protection laws in Nigeria?*

(a) Yes

(b) No.

17. *Is the consumer adequately protected in Nigeria?*

(a) Yes

(b) No.

18. *Please give reasons for the low level of consumer protection in Nigeria.*

. . . . . .

. . . . . .

19. *What are the solutions to the low level of protection?*

. . . . . .

Module 5: **For Voluntary Consumer Associations**

1. *Name of association*: . . . . . .

2. *Year of formation*: . . . . . .

3. *Objectives of your association*: . . . . . .
. . . . . .

4. *Areas of consumer protection covered by your association*:
. . . . . .

5. *Membership strength:* . . . . . .

6. *Average yearly growth of membership*: . . . . . .

7. *No. of full-time staff*: . . . . . .

8. *No. of part-time staff*: . . . . . .

9. *No. of branches in Nigeria*: . . . . . .

10. *Name of locations*: . . . . . .

11. *How is your association funded?* . . . . . .
. . . . . .
. . . . . .

12, *Any affiliation to international organisation(s)?*
(a) Yes
(b) No.

13. *If yes, please name them.*
. . . . . .
. . . . . .
. . . . . .

14. ***How do you rate the members of your association?***

(a) Very consistent and active

(b) Passive and indifferent

(c) Others, specify . . . . . .

15. ***Problems facing your association.***

. . . . . .

. . . . . .

. . . . . .

16. ***Please list what you consider to be the major achievements of your association.***

. . . . . .

. . . . . .

17. ***How do you rate the level of consumer protection in nigeria?***

(a) High

(b) Low

18. ***Are there sufficient consumer protection laws in Nigeria?***

(a) Yes

(b) No

19. ***Are the consumers adequately protected in Nigeria?***

(a) Yes

(b) No

20. ***Please give reasons for the low level of consumer protection in nigeria.***

. . . . . .

. . . . . .

. . . . . .

21. ***What are the solutions to the low level of protection.***

. . . . . .

. . . . . .