



PRODUCT LIABILITY

A CRISIS OF DISINTEGRATION
OF THE MANUFACTURER?

-JUNE, 2020

INTRODUCTION

Every manufacturer of products is potentially exposed to liability associated with claims that the products, are either non-compliant with regulatory provisions or are in one way or the other defective and may or may not result in injury. No manufacturer wants to deal with the issues arising from product liability due to the wide range of impacts it could have on its business including but not limited to loss of customers or in extreme cases a total shut down of the business. In this article, we shall be looking at product liability through the twin prism of litigation and regulatory intervention, the crisis it portends to manufacturers, the exposure, and how they can mitigate such exposure and/or manage the crisis.

PRODUCT LIABILITY: WHAT IS IT?

Product liability can be described as that area of the law that seeks to hold accountable manufacturers, distributors, suppliers, retailers, and others who make products available to the public for the injuries those products inflict on consumers or users. It is the body of principles of the law as found in the statute books and case law that govern the liability of manufacturers/sellers for the injuries/losses caused by defects in their products to consumers and the public at large. While products are generally thought of as tangible personal property, product liability has stretched that definition to include intangibles. For example, the Federal Competition and Consumer Protection Act of Nigeria, 2018 (FCCPA) defines products to include goods or services¹.

¹ Section 167(1) of the FCCPA.

Issues arising from product liability may escalate to a crisis level if not adequately managed promptly. The complainant, in any case of product liability, may either commence litigation or approach the regulator. The FCCPA vide Section 146, provides different options for a consumer to enforce his or her rights. These options include approaching the manufacturer, the Federal Competition and Consumer Protection Commission (FCCPC), the regulator, or the court with competent jurisdiction.

CIVIL LITIGATION

Litigation is a major way that consumers seek redress for losses suffered because of product defects. While it may be difficult to state with a degree of exactitude, the volume of product liability cases in Nigeria, it cannot be overstated that there has been a steady development of the jurisprudence around product liability matters in Nigeria, the classic cases² that the Nigerian courts have decided lend credence to this position. In 2016, the Court of Appeal, Lagos Judicial Division, ordered Barewa Pharmaceutical Company to pay a fine of N1,000,000 (One Million Naira) for the sale of a contaminated baby teething mixture, which resulted in the death of several babies in the country³. The Court of Appeal also upheld the seven years imprisonment imposed on the company's Production Manager and its Quality Assurance Manager⁴.



Cause of Action and Jurisdiction

Manufacturers need to be mindful of certain elements when an action for product liability is brought against them. One is the court in which such matter is brought before, and the other is the cause of action. A clear understanding of these two elements will, to a large extent, determine the approach to take, and how best to respond to mitigate the exposures of the manufacturer.

² Nigerian Bottling Company Plc v. Edward Okwejiminor (2008) 5 NWLR (Pt.1079) 172 S.C.; Bottling Co. Ltd. v Ngonadi (1985) NWLR (Pt.4) 739; Osemobor v. Niger Biscuits Co. Ltd and Nassars & Sons [1973] NCLR 382; Nigeria Bottling Company Plc v. Demola Olanrewaju (2007) 5 NWLR (Pt.1027) pg.255; Boardman v. Guinness Nigeria Ltd (1980) NCLR 109; Okonkwo v. Guinness Nigeria Ltd (1980) IPLR 581; Nathaniel Ebelamu v. Guinness Nigeria Ltd (1983) 1 FNLR 42.

³ Barewa Pharmaceuticals Limited V. Federal Republic of Nigeria (2016) LPELR-40536(CA).

⁴ Egbele Austin Eromosele V. Federal Republic of Nigeria (2016) LPELR-40539(CA).

Section 272 of the Constitution of the Federal Republic of Nigeria 1999 (as amended), confers jurisdiction on the High Court to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, and liability is in issue. As such, the court with jurisdiction in an action for product liability is the High Court.

Thus, where a consumer commences an action for product liability in any other court, it stands the risk of being struck out for lack of jurisdiction. This is because jurisdiction is fundamental to adjudication, and where a court proceeds without jurisdiction to hear a case, the proceedings are a nullity, irrespective of how well the proceedings were conducted⁵.

Another critical element in commencing an action for product liability is the cause of action. The cause of action is the fact or aggregate of facts which establish or give rise to a right of action. It is a factual situation that gives a person a right to judicial relief⁶. It is thus the factual situation stated by the consumer which, if proved, will entitle the consumer to a remedy against the manufacturer. A consumers' cause of action for product liability can be founded on negligence, breach of contract and strict liability.

Negligence

An action for negligence may be brought against the manufacturer by a consumer(s). What this presupposes is that there is a duty of care owed by the manufacturer to the consumer in the manufacture of the product, and such duty has been breached by the manufacturer. The question then is, is there a duty of care owed by manufacturers to the consumers of their products? The answer to this is in the affirmative. The manufacturer's duty of care established by the Appellate Committee of the United Kingdom (UK) House of Lords (now known as Supreme Court), in *Donoghue v. Stevenson* is well-recognised by the Nigerian courts. The principle was cited with approval and applied by the Supreme Court in *Nigerian Bottling Company Limited v Ngonadi*⁷ and *Okwejiminor v Gbakeji*⁸.

⁵ *Madukolu & ors v. Nkemdili* (1962) LPELR-24023 (SC); *Okorochoa v. UBA PLC & Ors.* (2018) LPELR-45122(SC); *Onuyekweluje & anor v. Animashaun & anor* (2019) LPELR-46528(SC); and *Oloriode v. Oyebe* (1984) 5 SC 1.

⁶ *Nwosu v. APP & Ors* (2019) LPELR-49206 (CA); *A.G. Adamawa v. A.G Federation* (2014) LPELR-23221 (SC); and *NPA PLC v. Lotus Plastics Ltd* (2005) LPELR-2028 (SC).

⁷ [1985] 1 NWLR (Pt 4) 739.

⁸ (2008) LPELR-2537 (SC). See also, *NBC PLC v. Ibrahim* (2016) LPELR-41943 (CA); *7UP Bottling Company Plc v. Emmanuel* (2013) LPELR-21104 (CA); and *Nigerian Bottling Co (Nig) Ltd v. Ngonadi* [1985] 1 NWLR (Pt.4) 739.

For a consumer to succeed in an action for product liability founded on negligence, the consumer must by pleadings and evidence establish the three essential ingredients of negligence, to wit:

- a. That the manufacturer owes him or her a duty of care;
- b. That the duty of care was breached by the manufacturer; and
- c. That he or she has suffered damage as a result of the breach of the duty of care.

The first element is easily satisfied when the manufacturer-consumer relationship is established. The second element requires the consumer to show the action or inaction of the manufacturer that has led to the breach of the duty. In other words, what step was taken by the manufacturer that it ought not to have taken, or what the manufacturer failed to do, that was required of it either by statute or the standard expected of a reasonable man. The third element requires the consumer to establish a direct link between the damage suffered and the breach of the duty by the manufacturer. Where the manufacturer can show that there is no connection between the damage suffered by a consumer and its products, then the consumer will not succeed on this claim.

The consumer is required to not only prove the three elements aforementioned, but his or her case must stand on its strength and not the weakness of the manufacturer's defence. Where the consumer, *prima facie* establishes a case of negligence, the evidential burden shifts to the manufacturer to exonerate itself.

Where the consumer successfully establishes negligence, the consumer will be entitled to damages, and the manufacturer's liability cannot be restricted or excluded by any reference to any contract term⁹.



⁹ Sections 136-138 of the FCCPA.

A manufacturer will thus need to ensure the following to minimize its exposure to claims of product liability founded on negligence:

- a. the process for the production of the products follows a fool-proof system;
- b. the product defect is not discoverable within the limitations of science and technology at the time of distribution; and
- c. the product complied with the standards or requirements concerning the alleged defect¹⁰.

Breach Of Contract

Product liability claims may also be commenced under contract law or the sale of goods laws of the various states of Nigeria. This action may be initiated where a party has breached the terms of a contract in respect of the specification of the goods supplied or has failed to supply goods that are fit for purpose or are of merchantable quality. A party need not have suffered any injury to institute a product liability claim under contract law.

Also, section 132 of the FCCPA implies in every contract for the sale of goods that such goods shall be reasonably suitable for the purpose for which it was intended, are of good quality, free of defects, and must comply with the applicable standards set by industry regulators. It is thus immaterial that a contract does not provide for this. More so, the consumer has a right to return any goods that do not meet the implied terms within three (3) months of delivery, and the supplier is required to repair or replace the goods or refund the price paid by the consumer.

Strict Liability

Victims of product injury under the negligence regime are required to establish fault on the part of the manufacturer. This has been proposed to be an arduous task for different reasons. First, it is believed that the manufacturer knows its business and operations more than the consumers, and it can easily satisfy that it took all necessary steps. Secondly, it is assumed that the manufacturers have deep pockets and can engage experts to establish the quality of its products, as well as how the injury of the consumer is unconnected to its products; this informed judicial activism towards the adoption of strict liability to remedy wrongs done to claimants.

¹⁰ Okwejunior v. Gbakeji & anor (supra); Onyejekwe v. Nigerian Breweries Ltd (Unrep.) Suit No. E/129/72; Boardman v. Guinness Nigeria Ltd (1980) NCLR 109; Okonkwo v. Guinness Nigeria Ltd (1980) IPLR 581; Nathaniel Ebelamu v. Guinness Nigeria Ltd (1983) 1 FNLR 42; Dumuje v. Nigerian Breweries plc & Ors (2015) LPELR-25583; Nigerian Breweries plc v. David Audu (2009) LPELR-CA/A/235/05.



The concept of strict liability, as opposed to negligence, does not require the consumer to establish the fault of the manufacturer. The manufacturer is liable once the product is defective, even if the manufacturer was not negligent in making the product.

Strict liability comes to the aid of the consumer, where he cannot prove negligence. The courts have, in deserving cases, recognised strict liability. An example is the decision of the Supreme Court in *Okwejinor (supra)*, which found the Defendant/Respondent liable for an ailment suffered by the Claimant/Appellant after consuming the Respondent products containing a dead cockroach, despite the fool-proof production evidence advanced by the manufacturer to show that it took all reasonable care in its production process.

Furthermore, some statutes provide for strict liability on the part of the manufacturers where it is established that the consumer has suffered an injury as a result of the use or consumption of their products, such as the FCCPA vide sections 136-138 and the Law Reform (Torts) Law of Lagos State.



Regulatory Invention

There are quite a number of regulatory agencies charged with specific duties pertaining to the monitoring of commercial activities and ensuring consumer protection (directly or indirectly) in the country. Some of the agencies are the Standard Organisation of Nigeria (**SON**), National Agency for Food and Drugs Administration and Control (**NAFDAC**); the Federal Competition and Consumer Protection Commission (**FCCPC** or the **Commission**).

Federal Competition and Consumer Protection Commission (FCCPC)

The FCCPC, by virtue of the FCCPA, is the main authority charged with the primary responsibility of protecting and safeguarding the rights of consumers in Nigeria. It is empowered by law to, amongst other things, enforce the FCCPA and any other enactment with respect to competition and protection of consumers. The FCCPC is also authorized to carry out investigations or inquiries; resolve disputes or complaints, issue directives and apply sanctions where necessary; regulate and seek ways and means of removing or eliminating from the market, hazardous goods, and services¹¹.

National Agency for Food and Drugs Administration and Control (NAFDAC)

Apart from the FCCPC, the NAFDAC established by the National Agency for Food and Drug Administration and Control Act 2004 (NAFDAC Act) is also a frontline regulator of manufacturers, importers, and exporters of regulated products such as food, drug, cosmetics, medical devices, bottled water, and chemicals.

¹¹ Section 17 of the FCCPA.

Under the NAFDAC Act, NAFDAC has regulatory oversight over the quality and safety of products placed under its regulation. It is empowered to register, after appropriate analysis, regulated products and grant them the requisite permit for distribution into the Nigerian market.



As part of its statutory powers, issues relating to regulated product defects are dealt with, and it can make rulings or give directions as to how any identified shortcomings may be addressed. For example, NAFDAC has made efforts towards closing illegal drug markets (unlicensed premises) which sells either prescribed or over the counter (OTC) drugs nationwide.

Section 26 of the NAFDAC Act also empowers NAFDAC to conduct criminal proceedings, subject to the approval of the Attorney-General of the Federation, in respect of offences under Section 25 of the NAFDAC Act, or Regulations made pursuant to Section 30 of the NAFDAC Act. Hence, the manufacturer of a defective regulated product may be sanctioned administratively by the NAFDAC or may be prosecuted in a criminal action by the agency.

Standards Organization of Nigeria (SON)

Another regulatory agency is the SON, established by the Standard Organisation of Nigeria Act 2015 (the SON Act). The Standards Council established by the SON Act is responsible for ensuring product safety by setting out Nigerian industrial standards and conducting tests to ensure compliance with product standards. In addition, the SON also regulates the quality of products manufactured in Nigeria. The SON is also empowered to seize and destroy or prohibit the selling of any products that are below standard in Nigeria.

It is to be noted that the afore-mentioned regulatory agencies in Nigeria can within their own remit in Nigeria look into or intervene based on petitions forwarded to it by a consumer or a consumer rights group.



The Product Liability Crisis

Literally, crisis connotes a time of intense difficulty or danger, which requires tough and important decisions to be made as a matter of urgency to prevent further catastrophes.

The foregoing description, when juxtaposed with the potential and actual devastating effects of a product defect on a consumer or the society at large, as well as the consequential damage to the manufacturer, no doubt, presents product liability situations as a manifestation of real crisis to the manufacturer.

A consumer, may because of product defect, suffer direct or indirect financial losses, damage to his property, damage to his physical or mental health, or ultimately, loss of life. The society-at-large and the government may not be left out of the adverse effects of product defects, as some circumstances could lead to a situation of public nuisance requiring government intervention and expenditure of public funds towards abating and preventing further damage to the environment and the citizenry.

The quest for redress for these private and public losses suffered on account of product liability can be so enormous that it may irredeemably send a company out of business. Litigation and its attendant dissipation of time, labour and its associated financial costs are a sure distraction to the survival of any company. The wider effects of litigation could encompass various heads of damages and monetary compensations and fines that could be awarded against a manufacturer. The enormity of the adverse effects are further exacerbated by the fact that the rules of court permit mass actions in the form of a representative action to the extent that the persons being represented and the one representing them have a common interest and a common grievance¹². In such situations, damages likely to be awarded by the court becomes severely damaging to the economic viability of the manufacturing company.

¹² *Mozie & Ors V. Mbamalu & Ors* (2006) LPELR-1922(SC).

The situation is made worse by the fact that the interest of illiterates and less informed members of the society who who would ordinarily have not bothered to take any action for product defect, may have been envisaged by the provision of Section 151 (2) of the FCCPA. This provides that an accredited consumer protection group may commence or undertake any action to protect the interests of consumers individually or collectively, in any matter or before any forum contemplated in this Act. Thus, an accredited group may represent consumers where there has been an infraction of their rights as provided under the FCCPA. There seems to be no escaping for the manufacturer; it would appear in a society where consumer rights have come into the consciousness of the people.

The crises of product liability may also lead to seizures and destruction of products, as well as a seal-up of the manufacturer's factory. Self-regulation and own-prescribed remedies such as recall, or re-work of products also come with its attendant financial losses and consequences. Ford Motor spent roughly US\$3 billion replacing 10.6 million potentially defective Firestone tires while Mattel said the first of several toys recalls it announced in 2007 cut its quarterly operating income by US\$30 million. The regulators may also revoke the license of a manufacturer while individuals, especially at the senior management levels, may face criminal prosecution attracting penalties in the form of either fines, imprisonment or both, as it happened in the Barewa pharmaceutical case. Possible winding-up of the manufacturer is another major crisis to be confronted in all of these.

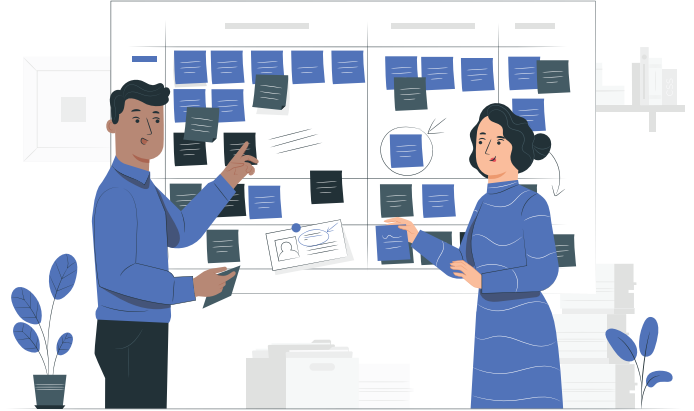
All of the foregoing comes with bad press, and attendant negative public perception, which, if improperly managed, would lead to diminished brand value, loss of reputation, and business and may ultimately lead to a disintegration of the organization. It would be a herculean task picking up from all these disruptions to the manufacturer's operations if at all it survives the fallout. Peanut Corp., based in Lynchburg, Va. for instance, was driven into bankruptcy since health officials linked tainted peanuts to more than 600 illnesses and nine deaths.

Managing the Crisis

Crisis management is the process by which an organization deals with a disruptive and unexpected event that threatens to harm the reputation, financial, and corporate existence of the organization or its stakeholders. It involves dealing with threats before, during, and after they have occurred.

This section of the article deals with hints at effective crisis management in every organization.

The responsibility for crisis management must lie with the top hierarchy of any organization – the Board. This is the start point for any effective crisis management strategy. The Board must put in place a strategy that ensures the following five steps:



Mitigate the Exposure of product liability

As a preventive and proactive step, every company must be able to determine the actual and potential risk exposures endemic in the processes of its manufacture, environment, and products. This must entail identifying the various personnel and departments that are involved in each stage of the processes and providing them with the necessary training on the job, as well as equipment and facility to ensure hitch-free conduct of their work that leads to safe and effective products.

A significant consideration in this wise is ensuring that the manufacturing processes meet with industry and regulatory standards and dictates to prevent accidents and product defects.

Furthermore, every organization must strive to have excellent working relationships with its sector regulators.

The best way of ensuring this is to maintain a good track record of regulatory compliance over the years in a manner that builds confidence in your processes and products with the regulators. This helps to mitigate regulatory intervention.

On standby for every manufacturer should be its Solicitors and Public Relations experts. While a company may maintain several lawyers in handling different issues for it, our experience has shown that it is always strategic to maintain that firm of solicitors that is sufficiently knowledgeable about your sector, your internal workings, and the nature of legal issues faced by the company. This points out the advantage of maintaining a Firm to manage the litigation portfolio of a manufacturer either from the perspective of project-managing the cases being handled by various lawyers for the manufacturer or directly litigating all or substantial part of the cases of the manufacturer. Also, a stand-by public relations expert puts the company in an advantageous position, but it is essential that they work with the legal advisors to ensure that their activities do not aggravate any legal breaches or violate the principle of sub judice.

Control and Management of Crisis

Once a crisis has arisen, the company must set in motion, machinery for control, termination, and mitigation of any adverse effects. This involves determining the most effective means of tackling the crisis while the public relations experts ensure the information management in a manner that the company drives the narratives.

Regulator engagement becomes very vital at this stage and underscores the need always to maintain a good relationship with the regulator through proactive regulatory compliance. This helps to mitigate or avert sanctions from the regulator and can also lead to the regulator, encouraging an amicable resolution with the consumers and the larger society.

In situations of litigation, an experienced firm with sector/industry knowledge is always the best. An understanding of the different defences outlined under each of the causes of actions discussed above will come to the aid of the manufacturer at a time like this.

Alternative Dispute Resolution mechanisms should be explored as much as possible because of the less public nature of the proceedings.

Crisis Monitoring

As the crisis rages on, periodic and regular assessment of the same is necessary. This ensures flexibility as against rigidity in the approach to resolution. All changes in the regulatory and compliance framework must be monitored and put into consideration in the deployment of flexible strategies.

Dispute Resolution

We have already given some guidelines concerning litigation above in terms of possible defences and approaches to engaging a firm of solicitors. A major strategic decision will have to be made as to how best to amicably resolve the case in the shortest possible time and with minimal reputation and financial damages to the manufacturer.

Nevertheless, there is always that question as to whether the regulator can be wrong, and many times they can be. A well-calculated decision must be made in such circumstances on whether to fight the case on the grounds of principles and preventing the setting of a wrong precedent.

At the end of every crisis, a post-mortem analysis is sacrosanct. The results of such analysis must, going forward, be incorporated into the business operations of the company towards the prevention of future crises or the mitigation of the same.

A good approach to do this, or indeed prevent product liability cases in the first place, is to conduct proactive regulatory compliance of the entire value chain of a manufacturing venture. This enables you to identify gaps in compliance measures, health and safety requirements and protocols and allows the company to fix such gaps. A high compliance track record helps in building a 'fool-proof' defence and attracting regulatory compassion in the event of a crisis. This aspect of crisis management in product liability enables the manufacturer to consider the following:

- a. Revise the existing crisis response plan as needed.
- b. Conduct crisis post-mortem and make needed changes to the company's procedures.
- c. Prepare "lessons learned" evaluation of the crisis.
- d. Evaluate insurance needs.
- e. Consider the need for a public relations consultant.
- f. Consider additional employee training.
- g. Consider additional preventive legal audit and counselling.



Conclusion

The risk of product liability is inherent in every business involved in the manufacturing or distribution of goods. Its attendant consequences and impact could be devastating, ranging from minor distractions or temporary disruptions of business activities to a total shut down of a business, either as a result of a court decision or regulatory decision. It is thus imperative for manufacturers to take all necessary steps to minimize the exposures as well as to properly manage a product liability crisis. The need to engage with the regulators as well as consult a solicitor to mitigate and manage the crisis cannot, thus, be over-emphasised.

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