



## A REVIEW OF THE EFFICACY OF THE STRICT LIABILITY THEORY IN PRODUCT LIABILITY LAW\*

### Abstract

Product liability law is founded on the twin principles of negligence and strict liability. The strict liability theory was advanced due to the need to still attach liability to negligent manufacturers without the rigorous and tiresome process of proof of fault by the victim, this rule can be traced to the rule in *Rylands v Fletcher*; that placed liability on anyone who brings in any dangerous item that may cause harm to innocent bystanders. The aim of this paper is to review the efficacy of strict liability theory in product liability law. The research methodology adopted was the doctrinal research methodology. From the findings, the legal framework on product liability in Nigeria includes; the Federal Competition and Consumer Protection Act, and the National Agency for Food and Drugs Administration and Control Act. Also, consumers can fully rely on strict liability once it is established that the defendant's product caused harm, injury or loss to the consumer. It is therefore recommended that a total adoption of the strict liability theory is sacrosanct to ensure protection of consumers from defective products.

**Keywords:** Consumer, Product Liability, Negligence, Manufacturer, Strict Liability.

### 1. Introduction

Product liability is the process of holding the manufacturer and others in the supply chain liable for placing defective products in the hands of a consumer.<sup>1</sup> Product liability law was developed for the need of modern society to provide consumers with redress from injuries and loss which results from the use and purchase of defective products.

Strict liability is the principle in which a person is held liable for the consequences of his actions irrespective of fault.<sup>2</sup> Liability arises when it is shown that a duty was owed and breached which subsequently led to injury to the person whom the duty is owed<sup>3</sup>. Liability is divided into fault liability and strict liability, and strict liability is liability without regard to fault.

Liability which occurs when a defective product has caused harm is known as product liability, and this defect may include various forms such as; manufacturing, product or a design defect. The simple fact of the existence of a defect is not sufficient for product liability to follow; however, the defect must have had a specific harmful result which has a causal connection to such defect. As such, the defect must have rendered the product hazardous, injurious, and unhealthy.

Product liability is the liability which is imposed on the seller, manufacturer or supplier of a product for harm caused to a consumer, user or any person affected by the use of a defective product.<sup>4</sup> Product liability is the area of law in which manufacturers, distributors, suppliers and retailers are held responsible for any injury products cause<sup>5</sup>. The law governing product liability for defective products, dates as far back as 1266 when England made the first legislation imposing criminal liability for the supply of corrupt food. The crown listed products such as, bread, beer,

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<sup>1</sup> J Eggen, *Toxic Torts in a Nutshell* (4<sup>th</sup> edn. West Publishing Co. 2010) 114.

<sup>2</sup> FN Monye, *Law of Consumer Protection* (Spectrum Books Ibadan 2003) 19.

<sup>3</sup> JO Enyia and IC Akam, 'Liability in Tort for Defective Product: A Review' *International Journal of Scientific and Research Publications*, (2018) (8) (8) 1.

<sup>4</sup> M McQuoid, *Consumer Law in South Africa* (Juta Legal and Academic Publishers 1997) 65.

<sup>5</sup> RJ Adams and JM Browning, 'Purchasing and Product Liability' *Journal of Purchasing and Materials Management*; (1991) (25) (2) 2-9.



meat and fuel as being regulated for quality and quantity, afterwards more laws were passed in order to regulate and protect food and services, and they were existing in England at that time.<sup>6</sup>

## 2. Definition of Some Concepts

**2.1 Consumer:** A consumer has been defined to include the buyer, the patient, the client, the hirer, the sailor, the bank customer, the insured or policy holder, and all end users of goods and services.<sup>7</sup> There have also been cases of people who borrowed defective products; the courts have also held them to be consumers of such products,<sup>8</sup> A consumer also includes anyone who can be harmed by the lack of employing due care by the manufacturer, which goes beyond the ultimate buyer to the end user of the product.<sup>9</sup> Some writers have proposed that the definition of consumer should be broadened to include anyone who consumes goods or services at the chain of production, this invariably is to include the ultimate user of the good who may or may not be privy to the contract of sale of the said product which caused the injury.<sup>10</sup>

**2.2 Consumer Protection:** Consumer protection has been defined as the system of preventing or reducing injuries or wrongs being occasioned by the manufacturer, and creating provisions for redress for the purchaser, consumer, user or disposer of the said product or service. As a generic term, consumer protection is all encompassing to include all those who stand in a converse position to the consumer in relation to contractual relations, and they include; manufacturers, marketers, retailers, wholesalers, and importers.<sup>11</sup> Consumer protection has also been defined as the act of safeguarding the interests of the consumer in issues relating to the supply of goods and services, fraudulent and hazardous practices, and also environmental degradation.<sup>12</sup> Adeleye<sup>13</sup> is of the view that consumer protection is the regulatory response to market failure, and very instrumental to the protection of consumer rights, safeguarding consumer interests, ensuring public health and safety in the market place.

**2.3 Manufacturer:** Any person who is engaged in producing or assembling new products is referred to as a manufacturer.<sup>14</sup> Thus within the ambit of product liability claims, it also covers retailers and even in some climes the repairers of the product. A manufacturer has also been defined as someone who produces the material or component part. This also covers any person who represents himself as a producer by putting his name, trademark, or other distinctive mark on the goods.<sup>15</sup> In the case whereby the manufacturer of the goods cannot be established, each supplier of the goods shall be held to be the manufacturer of the goods.

**2.4 Negligence:** this is failure to take that degree of care which is reasonable in the circumstances of the case or failure to act as a reasonable person. The tort of negligence requires that the defendant

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<sup>6</sup> WL Prosser, 'The Assault Upon the Citadel: Strict Liability to the Consumer' *Yale Law Review*, (1960) (69)1099-110.

<sup>7</sup> BB Kanyip, *Consumer Protection in Nigeria: Law, Theory and Policy* (Rekon Books Ltd 2005) 30.

<sup>8</sup> *Griffiths v Arch Engineering Co. Ltd.* [1968] 3 All E.R 217.

<sup>9</sup> R Lowe and GF Wordroffe, *Consumer Law and Practice*, (4th edn, Sweet and Maxwell 1980)1-2.

<sup>10</sup> RW Harvey and DL Parry, *the Law of Consumer Protection and Fair Trading* (5<sup>th</sup> edn. Buttersworth London 1996).

<sup>11</sup> Kanyip (n 7) 37.

<sup>12</sup> Monye (n 2).

<sup>13</sup> A Adeleye, 'an Appraisal of the Consumer Protection Council Act and Consumer Rights in Nigeria' (2017) (8) (2) *the Gravitas Review of Business and Property Law*; 116.

<sup>14</sup> AB Garner (ed) *Black's Law Dictionary* (7th edn, West Group 2004) 311.

<sup>15</sup> Product Liability Directive (85/374/EEC) Article 3.



is at fault in failing to prevent the harm, not that he intended the harm.<sup>16</sup> Negligence is also said to be an omission by a reasonable man to do what he ought to do when ruled by those requirements which ordinarily regulate the conduct of human affairs, or doing something which a prudent and reasonable man would not do.<sup>17</sup> A similar definition was also proffered by Akpata, J.S.C.,<sup>18</sup> who defined negligence generally as 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. The writers, Winfield and Jolowicz,<sup>19</sup> also suggest that negligence arises when a legal duty to take care is breached by the defendant, which as a tort will lead to damage to the plaintiff, although undesired by the defendant.

**2.5 Product liability:** this is the liability imposed on the seller, manufacturer or supplier of a product for harm caused to a consumer, user or any person affected by the use of a defective product.<sup>20</sup> Product liability is the area of law in which manufacturers, distributors, suppliers and retailers are held responsible for any injuries their products cause to users.<sup>21</sup> Monye<sup>22</sup> defines liability as the principle in which a person is held liable for the consequences of his actions irrespective of fault. Liability arises when it is shown that a duty was owed and breached which subsequently led to injury to the person whom the duty is owed.<sup>23</sup>

### 3. Historical Development of Product Liability Law

Product liability is the liability placed on a producer for the production, distribution, and sale of harmful products, which results in the buyer, user, or bystander suffering damage or injury and this is said to be a tortious liability.<sup>24</sup> Product liability as a tort makes producers and sellers strictly liable, this happens whereby the products is found to be hazardous or defective, which as a result led to great loss to person or property, injury or death.

A consideration of the history of product liability as seen in both the United States of America (US) and the United Kingdom (UK), shows that in both jurisdictions, the product liability regime was negligence based, yet the laws were formed in strict liability terminology, also the UK made use of the legislative revolution approach to encourage the growth of strict liability regime, while that of the US was fully developed by strict liability aided by case law in all the states.<sup>25</sup> The rise in product liability law and subsequent liability for production and distribution of harmful products

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<sup>16</sup> R Posner, *A Theory of Negligence* (Cambridge: Mass Belknap Press 1986) 77.

<sup>17</sup> *Blyth v Birmingham Waterworks Ltd* (1856) 11 Exch. 781.

<sup>18</sup> *Odinaka & Anor v Moghalu* (1992) 4 NWLR (Pt. 233) 1.

<sup>19</sup> P Winfield and J Jolowicz, *Duty in Tortious Negligence* (11th edn, Sweet and Maxwell 1979) 66.

<sup>20</sup> M McQuoid, *Consumer Law in South Africa* (Juta Legal and Academic Publishers 1997) 65.

<sup>21</sup> RJ Adams and JM Browning, 'Purchasing and Product Liability' *Journal of Purchasing and Materials Management*; (1991) (25) (2) 2-9.

<sup>22</sup> Monye (n 2) 19.

<sup>23</sup> JO Enyia and IC Akam, Liability in Tort for Defective Product: A Review *International Journal of Scientific and Research Publications*; (2018) (8) (8) 1.

<sup>24</sup> BV Eradi, 'Consumer Protection and National Consumer Disputes Redressal Commission' (National Consumer Disputes Redressal Commission 2013) 68.

<sup>25</sup> A Awad, 'The Concept of Defect in American and English Products Liability Discourse: Despite Strict Liability Linguistics, Negligence Is Back with a Vengeance!' *Pace International Law Review*; (1998) (1) (10)11.



can be traced to the US, as far back as the 17<sup>th</sup> century; this was known as tort reform or revolution.<sup>26</sup>

In the UK, unless and until the property is transferred to the buyer, the seller is responsible for the safety and risk of the goods. The goods are at the buyer's risk when the property is transferred, whether the goods are delivered or not. Generally, the risk passes with the property and the manufacturer was liable only to those with whom he had a contract of sale.<sup>27</sup> The only caveat to this rule was the concept of inherent dangerousness; drugs, blasting activities, where goods or activities were considered inherently dangerous.

The history of product liability dates as far back as the celebrated English case of *Winterbottom v. Wright*,<sup>28</sup> wherein the court considered the doctrine of privity of contract in determining liability. Most scholars widely interpreted the *Winterbottom* case as a precedent demonstrating the need for contractual privity before any tort rights accrued to an injured plaintiff. Thereafter, the locus classicus case of *Donoghue v Stevenson*,<sup>29</sup> laid the foundation of negligence by establishing the duty of care owed by the manufacturer to the consumer. However, the current shift to strict liability can be traced to the rule in *Rylands v Fletcher*,<sup>30</sup> which is on inherent dangerousness and resultant harm which introduced a more advanced area of tort law, by attempting to eliminate the age long fault principle.

In the US, the Missouri Supreme Court, pursuant to the prevailing common law rules of the time, held that the manufacturer was not liable because there was no contractual relationship. The manufacturer could only be liable to a third party, if the act were considered "necessarily and inherently dangerous to human life."<sup>31</sup> In such cases, most States in the US allowed for a third party; that is, one without a contract with the manufacturer, to sue under a theory of absolute, or strict liability. However, it was at the end of the twentieth century that the US applied a standard called strict liability. Strict liability is also called mandatory liability, which exists without regard to one's fault or whether a contract exists between the maker and user of a product, this doctrine of strict liability was adopted by Missouri a state in the United States of America in 1969.

#### **4. Legal Framework of Product Liability in Nigeria**

##### **4.1 Constitution of the Federal Republic of Nigeria, 1999 (as amended)**

The high court is conferred with the jurisdiction to hear and determine all civil proceedings, which the existence of any legal right, power, duty and liability is in issue.<sup>32</sup>

##### **4.2 The Federal Competition and Consumer Protection Act 2018(FCCPC Act),**

This is a holistic framework that tackles incidences of sale, manufacture and distribution of defective products. Every product manufacturer is expected to take reasonable care in his manufacturing processes to avoid injury being caused or suffered by those who are to use or consume his product as intended. The FCCPC Act also provides that every manufacturer,

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<sup>26</sup> B Field, *Activism in Pursuit of the Public Interest: The Jurisprudence of Chief Justice Roger J. Traynor* (Berkeley: Berkeley Public Policy Press, 2003) 103.

<sup>27</sup> Sale of Goods Act UK 1979 s 20(1).

<sup>28</sup> 10 M&W 100 (1842).

<sup>29</sup> (1932) AC 52.

<sup>30</sup> (1868) UKHL 1.

<sup>31</sup> *Heizer v Kingsland & Douglass Mfg. Co.*, 110 Mo. 605; 19 S.W. 630 (1892).

<sup>32</sup> Constitution of the Federal Republic of Nigeria, 1999 (as amended) s 272(1).



importer, distributor of all products is required to adequately label and clearly describe the goods in a way that it can easily be traced to the particular manufacturer or distributor.<sup>33</sup>

The FCCPC Act<sup>34</sup> totally protects consumers from defective products especially in the circumstances whereby the harm was occasioned either wholly or partly by the product. Therefore, the seller of such goods is totally liable for the loss, harm or injury caused by the defective product. The damage also includes personal injury to the consumer, and also any sort of damage to the consumer's property. The seller who supplied the product will be held liable whether the consumer bought the products or had a contractual agreement with the seller or not. Any victim of defective products has the absolute right to sue under the FCCPC Act, and the liability of the seller cannot be restricted or excluded.

#### 4.3 National Agency for Food and Drugs Administration and Control Act 1993

NAFDAC is empowered by its enabling Act, and is at the forefront of eliminating and drastically reducing the distribution of defective products in Nigeria. NAFDAC has the motive of removing fake and substandard foods, drugs, falsified medicines and dangerous cosmetics from the Nigerian market.<sup>35</sup> NAFDAC periodically destroys products which are made up of substandard and falsified medicines, unwholesome processed food products, unsafe cosmetics, and other counterfeit regulated products seized from importers and manufacturers.

4.4 The Counterfeit and Fake Drugs and Unwholesome Foods Act 1999(CFDUFA):<sup>36</sup> is also relevant to tackle and prohibit the sale and distribution of counterfeit, adulterated, banned or fake, substandard or expired drug or unwholesome processed foods. All offences under the CFDUFA are tried by the Federal High Court.<sup>37</sup>

#### 5. Review of the Strict Liability Theory

The decision of the House of Lords in the *locus classicus* case of *Donoghue v. Stevenson*<sup>38</sup> was the taking off moment for negligence as an independent actionable tort. Negligence has developed to become the preeminent tort, over older actions such as; trespass, nuisance and breach of statutory duty. The early cases of this tort, dealt with appositive acts rather than omissions, or with misfeasance rather than non-feasance. Liability for omission started at the beginning of the nineteenth century. Thereafter tremendous growth in the field of science and technology brought human beings more into direct contact, abolition of distinction between direct and indirect injury, abolition of forms of action, rapid increase in the number of accidents and faster traffic were among the main factors responsible for the development of negligence.<sup>39</sup>

However, the major issue with the negligence/fault principle is that the person who suffers injury may not be adequately compensated or claim damages, when he fails to prove that the negligent acts of the defendant led to his injury or loss. This may arise, whereby the defendant is able to show that the injury was not as a result of his negligent acts. This has been seen to occur

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<sup>33</sup> Federal Competition and Consumer Protection Act 2018(FCCPC Act) s 134.

<sup>34</sup> Ibid s 136(1)-(5).

<sup>35</sup> C Onyesi, 'NAFDAC destroys N515.73m worth of unwholesome products in North East' <<https://dailypost.ng/news/nafdac-destroys-n515-73m-worth-of-unwholesome-products-in-north-east/>> accessed 9 April 2024.

<sup>36</sup> Counterfeit and Fake Drugs and Unwholesome Foods Act 1999(CFDUFA) Cap C34 LFN, 2004.

<sup>37</sup> Ibid s 4.

<sup>38</sup> (1932) AC 562.

<sup>39</sup>BM Gandhi, *Law of Torts* (3rd edn. Eastern Book Company 2011) 228.



in most cases brought to court; the defendant shows a foolproof system of production and is thereby cleared by the courts of any form of liability.

On the other hand, strict liability in tort imposes a duty not to injure by the defendant. Ukwueze and Okiche<sup>40</sup> are of the view that the position regarding civil liability for defective products in Nigeria in times past was primarily based on the general principles of breach of contract/breach of warranty and negligence in tort. For a consumer who suffered injury or loss as a result of the use or consumption of a defective product, the option available for redress for breach of contract if the victim was the purchaser of the defective product was under the tort of negligence, if the victim could show proof of negligence against the manufacturer or supplier of the defective product. In the same vein, subject to the law of contract, the privity rule posed a serious challenge to non-contracting consumers, as they could not sue for the product defect even where the supplier is in breach of the contract for the supply of the product.

The writers<sup>41</sup> further assert that this negligence principle was followed to the letter by Nigerian courts, and a consumer who was unable to prove negligence against a manufacturer or supplier of a product did not recover any remedy for the damage suffered. Therefore, the full application of the negligence principle was such that in product liability cases, the courts adamantly refused to apply the doctrine of *res ipsa loquitur*, as they normally do in the general area of the tort of negligence; especially in accident cases, to establish a prima facie presumption of negligence against a defendant so as to shift the evidential burden of disproving negligence to the defendant.<sup>42</sup> Sadly, this strict requirement of the proof of negligence became a serious disservice to consumers who were victims and who suffered damage from defective products, and discouraged them from suing for redress, due to the difficult and cumbersome process of obtaining a favourable judgment from such type of cases.<sup>43</sup>

Therefore, subject to the strict liability theory, the manufacturer or supplier of a product may be held liable for any injury or damage to a consumer which was caused by the use of his product with or without any fault on his part. This action was often justified on grounds of public policy, which ostensibly demands that responsibility should be fixed wherever, and in whatever circumstance which will most effectively reduce the likely hazards of life and health inherent in the use and consumption of harmful products that reach the product market. This position was equally based upon and found expression in the economic policy of accident prevention and adjustment of loss distribution. Clark<sup>44</sup> also adds to this by explaining that it helps to create an economically motivated safety consciousness amongst all product manufacturers and sellers. This is because it provides the incentive and drive for product sellers and distributors to monitor the safety of products, which they stock and sell, and to cease to deal with unreliable manufacturers. Equally so, it is also evident that the manufacturer can also anticipate certain hazards and guard against their occurrence in a manner that the public or users of such products, which suffers harm from defective products cannot.<sup>45</sup>

Kanyip<sup>46</sup> also is of the view that the essence of a strict product liability regime is that the proof of fault is removed as a necessary condition of liability and, in its place, more rational

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<sup>40</sup> FO Ukwueze and EL Okiche, 'Product liability in Nigeria: a Paradigm Shift from Fault-based to Strict Liability Regime' *Commonwealth Law Bulletin*; (2020) 395-416.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> A Clark 'The Conceptual Basis of Product Liability' (1985) (48) *Modern Law Rev*; 325.

<sup>45</sup> *Escola v Coca Cola Bottling Co. of Fresno*, (1994)24 Cal 2n 453, 2nd 436.

<sup>46</sup> Kanyip (n 7) 296.



policies, such as; enterprise liability, loss spreading, accident prevention and consumer expectations, are adopted as justifications for the adjustment of accident losses. Also, in addition to policy considerations, the other reasons advanced for the strict product liability theory also includes the fact that, by the manufacturer putting his product on the market, he impliedly guarantees the quality of such products. The manufacturer should, therefore, be held liable for any harm which results from the use of his product.

The theory of strict product liability has been criticized by some writers<sup>47</sup> as being capable of leading to an explosion in product liability litigation with increase in the percentage of verdicts which would be highly favourable to claimants and increase in the size of compensation or awards, which will result in huge financial losses by insurance companies, which was experienced in jurisdictions such as the US upon the adoption of the strict liability route by filing of mass tort actions by victims of defective products. The writers by responding to this criticism are of the opinion that fear of increase in litigation should not be used as a yardstick to deny deserving consumers redress, as on the contrary this would result to an extended unwarranted subsidy to manufacturers to the detriment of consumers.<sup>48</sup>

Strict product liability has also been criticized and viewed negatively because it involves attribution of liability that implies judgment of blameworthiness or culpability which conjures up feelings of regret, shame and guilt. However, Kanyip<sup>49</sup> in his own view has argued that, under the strict liability regime, the producer is merely seen as a better party to absorb loss, and that tort liability rarely invokes feelings of contrition, guilt, regret, shame, remorse and the like, on the part of the defendant who has been asked to pay compensation for an injury. The concerns about strict product liability having the potential to restrict manufacturers from seeking new improvements on their products for fear of liability, can be discountenanced by the fact that, since the existing liability regimes in contract, negligence and even criminal law, have not deterred manufacturers from seeking to improve their products or from adopting new methods of production, it is reasonably expected that these manufacturers are not likely to be deterred by the application of the strict liability theory.

There have also been various arguments that has been put forward, that the adoption of strict product liability will subject manufacturers to an avalanche of false claims based on fictitious defects and fake injuries. However, according to the writers Ukwueze and Okiche,<sup>50</sup> this argument seems to miss an important point which is that claims of injuries arising from consumption or use of products are usually thoroughly investigated. Equally so, the award of compensation is not awarded *ipse dixit*; that is, dogmatically on the allegation of a complainant without the required proof of liability. Furthermore, the claimant has the burden of proving that his injury was caused by the product which he has alleged to be defective. It must also be pointed out that these manufacturers and their insurance companies that ultimately bear liability have an interest in, and usually do investigate the claim, thus it will simply not be easy for a fictitious claim to scale through those rigorous processes and escape detection.

Therefore, the contention on whether product liability is strict or fault-based is a matter of deliberate policy for different legal jurisdictions, and may be introduced by case law or legislation or a combination of both. The strict liability regime applies in various forms in the US and the

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<sup>47</sup> RS Summers, 'Strict Liability in Tort for Personal Injuries Caused by Dangerously Defective Products – Aspects of the American Experience' in L Kalliomaa (ed) *Lectures on Products Liability: Report from a Jubilee Seminar* (Department of Private Law, University of Helsinki 1990) 23–47.

<sup>48</sup> Ukwueze and Okiche (n 40).

<sup>49</sup> Kanyip (n 7).

<sup>50</sup> Ukwueze and Okiche (n 40).



European Union. The success rate and attractions of the strict product liability regime encouraged Nigerian interest and consumer groups, over the years, to advocate for its adoption.<sup>51</sup>

Hart and Honore<sup>52</sup> also sheds more light on the theory of strict liability, by stating that strict liability does not necessarily construe a conduct as wrongful in itself but when the harm was caused by engaging in risky activities, it will be regarded as a wrongful conduct. The premise is that while the law does not expressly forbid some activities, they are frowned upon such that in cases of resulting harm, liability will attach on the defendant without proof of fault for he acts at his own peril, and the plea that he could not by taking due care have prevented the harm, will not avail him.

The issue with the position of Hart and Honore on strict liability is that it is too broad in interpretation. Although, it is a good departure from the difficult to prove rigid fault principle, the use of the word; ‘risky activities’, does not clearly protect the injured party. The courts are still left with the duty to dictate what activities fall into the purview of strict liability. Cane<sup>53</sup> states that, strict liability is not liability in the absence of fault but liability regardless of the absence or presence of fault. This clearly means that, the defendant must be held liable if it is shown that he produced the goods, whether he was at fault or not, the defendant must be strictly held liable for any injury/loss suffered by the injured party. This position implies that, the manufacturer must take due care in his manufacturing process to ensure that no risk or injury is occasioned. However, if such risks occur, the manufacturer will still be held liable, and must pay for the loss or take responsibility for any harm that occurred.

Vandall<sup>54</sup> noted that strict liability is not a form of negligence, and thus negligence should never be used to qualify defect under strict liability. In negligence, the courts will consider the proximate cause of the defect by asking such questions in consideration if the damage was foreseeable by the defendant, the occurrence was natural, remoteness of the injury, or whether the defendant’s action was the sole proximate cause of the damage. However, in strict liability the court is asked to face directly the question of whether the risk of the activity exceeds the benefit. Product liability affects all in the supply chain, for example; the manufacturers, distributors, suppliers, retailers, and all others who make products available to the public, they are usually held liable for the injuries those products may have caused.<sup>55</sup> This liability in question, has a wider meaning, however, product liability, is usually limited to products in the form of personal property which is real and comprehensible. This liability refers to the full culpability of any or all parties who were involved in the process of production of the goods which resulted in the damage which the product caused. This includes those at the very top of the production chain; which is usually the manufacturer of part of the large entity, the person who assembles, the wholesaler, even down to the retail store owner; at the bottom of the chain. All products that are found to contain any extrinsic defects that have caused harm to a consumer of the product, or someone the product was given to will be liable to be sued for product liability. Depending on the facts of the case and the jurisdiction the matter comes up, products liability claims can be based on negligence, strict liability, or breach of warranty of fitness.<sup>56</sup>

<sup>51</sup> AD Badaiki, ‘The Legal Regime of Products Liability in Nigeria’ (2001) (5) (1) *Modern Practice Journal Finance Investment Law*; 36.

<sup>52</sup> HLA Hart and T. Honore, *Causation in the Law* (2nd edn. Oxford Clarendon Press 1985) 26-27.

<sup>53</sup> PF Cane, ‘Physical loss, Economic loss and Product Liability’ *Law Quarterly Review*; (1979) (98)117.

<sup>54</sup> F Vandall, ‘Design Defect in Products Liability: Rethinking Negligence and Strict Liability’ *Ohio State Law Journal*; (1982) (43) (1) 62-87.

<sup>55</sup> FCCPA 2018 Part XVI s 134-145.

<sup>56</sup> *Parker v Oloxo Ltd and Senior* (1937) 3 All E.R. 42.



## 6. The Efficacy of the Strict Liability Theory in Product Liability Law

Product liability law is an area of law which is charged with the responsibility of ensuring that there is proper accountability, this area of law also advocates for full compliance of the statutes and rules by producers, and this legal responsibility, covers the manufacturers and those in the chain of distribution and retail. Product liability law ensures that producers are held responsible for any injury or death inflicted by the products they produce and sell. The countries rules as to the liability of the respective parties involved, as products go from manufacturer to consumer, will change in accordance with a nation's rule of law which all and sundry must abide by.<sup>57</sup>

Product liability arises when goods are defective such as they cause harm or loss to the consumer. Goods that are not fit for the purpose, and those that are not of merchantable quality may in many instances harm the consumer. For example, in the medical industry, wrong prescription may cause serious health problems. When wrong drugs are sold to an unsuspecting consumer, this amount to drug abuse and such drugs are not fit for the purpose they were purchased by the consumer because the drug cannot treat the ailment. In addition, sale of expired drugs to a consumer may cause serious health problems as well. Expired drugs are not of merchantable quality, nor are they fit for the purpose for which they were bought. Once a consumer purchases a particular product, he may suffer a variety of losses which is as a result of some defect in the product, this includes; personal injury, injury to the product itself or some other property, and pure economic loss.<sup>58</sup> Therefore, the best standard, which ultimately emerged for determining if a product is defective, is what is referred to as the reasonable expectations test. This test uses an objective standard, usually employed by the jury/judge as a question of fact, and is reminiscent of the implied warranty of merchantability and fitness for purpose. The question usually asked is if the product met the reasonable expectations of the consumer, if not, then it is labeled as defective.<sup>59</sup>

Product liability is the branch of tort law that demonstrates the conditions under which the producers and sellers of defective products are liable for any injury or damages that may occur due to the use of their products. This is a cultural trend away from philosophical individualism to philosophical collectivism. Privity, warranty and negligence were the three legal doctrines that made up product liability law, at the dawn of the twentieth century, however, one after the other they had fallen into disrepute and were replaced by the strict liability theory. However, the negligence theory is still highly respected by legal scholars and judges.<sup>60</sup>

The application of the strict liability theory has been reflected in some Nigerian cases, for instance the Court of Appeal in *Ebelamu v Guinness (Nig.) Ltd.* was of the view that there must be the slightest option of a defect in a product, and that is where its liability begins. In *Fijabi Holdings and another v Nigerian Bottling Company and NAFDAC*,<sup>61</sup> the court awarded damages against the defendants for negligence which led to the claimant's loss of earnings and respect. The case also raised a lot of issues as to how adequate compliance with the applicable standards can be enforced and monitored. In *Chevron Nigeria Ltd and Anor v Kehinde Omoregha and Ors*,<sup>62</sup> the court ruled that the defendants were negligent which resulted in harm/loss to the claimant. The

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<sup>57</sup> All Answers Ltd, 'The purpose of Product Liability laws' (Lawteacher.net, August 2018) <<https://www.lawteacher.net/free-law-essays/commercial-law/the-purpose-of-product-liability-laws-commercial-law-essay.php?vref=1>> accessed 2nd April 2024.

<sup>58</sup> KJ Tillman, 'Product Defects Resulting in Pure Economic Loss: Under What Theory Can a Consumer Recover' (1985), <<http://scholarship.law.missouri.edu/mlr/vol50/iss3/6>> accessed 3 April 2024.

<sup>59</sup> DA Fischer, 'Product Liability-The Meaning of Defect' (1974) (39) *Missouri Law Review*; 339, 348.

<sup>60</sup> J Kirkpatrick, 'Product Liability Law: From Negligence to Strict Liability in the US' *Business Law Review*; (2009)48.

<sup>61</sup> (Unrep) Suit No: LD/13/2008, High Court Lagos Division; Wednesday 15th February, 2017.

<sup>62</sup> (2015) LPELR- 24516 (CA) 15.



defendants were also ordered to pay damages for bodily harm and loss of earnings. In *Barewa Pharmaceuticals Nigeria Limited v Federal Republic of Nigeria*,<sup>63</sup> the popular “My Pikins Case”, the appellants were found guilty of violating the provisions of the Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act,<sup>64</sup> by circulating a product named “My Pikin” a teething mixture that led to the death of some children after taking the syrup.

Akinrinmade<sup>65</sup> is of the view that progressive judgments by courts is in essence to improve, and update the law in order to ensure its efficacy is the practice which is acceptable all around the world and referred to as judicial activism. However, the major challenge faced in Nigeria is that courts deal with live issues, and most Nigerians find it difficult if not impossible to bring product liability claims to court, consequently, courts most times are not seized of such cases to afford them the opportunity of espousing and extending the law if the situation so demands. Most times, Nigerian courts are not willing to expand applicable common law principles, by placing too much reliance on precedent, while some judges on the other hand have the belief that it is the exclusive preserve of the legislature to effect a change in the provision of the law where there is defect. While this view to some extent may be correct, it is not valid in all situations, this is because laws and statutes are encapsulated in words which ordinarily are not instruments of mathematical precision, coupled with the fact that laws or statutes cannot envisage all the circumstances which may arise in future, so as to cater for and provide remedies in such circumstances. Furthermore, the facts and particular circumstances surrounding the application of a statute or case may change, in such unprecedented circumstances, judges are empowered to fill in the gaps and also extend the frontiers of the law or statute by adopting appropriate principles of law in resolving the case before them.<sup>66</sup>

Akinrinmade states further that taking a cursory look at the development of the negligence principle under English law of tort, it shows that it was not spontaneous, as the principle of negligence evolved gradually and till date it is still been extended, as the categories of negligence are not exhausted. The journey towards the adoption of negligence principle as one of the theoretical basis for the resolution of product liability claim started with liability being imposed where the property was inherently dangerous, as shown in the case of *Dixon v Bell*,<sup>67</sup> this was also followed by the case of *Winterbottom v Wright*,<sup>68</sup> and also the case of *Longmeid v Holliday*,<sup>69</sup> which outlined the circumstances when a non- privity could claim for damages thereby laying to rest the privity doctrine.

Furthermore, every consumer has a clear desire and expectation to consume a safe product which will not put his life and organs in danger. In the unfortunate incident that such a product is consumed and it results into an injury, the reasonable expectation is such that the loss occasioned should be adequately compensated.<sup>70</sup>

At present, tort law in Nigeria is based on the principles of negligence and strict liability. However, when dealing with product liability claims, Nigerian courts usually rely on the precedent of *Donoghue v Stevenson*, and for a long time, the law had refused to take into consideration the

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<sup>63</sup> (2019) LPELR 47385.

<sup>64</sup> Cap C 34 LFN 2004.

<sup>65</sup> GO Akinrinmade, ‘Prospects and Challenges of Sociological Conception of Law: The Nigerian Experience’ *OIDA International Journal of Sustainable Development*; (2013)11.

<sup>66</sup> *Ibid.*

<sup>67</sup> (1816) 5 M. & S. 198.

<sup>68</sup> (1842) 10 M. & W 109.

<sup>69</sup> (1851) 6 Ex.761.

<sup>70</sup> Akinrinmade, (n 65).



peculiar circumstances of our environment, whereas the principle in the UK has since been extended, and the additional theory of strict liability adopted with judicial precedents to back up the theory as a result of emerging circumstance and challenges posed by negligence in this area.<sup>71</sup>

The point to be noted is that product liability claims are complex and intricate. For example, in order to establish a manufacturing defect relating to the adulteration of a consumable product, such product must be subjected to laboratory analysis within the shortest possible time, immediately following the period when the defect was noticed or detected. However, there are various factors which are averse to taking such steps in Nigeria, for example a reasonable number of the people live in areas where easy access to laboratory facilities is not easily available. Therefore, the failure to subject the alleged defective product to laboratory examination within a reasonable period of time may adversely change the taste and condition of the product, thereby making it impossible to establish the important element of causation, which is a condition precedent to the proof of liability under the negligence principle. Secondly, an average Nigerian has a monthly income which is very low, and it is therefore very difficult if not impossible to oppose the otherwise sophisticated evidence usually brought forward by most manufacturers of defective products such as beverages or soft drinks.

Finally, on this issue, such plaintiffs do not have clear knowledge of the intricacies and complexities of manufacturing processes which may assist in giving them an insight into the issue whether the manufacturer was negligent or not. Flowing from these issues above, Akinrinmade<sup>72</sup> posits further that the challenges and frustration caused by solely relying on the negligence theory ought to be addressed, and thus Nigerian courts should be willing to extend existing principles of strict liability when the need arises.

## 7. Conclusion/Recommendations

Every consumer needs to be adequately protected from defective products. From the analysis above, it is clear that the common law doctrine of proof of negligence has not totally protected consumers' rights, hence the adoption of the strict liability theory. The passage of the FCCPA which provides for strict product liability is a step in the right direction which will encourage more victims to seek redress in court and enforce their rights. However, the issue of cost of litigation and the delay in obtaining justice is also a grey area that will need intervention by the courts in order to afford victims the opportunity to obtain justice, and also enrich our jurisprudence with notable judgements on the principle of product liability.

Therefore, courts in Nigeria have the duty to fully apply the strict liability principle to encourage victims to enforce their rights. Strict liability is very intriguing and has instrumental value for both the citizens and the nation in general, as it promotes safety and improves the standard of living of the populace. It is therefore recommended that; the Nigerian judicial system needs to undergo a thorough and rigorous tort reform to fully adopt the strict liability rule. This is geared towards adequately protecting the citizens from harm and injury caused by defective products.

Looking at the FCCPC Act, it is clear that liability is also extended to all those in the supply chain, therefore, it is also recommended that the regulatory agencies should invest in creating awareness to retailers, suppliers and distributors. They should be educated to insist on quality from manufacturers, and also boycott sale of defective products.

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<sup>71</sup> Ibid.

<sup>72</sup> Ibid.