

# THE PLACE OF THE TORT OF NEGLIGENCE IN THE LAW OF CONSUMER PROTECTION

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## **Abstract**

Under normal circumstances, parties bound by contract are those that should be held liable when there is a breach of any of the obligations owed by the parties. But in the sphere of consumer protection, it is not all the time so when the consumer is not in direct contractual relationship with the manufacturer/producer. The essence of this paper is to examine the position of the tort of negligence, focusing on the tripod on which the tort stands and its application in the protection of the consumer.

## **Introduction and Historical Development of the Tort of Negligence**

The tort of negligence is the premise on which a consumer injured by the unreasonable act of another, more importantly a third party can anchor his legal action. It is the basis of tortious liability for consumers in the sphere of consumer protection. It is applicable in Nigeria because of our colonial heritage. The negligence concept had roots in English jurisprudence as far back as the early sixteenth century when it merely attached liability to those who professed competence in certain callings. According to Winfield (1926), the negligence concept owes its development to the era of industrial revolution, which swept across the western world in the eighteenth and nineteenth centuries. The revolution led to the construction of roads and railroads, machinery and other newly developing technologies to match the fast growing industries. This growth in converse, led to the growth in the number of injuries to persons and property. These injuries did not fit within the intentional tort framework, however, because most of them were not intended. Some injuries were simply the unavoidable consequences of life in a high-speed technologically, advanced modern society (*Metzger, Mallor, Barnes, Bomers and Phillips, 1992*). Holding infant industries totally responsible for all of the harms they caused, could have seriously impeded the process of industrial development. To avoid such a result, new tort rules were needed. In response to these growing social pressures, the courts created the law of negligence, but its present wide tentacles lie in the famous decision of the English Court in *Donoghue v. Stevenson* (1932) which has subsequently, become the watershed of the law of tort as it has encouraged the use of tort of negligence for such recovery. The case climaxed in establishing that a person may owe a duty to take care to another even though there was no privity of contract between them. Negligence comes in aid of such non-contractual party against the manufacturer. The House of Lords in that case, held that the manufacturer or producer of an article of food, medicine or the like, sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by ordinary inspection, any defect there may be, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defects likely to cause injury to health or property, (*Igweike, 2002*).

In consequence of the acceptance of the common law rules, the concept applies in Nigeria as a common law country. Negligence focuses on conduct that falls below the legal standards which the law has established to protect the members of the society against unreasonable risks of harm (*Okwejininor V. Gbakeji 2008; Blyth v. Birmingham Waterworks Co., 1856*).

## **Meaning of Negligence**

The concept has been judicially defined to mean 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. The Supreme Court of Nigeria described negligence to mean lack of proper care and attention, careless behaviour or conduct, state of mind which is opposed to intention, the breach of a duty of care imposed by common law and statute resulting in damage to the complainant. The general concept of reasonable foresight is the criterion of negligence *UTB Nig Ltd v. Ozoemena, 2007*).

The statutory definition/description of the nature of tort of negligence as contained in Sec 217 of the Torts Law of Anambra State was judicially confirmed by the Supreme Court in (*UTB Nig Ltd v. Ozoemena*). In further analysis of the concept, Lord Wright declared in *Lochgelly Iron and Coal Co. v. M' Mullan*, 1934, that “negligence means more than heedless or careless conduct, whether in omission or commission, that it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owed”. This is in consonance with the statutory description of the concept as a civil wrong which consists of breach of a legal duty to take care which results in damage which may not have been desired or even contemplated by the person committing the breach, to the person to whom the duty is owed (Torts Law of Anambra State, 1991, Torts Law of Enugu State 2004, *UTB Nig Ltd v. Ozoemena* 2007). Textually, it is the breach of the legal duty to take care which results in damage undesired by the defendant to the plaintiff (Rogers, 1989).

It then follows that where the defendant has done something which a reasonable person would not do or has refrained from doing something which a reasonable person would have done and such commission or omission caused injury to the person or property of the plaintiff, it is a civil wrong which is referred to as the tort of negligence.

### **Ingredients of the Concept**

The tort of negligence is predicated on the existence of these three premises namely:

- i. The existence of a duty to care
- ii. The breach of such a duty and that
- iii. The resultant damage was caused by the breach of that duty to care.

These three ingredients have been so aptly tied up in the statement of *Lord Wright in Lochgelly Iron and Coal v. M'Mullan* thus; “negligence means more than heedless or careless conduct...it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owed”.

So negligence essentially involves a breach of a legal duty owed to another which results in some legally recognizable injury to the other’s person or property. A plaintiff in a negligence suit must prove that the defendant had a duty not to injure him, that the defendant breached that duty and that the defendant’s breach of the duty was the actual cause of his injury.

#### **(i) Existence of the Duty of Care**

The basic idea of negligence is that each member of the society has a duty to conduct his affairs in a way that avoids an unreasonable risk of harm to others and their property. That means a person has a duty to protect others from injury resulting from his own actions and this liability extends to actions by third parties that the individual can reasonably anticipate to occur Bass and Wiesen (1983). In relation to this duty Lord Atkin, explained its nature in the following words:

A manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer’s life or property owes a duty to the consumer to take reasonable care (*Donoghue v. Stevenson* 1932).

In analysing the import of the above dictum with regard to duty of care, three questions call to mind first, what is the subject matter of this duty of care?, secondly to whom is this duty owed? and thirdly who really owes this duty?

In respect of the first question, the court in *Donoghue v. Steveson* while dealing with a bottle of ginger beer referred to a 'Manufacturer of Products' inferring that aside the bottle of ginger beer which is the subject matter of the case before the court, other products are inclusive and so, products here are not restricted to only goods and drinks but the principle has been extended to include other manufactured products, thereby widening the meaning of product to comprise as Badaiki affirmed "something which has emerged out of a production process". Accordingly, products had been held to include lifts: (*Paine v. Colna Valley Electrical Supply Co*, 1936); undergarment: (*Grant v. Australian Knitting Mills Co*, 1936); motor car: (*Vacwell Engineering Co Ltd V B.O.H. Chemicals Ltd*, 1971); hair dyes: (*Watson v. Buckley Carborne Garret & Co Ltd and Wyrovogs Products Ltd*, 1940); industrial chemicals: (*Haseldine v. Daw* 1974); biscuits: (*Osemebor v. Niger Biscuits* 1973); kiosks: (*Nigerian Bottling Co. Ltd v Ngonadi*, 1985); and Petroleum Products: (*Petroleum Act, Cap P10 Laws of the Federation of Nigeria* 2004), etc. Anything that is the end product of a manufacturing process qualifies as a product which can constitute the subject matter of a tort of negligence.

To who is the duty of care owed? In answer to this question, Lord Atkin in his judgment maintained that the concept of this duty was based mainly on reasonable foresight explaining that the duty is owed to anyone to whom injury is reasonably foreseeable, whether it is injury to the person of the consumer or damage to his property (Stephenson, 2000). In the course of explaining who the plaintiff should be, he conceived the neighbour principle when he stated that: 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 or directly affected by my acts that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

It seems therefore, that a manufacturer owes no duty of care to a particular person but to all or any person who uses or consumes his product (Enemu, 2002). So the friends of the purchaser are included. It should be remembered that in *Donoghue's* case, it was a friend of Mrs. Donoghue who bought the ginger beer for her, members of the purchaser's family or guests to whom the product will be offered (Metzger, 1992), persons to whom the purchaser has given or lent the product, (*Harvey and Parry*, 1996); employees who handle it, (*Vacwell Engineering Co. Ltd. v. Boh Chemicals Ltd*, 1971); and even bystanders who are injured by it, (*Stenet v. Hancock and Peters*, 1939).

The issue of bystanders deserves more elucidation. In *Stenet v. Hancock and Peters*, where a flange came off the wheel of a lorry and the owner took it for repairs to the second defendant who arranged for the repairs. A few hours later, the flange came off the vehicle again while being driven along the road. It struck the claimant who sustained personal injuries. In holding that the second defendant repairer (Peters) was liable, the court explained that he was liable by reason of his negligently repairing a vehicle which he knew was going to be used upon the road and which he knew would, if so used, be liable to inflict injury upon a passerby.

Concerning this duty, the age of the consumer is immaterial. A child born disabled has a right of action in negligence in respect of pre-natal injuries as provided in the English *Congenital Disabilities (Civil Liability) Act* of 1976, as where for example, the foetus is affected by drugs having a teratogenic effect (*Harvey and Parry*, 1996). It is immaterial that the product was given away free.

Thirdly, the liability in *Donoghue v. Stevenson* is to be borne by the manufacturer of products but the rule has been held to extend to any person in the distribution chain provided the claimant/plaintiff can establish that any such person has been at fault in relation to the product. It covers the manufacturers of components (*Evans v. Triplex Ltd.*, 1936), assemblers: (*Howard v. Furness Ltd.*, 1936), distributors: (*Parker v. Oloxo Ltd.*, 1937) and retailers: (*Fisher v. Harrods Ltd.*, 1966). Thus any business person who forms the link in the chain of distribution may potentially be liable though the manifestation of the duty may vary according to the defendant's position in the chain (Macleod, (2002).

The English Consumer Protection Act of 1987 in recognition of the existence of the numerous hands in the chain of distribution makes provision for a range wider than the contracting parties as people susceptible to liability should the consumer suffer injury in the course of consumption of any product. The Act imposes liability on:

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1. The Producer,
  2. Any person who, by putting his name on the product or using a trade mark or other distinguishing mark in relation to the product, has held himself out as the producer of the product.
  3. Any person who imported the goods into a member state of the EC from a place outside the member states in order, in the course of business, to supply it to another.

In relation to a product sub-section 2 of section 1 defines a producer as-

- a) The person who manufactured it;
- b) In the case of a substance which has not been manufactured but has been won or abstracted, the person who had won or abstracted it (this covers mining and quarrying);
- c) In any other case, a person who has applied an industrial or other process affecting the essential characteristics of the product (Lowe and Woodroffe, 1996).

This subsection incorporates other persons who may have affected the nature of the product in such a substantial manner that it is no longer retaining its original character at the time of production as liable as the original producer. It also includes an importer of a product, not being the producer but is the source through which the product found its way into a particular country. It is invariably saying that if the consumer holds the importer, the importer can then hold the actual producer or bears the brunt alone if he fails to do so. The liability of the manufacturer depends on the state in which the product was before it got to the consumer. Because as stated by Lord Atkin, the manufacturer will be liable where..." he intends the products to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination..." Conversely, where there is the possibility of an intermediate examination, this would definitely shift liability where the manufacturer can prove that the product became defective based on the activity of the intermediary. This is so because without an interference by the intermediary, the product would have reached the consumer in the state in which it left the manufacturer but where it is tampered with it, may have been probably defaced and contaminated, and where the manufacturer can prove that the product was meddled with when it was no longer within his confines and control, this automatically shifts the liability to the next person in the production chain and so it continues till the liability is finally settled on the perpetrator of the act.

The next set of people in the distribution chain before the product reaches the purchaser and probably the ultimate consumer are the distributors and the retailers who are usually referred to as middlemen and to be liable they have to perform some work on the products other than mere distribution (Enemu, 2002).

The distributor who may be held liable in negligence where the situation so demands, as was the case in *Watson v. Buckely, Osborne, Garret & Co And Wyrovovs Products Ltd, 1940*; where the plaintiff's hair was dyed by the first defendant at a hair dressing outlet with a product manufactured by the third defendant and distributed by the second defendants. The product instead of containing 4 percent acid contained 10 percent. Its use on the plaintiff made him contract dermatitis. The distributors had advertised the dye to be absolutely safe and harmless and needed no preliminary test before use. They were held liable in negligence. The basis for their liability was that by their advertisement, they intentionally excluded interference with or examination of the product by the consumer and by this, they brought themselves into direct relationship with the plaintiff. *Kubach & Anor v. Hollands & Anor 1937*; is another case where the negligence of a distributor as a middleman came to the fore. There, a 13 year old girl lost an eye in an accident in a chemistry laboratory. The black powder purchased by her teacher was labeled manganese dioxide by the retailers, but it was in fact another chemical which was dangerous when heated. The manufacturers informed the distributors that the powder must be tested before use and so were absolved from liability. The distributors neither carried out the tests nor warned the teachers that a test was necessary, and so they were held liable. In both cases the distributors as middlemen omitted to carry out the duties required of them and so they were held liable in negligence.

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There are two Nigerian cases that establish the liability of distributors. In *Solu v. Total (Nig) Ltd., 1988*; a gas cylinder purchased from Total Nig. Ltd., the defendant exploded, while the plaintiff was cooking and injured the plaintiff. The court held the defendant company negligent and in breach of their contractual and statutory duty of care. Another is *Nigerian Bottling Co. Ltd. v. Ngonadi, 1985*; here a distributor sold a defective kerosene refrigerator to a lady. The refrigerator exploded and caught fire while in operation and caused injury to the plaintiff/ respondent. She sued the distributor who was not the manufacturer. The high court found for the plaintiff and this was upheld by the Court of Appeal. At the Supreme Court, the court held that the liability of the manufacturer is concurrent with that of the distributor and that the plaintiff has a choice of who to sue, she may either sue both or all of them. The Supreme Court in the words of Oputa J.S.C stated unequivocally that "the ultimate consumer has an option to sue the person who sold to him or anyone in the chain of distribution up to the manufacturer".

The position of the retailer and that of the distributor rank same regarding liability as a retailer of a defective product can as the distributor be held liable where the situation so demands. This is illustrated in *Clarks And Wife v. Army And Navy Cooperative Society Ltd., 1940*; where the retailers of chlorinated lime were held liable for injuries sustained by a consumer.

The duty owed by each of the above parties in the chain of distribution is merely to exercise reasonable care so as not to cause damage to the user of the product.

#### **(ii) Breach of the Duty of Care**

Where a duty of care has been established to exist, the plaintiff should go further to prove that there has been a breach of that duty. A person is guilty of breach of duty of care if he exposes another to an unreasonably, foreseeable risk of harm. The person seeking redress must show that the person sued is in breach of a duty of care owed him and he does this by showing that he did not exercise reasonable care in the matter in question. To determine whether a breach of duty has occurred, the court assesses it by the standard of care applied. The measure of this standard depends on the concept of a reasonable man. The standard must be that of reasonable care in all circumstances, as it is elsewhere in the tort of negligence for reasonability here is relative. The law considers the personal characteristics of the particular defendant whose conduct is being judged. For example, children are generally required to act as reasonable persons of similar age, intelligence and experience would act

under similar circumstances. Persons of physical disability are required to act as would a reasonable person with the same disability (Metzger,1992). In the same vein, the standard of care required of a manufacturer is the standard of care of a manufacturer in his position. Thus, where the consumer buys from known unqualified manufacturer, the standard of care expected would be that of a local substandard manufacturer (Enemu, 2002).

### **(iii) Consequential Damage**

Where the plaintiff has proved the existence of a duty of care and the breach of that duty, the third and final leg is to prove that the damage which resulted was because of the breach of the duty. In other words, the damage suffered must be the natural consequence of the wrongful act of the defendant (Monye, 2003). That is the breach must be the actual cause or the cause in fact of the injury to the other person. There is the need for there to exist a nexus between the resulting damage and the breach. According to Lord Macmillan in *Donoghue v. Stevenson*, 1932; “the law does not take circumstance 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”.

This imports the employment of the “but for test”: a defendant’s conduct is the actual cause of a plaintiff’s injury if that injury would not have occurred but for the defendant’s breach of duty. This presupposes the proof of the damage as a precondition for success in a suit on negligence. This “but for test” was applied in *Donoghue v. Stevenson* when Mrs. Donoghue averred, and the court accepted, that the presence of the decomposed snail in the ginger beer gave her shock and gastro-enteritis, ~~Nkara J. Obumneme Okafor (Ph.D)~~ing in her favour. The same was the position in *Grant v. Australian Knitting Mills Ltd.*, 1936; because the plaintiff was able to show that the dermatitis he suffered was as a result of free sulphite in the underwear. There must be a nexus or link connecting the injury/damage with the breach under consideration. In *Nigeria Bottling Co Ltd v. Ngonadi* 1985; and *Solu v. Total Nig. Ltd.*, 1988; the defective kerosene refrigerator and the gas cylinder, respectively, were both connected to the injuries which both plaintiffs suffered which were the basis of the court holding the defendants liable. This leads to the doctrine of *res ipsa loquitur* (the thing speaks for itself). In such a case it comes to the aid of a plaintiff in proof of his case. This doctrine applies;

- (a) When the defendant has exclusive control of the instrumentality of harm (and therefore probable knowledge of, and responsibility for the cause of the harm),
- (b) The harm that occurred would not have ordinarily occurred in the absence of negligence and,
- (c) The plaintiff was in no way responsible for his own injury.

When those elements are present, an inference may arise that the defendant was negligent and that his negligence was the cause of the plaintiffs’ injury (Metzger,1992).

In product liability cases, the plaintiff must show that the product is defective and it was a defect caused by the negligent act of the defendant. He must therefore, show that it was the act of omission or commission of the defendant which qualify as the breach of his duty of care to the plaintiff. In *Watson v. Buckley Carborne Garret & Co Ltd and Wyrovogs Products Ltd*, 1940; the distributors of a hair dye were held liable in negligence. Their acts of negligence were the various acts of omissions or commissions (for e.g false advertisements, failure to carry out necessary tests and guarantees) which took place between them (distributors) and the plaintiff that made them liable. Likewise in *Kubach & Anor v. Holand & Anor* (1937), the negligent acts of the distributors which made them liable was their inability to test the chemical before use or to warn the teachers of the necessity of a test.

In some cases, a person’s negligent conduct may combine with the negligent conduct of another to cause a plaintiff’s injury (*Kubach & Anor v. Holand & Anor* (1937)). For instance, where on a very dry harmattan afternoon, Emeka decides to burn rubbish from his house in front of his gate and Uche on his own was burning his bush beside his house in preparation for farming without taking precaution to prevent it from spreading. The combined fires now burnt down the house of Chima. The court would try to find out whether each defendant’s conduct was a substantial factor in the loss

suffered by Chima. If by evidence it is proved that Chima's house would have been destroyed by either fire in the absence of the other, both Emeka and Uche would be liable for Chima's loss.

For an action in negligence to be sustained, the plaintiff must prove actual damage done which was caused by failure to discharge the duty owed. Where it is not so, the suit will fail on inability to prove. In *I.M.N.L v. Nwachukwu*, 2004; the respondent plaintiff sued the defendant for negligence arising from the non-delivery of a letter on time. The letter was an invitation for an interview by Shell PDC Nig Ltd, which interview was to take place on 1<sup>st</sup> November, 1993 while the plaintiff received the letter on 15<sup>th</sup> Nov, 1993, thereby missing the interview. The letter was delivered at the appellant's office at Port Harcourt on 20<sup>th</sup> Oct, 1993 at 6.15 pm for delivery to the respondent in Abuja. The letter had no address for delivery but was to be kept at the appellants office to be personally collected by the respondent. The appellant is only required to advise the respondent of the arrival of the letter at Abuja through a post office box number. The letter got to Abuja on Friday 29<sup>th</sup> Oct. 1993 at about 12noon. Saturday and Sunday were not working days so the appellant dispatched the advice to the respondent on 2<sup>nd</sup> Nov, 1993 a day after the interview. In fact the advice got to the respondent on 15<sup>th</sup> Nov 1993 and consequently he missed the interview.

The trial court and Court of Appeal found for the respondent. But the Supreme court in allowing the appeal held that the appellant was neither careless nor negligent in performing his part of the contract as he did not breach the contract but was only acting according to the advice given to it and so was not guilty of inordinate and inexcusable delay (*I. M. N. L. v. Nwachukwu*, 2004). The respondent in this case could not prove that it was the delay of the appellant that caused this damage of his not attending the interview. Therefore the tort of negligence could not avail him.

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#### **Conclusion**

In the final analysis, for tortious liability to exist against the defendant, the plaintiff\consumer must proceed through the tort of negligence. The elements of the tort are the existence of duty of care, the breach of that duty and the resulting damage caused by that breach. It is the adequate proof of these three elements that will ground liability in negligence against the defendant. The proof of these ingredients is a tall order the achievement of which is no mean feat.

#### **Recommendations**

It is conceded that the courts in Nigeria are beginning to take a more liberal approach towards the question of product defects and the finding of liability based on the rule in *Donoghue v. Stevenson*. It should however still be appreciated that the rule in *Donoghue v. Stevenson* established and settled the issue of duty of care as being owed generally by a manufacturer to anyone who consumes his product whether or not he purchased it directly from the manufacturer .

However, that the rule still demanded the proof of fault is a major problem for the affected consumer because the quantum of resources required to prove fault in terms of the breach of the duty of care vis-à-vis the enormous resources of the manufacturer stands out as a major deterrent. It is thus recommended that the requirement of proof of damage should be played down so that once it is established that there was a defect in the product, liability should attach without the need to establish consequential damage. This is another way of doing away effectively with the lopsided defence of fool proof production process with its attendant injustice to the consumer with the manufacturer placed at a vantage position.

It is also recommended that the standard of the duty of care imposed on the manufacturer should be made statutorily higher and more explicit so as to reduce the uncertainty of the expected outcome from the judicial process as the question of judicial discretion in that regard, would be reduced to the barest minimum if not completely removed.

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