

THE DEFENCE OF FOOL-PROOF PRODUCTION PROCESS IN PRODUCT LIABILITY CASES

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Abstract

In most situations, the consumer of a product does not come in direct contact with the manufacturer of the product. He purchases from the manufacturer through the middlemen or the retailers. Where therefore he consumes a defective product, he can only proceed against any of those on the manufacturing and chain of distribution through the tort of negligence. This paper aims at bringing to the fore the hardship faced by the consumer in attaching the defect of the product on the manufacturer who most times, waves the defence of fool-proof production process before the courts and thereby escape liability.

Introduction

By the very nature of the tort of negligence, for the plaintiff to succeed, reliance is placed on the blameworthy disposition of the defendant. This is the product of the trilogy of the duty of care, breach of that duty and the resultant damage (Kanyip, 2005). This means that the plaintiff must prove that the defendant owed him a duty to take care, for which he was negligent, that is, he failed to take that degree of care which was reasonable in the circumstances of the case or he failed to act as a reasonable man would have acted. Then if the defendant owed that duty, his negligence becomes a breach of that duty. The resultant damage to the plaintiff would then become actionable. The courts always insist that these requirements must co-exist and relate as between the plaintiff and the defendant if liability in negligence is to be returned. Just as the courts have held, negligence cannot be committed in the air, neither can it or damage alone found a cause of action (I. M. N. L. v. Nwachukwu, 2004). The implication is that a plaintiff who cannot show the fault of the producer/defendant towards him cannot succeed in an action in negligence. But once proved, the plaintiff is entitled to the necessary remedy. According to Kanyip, this burden of proving the negligence of the defendant referred to as the fault principle is an onerous task for a consumer who has to establish on a balance of probabilities the allegation of negligence in the manufacturing, processing, inspecting or testing processes which are involved in the production of a good/product/article.

Assessment of the Defence of Fool-Proof Production Process

To earn the protection affordable by the tort of negligence, the plaintiff/ consumer is required to establish where the fault lies. The consumer has to discharge this burden on him by proving the particular negligent act or omission on the part of the manufacturer, or the middlemen or the retailers which led to his injury. Our remonstrance to this requirement is that it comes hard on a consumer/plaintiff. It involves a denial of redress to the plaintiff suffering harm or injury merely because he has not been able to prove it due to the intricacies involved in the production and distribution processes of the products which make it almost totally impossible for the consumer. This remains so however meritorious the behaviour of the plaintiff may have been and whatever risks were taken at his expense (Evans v. Toplex Safety Glass Co., Ltd 1936). This unenviable situation in which the consumer/plaintiff finds himself in the application of the negligence doctrine is well exposed in *Ebelamu v. Guinness (Nig) Ltd*, *Ogbidi v. Guinness (Nig) Ltd*, *Boardman v. Guinness (Nig) Ltd* and

Okonkwo v. Guinness (Nig) Ltd popularly referred to as the Guinness cases. These cases are product liability cases and the principle of negligence constitutes an important pillar on which depends liability and the attendant remedy. Therefore a little examination of them will not be out of place.

In Ebelamu v. Guinness (Nig) Ltd. 1983, the plaintiff/appellant arranged a party in his house. He bought a carton of Harp lager beer from Kingsway Stores, Ikeja. At the party, he drank part of the beer and noticed that he had stomach pain and had to go to the toilet to defecate. He later vomited. While in pain, he noticed that other people on the same table with him were also vomiting and visiting the toilet. They were eventually taken to a nearby hospital and treated for food poisoning. The plaintiff asserted that the beer contained sediments which an expert called to testify said contained algae and so was unfit for human consumption. The company led evidence of how foolproof the preparation of its products were. But it admitted that bad storage condition could cause sedimentation in the beer although such sedimentation were mere protein breakdown which did not constitute poison. The Court of Appeal acknowledged the foolproof production process of the respondent but asserted that “there is still the odd chance of a defect and that is where its liability begins”. Despite this open concession to the existence of defect, the appeal was dismissed on the ground that the *res ipsa loquitur* doctrine was not applicable and the court maintained that the appellant failed to show proper nexus between the unopened bottle of beer which was analyzed and the other two bottles which had been opened and consumed.

The facts of Ogbidi v Guinness (Nig) Ltd. 1981, were that the plaintiff drank, from a bottle of Harp lager beer brewed by the defendant company. He immediately started vomiting. On examination of the bottle of beer, he found in its content certain black sediments. He said he was hospitalized for two weeks because of the resultant illness. The defendant gave oral evidence as to their meticulous and elaborate method of brewing harp to avoid contamination. In fact they denied that the bottles of Harp lager beer were theirs and asserted that the Harp lager beer they produced was wholesome and good for human consumption. Once more convinced of the foolproof production process of the defendant company, the court dismissed the plaintiff’s claim as baseless and frivolous and gave a verdict of no liability in favour of the company.

The case of Boardman v Guinness (Nig) Ltd. 1980, also dwelt on Harp Lager beer. The plaintiff consumer bought two bottles of Harp beer, opened one in an ill-lit room and drank part of the contents. It tasted sour and shortly thereafter, he became ill. When the remaining content of the beer was examined, it was cloudy and contained a considerable quantity of sediment. The cork was replaced on the bottle and it was later sent to a laboratory for analysis. The report of the analysis was that the beer contained certain bacteria but did not prove that the illness of the plaintiff was caused by the bacteria. The defendant company gave evidence that the defendant’s methods of brewing and bottling were of internationally recognized standard as they were carried out under strictly controlled conditions. Evidence was further adduced by the company that there were clever ways of opening and corking a bottled drink without being discovered by anybody. Moreover, that the particular beer in question could have been faked. Again swayed by the foolproof production process evidence and the expert evidence of a retired Chief Consultant Pathologist, Professor Onuigbo, that the laboratory analysis ought to have been a toxicological and not a bacteriological test since not all bacteria were harmful, the court dismissed the plaintiff’s claim refusing in the process the plea for reliance on the *res ipsa loquitur* doctrine. The court in doing this reiterated that ‘negligence alone does not give a cause of action and damage alone does not give a cause of action, but the two must co-exist.

The Okonkwo v. Guinness (Nig) Ltd and Obinma & Sons (Nig) Ltd. 1980, case is even more intriguing in that it is a case on all fours with the case of Donoghue v. Stevenson 1932, yet a no liability verdict against the defendant was given. In that case, the plaintiff went out for a drink with

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one Mr. Peter Ajayi in the hotel owned by the 2nd defendant. The plaintiff ordered for a bottle of stout and Mr. Ajayi for a beer. Mr. Ajayi paid for the drinks. While drinking, the plaintiff complained of abdominal disorder and soon started vomiting. When they switched on the brighter light in the place they were, they found out that the bottle of stout contained certain smaller particles which looked like roots, leaves or bark of a tree. He was later treated by a doctor for food poisoning. He sued the manufacturer and the retailer for negligence. The plaintiff must have thought that following the *Donoghue v Stevenson* fact situation a verdict in his favour would be returned. The plaintiff did not at the trial, prove that the foreign matters entered the bottle of stout at the factory or that the bottle was tampered with by the retailer, nor did he adduce any evidence to show that there was no possibility of examination of what colour the bottle was. It was held that the action failed because first the plaintiff could not establish that the bottle of stout he drank was manufactured by the first defendant within the scope of the principle laid down in *Donoghue v. Stevenson*. Second, the plaintiff could not establish that what he saw in the bottle of the stout beer was there when the bottle left the factory or to show that the bottle was of such a nature as to exclude the possibility of any intermediate examination of the contents of the bottle by the retailer or purchasers or consumers. Third, the medical evidence did not show that the roots, leaves and bark of trees caused the food poisoning or are capable of causing the same. *Res ipsa loquitur* does not apply and nothing is to be presumed in favour of the plaintiff. Fourth, the case against the second defendant was misconceived since no negligence was relied upon against the seller. The court further stated that *Donoghue v. Stevenson* did not create a magic wand for the recovery of damages against manufacturers of drinks by the ultimate consumers of drinks.

The court must have been particularly influenced to come to this conclusion because of the oral evidence of the foolproof production process of the first defendant which it held eliminated all possibilities of the presence of extraneous bodies in their product. The plaintiff having not called any witness regarding the process of manufacture of Guinness stout the only oral evidence of Mr. Obajolu the brewery manager for stout by the first defendant must be the gospel truth.

These cases show the difficulty in discharging the burden cast on the plaintiff by the negligence principle – to prove that the defendant breached his duty of care which resulted in the injury suffered by the plaintiff. It is easier for the consumer in cases where the manufacturer is the supplier to the consumer or where there is only a retailer between the manufacturer and the consumer as in the Guinness cases. The burden is heavier where the product has to pass from the manufacturer through one or two other middlemen before it gets to the consumer as is the case with products like drugs, petroleum products, and the like. Really, such consumers are in a more precarious position than the plaintiffs in the Guinness cases who could not move the court in their favour irrespective of how glaring the cases were. These cases show how very difficult it is for the consumer to prove exactly the particular act or omission which caused the damage by reason of the fact that he is unfamiliar with the mechanism of the manufacturing processes of the brewery industry. How much more difficult will it be for example, for a consumer of defective petroleum product to prove fault in the intricate, intertwined, mazy and arduous system that is the production process in the petroleum industry. Apart from grappling with the numerous middlemen, the consumer has the production process to grapple with too.

The inference here is that by the fault principle, the consumer may be required to bear the cost of accidents that are not his fault but which he is unable to show that it was someone else's fault although that someone was responsible for the injury creating activity. Or if neither the plaintiff nor the defendant is at fault, the fault principle works so that the faultless victim bears the cost. This is because, in law, the loss will lie where it falls if no one is held responsible for it. According to Kanyip

this in essence amounts to a strict victim liability regime. It is immaterial that the injury causing activity came from the defendant.

From the foregoing, the negligence principle provides very little protection for the consumer. To enjoy this very little protection, the task of proving a breach of the duty of care is difficult. Moreso, the consumer is disadvantaged by his lack of familiarity with the manufacturing or production process especially if the manufacturer made an affirmative showing of proper care by showing a foolproof production process. Again defects may occur even in the absence of negligence. Lastly, negligence is almost an impractical theory for liability for defective products.

Recommendations - Non-Rigid Adherence to the Foolproof Production Process

The defence of foolproof production process is anathema to a consumer friendly environment. It affords the defaulting manufacturers an easy escape route from liability while it is obvious that the consumer who has suffered the injury had no means of knowing what goes on in the production process. He is therefore in a disadvantaged position by his lack of familiarity with the manufacturing process where the manufacturer successfully makes an affirmative showing of proper care (James 1979). The ease with which the courts lend weight and credence to the claim of foolproof production process as evidenced in the Guinness cases is alarming and disappointing. It flies in the face of justice and stands it in its head.

Ordinarily, the courts should not accept hook, line and sinker, a claim by the defendant manufacturer who is labouring to extricate himself from liability to the effect that he did all that was impeccably necessary and possible to ensure the manufacturing of a non-defective product and that any defect was occasioned by the intervention of Mr. John Doe (that is, an unknown third party intervener). Even where the defendant company in Boardman v Guinness (Nig) Ltd admitted by itself that there are clever ways of opening and corking a bottled drink without anybody discovering it and offered to demonstrate this. With this acknowledgement of the defendant, can it then in all sincerity be said that the corking system, which is an integral part of the production process is foolproof so as to negate liability? This according to Kanyip goes to prove that the so called foolproof production process does admit of defective products and so should not negate, without more, liability in negligence. There should be no semblance of admittance of foolproof production process in certain manufacturing processes where products pass through numerous hands before getting to the consumer such that the burden of proving where the fault lies is an arduous if not a near-impossible task for the consumer. A typical example here is the petroleum industry where it is known that even after the products had been produced possibly without defects, the products pass through numerous marketers/middlemen, outlet operators and even truck drivers who may tinker with the products to affect their quality and quantity. Accepting this process without much ado in such a situation which enables the manufacturer to escape liability is disastrous to the consumer.

Conclusion

So the courts should come away from the slavish adherence to the theory of foolproof production process which presents itself as a valid exonerative scenario for the manufacturers. For the only effective means by which a diligent plaintiff can stand up to them is by calling an expert witness who is versed in the same production process to give a contradictory evidence demonstrating the non-foolproof claim in the production process. Not every plaintiff can afford the cost of procuring such a witness. Therefore it places justice beyond the reach of the ordinary consumer who has suffered from product defect. The courts should be wary of accepting the defence. They should adopt a more proactive approach aimed at assessing each case based on its own peculiar circumstance. They should

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only accept the process when from all the circumstances of the case, it is all too obvious that the production process was foolproof. They should not be cowed and overwhelmed by the near-flawless presentation of the foolproof production process defence most often done by an expert, nor should they be made to bow or kowtow to the overbearing influence and larger-than-life economic size of most of these defendant companies who aim at profit maximization instead of the paramount interest of consumer satisfaction and a fortiori, his protection.

References

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