

Recoverable Damages in Product Liability: Whither Nigerian Jurisprudence

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Abstract

The spate of production, importation and manufacture of fake, substandard, and defective products, which put life and limb into danger, is becoming alarming in Nigeria. The consequential damage caused by such product are calamitous, while whether recovery for some head of claim remained uncertain. Aside from this, Nigerian courts are yet to be tasked with some head/ type of claims caused by defective product. It is in the light of this that this paper set out in the main to examine and discuss types/heads of recoverable damage in respect of losses caused by defective products, while inspirations will be drawn from comparative jurisprudence with the view of providing a direction for Nigerian law in this regard.

Keywords: *Recoverable Damages, Product Liability, Defective Products, Comparative Jurisprudence, Nigerian Perspective*

Introduction

Product liability is not yet a separate field of study in Nigeria unlike the position in other jurisdictions.¹ Nigerian Law recognize product liability claims under the broad spectrum of the Nigerian law of torts. However, Nigerian courts are yet to be tasked on recovery for some categories of contentious claims within the scope of this discourse.² Obviously, defective products may cause various types of harm, including personal injury and property damage. This work in the main set out to discuss the type of recoverable damages /head of damages for loses caused by defective products. It also examine the law in other jurisdictions on the subject matter of discourse with the view of providing guidelines towards improving the current state of Nigerian law. Reason being that there are dearth of authorities, lacunae and uncertainties in this area of Nigerian law. The jurisdictions which will form the basis of our comparative examination are the United Kingdom which position represents English Law, the United States of America and India.

The scope of this discourse is within the province of Tort law and this paper is principally divided into six segments comprising of the following: (i) Meaning of product liability and Concept of damage (ii) Recoverable damages under Nigerian law, (iii) Comparative Jurisprudence and heads of recoverable damages (iv) Lessons learnt from comparative jurisprudence (v) Whither Nigerian jurisprudence and (vi) Conclusion and recommendations.

Meaning of Product Liability

The expression “product liability” examines the civil liability of those engaged in manufacturing, distribution and selling of products in tort law for injury occasioned by such defective products.³

The term has been described and understood to refer to ‘the civil liability of manufacturers and others where damage or loss is caused by products or part thereof which fail to meet the standards claimed expressly or implicitly for them or which are dangerous or otherwise defective.’⁴This

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definition is wide enough to accommodate defects, which belong to the province of contract or sales law, which are outside the scope of this paper.

Concept of Damage and Damages

The word damage and damages are two separate words, with separate distinct meanings within product liability claim. The word “damage” within the context of product liability claim and presumably under the general law of tort refer to the injury occasioned to the claimant by the tortfeasor, or better still, it could refer to loss for which compensation is sought. This is in contradistinction to damages which is the money awarded to compensate for the injury occasioned by the tortfeasor. Gahan defines damages as ‘the sum of money which a person wronged is entitled to receive from the wrongdoer as compensation for the wrong’.⁵ The rationale for the award of damages in tort cases is to provide remedies which will restore the claimant to his original position prior to the occurrence of such tort. In the Nigerian case of Chief Aina Jegede v David Bamidele,⁶ damages was defined “as monetary compensation for loss or injury to a person or property. In other words, damages are the sum of money received from a wrongdoer as compensation for the wrong.”

The types of recoverable damage that is relevant to this discourse and which will be discussed in this work are the following: (a) Damage to person and accompanying loss, (b) Property damage and cost of repair to avoid a threatening loss and consequential loss arising therefrom, (c) Damage to the defective product, (d) Pure economic loss, (e) Special damage. (f) General damage, and (g) Punitive damage.

Types of Recoverable Damages in Product Liability Claim in Nigeria

This segment is devoted to a discourse of types of recoverable damages in product liability claim in Nigeria. Traditionally, as earlier noted above the rationale for the award of damages in a tort claim is to compensate the injured party and not to allow him profit from such loss or protect economic interest. The principle behind the award of damages was succinctly captured by Gary Chan Koke Yew & Lee Pey Woan in their text.⁷ In a product liability regime regulated by the principle of negligence, recovery for the types of damages discussed below will be discussed.

Damage to person and accompanying losses

Personal injury in a negligence action is defined as ‘any harm caused to a person, such as a broken bone, a cut, or a bruise or bodily injury’.⁸ It also includes shock, pain, agony and discomfort. Support for this view is found in the Nigerian Supreme court’s decision in the product liability case of Edward Okwejinor v G Gbakeji and Nigerian Bottling Co Plc.⁹ In this case, the claimant claimed the following as damages:

- “(a)The sum of N551.00 being medical expenses borne by the plaintiff as a result of the negligent acts of the defendants in bottling and selling a contaminated and poisonous Fanta orange drink to the plaintiff;
- (b) The sum N27.00 being costs of the crate of mineral purchased from the 1st defendant;
- (c) The sum of N299,000.00 being general loss of business expectation, profits or income for the period of the plaintiff’s treatment and time for recuperation;
- (d) The sum of N700,422.00 being general damages for loss of life expectancy; and
- (e) The sum of N1,000,000.00 being damages for shock, pain, agony and discomfort suffered

by the plaintiff as a result of the contaminated Fanta drink bottled and sold by the defendant.

The total sum claimed was N2,000,000.00.

While the trial court allowed recovery for the above category of claim and also reduced the quantum of damages; it observed as follows:

...that the 2nd defendant is liable under this head of claim. I have considered carefully the circumstances and the facts of this case and I come to the conclusion that the plaintiff is entitled to the sum of N950,000.00 (Nine hundred and fifty thousand naira) as damages for the injury suffered by the plaintiff as a result of the consumption of the contaminated Fanta orange drink against the 2nd defendant.¹⁰

The point being made here is that recovery for personal injury and other related injury under this head of claim is recognized under Nigerian law.

Property Damage: Cost of repair to avoid a threatening loss and consequential loss arising therefrom

There are instances when a defective property may not cause injury to a person, rather such may be occasioned to a property. In addition, there may even be need to avoid a threatening loss and consequential loss arising therefrom. This may manifest in any of the following ways.

- (a) Cost of repair to avoid a threatening loss or consequential loss therefrom.
- (b) Damages to the product itself.
- (c) Damages to other property or properties.
- (d) Damages for the loss of use, lost profits and interruption of business arising from the instances mentioned above.

While there is dearth of authority on recovery for these types of damage presently in Nigeria, Nigerian law and courts decisions on the above heads of claim is likely to be on the same footing with English law. The current English law position is controversial as to whether the cost of remedial work undertaken to avert danger is recoverable.¹¹

Damage to the defective product

The position for recovery as decided in the case of *Donoghue v Stevenson*¹² is premised on the fact that there must be an existing danger to the person or to the person's property, one may be tempted to argue that damage occasioned to the defective product itself is not recoverable.¹³ Recovery for this type of loss is controversial, and to date there is no known decided authority on this issue in the Nigerian jurisdiction under review; except for that which permits recovery to damaged property caused because of negligence, and not directly under *Donoghue's* case principles.¹⁴

Pure economic loss

Pure economic loss is financial damage suffered because of the negligent act of another party, which is not accompanied by any physical damage to a person or property. Tort mechanisms customarily frown upon recovery for pure economic losses; except under exceptional circumstances.¹⁵ Primarily, recovery in negligence has always been connected with the existence of physical damage.¹⁶ Recovery for economic losses are however allowed under exceptional

circumstances. The current position under English law on recovery under this head of claim is also posited to be the law in Nigeria; reason for this proposition is premised on the fact that English law is one of the sources of law in Nigeria and decisions from this jurisdiction serve as persuasive authority in Nigeria. The English law position is represented by the decision in the case of *Muirhead v Industrial Tank Specialities*.¹⁷ The plaintiff contended that he was entitled to recover for the various losses he suffered as a result of damage occasioned to his lobsters which were destroyed owing to a defect in the cooling appliances in which they were stored. He further argued that he was entitled to recover for both the market value of the lobsters and the cost of cleaning the lobster tank. On appeal, the court unanimously disallowed recovery in tort for the whole economic loss suffered. Recovery was allowed only for foreseeable physical loss and any consequential economic loss suffered as a result of that physical damage, and a claim for lost profits failed. Goff LJ stated as follows:

“I therefore conclude that the manufacturer should be held liable to the plaintiff, not in respect of the whole economic loss suffered by him, but only in respect of the physical damage caused to his stock of lobsters, and of course only financial loss suffered by the plaintiff in consequence of that physical damage.”

The decision in the case of *Junior Books v Veitch Co Ltd*,¹⁸ is also relevant on this issue of recovery for pure economic loss; however the judgement has been regarded as somewhat exceptional in this field and the clarity of its reasoning has been questioned¹⁹

Special damages

The law does not presume this type of damage; it must be specifically pleaded and proved. Bowen LJ, in the English case of *Radcliffe v Evans*,²⁰ described this head of damage as follows:

Special damage is the particular damage (beyond the general damage) which results from the particular circumstances of the case and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial.²¹

Where the loss occasioned by the negligent act of the defendant has led to the loss or damage of the plaintiff's property, such loss will be recoverable, since the aim of the law is to restore the plaintiff to its original position, *restitutio ad integrum*.²²

Damages, in this sense, may include the cost of repairs. In *Ekpe v Fagbemi*,²³ the Supreme Court held that, where the plaintiff's property is damaged, the estimated cost of repairs is recoverable as special damages and not general damages.²⁴ Bello JSC (as he then was) observed as follows: ‘Recoveries are also allowed under this head for loss of use, while reasonable steps must be taken to mitigate such loss.’

From the above, it can be inferred that recovery will be allowed in respect of a product liability claim for special damages as long as it is specifically pleaded, proved and provided reasonable steps to mitigate the loss have been taken by the plaintiff.²⁵

General damages

General damages represent the type of damages that cannot be easily assigned a monetary value, for example pain and suffering, loss of consortium and emotional trauma. This head of damage is normally presumed by the court to have emanated from the defendant's act and cannot be precisely quantified. It need not be specifically pleaded, but evidence must be adduced towards establishing it.²⁶

Thus, in a product liability claim, general damages are recoverable if there is basis for such an award. For instance if the ensuing injury occasioned by the defective product causes loss of expectation of life or loss of amenities.²⁷

Punitive Damages.

Punitive damage is awarded with the intention of punishing the defendant rather than compensate the claimant and are only available in precise and limited circumstances such as where the defendant is guilty of oppressive or unconstitutional action or has calculated that the money to be made from his wrongdoing will probably exceed the damages payable.²⁸

However, there seems to be some kind of reluctance on the part of courts to award punitive damages in cases involving product liability claims save for when the court feels a strong need to show judicial disapproval of the tortfeasors conduct. For instance, if the defendant's conduct has been calculated by him to make a profit of which may well exceed the compensation payable to the claimant.²⁹ There has been series of arguments proffered in support and against the award of punitive damages in respect of product related claims.³⁰ It must be noted that while claims for punitive damages for losses occasioned by product defects are yet to task Nigerian courts, Nigerian courts are likely to follow the English law position on this issue for reasons stated earlier in this work.

It is however our view that due to the spate of production and importation of fake adulterated and substandard goods in and into Nigeria which put life and limb in danger despite the existence of laws prohibiting such reprehensible practices; it is posited that Nigerian courts should be willing to award punitive damages in respect of product related accidents if and when the circumstances so demands.

Comparative Jurisprudence on Recoverable Damages under the Negligence Regime

This segment is devoted to a consideration of whether the following types of damages are recoverable under English, American and Indian laws: (a) Damage to person and accompanying loss (b) Property damage and cost of repair to avoid a threatening loss and consequential loss arising therefrom. (c) Damage to the defective product (d) Pure economic loss (e) Special damage (f) General damage (g) Punitive damage

(a) Damages to person and accompanying loss:

Case law decisions and judicial opinions from all the courts in the jurisdictions forming the basis of the comparative discourse in this work evidenced the fact that recovery is allowed for this head of claim.³¹ This head of claim includes damage for personal injury, pain, agony, shock and discomfort.³²

(b) Property damage: Cost of repair to avoid threatening harm and consequential loss arising therefrom

The position whether recovery will be allowed for damage caused to the defective product under English law itself is controversial. This view is premised on the fact that actual damage to a person or other property is a condition precedent to recovery of damage in respect of loss caused by a defective product.³³ If a component part of a product is defective, thereby causing damage to the entire product itself, it has been posited that recovery would not be allowed under such circumstances.³⁴

In addition, considering whether damage to the product caused by a defect in a component part consisting of the product is recoverable, Lord Bridge in the *D & F Estates Ltd v Church Comrs for England*,³⁵ case observed as follows:

...It may be arguable that in the case of complex structures, as indeed possibly in the case of complex chattels, one element of the structure should be regarded as, for the purpose of the application of the principles under discussion, distinct from another element, so that damage to one part of the structure caused by a hidden defect in another part may qualify to be treated as damage to other property, and whether the argument should prevail may depend on the circumstances of the case.³⁶

The logical inference to be drawn from the above case is that it is possible to recover for damage to the product as a result of a defect in its component part because such damage can be classified as damage to other property, damage to the defective product itself cannot be treated as damage to other property. In view of this, in our humble view that recovery will not be allowed under such circumstances.

The position of the law on whether damage to the defective product is recoverable in the United States of America is not settled. It varies from state to state. Some states allow recovery for damage to the defective goods;³⁷ while some others allow recovery for physical damage to other property.³⁸ We are of the view that the law in India, subject to exigencies and justice of the case in question is likely to follow as persuasive authority English law decisions in this regard.³⁹ This position is however without prejudice to the rights reserved by the provisions of the Indian Consumer Protection Act of 2019.

Suffice to note as earlier stated above that recovery will not be allowed for damage occasioned to the defective product under the *Donoghue* case principle since damage to other property is required before recovery is allowed.

(c) Remedial cost to avoid a threatening defect and consequential losses

Instances abound when a defect, which threatens or poses a serious danger to a product is discovered before it renders any havoc. To avoid the destruction of the product, remedial or repair work may be carried out to avert such danger. The question is whether such costs are recoverable. There are two conflicting views on this issue under English law. On the authority of the case of *Dutton v Bognor Regis Urban District Council*,⁴⁰ which concerned the liability of a local authority for cracks that appeared in a house soon after it was built; Lord Denning, who delivered the judgment of the court, held the Council liable for the cost of repair when he stated thus:

I would say the same about the manufacturer of an article. If he makes it negligently with a latent defect (so that it breaks to pieces and injures someone), he is undoubtedly liable. Suppose that the defect is discovered in time to prevent the injury, surely he is liable for the cost of repair.⁴¹

In contradistinction to the above position, the English case of *D & F Estates Ltd v Church Comrs for England*,⁴² supports the proposition that remedial costs which were classified as economic were not recoverable. In this case, the plaintiff's action in negligence to recover for the cost of remedial work carried out by renewing the plaster-work was disallowed by the majority. It was seen as pure economic loss, which was not recoverable under the rules of the *Donoghue v Stevenson*⁴³ case. Lord Bridge summed up the principles as follows:

If the hidden defect in the chattel is the cause of personal injury or damage to property other than the chattel itself, the manufacturer is liable. But if the hidden defect is discovered before

any such damage is caused, there is no longer any room for the application of the *Donoghue v Stevenson* [1932] A.C.562 principle. The chattel is now defective in quality... If the defect is discovered before any damage is done, the loss sustained by the owner of the structure who has to repair or demolish it to avoid a potential source of danger to third parties would seem to be purely economic.⁴⁴

From the above case, one may draw the inference that the cost of remedial work may not be recoverable, but recovery for the cost of remedial work to avert danger is recoverable.⁴⁵ However, it is our view that the decision in *Dutton's case*⁴⁶ above accords with the dictates of justice and the same is preferred.

The position of the law on this particular area is not settled under American law; it varies from state to state. As earlier observed in the preceding section of this work, some states allow recovery for remedial cost and damage to the defective goods⁴⁷ while others do not. For instance, the Pennsylvania Supreme Court has recognized the economic loss rule. If a product malfunctions, a claimant cannot sue in tort, whether the theory is negligence or under the strict liability regime. If the malfunction only damages the product itself, a claimant's remedy lies in contract.⁴⁸

It is posited that the Indian law is likely to follow the English law position as decided in the case of *Dutton v Bognor Regis Urban District Council*⁴⁹ as persuasive authority in respect of this category of claim. The case supports the view that remedial costs incurred to prevent the injury is recoverable. This decision is just and expedient and in line with one of the fundamental objectives of tort law which is to restore the injured party to its original position before the injury occasioned by the tortfeasor.

(d) Pure Economic Loss

Whether recovery is allowed for pure economic losses accompanying property damage under the principles of English tort law is doubtful.⁵⁰ The position under tort law is that tort mechanisms are reluctant to protect economic losses, except under certain circumstances. Primarily, recovery in negligence has always been connected with the existence of physical damage.⁵¹ The position concerning recovery for economic loss remains controversial in America.⁵² There are three different views on this issue. These can briefly be summarized as follows:⁵³

- (a) The first view is represented by the decision in the case of *Seeley v White Motor Co.*⁵⁴ In this case, the claimant, who had entered into a conditional sale agreement with the manufacturer of a truck, sued the manufacturer for its defective condition. He claimed for loss of profit, refund of the initial deposit made, cost of repair caused by the defective condition and economic loss. Justice Traynor refused the claim for economic loss, while the claim for physical loss, though recoverable, was denied because it had not been proved. On the authority of this case, pure economic losses are not recoverable, whereas physical damage to persons or property, along with economic loss accompanying them, is recoverable. The principle of no recovery where the defective product damages itself was also given approval in the case of *East River Steamship Corporation v Transamerica Delaval Inc.*⁵⁵ In this case, the charterers of an oil transporting supertanker sued the manufacturer of a turbine which had been supplied as "an integrated package" used as the main propulsion unit on the tankers. The turbine malfunctioned, and this led to additional damage to other parts of the turbine with no further damage to persons or property. The charterers in their action claimed for cost of repair and "associated loss of profits". The charterers' claim was disallowed by the court because there was no damage to person or other property.⁵⁶ Blackman J concluded as follows:

The intermediate positions, which essentially turn on the degree of risk, are too indeterminate to enable manufacturers easily to structure their business behavior. Nor do we find persuasive a distinction that rests on the manner in which the product is injured. We realize that the damage may be qualitative, occurring through gradual deterioration or internal breakage. Or it may be calamitous... But either way, since by definition no person or other property is damaged, the resulting loss is purely economic. Even when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain - traditionally the core concern of contract law.⁵⁷

- (b) The second view, which allows recovery in a situation where the damage is to the defective product itself, was delivered a few months before the Seeley's case by the New Jersey Supreme Court. This was the case of *Santor v A & M Kargheusian Inc.*⁵⁸ The claimant was able to recover against the manufacturer for the cost of damage done to the carpet purchased, despite the fact that there was no damage to other property. The court held the manufacturer liable under the strict liability regime and implied warranty theories. Justice Francis stated as follows:

Existence of the defect means violation of the representation implicit in the presence of the article in the stream of trade that it is suitable for the general purpose for which it is sold and for which such goods are generally appropriate. As we have said, the representation is found in the law. If it is not a fact - if the article is defective and the defect is chargeable to the manufacturer, his must be the responsibility for the consequent damage or injury.⁵⁹

- (c) The third view is a middle course approach where recovery is allowed for remedial measures, which are undertaken for the purposes of avoiding dangers, which are unreasonable and are likely to cause harm to a person or physical property. This view was expressed in the case of *Pennsylvania Glass Sand Corp v Caterpillar Tract Co.*⁶⁰

In India, there is the likelihood that recovery will be allowed for pure economic loss associated with a defective product where there are special relationship between the parties. This view is premised on the High court decision of Singapore; a jurisdiction which legal system share some features with that of India. In that decision, the court allowed a claim for pure economic loss claim hinged on the doctrine of negligence.⁶¹

(e) Punitive Damages

Punitive damage in tort is meant to punish, deter and condemn the tortfeasor, it serve wider social functions such as condemnation, general deterrence, and appeasement of the victim's right.

However, English law is slow to award punitive or exemplary damages. Punitive damages are available for all torts that involve a willful element on the part of tortfeasor. Lord Nicholls succinctly captured the rationale behind punitive damage as follows in the case of *Kuddus v Chief Constable of Leicestershire Constabulary*:⁶²

From time to time cases do arise where awards of compensatory damages are perceived as inadequate to achieve a just result between the parties. The nature of the defendant's conduct calls for a further response from the courts. On occasion conscious wrongdoing by a defendant is so contumelious, that something more is needed to show that the law will not tolerate such behaviour. Without an award of exemplary damages, justice will not have been done. Exemplary damages, as a remedy of last resort, fill what otherwise would be a regrettable lacuna.

The award of punitive damage in product liability claims is not novel in America. Courts in this jurisdiction will award punitive damage if the manufacturer had acted with an evil motive or with reckless indifference.⁶³ While some states have statutes, which regulate the award of punitive damage, others do not. Where there is no statute in existence, the award of punitive damage is governed by the common law.⁶⁴ In order to claim punitive damages, the plaintiff must show more than negligence or gross negligence on the part of the tortfeasor.⁶⁵

In India, the award of punitive damage is not alien to the country's jurisprudence on tort. The Indian courts have ruled in a plethora of cases influenced by the decision in *Rookes v Benard*⁶⁶ that punitive damages can be awarded. One of such circumstance is in cases where the defendant's conduct has been calculated to make a profit for himself, which may well exceed the compensation paid to the tortfeasor.⁶⁷ It therefore follows that where a manufacturer purposely introduce a defective product into the stream of commerce to make profit for himself which may exceed the compensation payable to the claimant, the court will not hesitate to impose punitive damage.

(f) Special Damages

Special damages are also recoverable in all the jurisdictions forming the basis of our consideration in this discourse. The only limitation is that it must be pleaded i.e. that is specially claimed and credible evidence must be adduced to substantiate such claim.⁶⁸

The above is a brief discourse of recoverable damage in product liability claim in the jurisdictions which formed the basis of our comparative examination in this paper. The lessons learnt from our comparative examination can be summarized as follows:

Lessons Learnt from Comparative Jurisprudence

From the comparative examination carried out in this work, the following lessons are learnt:

- a. Recovery is allowed for loses arising from product defects in respect of damage to person or property under English, American and Indian laws.
- b. Whether recovery is allowed for damage to the defective good under English law is controversial reason being that damage to other good is a prerequisite for recovery under the principle enunciated in the case of *Donoghue v Stevenson* (supra). The position in this regard under American law is not settled; it varies from state to state. The first view is represented by the decision in the case of *Seeley v White Motor Comp*; (supra) which disallowed recovery on the ground that there was no damage to person or property. The second view is represented by the decision in the case of *Santor v A & M. Kargheusion Inc*, (supra) a case which allowed recovery to the damage done to the carpet despite the fact that there was no damage to other person. The third view which is a moderate approach allow recovery for remedial cost taken to avoid damages which are unreasonable and are likely to harm a person or cause physical damage. This is represented by the decision in *Pennsylvania Glass Sand Corp v Caterpillar Tract Co*. (supra).

In there there is the likelihood that recovery will not be allowed under this head of claim based on the English decision of *Donoghue v Stevenson* (supra) which require that there must be damage to other good.

- c. On recovery for pure economic loss, the general position under English law is that tort mechanisms are reluctant to protect pure economic loss, except under certain circumstances. However, recovery under the negligence system has always been connected with the existence of physical damage. Thus, in the case of *Junior Books v Veitchi Co Ltd* the House

of Lords allowed the claimant to claim the cost of repair and other consequential damages. The above also represents the position under American law, save for slight variation in some States in America.

Emerging judicial opinion from Singapore, a judicial system that has close affinity with the Indian legal system tend to support the view that recovery may be allowed for pure economic loss in exceptional circumstances where there is special relationship between the parties as evidenced by the decisions from Singapore, and Australia.

- (c) It is not settled under the English law whether claim can be made for remedial cost to avoid a threatening defect. The reason for this proposition is that there are conflicting decisions in this regard. Under the English law, we are of the view that the decision of Lord Denning where recovery was allowed for remedial cost in the case of *Dutton v Bognor Regis United Building Co Ltd*, (supra) is preferred. This is in contradistinction with the decision in the case of *D & F Estates Ltd v Church Comrs for England* (supra) which supports the proposition that remedial costs classified as economic loss were not recoverable. However, under American law, there are three views in this regard which we have discussed above. It is humbly submitted that the courts decision in the case of *Dutton v Bognor Regis Urban District Council* (supra) is also posited in this work as the probable position of Indian law in this regard.

Whither Nigerian Jurisprudence

The above discourse is a summary of recoverable damages, which may be claimed for losses occasioned by a defective product under the doctrinal principle of negligence. While it is not in dispute that recovery is allowed in all the jurisdictions which formed the basis of our discussion on damage to person or property, the position regarding remedial cost, damage to the defective product and pure economic remain controversial in some of the jurisdictions discussed in this work. While not unmindful that tort mechanisms are not meant to protect purely economic interest, coupled with the fact that tort mechanism strives to restore the claimant to the position he was before the injury occasioned by the tortfeasor; the basic fact is that where there is a wrong there must be a remedy. It is in this light that we believe that in the interest of justice, Nigerian law relating to damages occasioned by defective product should be in line with modern trend which focus primarily on ensuring that justice is done. In view of this coupled with lessons learnt from comparative jurisprudence we are of the view that Nigerian law should be in-tandem with the undermentioned position:

- (a) Nigerian law should continue to allow recovery for personal and property losses occasioned as a result of the manufacturer's or seller's negligence. The circumstances whether recovery for economic losses under English Law is allowed however remain unsettled. In view of the conflicting decisions on this issue, it is suggested that in the interest of justice, recovery should be allowed only where it is a foreseeable damage and there is a close connection or relationship between the parties.
- (b) On recovery for remedial cost incurred to avoid a threatening defect and consequential losses; it is suggested that recovery should be allowed for remedial costs carried out to avoid a threatening danger along with foreseeable economic loss arising therefrom. The reason for this position is to make the manufacturer liable for his negligence; one however is not unmindful that such claim is equally cognizable in contract. However if such is not allowed under the tort law mechanism a non-purchaser will be caught by the privity bar.
- (c) Related to the above, is the issue bordering on the recovery of damages to the defective product. The position on recovery for such loss is also unsettled under comparative

jurisprudence discussed in this work. It is submitted that recovery for damage to the defective product should be allowed where such damage is accompanied by personal damages which extend or include damage to the defective product. Suggesting that recovery for the loss occasioned to the defective product should only be left within the purview of the contract law amount to dissipation and duplication of judicial time and financial expenses.

- (d) While not unmindful of the fact that compensation is the dominant remedy if not the purpose of modern tort law; punitive damages are exception to the fundamental principle in modern law of remedies that tort damages should restore the victim to the pre-tort condition (restitution in integrum). It is suggested that in view of the spate at which fake and substandard goods which put lives, limb and properties in danger are imported and manufactured in Nigeria, the Nigerian courts should be ready to impose punitive damages where and when the circumstances of the case so demands. The reluctance or hesitation on the part of the courts in not doing so is at the expense of safety and lives which the law seeks to protect.
- (e) Recovery should also be allowed for pure economic loss where there is special relationship between the parties justified by justice and exigencies of the case in question. However, the court should be reluctant in doing this save in exceptional circumstances.

Conclusion

The above discourse is a summary of recoverable damages in respect of loss occasioned by defective product. While Nigerian courts are yet to be tasked with complex issues relating to claims for expenses incurred to remedy a threatening defect, damage to the product itself, and pure economic loss; a direction has been provided in this work in the preceding segment. Justice is a double-edged sword, i.e. justice to the tortfeasor and the victim. However, since the claim for pure economic loss may be indeterminate, courts should be cautious in awarding same; while the existence of a special relationship between the parties, justice and peculiar circumstances of the case should be used as parameters in awarding punitive damages.

Endnotes

¹ Unlike the position in the United States of America and under English law.

² For instance damage to the defective product caused by an inherent defect in the said product

³ For further reading see Thomas T A, et al American Jurisprudence 2d Vol. 63 (1996 Lawyers Cooperative Publishing Rochester, New York) p.38.

⁴ C.J. Miller and R.S. Goldberg Product Liability Oxford University Press 2004 para 1.01. See also Gbade Akinrinmade, "Prospects and Challenges of Sociological Conception of Law" The Nigerian Experience OIDA International Journal of Sustainable Development Vol. 5 No. 12, 2013, p. 79-94.

⁵ F. Gahan The Law of Damages, Sweet & Maxwell, (1936) p.1. See Bryan. A Garner Black's Law Dictionary 7th ed. West Group, St Paul Minn., 1999.

⁶ (2006) All FwLR Part 315 p.109 at 126.

⁷ The Law of Torts in Singapore, Singapore Academy Publishing, Law Practice Series (2011) Singapore at p.726 -750. "The purpose of compensatory damages is to put the victim in the same position as if the tort had not occurred. As stated by Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 AppCas 25 at 39, the measure of damages is: "...The sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation...the loss to be compensated may be pecuniary (a loss of wealth) or non-pecuniary (including pain and suffering and loss of amenity, loss of reputation, and mental distress). The amounts for the latter are based on conventionally – accepted sums. In cases of non-pecuniary losses, complete restoration to the original position is not possible. In this regard, the objective of compensatory damages is to award fair and reasonable sums..." (726) "...Aggravated damages may be awarded for the additional injury suffered by the plaintiff arising from the manner and motives of the defendant's commission of the tort or his subsequent conduct. The award is for additional injury to feelings and mental distress caused to the plaintiff. The purpose of an award of aggravated damages is to compensate the victim for the injury suffered not to punish the wrongdoer. Due to the additional injuries suffered by the plaintiff, the basic awards of damages may not suffice to compensate the plaintiff, hence the need to award aggravated damages...(726-727). Exemplary or punitive damages – the main rationale for an award of exemplary damages is deterrence, i.e. to show that tort does not pay. In contrast to compensatory damages, the scope for awarding exemplary damages is clearly more restricted, perhaps as a 'last resort' remedy (729). Nominal damages are awarded in torts which are actionable per se. where the plaintiff's rights have been infringed by the defendant's tortious conduct, but the plaintiff suffers no loss, he is only awarded nominal damages. Alternatively, there may be a loss but if the plaintiff is not able to adduce sufficient evidence to prove the loss. Nominal damages will be awarded. This is in contrast to substantial damages which are awarded only if the plaintiff has proven a loss. It should be highlighted that nominal damages does not necessarily mean a small amount of damages. (736). Vindictory damages: one purpose of tort law is to allow an aggrieved party to vindicate his or her legal rights and not merely to compensate for loss. (737). Restitutory damages are essentially a remedy where damages are assessed according to the gains made by the tortfeasor rather than the loss suffered by the plaintiff. It seeks to reverse the 'unjust enrichment' that less common in non-proprietary torts. (738-739). Damages for personal injuries and death (739)

⁸ Bryan A. Garner, Blacks Law Dictionary 7th ed. West Group, St Paul, Minn 1999.

⁹ (2008) All FwLR (Pt 409) p. 405.

¹⁰ (2008) All FwLR (Pt 409) p. 405 at 427 para F.

¹¹ In the case of *D & F Estates Ltd v Church Comrs for England* (1988) 3 WLR p.368, the court held that the cost of remedial work undertaken to avert danger was recoverable. However, in the case of *Dutton v Bognor Regis Urban District Council* (1972) 1 QB p. 373, the court held that such claim was not recoverable.

¹² (1932) AC 562

¹³ See the view expressed by Lord Brandon in his dissenting judgment in *Junior Books Ltd v Veitchi Co Ltd* (1983) 1 AC 520 where he stated as follows: "The first consideration is that, in *Donoghue v Stevenson* itself and in all the numerous cases in which the principle of that decision has been applied to different but analogous factual situations, it has always been expressly stated, or taken for granted, that an essential ingredient in the cause of action relied on was the existence of danger, or the threat of danger of physical damage to person or their property, excluding for this purpose the very piece of property from the defective condition of which such danger or threat of danger, arises."

¹⁴ See *Ekpe v Fagbemi* (1978) ILRN p. 137.

¹⁵ *Miller C.J. & Goldberg R.S Product Liability* (2004 Oxford University Press) Chap. 16. See the court's decision in the case of *Junior Books v* (1983) AC 520; contrast the decision with that of the case of *Muirhead v Industrial Tank Specialities* (1986) QB 507.

¹⁶ See generally *Peel and Goudkamp "Winfield and Jolowicz on Tort"* 9th ed. P.119. (Sweet & Maxwell)

¹⁷ (1986) QB 507. (1985) 3 All ER 705 719. O'Connor LJ also expressed the following view: "The heads of damage in the statement of claim show that this case is so close to *Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd* (1972) 3 All ER 557, (1972) QB 27 that in my judgment it should not be distinguished from that case: until it is overruled we are bound by it. The defendants negligently cut the electricity to the plaintiff's factory, a batch of metal in the furnace was damaged and they were unable to process four further batches. By a majority, this court held that they were entitled to recover the value of the damaged batch, and the consequential loss of profit thereon, but could not recover for the loss of profit on the lost batches."

¹⁸ (1983) AC 520 The facts of this case are as follows: The plaintiff entered into a building contract with builders who nominated Veitchi, a flooring specialist, to lay the floor of the building. There was no direct contract between Veitchi and Junior Books. The floor was badly laid, and it had to be replaced. Junior Books sued Veitchi for a total sum of €200,000:00 representing the cost of repair which was €50,000:00 and for other consequential damages inclusive. The action was commenced in tort as there was no direct contractual relationship between the parties. The House of Lords held that Veitchi was liable for the loss. The basis of the court's decision was that there was a close relationship between the two parties and that there was nothing limiting the scope of duty of care owed as a result of the relationship. For these reasons, Junior Books was able to recover for the loss.

¹⁹ *Peel and Goump "Winfield and Jolowicz on Tort"* 9th ed. pp 120-121. (Sweet & Maxwell)

²⁰ (1892) 2 QB 524 p. 528.

²¹ See the case of *Dumez (Nig) Ltd v Ogboli* (1973) 3 UILR p. 306, the Supreme Court lending credence the above view, observed as follows: "It is axiomatic that special damages must be strictly proved and (unlike general damages, where, if the plaintiff establishes in principle his legal entitlement to them, a trial judge must make his own assessment of the quantum of such general damages)...so far as special damages

are concerned, a trial judge cannot make his own individual assessment but must act strictly on the evidence before him which he accepts as establishing the amount to be awarded.”

²² This is a Latin term which means restoration to the original position.

²³ (1978) ILRN 137.

²⁴ See the view of Bello JSC in this case, which he expressed as follows: “In the case in hand, the damage to the respondent’s motor car is not prospective but, as a matter of fact, it was retrospective. The car had suffered real and actual damage. That being the case, the respondent was entitled to recover the cost of its repairs plus a certain sum as compensation for loss of its use during a reasonable time for repairs... We may add that it does not matter that the repairs have not been carried out at the date of the trial, or even that repairs would be carried out. It follows from the foregoing that the trial judge erred in law in treating the claims for cost of repairs as an item of general damages. Having found, quite rightly in our view, that the estimate for the cost of repairs as contained in the engineer’s report was properly proved and was acceptable, he ought to have awarded the respondent the estimated cost of repairs.”

²⁵ Edward Okwejinor v G Gbakeji and Nigerian Bottling Co Plc (2008) All FWLR (Pt 409) p. 405. In this case, the claimant claimed the following, medical expenses, cost of crate of mineral, general loss of business expectation, profits or income for the period of treatment, and time of recuperation, general damages and damages for shock, pain agony and discomfort. The trial court allowed recovery for these claims.

²⁶ See the case of Okuneye v Lagos City Council (1973) 2 CCHCJ 38, where Akibo Savage J expressed the following view regarding the fact that there are no fixed rules to assessing general damages: “It seems that in many cases of this type there is no fixed rule by which to assess damages; there can be none, for instance, by which to ascertain what will compensate a man for the loss of an eye or a limb, or for pain and suffering, or disfigurement, loss of amenity or enjoyment of life, or shortened expectation of life.”

²⁷ See the English case of Flint v Lovell [1935] 1 KB 354. See also the case of Okuneye v Lagos City Council (1973) 2 CCHCJ 38 43, where Akibo Savage J remarked as follows: “The plaintiff is a young schoolboy aged about 13 years now. He has lost an arm in very tragic circumstances. The evidence of Dr. Efunkeye is to the effect that due to the shortness of the arm stump, it is most unlikely that the plaintiff can be fitted with the usual available designs of artificial limb. The loss of his arm will remain a constant source of sorrow and social embarrassment to him. He can no longer continue his education at St. John’s School, Aroloya, Lagos, because he feels embarrassed in the company of his colleagues at school. His father has had to find him another school in another town; he can no longer participate in sports and other games as he used to do; as a young boy, having regard to the average span of a man’s life, he has many more years of existence before him, but they are years of a handicapped life.”

²⁸ See the case of Rookes v Barnard [1964] AC 1129

²⁹ See the case of Rookes v Banard (1973) 3 Burr 1845, 97 E.R.1130.

³⁰ See generally Jason Taliadoros “The Roots of Punitive Damages at Common Law: A Longer History” 64 Clev. St. L.REV. 2016, p. 251.

³¹ See generally Miller C.J. & Goldberg R.S Product Liability (2004 Oxford University Press) chap.16. See the case of Vaughn v General Motors Corp. 466 NE 2d 195 (11 1984) and Kajal v Jagdish Chand & Ors Civil Appeal No. 735 of 2020.

³² See the following cases: Donoghue v Stevenson (1932) AC 562, Ashington Piggeries Ltd v Christopher Hill Ltd (1972) AC 441. See the cases of Vaughn v General Motors Corp. 466 NE 2d 195 (11 1984), John R. Dudley Construction Inc v Drott Manufacturing Co, 66 AD 2d 368 (1979).

³³ Lord Brandon, in his dissenting judgment in Junior Books v Vietchi Co Ltd (1983) 1 AC 520, affirmed: “The first consideration is that, in Donoghue v. Stevenson, itself and in all the numerous cases in which the principle of that decision has been applied to different but analogous factual situations, it has always been expressly stated, or taken for granted, that an essential ingredient in the cause of action relied on was the existence of danger, or the threat of danger of physical damage to persons or their property, excluding for this purpose the very piece of property from the defective condition of which such danger or threat of danger, arises.”

³⁴ See the view of Lloyd LJ in Aswan Engineering Co v Lupdine Ltd (1987) 1 All ER 135 at 152: “[I]f I buy a defective tyre for my car and it bursts, I can sue the manufacturer of the tyre for damage to the car as well as injury to my person. But what if the tyre was part of the original equipment? Presumably the tyre is other property of the plaintiff, even though the tyre and property in the car passed simultaneously. Another example, perhaps even closer to the present case, would be if I buy a bottle of wine and find that the wine is undrinkable owing to a defect in the cork. Is the wine other property, so as to enable me to bring an action against the manufacturer of the cork in tort?”

³⁵ (1988) 3WLR 368.

³⁶ Ibid at 386.

³⁷ In the case of Tennis v Ford Motor Co, 730 F Supp 2d 437 (WD Pa 2010), the plaintiffs alleged that the vehicle manufactured by the defendant malfunctioned and this resulted in a fire. The fire spread and caused damage to other property beside the vehicle. The court denied the defendant’s motion to discuss the action premised on the economic loss rule.

³⁸ See the cases of Vaughn v General Motors Corp, 466 NE 2d 195 (11 1984) and John R. Dudley Construction, Inc v Drott Manufacturing Co, 66 AD 2d 368 (1979).

³⁹ See fn. 34 – 36.

⁴⁰ (1972) 1 QB 373.

⁴¹ Ibid at 343. The above position has been upheld in other cases, for instance in the case of Anns v London Borough Council of Merton (1977) 2 All ER 492 where Lord Wilberforce stated: “[T]he relevant damage is in my opinion material physical damage, and what is recoverable is the amount of expenditure necessary to restore the dwelling to a condition in which it is no longer a danger to the health or safety of persons occupying and possible expenses arising from necessary displacement.”

⁴² See fn. 50.

⁴³ See fn. 12.

⁴⁴ See the view expressed by Lord Oliver in the same case at p. 395: “I think the correct analysis, in principle to be simply that “... the builder of a house or other structure is liable at common law for negligence only where actual damage, either to person or property, results from carelessness on his part in the course of construction.”

⁴⁵ The issue of whether the cost of remedial work is recoverable came up for consideration in the Canadian case of Rivtow Marine v Washington Iron Work (1974) 40 DLR (3d) p. 530. In this case, the charterers of a barge with cranes carried out remedial work on the barge in order to avert a disaster. The manufacturer and distributors were aware of this defect, but failed and/or neglected to warn the charterers. The charterers commenced an action for the cost of repairs and damages for the loss of profit suffered during the course of repairs. The majority decision of the Supreme Court of Canada in favour of the plaintiffs was premised on the fact that there was breach of duty to warn of a known danger. Accordingly the damages awarded were the difference between the profits that would have been lost if the barge had

been withdrawn in February, and the profits actually lost when the barge was withdrawn in September. It must be noted that the court refused the claim for cost of repairs since it was not a result of a neglect of a duty to warn, although this head of claim may be held to be recoverable in view of the opinion expressed by the minority which was to the effect that: "The case is not one where a manufactured product proves to be merely defective (in short, where it has not met promised expectations), but rather one where by reason of the defect there is a foreseeable risk of physical harm from its use and where the alert avoidance of such gives rise to economic loss. Prevention of threatened harm resulting directly in economic loss should not be treated differently from post injury."

⁴⁶Supra

⁴⁷In the case of *Tennis v Ford Motor Co*, 730 F Supp 2d 437 (WD Pa 2010), the plaintiffs alleged that the vehicle manufactured by the defendant malfunctioned and this resulted in a fire. The fire spread and caused damage to other property beside the vehicle. The court denied the defendant's motion to discuss the action premised on the economic loss rule.

⁴⁸*Moscattivello v Pittsburg Contractors Equip Co*, 595 A 2d 1198, 1201 Pa Super Ct 1991.

⁴⁹[1972] 1 QB 373.

⁵⁰See P.F. Cane "Physical Loss, Economic Loss and Product Liability" 1979, 95 LQR p. 120.

⁵¹See the case of *Murphy v Brentwood District Council* (1991) AC 398.

⁵²Although in an earlier phase of American product liability law, damages were recoverable for economic loss. See *Quackenbush v Ford Motor Co* 167 App Div 433 (NY 1915); *Henningsen v Bloomfield Motors Inc and Chrysler Corp* 161 A 2d 69 (NJ, 1960); *Ghera v Ford Motor Co*, 55 Cal Rptr 94 (Cil App, 1966); *Trans World Airlines v Curtiss-Wright Corporation* 148 NYS 2d 284.

⁵³See in general C.J. Miller and R.S. Goldberg *Product Liability* paras 16.82, 16.89.

⁵⁴45 Cal Repr 17 (1965).

⁵⁵476 US 858 (1986).

⁵⁶476 US 858 (1986) 870.

⁵⁷476 US 858 870.

⁵⁸207 A 2d 305 (NJ 1965).

⁵⁹207 A 2d 305 313.

⁶⁰652 F 2d 1165 (3d Cir 1981).

⁶¹*P.T. Bumi International Tankers v Man B & W Diesel and Mirrtees Blackston* (2003) SGHC 152. See also the cases of *RSP Architects Planners & Engineers v Ocean Front Pte Ltd* (1996) 1 SLR 113 and *RSP Architects Planners & Engineers (Raglan Square & Partners FE) v Management Corporation Strata Title Plan No 1075* (1999) 2 SLR 449.

⁶²[2001] UKHL 29.

⁶³See the case of *Philips v Cricket Lighters* 883 A 2d 439 (Pa 2005).

⁶⁴See the Restatement 2nd section 908 provides as follows:

⁶⁵"Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant."

⁶⁶See the case of *Fleet v Hollenkemp*, 52 Ky. 175. In this case, the plaintiff became ill after taking a concoction prescribed by his doctor but negligently prepared by the pharmacist. Traces of poison had been inadvertently mixed in with the medicine. The plaintiff brought an action in case to recover compensatory and punitive damages. The defendant argued that punitive damages were inappropriate in an action in case because it is an indirect action involving no intent to harm the plaintiff. The court was not persuaded by this argument and upheld the punitive damages award, stating that it is the conduct of a defendant which is critical to a punitive damages award, not the form of action.

⁶⁷(1963) UKHL (1)

⁶⁸See the case of *Rustom K. Karanja v Krishnaraj M.D. Thackersey* AIR 1970 Bom 424, *Union of India and Others v Sancheti Food Products Limited* 2015 (9) SCALE 213.

⁶⁹See the following cases: *Vijay Kumar Singh v Bajaj delhi High Court* Jan 24, 2012, *Oshinjinrin & ors v Elias & ors* (1970) LPELR-2799 (SC), *Ratcliffe v Evans* (1892) 2 Q.B. 524.

