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Fijabi Adebo Holding Limited & Anor v. Nigerian Bottling Company PLC & Anor: Lagos High Court Suit No LD/13/2008

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Abstract

Product liability is an emerging separate field of law, with so many conceptual shelves into which product frustration cases may be shelved. Being an emerging separate field of law in Nigeria, our courts are yet to be tasked with the resolution of complex cases in this area of the law. This comment on the case of Fijabi Adebo Holding Limited & Anor v. Nigerian Bottling Company Plc & Anor which is still a subject of a pending appeal in the main focus on the circumstances of when a manufacturer of carbonated drink along with a regulatory authority may be held liable for breach of their respective duties. It also considers whether compliance with Industrial Standard or Practice may amount to breach of statutory duty. The case comment concludes that compliance with industrial standard will not amount to breach of statutory duty by a regulatory agency. Further, that environmental or climatic condition is the reason for variation in the percentage of Benzoic acid in carbonated drink purpose of which is to prevent spoilage. It for this reason that the level or percentage vary from country to country depending on the climatic condition of each country.

Key words – product liability, negligence, compliance with industrial standard, damages.

Introduction

The decision of the Lagos High Court in Suit No LD/13/2008, i.e. the case of *Fijabi Adebo Holding Limited & Anor v Nigerian Bottling Company Plc & Anor*[1] is still a subject of appeal at the Lagos Division of the Court of Appeal in Nigeria raises some fundamental issues in the area of product liability and consumer protection. It brings to the fore thoughts and reflections on the legal implication of compliance with industrial standards *vis-á-vis* liability of product manufacturers. It also gives insight into circumstances under which a regulatory authority may be found culpable in the course of discharging its duties. Product liability is an emerging separate field of law in Nigeria, though there are many heads under which product liability frustration cases could be discussed in Nigeria, for instance-law of contract, sale of goods among a host of other areas of the law.

This case comment is restricted to the principle of negligence, which is the only theoretical principle of liability under tort law in Nigeria; in contradistinction with the position in England, and America, where strict liability is also recognized as additional theoretical principle of liability under tort law.

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[1] LD/13/2008. Available at: www.lexology.com/library/detail.aspx?g=22171143-if49-49fe-8a07-71a3753ba080 accessed on 12/04/2021.

The Facts of the Case

This suit was commenced by the Claimants against the defendants vide a Writ of Summons dated 08/01/2008. The 1st defendant is the Nigerian Bottling Company manufacturers/producers of Coca-Cola and other associated carbonated drinks in Nigeria. The 2nd defendant is an agency of the Federal Republic of Nigeria saddled principally with the responsibility of regulating and certification of the production of foods and drugs along with other related functions in Nigeria.[2]

The claimant's claim was hinged on negligence as theoretical principle of establishing the liability of 1st and 2nd defendants. The 1s t defendant was alleged to have produced drinks not safe for human consumption, while the 2nd defendant was alleged to have failed in the performance of its statutory duty. The claimants alleged that when the first set of the consignment ordered from the 1st defendant arrived in the United Kingdom, fundamental health related matters were raised on the contents, and composition of the Fanta products which formed part of the products ordered by the claimants from the 1st defendant. The United Kingdom Health officials specifically the Stockport Metropolitan Borough Council Trading Standard Department of Environmental and Economy Directorate confirmed that the products contained excessive levels of sunset yellow and Benzoic acid, which are unsafe for human consumption. The Coca-Cola European Unions corroborated the findings by the above government agencies. The affected consignment was seized and destroyed.

The 1st defendant's case was that the percentage of the chemical components contained in the 1st defendant's soft drinks particularly Benzoic acid are well within the prescribed limit for human consumption set by the 2nd defendant. The 1st defendant further contended that there was no limit set for "sunset yellow" component of its Fanta orange product by the 2nd defendant. The 1st defendant maintained that the content of its products are not harmful to human health and in recognition of this fact and quality of its products, the 2nd defendant had consistently issued certificate of registration for a period of 5years. In view of the facts above, the 1st defendant denied that the damage claimed by the claimants was occasioned by its negligence and that the claimants were not entitled to claim damages from the 1st defendant as they had no knowledge that the product was to be exported outside Nigeria.

In its judgment, the court refused the claimants claim on the grounds that the 2nd defendant having certified all soft drinks manufactured by the 1st defendant as fit for human consumption, the 1st defendant cannot in the circumstances be held to have breached its duty of care to the claimants because of the chemical components of the said products. The 2nd defendant however was held liable for having been grossly irresponsible in its regulatory duties to its consumers of Fanta and Sprite manufactured by the 1st defendant on the grounds that it contained excessive Benzoic acid which are dangerous to human health. Consequently, the court awarded the sum of N2 million as damages against the 2nd defendant.

Relevant Issues for Comment

From the pleadings of both parties and issues submitted for resolution before the court, the undermentioned issues are relevant/identified for discussion in this paper.

(a) Whether the 1st defendant was negligent and breached the duty of care owed to the 1st claimant in the production of its Fanta and Sprite soft drinks which, according to the claimants, allegedly contained excessive sunset yellow and Benzoic acid.

[2] See NAFDAC Act Cap N1 Laws of Federation of Nigerian 2004.

(b) Whether the level of addictive marked as safe for human consumption in Nigeria is actually safe for human consumption as this was considered unsafe in the United Kingdom and Europe for human consumption, bearing in mind that the human body is basically the same irrespective of race or colour.
(c) Whether the claimants are entitled to the reliefs sought.

Comments

The relevant principles of law distilled from the issues submitted for resolution before the court and appropriate comments will be discussed in this segment of the review. These are: (a) duty of care, (b) breach of duty of care, (c)whether compliance with regulatory standards by the manufacturer may constitute breach of duty of care and/or exempt a manufacturer from liability, (d)whether the 2nd defendant failed in the performance of its statutory duty in the circumstances of this case, and (e) whether the 2nd defendant is liable in damages to the Claimants given the circumstances of the case.

Negligence

This has been defined as "…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."[3] In this case, after analysing series of English case law, the Supreme Court defined negligence as the failure to use such care as a reasonable, prudent and careful person would use under similar circumstances. It is the doing of some act which a person of ordinary prudence would not have done under similar circumstances or failure to do what a person of ordinary prudence would have done under similar circumstances.

To adjudge whether a manufacturer or someone within the stream of commerce is negligent in the production and/or manufacture of a product, the following constituent elements must be proved: (a) duty (b) breach of duty and (c) damages.[4] Each of these elements must be

[3] *Hanseatic International Ltd v Martin Usang* (2003) FWLR (Pt 149) 1563 1587.

[4] See the following cases: *Osemobor v Niger Biscuit Co Ltd* (1973) 7 CC HCJ 71; This was a case in which a decayed tooth was found in the biscuit manufactured by the defendant company. The court held that there had been a breach of duty because the plaintiff had had no opportunity of an examination of the biscuit in which she found the decayed tooth before purchasing it. In *Solu v Total (Nigeria) Ltd* ID/619/85 Lagos State High Court Judgment delivered on March 25 1988 (unreported), the allegedly defective product in the case in question was a gas cylinder which exploded while in use. On a careful consideration of the evidence adduced, the court came to the conclusion that there had been a breach of duty. The breach in this case was classified as a manufacturing defect rather than a design defect, since other cylinders in the series did not malfunction. In *Edward Okwejiminor v G Gbakeji and Nigerian Bottling Co* (2008) All FWLR (pt 409) In this case, the plaintiff/appellant returned home from work, very hungry and thirsty. In view of the fact that food was not ready, he took a bottle of Fanta orange drink from a crate of mineral purchased from the first defendant and manufactured by the second defendant. While drinking from the content of the bottle, he felt some sediment and rubbish go down his throat, and he immediately stopped the drink halfway. On examination, he found that the bottle contained a dead cockroach. Having taken some of the contents of the bottle, he experienced some discomfort, and, in the early hours of the following day, he developed severe stomach pain, while his neighbours, including the first defendant who shared the same compound with him, came to his rescue. He was taken to a government hospital where his treatment was delayed. Because of this, he was taken to a private hospital where he was attended to by a doctor whose preliminary investigation revealed symptoms of food poisoning. On further inquiry by the doctor, he disclosed that he had taken a Fanta orange drink which he had partially consumed. Samples of the Fanta orange drink and the stool of the plaintiff were taken for laboratory examination. Scientific analysis investigation carried out by a medical laboratory scientist revealed that the stool and Fanta in question contained shigella bacteria, which had caused the stomach pain. The doctor prescribed the necessary medication. The trial court held that it was the Fanta orange drink that had caused the food poisoning. An appeal against the decision was upheld on the ground that the plaintiff had not established causation. The Supreme Court, however, held that causation had been established and held the manufacturer liable. It is important to note that the above claimant established causation because he was able to access a laboratory where an examination of the defective drink was carried out. Such facilities are not easily

established on the balance of probability. Failure to establish any of these elements will exonerate the manufacturer from liability.

Duty of Care

Following the landmark decision in the case of *Donoghue v Stevenson*[5] wherein the "neighbourhood principle or test was enunciated, a manufacturer/producer owes its consumers a duty of care.

The neighbour principle as enunciated in the *Donoghue* case is as follows:

> "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 and directly affected by my act 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."[6]

Taking into consideration the relevant facts of this case, it is not in dispute that the 1st defendant owed the claimants a duty of care.

Breach of Duty

The second constituent element necessary to establish the liability of the manufacturer of a defective product under the fault-based regime is for the claimant to establish that the defendant breached the duty owed. The question then is: was there a breach of the duty owed the claimants in this case? In ascertaining this, the standard of care required of a defendant in tort cases is that of the hypothetical reasonable person. A classic and frequently cited formulation of this test is found in *Blyth v Birmingham Waterworks Co*.[7] In this case Alderson B said:

> "Negligence is 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."

This is an objective criterion,[8] but the reasonable person is placed in the position of the defendant.[9] In addition, the profession of the defendant is taken into account,[10] and in a product

available to those who live in remote areas, and neither are they accessed by those who do not appreciate the rationale and importance of carrying out a laboratory examination on defective products. Contrast with the case of *Boardman v Guinness Nig Ltd* (1980) NCLR 109 the plaintiff consumed part of the contents of a bottle of beer manufactured by the defendant. He observed that it tasted sour, and he became ill shortly afterwards. His companions examined the remaining content of the bottle of beer and discovered that it was cloudy with a considerable quantity of sediment. In the ensuing action for negligence, the defendant denied liability on the ground that the beer in question could not have been from the defendant's factory. They also adduced evidence that the system of production employed by the defendant was reasonably safe and as near perfect as possible. The court held that the plaintiff had failed to show that the defendant was careless in view of the fact that the defendant had taken great pains to adopt a fool-proof process in the manufacture of the alleged defective product. Furthermore, the onus was on the plaintiff to show that the people engaged in this process were so incompetent as to render the fool-proof process irrelevant. The *Boardman* case attest to the fact that, taking into consideration the typical educational background, income and exposure of an average Nigerian, it would be difficult if not impossible to impugn the sophisticated evidence which defendants to product claims may adduce at trial.

[5]1932 AC 562.

[6]*Ibid* 580.

[7](1856) 11 Ex 781 784

[8]Edwin Peel; James Goudkamp; Percy Henry Winfield, Sir J.A. Jolowicz, Winfield and Jolowicz on*Tort*19 Ed. (2014 London, Sweet and Maxwell) 143.

[9] *Ibid* 146.

[10] *Ibid* 147.

liability context it would be apt to enquire what a reasonable manufacturer or supplier, depending on the context, would have done. The courts, in ascertaining this objective standard in tort cases, take into consideration the "risk factors", as they are often referred to. The risk factors comprise the following: the possibility of the injury manifesting;[11] the severity of injury which the prejudiced party may suffer;[12] the cost implication of preventing the loss along with the practicability of steps to be taken to avoid the injury;[13] and the importance or utility of the defendant's activity.[14]

From the above, it can be deduced that there is an obligation on the part of a claimant in a product liability claim founded on negligence to establish that the manufacturer failed to exercise reasonable care in the production of his or her product either by failing to carry out appropriate tests or inspections or by providing an adequate warning.[15]

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[11] The greater the likelihood of the defendant conduct causing harm, the greater the amount of caution expected from the tortfeasor. In the case of *North Western Utilities Ltd v London Guarantee & Accident Co Ltd* [1936] AC 108 126 Lord Wright stated that "[t]he degree of care which the duty involves must be proportionate to the degree of risk involved if the duty of care should not be fulfilled." A consideration of this factor influenced the House of Lord's decision in the case of *Bolton v Stone* [1951] AC 850. The plaintiff's appeal against the committee and members of a cricket pitch on the grounds that they failed to take precautionary steps to ensure that cricket balls do not escape from their ground and injure passers-by was dismissed. The House of Lords dismissed the case on the grounds that the incident which led to the initiation of the action was unprecedented, while the hit which caused the prejudiced person's injury was exceptional. The court further considered the distance of the pitch to the road along with the height of the fence surrounding the pitch which was about seven feet high and had been erected purposely to prevent such an incident, coupled with the frequency at which balls had escaped on previous occasions.

[12] If the severity of the injury to be suffered by the prejudiced person as a result of the negligence of the tortfeasor is very high, a greater obligation is required on the part of the tortfeasor to prevent such an injury from manifesting. In *Paris v Stepney Borough Council* [1951] 1 All ER 42, failure of the defendant to provide a goggle to the claimant, a one-eyed man, who lost his sight when trying to remove a U-bolt, was held to have constituted an act of negligence on the defendant's part since the defendant knew he had had only one good eye.

[13] The amount of expenses involved and the degree of the measures necessary to avoid the harm are considered to determine whether a tortfeasor had breached the duty owed to the prejudiced party. Where the remedial cost and efforts needed to be taken to prevent the envisaged prejudice are so enormous that what was left undone or remained to be done to prevent the envisaged prejudice was minimal, insignificant or negligible and the failure to do this was not attributable to lapses on the part of the tortfeasor's, the defendant will not be held liable for having breached any duty of care. In the case of *Latimer v AEC* [1952] 2 QB 701, an unprecedented rainstorm caused the flooding of the respondent's factory floor. The flood water mixed with oily liquid within the factory, making the floor slippery. The defendant sustained injury as a result of the state of the company's floor and he initiated this action to recover damages for the injury he sustained. In an appeal against the reversal of the trial court's judgment by the House of Lords, Lord Turker observed (711): "[T]he respondents were faced with an unprecedented situation following a phenomenal rainstorm. They set forty men to work on cleaning up the factory when the flood subsided and used all available supply of saw dust, which was approximately three tons. The judge has found that every step taken which could reasonably have been taken to deal with the conditions which prevailed before the night shift came on duty, and has negatived every specific allegations of negligence as pleaded, but has held the respondents liable because they did not close the factory, or part of the factory where the accident occurred, before the commencement of the night shift.I do not question that such a drastic step may be required on the part of a reasonably prudent employer if the peril to his employees is sufficiently grave, and to the this extent it must always be a question of degree, but in my view, there was no evidence in the present case which could justify a finding of negligence on the part of the respondents to take this step."

[14] Where the benefit or social importance of the tortfeasor's act outweighs the risk associated with the act in question there may be justification for exposing others to risk. In *Daborn Bath Tramways Motor Co Ltd and T Smithey* [1946] 2 All ER 333, the plaintiff, a driver, sustained injury when she was thrown out of a left-hand drive ambulance driven by her. The ambulance was hit by a bus at the rear end when she turned right. The appeal lodged by the defendant against damages awarded in favour of the plaintiff was dismissed on the ground that the defendant had breached its duty to the plaintiff in view of the compelling circumstances which made the services being rendered by the plaintiff inevitable. See further Hepple, Howarth and Matthews *Tort Cases and Materials* 315.

[15] See Miller CJ. and Goldberg RS. *Product Liability* (2004 Oxford University Press) para 14.10. See also the case of *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540: In this case, which was heard in an Australian court, the defendant, a commercial oyster farming operator, sold to the defendant's relative some of its products

However, in the circumstances of this case, the court held and rightly so, that the 1st defendant did not breach its duty of care to the claimants. This finding was premised on the fact the 2nd defendant which is the regulatory agency in respect of manufactured food products has in the last five years continued to certify that the 1st defendants products were fit for human consumption.

Also related to the issue of breach of duty within the context of this case is whether the1st defendant had breached its duty of care by the level of Benzoic acid in its product.

It is important to note that the trial court failed to avert its mind to what role chemical preservatives play in increasing food and beverage's shelf life. The purpose is to inhibit or delay microbial growth depending on the temperature and weather condition of the country involved. While not unmindful that Benzoic acid, which is used commonly as sodium benzoate, has been used for many years as chemical preservative in foods and beverages in order to kill or inhibit the growth of microorganisms; the fact remains that it has detrimental effects on human beings especially at elevated concentration. However, the court in this case failed to advert its mind to the difference in climatic condition in Europe/ UK and Nigeria, despite positive evidence adduced in this regard before the court by an official of the 2nd defendant. In view of the above, there was no basis or justification for the court's finding that the 2nd defendant failed in the performance of its statutory duty for the following reasons:

a. The percentage of sunset yellow and Benzoic acid found in the product in question as produced by the 1st defendant was within the permissive level approved by the regulatory agency in Nigeria.
b. Closely related to the above is that compliance with Industrial Standards is a recognized defence in product liability claim.[16] The purpose of the permissive level of addictive in this product is to ensure the safety of the product in question and not to harm consumers.

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which it grew and harvested at Wallis Lake in New South Wales. The plaintiff consumed some of this product which was found to have been contaminated. He contracted the hepatitis A virus. It was established that the contamination was from faecal waste caused by heavy rainfall that resulted in the overflow of septic tanks and treatment plants within the area, and this led to the contamination of the lake. The defendants, conscious of the probable contamination of the lake, delayed in harvesting the oysters for two days. In the ensuing proceedings commenced against them, they acknowledged that they owed the plaintiff a duty of care, but they denied having breached it. In addressing the issue of breach of a duty of care, it was found that the rainstorm which had led to the contamination was the first in about hundred years of oyster growing in the area. While the risk of contamination was known, the probability of its occurrence was remote. It was also found that there was no known practical test which could have been carried out to detect the presence of the virus in the river in question and that the only alternative left for the defendant was any of the following: (a) to stop planting and harvesting oysters until the river had been cleared; (b) to sell the product with a warning of viral contamination; or (c) not to grow the product within the area at all. The Court of Appeal reversed the decision of the trial court and held that the precautionary steps taken by the defendant in delaying further harvesting and sale for two days was reasonable in the circumstances to prevent injury. Gummow J and Hayne J stated as follows: "Notwithstanding the significant magnitude of the risk of harm that eventuated in this case, the degree of probability of its occurrence cannot be said to justify the difficult, expensive and inconvenient alleviating action contended for by the consumers."

[16]It is a common practice in product manufacturing or product design that certain standards be met. A plaintiff may allege that the product did not comply with the operating standard or practice in the industry. Where a defence of compliance with industry standard is raised under the negligence regime, it raises a presumption that due care had been exercised in the production of the product. For instance, in the case of *Day v Barber-Colman Co* (10 III App 2d 494) an action was brought in negligence by the plaintiff who had been injured while trying to install a door. His contention was that, had a safety device been installed with the door, the accident which led to his injury would not have happened. The defendant relied on state-of-the-art defence. Sustaining the defence, the court held: "It is not of itself negligence to use a particular design or method in the manufacture or handling of a product... which is reasonably safe and in customary use in the industry, although other possible designs... might be conceived which would be safer... The view has also been canvassed that proof of compliance with accepted practice may not absolve one from liability. This view has been succinctly captured as follows: "The fact that the custom of manufacturers generally was followed is evidence of due care, but it does not establish its exercise as a matter of law. Obviously, a manufacturer cannot, by concurring in a careless or dangerous method of manufacture,

c. There was no justification and basis for the imposition of the sum of N2 million on the 2nd defendant as damages in favour of the claimants as the 2nd defendant had not breached its statutory obligation.

The next issue though briefly discussed above but common to most negligence actions is whether compliance with the standard practices of an industry is enough to absolve the defendant from fault provided such practice is reasonable.[17] If there is more than one accepted practice, it is not negligent to follow one rather than the other. Conversely, failure to comply with any accepted standard will lead to a strong inference of negligence, although it is not impossible for a defendant to justify such a departure even though there is evidence that had the defendant followed standard practices, the accident might have been averted.[18]

Damages

Once a claimant in a product liability claim has established that he or she had suffered damage as a result of the manufacturer's default, either through negligence or the supply of a defective product, he or she is entitled to damages.[19] Gahan defines damages as, "the sum of money which a person wronged is entitled to receive from the wrongdoer as compensation for the wrong".[20] In ascertaining the quantum reference could be made to the view of Otton LJ, who while commenting on the *quantum* of damages in tort in the case of *Indata Equipment Supplies Ltd v ACL Ltd*,[21] stated as follows:

> "In my view, the correct measure of damages was undoubtedly on a tortious basis, i.e. such sum as would have put the plaintiffs into the position it would have been in had it not been for the tort."[22]

Traditionally, the purpose of damages in a tort claim is to compensate the injured party and not to allow him to profit from such loss or protect economic interest.
The court having found rightly too in our opinion that the 1st defendant having not breached its duty of care to the claimants was justified in not awarding damages against the 1st defendant. However, the award of N2million as damages against the 2nd defendant in favour of the claimants in our view lacked any legal justification. Reasons for this view are that the court failed to consider the effect of environmental factors on carbonated drinks which is the major reason for the variation in the percentage or level of Benzoic acid in carbonated drinks. The court also did not advert its mind to the fact that compliance with industrial standard is a recognized defence in product liability claim, despite the evidence adduced before the court that the level of benzoic acid in the alleged dangerous product was within the permissible level approved in Nigeria by the 2nd defendant.

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establish his/her own standard of care." It follows that some judicial input will still be made in cases where the defence is made, because compliance with industrial practice will not be taken as conclusive proof that the manufacturer was not negligent.

[17] The final arbiter of what is reasonable practice will be the court: *Bolitho v City and Hackney Health Authority* [1997] 4 All ER 771.

[18] *Brown v Rolls Royce Ltd* [1960] 1 WLR 210.

[19] See in general Miller and Goldberg *Product Liability* ch 16; Peel and Goudkamp *Tort* ch 23; *AB v South West Water Services Ltd* (1993) 1 All ER 609.

[20] Gahan F. *The Law of Damages* (1936 Sweet & Maxwell) 1.

[21] (1988) 1 BCLC 412.

[22] *Ibid.*

Conclusion

While we await the outcome of the pending appeal in this case, the fact remains that a lot will still have to be learnt from comparative jurisprudence in the area of product liability particularly on issues dealing with breach of duty and scope of recoverable damages. The reason for this proposition is that product liability as a separate field of study is just emerging in Nigeria unlike the position in the United States of America and United Kingdom where it in now been treated as a separate field of law. In addition, Nigerian courts are yet to be tasked with the resolution of complex cases in this area of the law. This case review has brought to fore the complexities involved in the prosecution of product liability claim and the challenges would be claimants are likely to face in pursuing claims in this area of the law. It is our view however that the decision of the court in not finding the 1st defendant culpable in respect of the claimants claim in this case is right and legally justifiable. However, the award of N2 million as damages against the 2nd defendant in favour of the claimants in our view lacked any legal justification; reasons for this view having been stated above.