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THE BAR AND THE BENCH AS AGENTS OF CONSUMER ADVOCACY IN NIGERIA*

Abstract

The complexity of the production process, the sophistication and quantity of products and services churned out daily and the glaring inequality in bargaining power between the consumer and the producer and provider of goods and services underline the need for consumer advocacy. Consumer advocacy is “the process of standing beside an individual or group and speaking out on their behalf to protect and promote their rights and interests”¹ in the area of goods and services. An advocate may be an individual (such as a friend, a family member, a lawyer, etc) or an organization (such as a trade or professional association, governmental agency, a non-governmental organization, etc.). This paper examines the role of one of such organizations, the Nigerian Bar. It argues that given the pride of place the legal profession enjoys in the society, the bar and the bench needs to be more proactive in the area of consumer advocacy.

1. Introduction

...a country in which there is such a monumental degree of exploitation and total disregard for rights, health and interest of consumers. This is a society in which fake foreign labels are attached to local goods and products: in which expiry dates on expired products are routinely erased, and fresh ones pasted; in which unsold infested food is warmed over and retained indefinitely for sale to hapless victims instead of being thrown away: in which sawdust can be discovered in a newly opened tin of beverage and in which antibiotic capsules may contain talcum powder.²

This quotation by Sagay succinctly describes the contemporary Nigerian society. The Nigerian consumer is certainly in a precarious situation. More often than not, he is short changed by the producer of goods and the provider of services who inundate

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¹ Consumer Advocacy- a definition available at <http://www.cisia.org.au> last accessed 24/10/10

² I. E. Sagay, quoted in F. N. Monye, *Law of Consumer Protection* (Ibadan: Spectrum Book Ltd., 2003) p. xv.

him with substandard products and shoddy services. Substandard products include “fake and adulterated products, defective and inherently dangerous products, malfunctioning and poor quality products, foreign particles in especially drinks, extortionate and inflationary prices.”³ Shoddy services manifest in all areas of service delivery which include transport, power, communications, financial, professional, hotel and catering service. One is familiar with such things as unexplained flight delays in our airports, commuters who have to squeeze themselves into vehicles in excess of the authorized numbers the vehicles carry; or who are left stranded mid-way between trips with no fare refund in the event of break downs which are daily occurrences in the transport sector. Erratic power supply and excessive billing by the service providers in the power sector is no news in Nigeria. In the area of communications, inability to make calls or drop calls due to network failure, payments for services not rendered, inability to load recharge cards to mention but a few trail the industry. The consumer bears the brunt of all these problems. It is not only that, he does not get proper worth for his money. His safety, indeed sometime, his life, is compromised. As a result of illiteracy, poverty, ignorance of the protection the law affords him or even downright apathy, he rarely seeks redress. When he is exploited, which is always, he simply gnashes his teeth and tries to lick his wound. In all these, the consumer needs to be rescued. There is strong need for consumer advocacy. This paper seeks to examine the role the Bar and the Bench could play as agents of consumer advocacy in order to ameliorate the plight of the Nigerian consumer.

2. Conceptual Clarifications

It is important to delimit the terms used in this paper in order to properly situate this topic.

The term “consumer”⁴ has acquired an elastic meaning as a result of the various attempts made by different authors and commentators to define it. However, two broad categories of meanings are deductible. The first group prefers to give the word a narrow and restrictive meaning. This group insists that for a person to be considered a consumer there must be a contractual

³ B.B. Kanyip, *Consumer Protection in Nigeria: Law, Theory and Practice* (Abuja: Rekon Books Ltd, 2005) p. 3.

⁴ See Generally, Monye, *op. cit.*, pp. 15-19, Kanyip, *op. cit.*, pp. 11-26, Ikhide Ehighelue, *Consumer Protection Law* (Warri: New Pages Law Publishing Co., 2004), pp. 5-10, Workshop Paper on the Reform of Consumer Protection Law by Nigerian Law Reform Commission, 2006., P. A. Aaaker and G. S. Day, *Consumerism*, 2nd edn. (New York: Free Press, 1974) p. xvii quoted in Monye, *op.cit.* above n 2, p. 16.

nexus between him and the producer or service provider. Again, the producer must have acted in a business capacity and the buyer must have intended the goods or services for private not business use. For example, a consumer is defined as “a person who buys goods or service for personal, family or household use with no intention of resale...”⁵ Thus, following this definition, the plaintiff in the case of *Donoghue v. Stevenson*⁶ would not have been able to recover since there was no contract between her and the defendant as she was not the purchaser of the drink she took

The second group, on the other hand, favours an extended meaning of the term. It insists that the word be given a generic and broad interpretation so as to encompass different categories of persons. This group accommodates not just the purchasers or the ultimate users of products or services as consumers but any person who the supplier contemplates might be affected by such goods or services. Thus a consumer:

Is any person, natural or legal, to who goods or services or credit are supplied by another person in the course of a business carried on by that other person, and includes any person who uses the goods or services or who the supplier ought to have in contemplation that will be affected by such goods or services.⁷

Some others in this group even equate consumers to citizens. According to Aaker and Day, “consumer interest is involved when citizens enter into relationships with institutions like hospitals, insurances, the police force and various government agencies, as well as with business.”⁸ For Nadar “consumer should be equated with the word citizen so that consumer protection law will be regarded as an aspect of the protection of civil rights.”⁹ John Kennedy also agrees with this view. He says that “consumers include all of us, they are the largest economic group affecting and affected by almost every public and private economic decision, yet they are the only important group ...whose

⁵ Bryan A. Garner, ed. *Black's Law Dictionary*, 8th edn. (USA: West Publishing Co., 2004) p. 335.

⁶ (1932) A.C. 562

⁷ Workshop Paper, *op. cit.*, p. 10.

⁸ Aaker and Day, *op. cit.*, p. XV11.

⁹ As reported in D.W. Oughton, *Consumer Law: Text, Cases and Materials* (London: Blackstone Press Limited, 1991) p. 1 quoted in Kanyip, *op. cit.*, p. 12.

views are not heard.”¹⁰ In this paper, the term is construed widely. It would include the purchaser, the ultimate user as well as any person who the supplier ought to have in contemplation that might be affected by his goods or services.

Advocacy derives from the noun “advocate.” An advocate is “a person who pleads on behalf of another especially in a court of law, a person who speaks or writes in support of some cause, argument or proposal.”¹¹ To advocate is to plead the cause of another or to intercede for him. Advocacy denotes “the act of pleading, interceding or championing the cause of another.”¹² Correlatively, consumer advocacy is the act of championing or defending the cause of the consumer. It refers to actions taken by individuals or groups to promote and protect the interests of consumers. Advocacy aims at exposing unfair business practices or unsafe products that threaten the welfare of the general public. Consumer advocates use tactics like publicity, boycotts, letter-writing campaigns and law suits to counteract the financial and political power of the organizations they target.¹³

In a legal context, the word “bar” has three possible meanings. It could mean the physical division of a courtroom between its working and public areas or the process of qualifying to practice law or the legal profession.¹⁴ However “bar” is used here to mean the legal profession. It refers to “the whole body of lawyers qualified to practice in a given jurisdiction.”¹⁵ The term encompasses lawyers who represent clients. The word “bench,” on the other hand, refers to “judges and magistrates”¹⁶ *i.e.* the judiciary as a whole. The term is used to differentiate those lawyers who adjudicate and decide on the verdict from those who represent clients.¹⁷ This is the sense in which these words are used in this paper.

¹⁰ J. F. Kennedy’s address to the US Congress on 15 March, 1962 available at <http://www.consumersinternational.org/who-we-are/consumer-rights>. Last accessed on 24/10/2010.

¹¹ *The New Webster’s Dictionary*, (USA: Lexicon Publications, Inc., 2004) p. 12.
¹² *Ibid.*

¹³ Consumer Advocacy Law & Legal Definition available at <http://definitions.uslegal.com/c/consumer-advocacy>, last accessed on 25/10/2010.

¹⁴ The Bar, available at <http://en.wikipedia.org/Bar-law> last accessed 26/10/2010.

¹⁵ *Black’s Law Dictionary, op. cit.*, p. 157.

¹⁶ *The New Webster Dictionary op. cit.* p. 90.

¹⁷ See <http://en.wikipedia.org/wiki/Bench>, last accessed on 15/11/2010. Also <http://en.wiktionary.org/wiki/bench>, last accessed 15/11/2010

3. The Need for Consumer Advocacy

The main objective of consumer advocacy is to ensure that the consumer is not exploited or gets redress when exploited. The consumer is susceptible to exploitation because of the disparity between him and the manufacturer or service provider. This disparity is seen in the areas of bargaining power between the two, knowledge concerning the characteristic and technical components of the goods or services and, finally, resources¹⁸ in the sense that the producer is financially more capable than the consumer. The Industrial Revolution brought with it advanced technology leading to explosion in the quantity and complexity of goods and services. The result of this is that the average consumer is overwhelmed by the sheer variety and sophistication of goods and services in the market. He needs expert knowledge to enable him appreciate some of these goods and services. The consumer is further confounded by the aggressive marketing and sales promotions embarked upon by producers and service providers which further compound his problems. The result of these discriminating and unfair market practices against the consumer is proliferation of low quality and unsafe products, unsatisfactory services, *etc.* The bottom line is that the consumer is always at the receiving end. So, even in advanced countries where the level of literacy and awareness is high, the consumer still needs an advocate to plead his cause. This is why there are voluntary and Non-Governmental Organizations,¹⁹ trade and professional bodies,²⁰ regulatory agencies,²¹ *etc* which champion the consumer's cause.

In the light of the above, one can then appreciate the need of the Nigeria consumer. His problem is compounded by illiteracy, poverty, ignorance and lethargy. As a result of illiteracy, many consumers cannot read instructions on labels, manuals, *etc* and so, cannot distinguish between genuine and fake products. They may not even know when labels have been tampered with. Poverty could induce a consumer to purposely go for a substandard product (for instance, drug) instead of the genuine one which usually costs more. Due to ignorance many people,

¹⁸ Kanyip *op. cit.*, above n 3 at p. 3.

¹⁹ Such as Consumer International, (CI) Consumer Awareness Organization, (CAO) Consumer Organization of Nigeria (CON) *etc.*

²⁰ Nigeria Medical Association (NMA), Nigerian Bar Association (NBA), National Union of Road Transport Workers (NURTW) *etc.*

²¹ Some of the Agencies are the Standards Organization of Nigeria (SON), National Agency for Food and Drug Administration and Control (NAFDAC), Consumer Protection Council (CPC), National Insurance Commission (NAICOM), and Nigeria Communications Commission (NCC).

even among the literate ones, are not aware of their rights. Many consumers do not know of the existence of laws on consumer protection²² and so cannot take advantage of them. Apathy on the part of the Nigerian consumer is seen from the fact that even those who are aware of their rights are reluctant to enforce same. An average consumer who buys a fake product will prefer to throw it away and buy another one, especially if the product is relatively cheap. The reasons for this might be the high cost of litigation both in terms of time and money, the 'Nigerian' factor or that consumers are simply not interested in enforcing their rights. All these bring to the fore, the need for consumer advocacy.

4. The Task before the Consumer Advocate

As a result of the different roles played by lawyers who practice at the Bar and those who sit at the Bench, this will be taken from two dimensions.

4.1 The Bar

The Nigerian Government demonstrates its interest in protecting the consumer by the various laws²³ and agencies²⁴ it has put in place to take care of the interests of the consumer. In addition to these, a consumer whose right is infringed upon could take a civil action either in contract (if there is privity of contract) or in tort in the case of allegation of negligence.²⁵ Also there are consumer rights which are internationally recognized by governments and organizations such as the United Nations of which Nigeria is a member. These rights are reproduced hereunder:

- a. **The right to satisfaction of basic needs** - to have access to basic, essential goods and services: adequate food, clothing, shelter, health care, education, public utilities, water and sanitation.

²² Some of the laws are, the Standards Organization of Nigeria Act 1971, (Cap. S9 LFN 2004); the Weights and Measures Act, 1974, (Cap. W3); the Food and Drugs Act 1974, (Cap. F32); the Consumer Protection Council Act 1992, (Cap. C25); the National Agency for Food and drug Administration and Control Act 1993, (Cap. N1); the Trade Malpractices (Miscellaneous Offences) Act 1993, (Cap. T10); the Food, Drug and Related Products (Registration etc.) Act 1993, (Cap. F33); the Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions, Act 1999 (Cap. C34) and the Nigerian Communications Act 2003, (Cap. N33).

²³ See *supra* note 22.

²⁴ See *supra* note 21.

²⁵ For details see Monye, *op. cit.*, pp. 155-268, Kanyip. *op. cit.*, Ikhide, *op. cit.*

- b. **The right to safety** - to be protected against products, production processes and services that are hazardous to health or life.
- c. **The right to be informed** - to be given the facts needed to make an informed choice, and to be protected against dishonest or misleading advertising and labeling.
- d. **The right to choose** - to be able to select from a range of products and services, offered at competitive prices with an assurance of satisfactory quality.
- e. **The right to be heard** - to have consumer interests represented in the making and execution of government policy, and in the development of products and services.
- f. **The right to redress** - to receive a fair settlement of just claims, including compensation for misrepresentation, shoddy goods or unsatisfactory services.
- g. **The right to consumer education** - to acquire knowledge and skills needed to make informed, confident choices about goods and services, while being aware of basic consumer rights and responsibilities and how to act on them.
- h. **The right to a healthy environment** -to live and work in an environment that is non-threatening to the well-being of present and future generations.²⁶

The legal practitioner needs to be very familiar with these laws in order to be able to do the best for his client. For instance, he must know the proper head under which to file his clients claim. Our law reports are full of cases which could have been won but were lost because the lawyers who handled them lacked the necessary knowledge. A case in point is the issue of bailment. Here, Kanyip laments that, "it is in this regard that it is sad that our lawyers are not particularly conversant with the premises of bailment as to make any proper or rational use of it in litigation."²⁷ A brief discussion of some cases will help to buttress this point. In *Leventis Motors v. Cyrus Nunieh*²⁸ proper use of bailment was made and it paid off. In that case, the respondent deposited his car at the appellants' workshop for repairs. He collected his car but it broke down on his way home. He had to return to the defendants/appellants for further repairs. He was waiting for the repairs to be carried out when he discovered that his car had since been sold as scrap in an auction by the defendants/appellants. The

²⁶ CI Website www.consumerinternational.org last accessed on 2/10/10.

²⁷ Kanyip, *op. cit.*, p. 188.

²⁸ (1999) 13 NWLR (Pt.634) 235 CA.

court of first instance found for him whereupon the defendants appealed. The Court of Appeal, dismissing the appeal held that: "I have no hesitation whatever in coming to the conclusion that the appellant as bailee of the respondent's car for reward owed a duty of care to the respondent in ensuring that his car was returned to him..."²⁹ It further held that:

Although bailment is quite often associated with a contract, an action against a bailee can, quite often be presented, not only as an action in contract, nor in tort but as an action on its own *sui generis* arising out of the possession had by the bailee of goods. The law of bailment therefore overlaps the categories of the law of contract, tort and indeed, property and a bailee's duty to take care with regard to the subject matter of the bailment.³⁰

Also, in *Broadline Enterprises Ltd. v. Monterery Maritime Corporation*,³¹ the appellant consigned 100,000 bags of crystal sugar to respondents for delivery from Rotterdam to Lagos for valuable consideration. The respondents, in breach of their duty of care as common carriers and bailees failed to deliver a total of 3,434 bags of sugar. The trial court dismissed the claim. The Court of Appeal equally dismissed the suit on appeal. The Supreme Court, however, allowed the appeal, holding that:

A plaintiff establishes a justiciable cause of action by providing a bailment on which a duty of care arises at common law on the part of the defendants not to be negligent in respect of the plaintiff's goods independent of any contract and a breach of that duty.³²

The advantage of using bailment instead of any other head of claim is that liability is strict.³³ It saves the plaintiff the onerous task of discharging the burden of proof in negligence.³⁴ Another area where lawyers have failed to take advantage of the provisions

²⁹ (1999) 13 N.W.L.R. (Pt. 634) 235 at 250-251.

³⁰ *Ibid.*, at 250.

³¹ (1995) 9 NWLR (Pt.417) 1 SC.

³² *Ibid.* at 5.

³³ This is "Liability that does not depend on actual negligence or intent to harm but that is based on duty to make something safe." *Black Law Dictionary op. cit.*, p. 934.

³⁴ See *Nigerian Ports Plc. v. Beecham Pharmaceutical PTE Ltd.*, [2005] Vol. 24 WRN, 38.

of the law to advocate for the consumer is bankruptcy.³⁵ The law has remained moribund despite the fact that it has been in our law books since 1979.³⁶ It has hardly been tested in court.³⁷ Despite the reasons given for this,³⁸ our opinion is that ignorance of its relevance to consumer protection and lack of aggressiveness on the part of Nigerian lawyers are the major reasons. In America, for instance, the use of bankruptcy proceedings to reduce or eliminate consumer debt³⁹ is widespread.⁴⁰

Apart from being abreast with consumer laws, the Nigerian legal practitioner, as a minister in the temple of justice, needs to confront injustice against consumers frontally like in other jurisdictions. In America for instance, lawyers have been known to encourage and aid consumers to stand up for their rights even when consumers are reluctant to do so. A team of lawyers led consumers to go to court against Chase Bank of America when it reneged on its promise during a sales promotion.⁴¹ The bank had promised its consumers low interest rates of between 2.99% - 3.99% during the said promotion. It later raised the interest rate during the currency of the loans. There was a class action and the customers recovered. Also, policy holders of Hartford Insurance Co. of America⁴² took it to court for failing to give them notice when it charged them more premium based on information contained in their credit cards. The company opted for an out of court settlement with the consumers. It paid out sums ranging from \$150 to \$1000 to more than 700,000 consumers who met the terms of the settlement. These were possible because lawyers acted as consumer advocates.

Consumer conflicts could also be resolved through the regulatory agencies set up by the government. However, before

³⁵ The Bankruptcy Act, Cap. B2, Laws of the Federation of Nigeria (LFN),2004.

³⁶ See E. L. Okiche, 'The Relevancy of Bankruptcy Law to Consumer Protection' *Unizik Law Journal* ,Vol.7,No.1 2010, pp. 246-261.

³⁷ Recently, Afribank (now Mainstreet Bank Ltd.) initiated bankruptcy proceedings against a businessman, Cletus Ibeto. See Suit No. FHC/Bk/4/2010 available at <http://www.proshareng.com>, last accessed on 28/10/2010.

³⁸ Insolvency in Africa - The Nigerian Experience available at <http://www.akinwunimbusar.com>. last accessed on 28/10/2010.

³⁹ Consumer debts are those incurred to service personal needs as opposed to business needs.

⁴⁰ Bankruptcy Code Title 11 of the US Code.

⁴¹ Chase Bank credit card class action available at <http://www.ssbls.com/cos>, accessed 28/10/2010.

⁴² *Ibid.*, Hartford Insurance class action.

this could happen, lawyers need to keep themselves abreast of the activities of such agencies. The good jobs such agencies as National Agency for Food and Drug Administration and Control (NAFDAC), Nigeria Communications Commission (NCC) Consumer Protection Council (CPC), Standards Organization of Nigeria (SON) *etc* are doing are lost on many people. Most of them have consumer complaints desks or departments where consumers could lodge complaints. A simple complaint made in writing or even orally could help resolve some issues as many manufacturers do not want adverse publicity Experience has shown that most manufacturers prefer out of court settlement. This is where Alternative Dispute Resolution (ADR) methods are needed and lawyers are best able to do this. These agencies also organize consumer events such as the town hall meetings and the Consumer Parliament of the Nigerian Communications Commission. Unfortunately, most lawyers do not know about these, let alone attend.

Finally, lawyers could also help the consumers' cause by personally enforcing their rights as consumers. This will help to make manufacturers, distributors, retailers and service providers alive to their duties since some of them are ignorant of their obligations to consumers. Many people, including lawyers, do not know that a distributor, in fact anybody in the chain of distribution could be held liable for defective production. In the case of *Solu v. Total*,⁴³ the defendant who was a mere distributor was held liable for the sale of a defective gas cylinder. Most lawyers have the Automated Teller Machine (ATM) cards. How many of them bother to read the terms and conditions of the agreement between them and our banks before signing to obtain the cards? A look at some of the terms in the said agreement will help to buttress the point we are making:

Withdrawal of cash at the ATM shall be deemed to have concluded at the point when the ATM dispenses cash to you through the cash tray. The bank accepts no responsibility for any subsequent event occurring after cash has been so dispensed. You covenant and undertake that you shall be liable for all transactions on the card and the card will be at your own risk. You will be liable for any loss arising from the use of the card or PIN by any unauthorized person up to two working

⁴³ Unreported, Lagos State High Court Suit No D/619/85, March 25, 1985.

days after the Bank receives written notification of loss of card.⁴⁴

Should legal practitioners accept these conditions without question? We think not. Lawyers should not allow themselves to be taken for granted, or else the society would be the worse for it.

4.2 The Bench

From the time of *Donoghue v. Stevenson*⁴⁵ some courts have shown their willingness to help the cause of consumers. Some decided cases are evidence of this willingness. In *Osemobor v. Niger Biscuit Co. Ltd*⁴⁶ the manufacturer was held liable for the presence of a decayed tooth in the biscuit which caused nausea and vomiting. The plaintiff in *Nigerian Bottling Co Ltd. v. Ngonadi*⁴⁷ was also able to recover for personal injuries and permanent disfigurement. Again, the consumer who, while drinking a bottle of malt noticed a dead cockroach in it succeeded in his claim against the producer in *Dumuje v. Nigeria Breweries Plc.*⁴⁸

In the case of *Bosede Olugbaju v. National Electric Power Authority (NEPA)*⁴⁹ (now power Holding Company of Nigeria) the plaintiff, a seamstress who got injured by a NEPA cable which snapped from a decayed wooden crossbar was able to recover. She was awarded the sum of ₦17,970,000 (seventeen million, nine hundred and seventy thousand Naira). This is the highest amount that has ever been awarded for personal injury by any court in Nigeria. In fact, the judgment has been acclaimed as “a celebration of the judiciary as it will encourage judges to perform similarly in deserving cases.”⁵⁰ This remains to be seen.

However, some courts have refused to change by remaining restrictive and unresponsive to consumer protection. In tort-based actions, the three ingredients which constitute negligence, namely: existence of duty of care, breach of the duty

⁴⁴ An ATM Form from a Nigerian Bank.

⁴⁵ *Op. cit.*, above n 6.

⁴⁶ (1973) NCLR, 382.

⁴⁷ (1985) 2 N.S.C.C.753 or (1985) 5 SC 317.

⁴⁸ Unreported Suit ENC/236/94, July 4, 2001.

⁴⁹ Available at www.nairaland.com/nigeria/topic-69639.htm, last accessed on 13/10/2010.

⁵⁰ *Ibid.*

and consequential damage must be proved.⁵¹ There is no problem with the first element since it has already been firmly established by a lot of cases that the manufacturer owes a duty of care to the ultimate consumer.⁵² Where the consumer usually has problems is in establishing that the defendant has breached the duty of care owed him. To succeed, he must show the particular acts or omissions of the defendant which amount to negligence.⁵³ For instance, in a product liability case, he must prove, not only that the product was defective but that the defect was as a result of the manufacturer's negligence⁵⁴ and that his injury is linked to the product in question. In *NBL Plc. v Audu*,⁵⁵ the plaintiff who took the defendant's drink which he bought directly from the defendant felt something in his mouth. It turned out to be a dead cockroach. He took ill and was treated for shock and gastroenteritis. The court of first instance found for the plaintiff. The case was overturned on appeal. According to the Court of Appeal, there was no causal link between the injury and the drink. It further said that the respondent was -

Expected to avoid acts or omissions which he can foresee or contemplate would likely injure him. Hence if the respondent after the purchase but before the consumption of exhibit D, had stayed in a well-lit place and examined the bottle of drink, he would not have drunk the beer which allegedly caused him an injury.⁵⁶

Adducing evidence acceptable to most courts in Nigeria is difficult for consumers since most of the time they cannot match the financial might of the defendants. Again the acts or omissions complained of are facts within the sole knowledge of the defendant

The consumer's position is further compounded by the defense of "foolproof system of production." This describes the "defence raised by a defendant to the effect that his production process is perfect and, so, cannot admit of any defective or injurious products."⁵⁷ Since the case of *Onyejekwe v. Nigerian*

⁵¹ See generally, I. P. Enemo, *The Law of Tort* (Enugu: Chenglo Ltd. 2007) pp. 19-89.

⁵² *Donoghue v. Stevenson Supra, NBC v Ngonadi, Supra etc.*

⁵³ *Soreme v. Nigerian Bolting Co Ltd.* (1997) 10 CCHCJ 2735 among others.

⁵⁴ *Ibid.*,

⁵⁵ *Nigeria Breweries Plc v. David Audu* (2009) LPELR CA/A235/05.

⁵⁶ *Ibid.*

⁵⁷ *Soremi v. Nigerian Bottling Co Ltd.* (1997) 10 CCHCJ 2735 p. 31.

*Breweries Ltd.*⁵⁸ most courts have been convinced by this defence as evidenced by an array of cases.⁵⁹ There is the need for the courts to do away with this defence as it does not address the issues of whether the defendant was negligent or not as noted by the court in *Okwejimonor's case*.⁶⁰ In that case, the Supreme Court noted that the defendant's evidence of their manufacturing process did not answer the life issue in the case, which was whether the defendants were negligent or not. This means that such evidence is usually merely diversionary. This attitude of the Supreme Court must be commended, even though the court did not make a direct pronouncement on the issue.

Regarding the issue of consequential damage, the plaintiff must prove that the damage he suffered is a direct consequence of the defendant's negligence⁶¹ or else, he will not succeed. Many actions have failed as a result of the difficulties plaintiffs have in linking the injuries they have suffered to the defendants' acts or omissions. A way out of this predicament is to apply the doctrine of *res ipsa loquitur*⁶² in product liability cases. Unfortunately, most Nigerian courts are not minded to do this. In the case of *NBC v Olarewaju*,⁶³ the court expressly said that "the doctrine of *res ipsa loquitur* does not apply to food poisoning cases. There is no law to the effect that if a consumer consumes rice and there after feels stomach discomfort, then viola! the rice is the cause of the discomfort..."⁶⁴ The advantage of the use of this doctrine to the consumer cannot be over emphasized. This would mean that once the consumer proves the fact of the accident, the burden of proving that there was no negligence would be shifted to the defendant who is better able to do so.⁶⁵

Finally, the adoption of a regime of strict liability will afford the consumer better protection as it will save him the

⁵⁸ (unreported) suit No C/109/72 June 1, 1973.

⁵⁹ The Guinness Casessuch as *Boardman v. Guinness (Nig.) Ltd.* (1980) NCLR 109, *Okonkwo v. Guinness (Nig.) Ltd, supra*.

⁶⁰ *Okwejimonor v. Gbageji & NBC* [2008] 5 NWLR (Pt. 1079) 172.

⁶¹ *Donoghue v. Stevenson, supra*.

⁶² For a detailed discussion on this see, Ikhide Ehiguelua "Burden of Proof in Product Liability Suits and *Res Ipsa Loquitur*: The Need for Judicial Rethink in Nigeria." *Consumer Journal*, Vol. 3, 2007, pp. 58-63.

⁶³ *Nigeria Bottling Co. Plc v. Demola Olarewaju* [2007] 5 NWLR (Pt. 1027) 255.

⁶⁴ *Ibid.*

⁶⁵ *Audu v. Ahmed* (1990) 5 NWLR (Pt. 150) 287 CA.

problem of proving negligence which is onerous.⁶⁶ Again, this is the position in other jurisdictions. In America and the United Kingdom, liability is strict against manufacturers and providers of defective products and services. This has been so for decades now. In *Greenman v. Yuba Power Productions Ltd*, the Supreme Court of California held a manufacturer strictly liable for injuries to the consumer.⁶⁷ It said that:

A manufacturer is strictly liable in tort when an article he places on the market knowing that it is to be used without inspecting for defects, proves to have a defect that causes injury to a human being ... the purpose of such liability is to ensure that the costs of injuries resulting from defective products are borne by the manufacturer that put such product on the market rather than by the injured persons who are powerless to protect themselves.

Also in *Abouzaid v. Mothercare (UK) Ltd*,⁶⁸ the claimant was held entitled to damages even though the supplier was not found negligent. This decision is plausible owing to the advanced technology being used in the production of consumer goods. Thus, a system that places strict liability on producers to ensure that consumers of his goods do not suffer injury will definitely serve a better purpose.

Under contract, the consumer has also suffered some hardships as a result of the rigidity of some courts. The rule is that parties to a contract have the freedom to contract on any terms of their choice.⁶⁹ They can exclude or limit any term in their agreement by means of exclusion or limitation clause, respectively, subject however, to some exceptions.⁷⁰ The problem with this, however, is that as far as the consumer is concerned, there is disparity in bargaining power between him and the producer. Sometimes, the contracts might even be standard form contracts or contracts of adhesion.⁷¹ In some jurisdictions, legislation had been used to protect the consumer from draconic subjection to exclusion or

⁶⁶ Kanyip, *op. cit.*, p. 295.

⁶⁷ (1963) 27 Cal Reporter 697.

⁶⁸ [2000] EWCA CV 348.

⁶⁹ I. E. Sagay, *Nigerian Law of Contract* (Ibadan: Spectrum Books Ltd., 1985) pp. 92-157, F. O. Ukwueze, "Unfair terms in Consumer Contracts in Nigeria; The Need for Stricter Statutory Control" in *Consumer Journal*, Vol. 3 2007 pp. 33-57.

⁷⁰ Kanyip, *op. cit.*, pp. 134, 137.

⁷¹ *Ibid.*

limitation clauses.⁷² The South African Consumer Act,⁷³ amongst other far reaching provisions made to protect the consumer, lists a number of terms considered unfair to the consumer. For instance, “any term or condition that has as its general purpose or effect to defeat the purposes and policy of the Act”⁷⁴ is unlawful. “Exclusion or limitations of the suppliers’ liability for death or personal injury”⁷⁵ by any term is unfair. In Australia, the law⁷⁶ provides that unfair terms are void. By definition, a term is unfair when “it causes a significant imbalance in the parties’ rights and obligations arising under the Act,⁷⁷ amongst other things. Thus, the court found a number of terms which would enable a supplier to unilaterally vary the terms of the contract, increase charges or vary its product - unfair and so void.⁷⁸ This is not yet the case with Nigeria.⁷⁹ For now, the judiciary is our only hope and the watchword should be judicial activism. The courts should be more proactive in this regard. The role of the judiciary in controlling necessary gap in case law is of utmost importance to guarantee balance of power between the producer and the consumer.

4.3 The Nigerian Bar Association (NBA)

The NBA, as a professional body, also has a role to play in consumer advocacy. Mass education and enlightenment campaigns should form a regular part of the body’s activities. This will help to dispel ignorance which, as has been seen, is one of the factors inhibiting consumer protection in Nigeria. Like other professional associations, the NBA has a laid down procedure for dealing with dissident members.⁸⁰ The Legal Practitioner

⁷² For instance, The Unfair Contract Terms Act, 1977 of the United Kingdom.

⁷³ Consumer Protection Act (CPA), 66 of 2008. It will come into effect on April 1, 2011.

⁷⁴ CPA s. 51. The Act has a “Black list” of terms which are always unlawful and invalid and a “Grey list” which could be unfair, unjust and unreasonable. The grey list is further subdivided into “Fixed” list and “Presumed” list of terms.

⁷⁵ CPA, s. 48.

⁷⁶ Australian Consumer Law (ACL) which is set out in Schedule 2 of the Competition & Consumer Act 2010. It applies to all consumer transactions for goods and services except financial services which is regulated by Australian Securities and Investments Commission Act.

⁷⁷ ACL, s. 24.

⁷⁸ *Director of Consumer Affairs (Victoria) v. AAPT* [2006] VCAT 1493. Available at <http://www.austlii.edu.au/cases/vic/VCAT> last accessed 28/10/2010.

⁷⁹ The Nigerian Law Reform Commission has recommended an amendment in this respect. See workshop paper, *loc. cit.*, and pp. 30-33.

⁸⁰ Legal Practitioners’ Act, Cap.L11, hereinafter referred to as LPA, LFN, 2004, s. 10.

Disciplinary Committee has had cause to sanction some members for unprofessional conducts. When this is done, the consumer's interest is enhanced because the provision of shoddy services by lawyers is, to a large extent, checkmated. The question then is, should we retain the immunity granted the barrister under the Act?⁸¹ According to the Act,

- 1) Subject to the provision of this section, a person shall not be immune from liability for damage attributable for his negligence while acting in his capacity as a legal practitioner and any provisions purporting to exclude or limit that liability in any contract.
- 2) Nothing in subsection (1) of this section shall be construed as preventing the exclusion or limitation of the liability aforesaid in any case where a legal practitioner gives his services without a reward either by way of fees, disbursement or otherwise.
- 3) Nothing in subsection (1) of this section shall affect the application to a legal practitioner of the rule of law exempting barristers from liability aforesaid in so far as that rule applies to the conduct of proceedings in the face of any court, tribunal or other body.⁸²

The import of this section which codifies the common law rule in *Rondel v. Worsley*⁸³ is that a legal practitioner is liable in negligence to his client. He is also not allowed to exclude or limit his liability to his client by contractual terms.⁸⁴ However, the legal practitioner's liability may be limited or excluded if he renders his services *pro bono*. Also, he cannot be held liable for anything done in the face of the court. A lot of reasons have been given to justify this immunity.⁸⁵ First, as ministers in the temple of justice, the primary duty of counsel is to the court rather than to their

⁸¹ *Id.*, s. 9.

⁸² *Ibid* section 9 (1) – (3).

⁸³ [1969]1 AC 191.

⁸⁴ *Lawson v. Siffre* [1932] 11 NLR; *Raji v. X (A Legal Practitioner)* [1946] 18 NLR 74.

⁸⁵ See generally D.L. Carey-Willer "The Advocates Duty to Justice; where Does it Belong" (1981). 97 *LQR* 107. B.B Kanyi, "Revisiting the Liability Question in the Provision of Legal Services. A Consumer Protection Perspective" in International Legal Research House, *Burning Issues in Civil and Criminal Procedure and Practice. Essays in Honour of Honourable Justice Omotunde Ilori, Chief Judge of Lagos State* (Lagos: ILRIT, 1999), pp. 334 – 345. Thalia Anthony "Australia Anachronistic Advocates' Immunity: Lessons from Comparative Tort Law" (2007) 15 *Tort L Rev.* 11 at <http://11SSrn.com/abstract=1000835> accessed 18/11/2010.

clients. Immunity promotes this duty owed to the court. Abolishing it will elevate the duty to clients over and above that owed to the court. Also, as ministers, lawyers have a general duty to defend clients and, so, accept briefs indiscriminately.⁸⁶ Removal of immunity will make them pick and choose non risky cases. Again, the immunity given to the legal practitioner is analogous to that given to the other participants in the legal proceedings (such as judges, prosecutor, witnesses, *etc*) and, as such, it would be discriminatory to remove it. Moreover, by the provision of the Act⁸⁷ other sanctions apply to legal practitioners and those could be used to discipline erring members. The court need not come into the matter. Finally, the removal of immunity will open a floodgate leading to unending litigations and re-litigations.

On the other hand,⁸⁸ the advocates of immunity removal argue that the above reasons do not justify the detriment to public interests that results from this immunity. They insist that holding legal practitioners to a minimum standard of care will ensure quality in the provision of legal services. Exposure to civil liability, will lead to a higher degree of exercise of care which will be beneficial to the overall administration of justice. For instance, improved standards would ensure that innocent persons are not convicted. Also, the legal profession is not different from other professions (such as the medical profession) where members are held liable for negligence. It has since been established that a person who negligently performed a professional or other duties he had undertaken to do could be sued in tort for negligence.⁸⁹

Again, disciplinary measures put in place by the Act are merely self-regulatory measures which do not provide relief for clients who have been short changed nor are they substitutes for independent judicial intervention. The removal of immunity will bring an end to the anomalous exception to the basic rule that where ever there is a wrong, there should be a remedy. The issue of barristers not being able to choose their clients does not apply to Nigeria as a result of the fact that here in Nigeria, a legal practitioner is both a solicitor and an advocate. Concerning the duty of counsel to being to the court rather than to his client, one can say that the two are not mutually exclusive. Besides, no court can hold that a counsel who does his duty to the court to the

⁸⁶ This is the so called “cab rank” rule which imposes obligation upon a barrister (but not upon a solicitor) to accept instructions from whoever wants to engage his services in the area of law in which he practices even if he disapproves of the person or his case.

⁸⁷ LPA, s. 10

⁸⁸ *Supra* note 91.

⁸⁹ *Headley Byrne & Co. Ltd v Heller & Partners* [1964] AC 465.

detriment of his client is negligent. "Indeed, if the advocate's conduct was *bonafide* declared by his perception of his duty to the court, there would be no possibility of the court holding him to be negligent."⁹⁰ Moreover, the fear of endless litigation and re-litigation which would follow the removal of immunity has not proved to be true given the positions in jurisdictions where immunity has been abolished.⁹¹

Our opinion is that the immunity granted the legal practitioner does not serve the interest of the consumer in this era and time. It has outlived its usefulness. We agree with their Lordships in *Hall's* case⁹² that the policy concerns and circumstances upon which *Rondel's* case⁹³ was founded were legitimate in 1967 but that these have since changed. According to them:

The world has changed since 1967....Today, we live in a consumerist society in which people have a much greater awareness of rights. If they have suffered a wrong as a result of the provision of professional services, they expect to have the right to claim redress. It tends to erode confidence in the legal system if advocates, alone among all professional men, are immune from liability for negligence.⁹⁴

The immunity has to be done away with in order to keep lawyers on their toes.

5. Conclusion

From the foregoing, it would be seen that the Nigerian consumer is indeed in dire need of rescue more than his counterpart in developed nations. In this era of globalization, no nation can afford to stand still while others march forward. The Nigerian consumer needs to be woken up from his apathy. The Bar should march its force with those of other agents of consumer advocacy to enable the nation achieve the desired level of consumer protection.

⁹⁰ Per Lord Steyn in *Arthur J.S Hall (A Firm) v. Simons* (2002). I AC 615.

⁹¹ For instance immunity was abolished in USA in 1979 *Ferri v. Ackerman*, 444 US 193 (1979); England 2002, see *Arthur J.S Hall (A Firm) v. Simons supra*, New Zealand ,2005, see *Lai v. Chamberlains* [2005] NZCA 37 upheld by the Supreme Court of New Zealand in [2006] NZSC 70.

⁹² *Arthur J.S Hall (A firm) v Simons and Barratt v. Ansell & Ors v. Scholfield Roberts and Hall*[2000] UKHL 38: (2007) 3 ALL ER 673 available at <http://www.baillii.org/uk/cases//UKHL /2000/38.html> last accessed on 20/11/2010.

⁹³ *Rondel v. Worsley, supra*.

⁹⁴ Per Lord Steyn, in *Arthur J.S Hall v. Simons, supra*.