

## AN INVESTIGATION INTO THE LEGAL FRAMEWORK OF MARKETING IN NIGERIA

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### **ABSTRACT**

*The conceptual framework of marketing as well as the laws relating to marketing activities was reviewed. In the investigation, issues pertaining to the contractual relationship, obligation as to title, description, fitness for purpose, condition for merchantable quality, sale by sample, liability in the law of deceit and negligence in the law of Tort as well as regulatory bodies set up to guide marketing activities and possibly protect the consumers in Nigeria were looked into. The article has proven the need for an improvement on this legal framework especially in the tort of Negligence.*

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### **INTRODUCTION**

Modern business organizations are increasingly becoming complex and competitive. In order to achieve high profit margin, they devise various methods of marketing their products to consumers with the aim of not only bringing these products within the reach of consumers but also to see that they satisfy the needs of the consumers or buyers as the case may be and make profit.

Marketing is broadly defined as a process by which companies create customer interest in products or services. It generates the strategy that underlines sales techniques, business communication, and business development. It is an integrated process through which companies build strong customer relationships and create value for their customers and themselves.

Marketing is used to identify the customer, to keep the customer, and to satisfy the customer. With the customer as the focus of its activities, it can be concluded that marketing management is one of the major components of business management. The adoption of marketing strategies requires business to shift their focus from production to the perceived needs and wants of their customers as the means of staying profitable.

In 1950s, production-oriented of marketing was prevalent; a situation where a firm specializes in producing as much as possible of a product or service. Thus, this signifies a firm exploiting economies of scale, until the minimum efficient scale is reached. A production orientation may be deployed when a high demand for a product or services exists, coupled with a good certainty that consumer tastes do not rapidly alter (similar to the sales orientation). And later in 1960s, firms started employing a product orientation strategy which is chiefly concerned with the quality of the product. Firms continue to assume this with the intention that as long as their products were of a high standard, people would buy and consume the products. Later, firms began to adopt sales

oriented marketing which focuses primarily on the selling/promotion of a particular product, and not determining new consumer desires as such. This just entails selling an already existing product, and using promotion techniques to attain the highest sales possible. Such an orientation may suit scenarios in which a firm holds dead stock, or otherwise sells a product that is in high demand, with little likelihood of changes in consumer tastes diminishing demand. By the 70s, firms began to adopt marketing orientation which is perhaps the most common orientation used in contemporary marketing. It involves a firm essentially basing its marketing plans around the marketing concepts, and thus supplying products to suit new consumer tastes. The process starts with a firm employing market research to gauge consumer desires, use R&D to develop a product attuned to the revealed information, and then utilize promotion techniques to ensure persons know the product exists. Such that the product that is positioned for the consumers to buy must have originated from the consumers themselves.

But quite unfortunately, this is not always the case as the consumers or buyers, most times, are not satisfied with the products purchased. Such dissatisfaction is what Stanton (1981) called "Consumerism" which he defined as the actions of individuals and organizations responding to consumer dissatisfaction in exchange relationship. He further pointed out that it is a protest against perceived injustices and efforts made to remedy these injustices. The essence of this paper therefore is to critically examine the legal framework existing in marketing transactions in Nigeria.

## **2.0 CONCEPTUAL FRAMEWORK OF MARKETING**

Marketing as defined by American Association is the activities for creating, communicating, delivering and exchanging offerings that benefit the organization, its stakeholders and society at large. Marketing stresses the importance of delivering genuine benefits in the offerings of goods, services, and ideas positioned for customers to buy. It thus seeks to discover the needs and wants of prospective customers and satisfies them through a credible exchange. For marketing to take place the following requirements are necessary (i) there must be two or more parties with unsatisfied needs (ii) desire and ability to satisfy these needs (iii) there must be a platform of communication between the parties (iv) a transaction must take place where an exchange is effected.

One major challenge of marketing is discovering and meeting customers' needs. McCarthy (1960) advances the four Ps of marketing namely; Product (A good, service or idea to satisfy the consumer's needs), Price (Value for which the good or service or idea is being exchanged), Promotion (Means of communicating the good or services or idea to facilitate an exchange through various means including electronic marketing) and Place (a means of getting the product to the consumer). These four Ps are known as marketing mix. However, where companies/firms can control the marketing mix, other factors are mostly beyond their control. There are the environmental forces; they are otherwise known as the uncontrollable factors which are social, economic, technological, competitive and regulatory forces. These forces either provide opportunities or treats to marketing. It is important to note that forward looking, action-oriented firm can often affect some of these environmental factors.

The marketing programme of a firm connects it with their customers. The presence of competition at the market place has dictated the content and structure of this programme which in most cases is expected to focus on 'customer value' which entails providing unique value for the customers to engender profitable exchanges. Kotler (2002) defines customer value as the unique combination of benefits received by targeted buyers that includes quality, convenience, on time delivery and before sale and after sales service at a specific price.

So firms place value on their customers, with loyal and satisfied customers being more profitable. Reinartz and Kumar (2000) discovered that firms cannot succeed by being all things to all people, instead firms must find ways to build long-term customer relationships to provide unique value that they can deliver to these target market. Many firms often chose to deliver unique customer value in terms of "best price, best product or best service". However, it is noted that the ever changing tastes of the consumers often derail any of these strategies without notice.

Effective customer relationships are achieved by a firm identifying creative ways to connect closely to its customers through a set of defined marketing mix actions implemented in its marketing programme – this is otherwise known as Relationship marketing.

Relationship marketing links the organization to its individual customers, employees, suppliers and other parties for their mutual long term benefits. Palmatier, Dant, Grewal and Evans (2006) note that relationship marketing is more effective when there is personal ongoing communication between individuals involved in exchange process. The evolvment of information technology has greatly helped firms to tailor goods or services to the tastes of individual customers in high volumes at a relatively low cost. Effective relationship marketing

strategies help firms to discover what prospective customers need and marketing mix is integrated to provide the requisite customers good, service or idea to the prospective buyers.

Hunt and Burnett (1982) suggested that the well being of society at large should also be recognized in organization's marketing decision – societal marketing, which opine that organization should satisfy the needs of consumers in a way that provides for society's well being (Porter and Van der Linde, 1995). The societal marketing concept is related to macromarketing which is the study of the aggregate flow of a nation's goods and services to benefit society. Issues like wastefulness of advertising, resource scarcities, pollution, etc are addressed by macromarketing.

Wilkie and Moore (2006) investigate the benefit of marketing to consumers and say that marketing creates utility, which is the benefit or customer value received by the users of the product. The utility is the ultimate result of the marketing exchange process and the way society benefits from marketing. They suggest four different utilities: utility of form, place, time, and possession. The value to customers that comes from the production or attraction of a good or service constitutes form utility. Place utility is the value to consumers of having a good or a service available where it is needed, while time utility is the value to consumers of having a good or service available when needed. Possession utility on the other hand is the value to consumers of making an item easy to purchase so consumers can use it. Thus marketing creates its utilities by bridging space, time, to provide products for consumers to own and use.

By 1990 and 2000 is the era of customer relationship marketing with the evolution of market orientation which focuses on continuous collection of information about customer needs, sharing this information across departments, and using it to create customer value. These demands on marketing usher in the need for database marketing; which emphasis the need for an organized collection of comprehensive data about individual customers or prospects including geographic, demographic, psychographic and buying behavior data. And finally the recent attention placed on customer relationship management.

### **3.0 LEGAL FRAMEWORK OF MARKETING**

In investigating the legal framework of marketing issues pertaining to the contractual relationship, condition for merchantable quality, sale by sample, liability in the law of Tort as well as regulatory bodies set up to regulate marketing activities and possibly protect the consumers shall be looked into.

#### **3.1 Contractual Relationship**

Liability in a civil action between a seller and a buyer may be in contract or tort. It is contract based where there is breach of a term in the contract or in its statutory contractual provision.

Generally in Nigeria, contract of the sale of goods is governed by the Sales of Goods Act 1893 which is a statute of general application, applicable to those States in Nigeria that have not re-enacted their Sales of Goods Act. And being a contract, it is also governed by the general rules of contract such as privity of contract, offer, acceptance, consideration, etc. aside this, certain safeguards have been put in place by Law to protect the interest of the buyer by implying terms concerning the standard and quality of product in commercial transaction of sale of goods in the Sale of Goods Act. Breach by the seller of any of these terms entitles the buyer to institute an action and gets remedies for such breach. These terms as opined by Adams impose strict liability on the seller and they are actionable per se. it is irrelevant whether the seller was unaware of the alleged defect in goods or not. (Kanyip, 2005)

The terms are further classified as Fundamental Term, Condition or Warranty. If the issue in dispute arising from the contract relates to its core, a fundamental term of the contract is said to be breached and this entitles the innocent party to repudiate the contract. But where the issue in question, though not fundamental, affects the substance of the contract, it is said to be a Condition and breach of it also entitles the innocent party to repudiate the contract unless he decides to waive his right to so do. Where however, it relates to a minor term in the contract it is known as Warranty, the breach of which entitles the innocent party to a claim only for damages and not a right to treat the contract as repudiated.

The first of these implied terms which is the Seller's Obligation as to Title is found in Section 12 of the Act.

##### **3.1.1 Obligation as To Title**

Section 12 (1) provides that there is an implied condition on the part of the seller that in the case of a sale, he has a right to sell the goods and

that in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass.

Section 12 (2) also provides that there is an implied warranty that the buyer shall have and enjoy quiet possession of the goods.

Section 12 (3) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer at the time when the contract is made.

The summary of the above is that in Sub-Section 1, there is an implied condition that the seller has a right to sell the goods.

Sub-Section 2, a warranty of quiet possession and enjoyment of the goods.

Sub-Section 3, also a warranty that the goods are free from encumbrances in favour of third parties.

This general implied rule as to transfer of the title under this section is expressed in the Latin maxim “Memo Dat Quod Non Habet” which when interpreted, means “no one can give a better title than he possesses.” This common law principle was well enunciated in the Nigerian case of *Akoshile v Ogidan 19 NLR at page 87* where the defendant sold a car he bought from a European to the plaintiff unaware that it was stolen. The court held that section 12 (1) was applicable as the defendant had no right to sell the car when he did. The plaintiff was able to rescind the contract and claim back his purchase price. And in the case of *Niblet v. Confectioners Materials Co. (1921) 3 KB at page 387* the court held that having a right to sell means more than a right to pass the property in the goods. If a person who wants to sell goods can be stopped by process of law from selling, then he had no right to sell.

This particular rule appears to bring untold hardship to innocent buyers who may not be aware of the defective title of the seller. Lord Denning captioned this dilemma in *Bishopgate's Case (1949)1 KB page 332 at 336-337* where he noted as follows:

In the development of our law, two principles have striven for mastery. The first is for the protection of property; no one can give a better title than he himself possess. The second is for the protection of commercial transaction: the person who takes in good faith and for value without notice should get a good title.

To stop this rule from becoming arbitrary, the Act made some exceptions to the general rule in Section 21-26 whereby a person is allowed by law to give a better title than he possesses and the Sections specified the conditions under which this can be done.

While looking back into *Akoshile's Case*, the pertinent question that arises from the Section is; as between two innocent parties who should suffer for the fraud of a 3<sup>rd</sup>? Is it the seller who never knew in most cases that he had a defective title or the buyer who bought under the assumption that the seller had the right to sell? This question happens to be a dilemma one and has remained unresolved, (see the case of *Moorgate Mercantile Co. v. Twitching (1977) AC page 890*). However, commercial transaction will be meaningless and lose its integrity if a seller who had no right to sell goods because of defective title is allowed to do so as many vendors will engage in fraudulent trading with impunity.

Though Sub-Sections 1,2 and 3 are in the same Section, there are however distinguishing factors between them which Igweike (1980) has identified as the remedy in breaching them been different. While Sub-Section 1 is a Condition, Sub-Section 2 and 3 are warranty whose breach lies in damages.

Secondly, while Sub-Section 1 is related to title at the time of passing of property to the buyer, Sub-Section 2 is after title had passed.

He concluded by stating that the underlying purpose of both sub-sections are different and their rights and remedies were intended to be independent. This is entirely correct going by the aforesaid stated reasons.

### **3.1.2 Description**

A sale by description is provided in Section 13 which states that:

Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample as well as by description, it is not sufficient that the bulk of goods correspond with the sample if the goods do not also correspond with the description.

From the interpretation and appreciation, Igweike (1980) identifies these problems as emerging: one as to the scope and the other as to the meaning of the term “by description”. To solve the problem of what constitute the meaning of “sale by description”, *Nourse L.J in Harlington and Leinster Enterprises Ltd v. Christopher Hull Fine Art Ltd* Woodroffe and Lowe (1991:84) said:

“Authority apart, those words (i.e. Section 13) would suggest that the description must be influential in the sale, not necessarily alone but so as to become an essential term, i.e. a condition of the contract. Without such influence, a description cannot be said to be one by which the contract for the sale of goods is made”.

Therefore, pre-contractual statements made in respect of goods may not amount to description except where such statements not only amount to description but form part of the contract itself. *Channel J in Valey v. Whipp (1900) 1 QB 513* further defines it as applying to all cases where the purchaser has not seen the goods but relies on the description alone.

As to the issue of the scope of the Section, it is very broad as it applies to the quantity, measurement mode of packing the goods. In fact, the list is endless. This scope places undue favour on the buyer as against the seller. Liability or compliance to the rule is very strict as observed in *Arcos Ltd v. Ronaasen (1933) AC 470* where it was stated that if the article bought by the buyer is different from what was finally delivered, he is entitled to reject the goods even though it is the commercial equivalent of what he bought.

Lord Atkin in the above mentioned case also concurs with this view saying that if the contractual agreement specified the weight, measurement and the likes, they must be complied with. He further went on to explain that a ton does not mean about a ton, or a yard about a yard, neither does half an inch means about half an inch. But if the seller desires a margin, he must stipulate it in the contract though there may be some little deviations which might be reasonably ignored.

This strict compliance often times create problem for the seller as the buyer for any minor defect can reject the goods and repudiate the contract and this, as far back as 1976 led Lord Wilberforce in *Reardon Smith v. Hansen-Tangen (1976) 1 WLR989* to comment that such cases were too excessively technical and due for fresh examination in the court. According to him, if a strict and technical view is taken as regards the description of goods that are not ascertained then which detail of the description can be regarded as vital, to render a particular item in the description as constituting a substantial ingredient of the ‘identity’ of the thing sold so as to treat it as a condition. It is however suggested in line with Lord Wilberforce, that this Section be amended so that buyers don’t just reject goods and repudiate serious transactions because of minor breaches in the contract. It is worthy to note that Section 13 equally applies to sales by samples as well as by description.

### **3.1.3 Fitness for Purpose**

Section 14 (1) provides for condition as to fitness for the purpose wherein the goods were bought. It states that:

Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller’s skill or judgment and the goods are of a description which is in the course of the seller’s business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for the purpose, provided that in case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

This Section is closely related to the doctrine of caveat emptor which warns the buyer to beware of whatever product he is purchasing and also there is no implied warranty or condition as to the quality of or fitness for any particular purpose of goods supplied under its patent or trade name. The provision leans towards the protection of the buyer against fraudulent seller but this condition will not arise except the buyer tells the seller before

purchasing the goods what he needs the goods for though this condition is dispensed with if the goods can be used for a single purpose. This was part of the decision reached in the case of *Grant v. Australian Knitting Mills Ltd (1936) AC 85*.

It is important to note that the provision of this section be extended to 3<sup>rd</sup> parties who were not parties to the contract but got affected as a result of the use or consumption of the goods as was the case in *Frost v. Aylesbury Dairy Co. (1905) 1 KB 608* where a man bought a typhoid-infested milk which was consumed by his wife and subsequently affected. In an instituted action, the court held that the wife was not a party to the contractual transaction and so cannot succeed in the action.

### 3.1.4 Condition of Merchantable Quality

Section 14 (2) provides that;

where goods are bought by description from a seller who deals in goods of that description, (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quantity; provided that if the buyer has the goods, there shall be no implied condition as regards defect which such examination ought to have revealed.

There are two conditions to be met before a party can succeed in an action under this sub-section. The first is as to the merchantability of the goods, it must be shown that the sale was by description and the seller himself deals in goods of that description. Description in this sub-section appears to be different from the one in sub-section 1 as Lord Diplock in *Chris Hills Ltd v. Ashington Piggeries Ltd (1972) AC 441 at 505* distinguished both stating that;

In contrast to sub-section (1), the corresponding conduct of the buyer which gives rise to the imposed condition under sub-section (2) is that he should have bought the goods by description. The sub-section does not apply to any other type of contract for the sale of goods ... the words that description (in sub-section 2) refers to mean the actual description by which the goods which are the subject-matter of the contract were bought. Not only is it impossible to ascribe any other meaning to it grammatically, but also ... makes good commercial sense. The expression "that description" in sub-section (2) is referring to goods in which the seller deals. It is thus, narrower in meaning than the expression "a description" in sub-section (1) as referring to goods which is in the course of the seller's to supply.

The other condition is that the seller is a trader in goods of that description. And Igweike (1980) has argued whether the above clause has the same or different meaning with goods "which is in the course of the seller's business to supply". The conditions in this sub-section will be dispensed with if the buyer has examined the goods and ought to have seen the defects therein.

He went further to cite the case of *British and Overseas Credit Ltd v. Animashawun (1961) All NLR 120* to buttress this point, in the case, the defendant bought consignment of tomatoe paste from the plaintiff being fully aware that part of it had earlier been condemned as unfit for human consumption. Having examined the goods, the defendant went ahead to buy them. The plaintiff later contended in an action that the defendant having examined the goods before buying, had had full knowledge of their condition and so the implied condition as to merchantability cannot apply in the circumstances. The court agreed with him and held that since the defendant had seen and examined the goods and the defects being such as can be revealed by examination within the meaning of the proviso to section 14 (2), there was no implied condition to it.

We want to agree with Igweike (1980) that with due respect to the decision in the case that ordinary examination of a tomatoe paste cannot reveal whether it is fit for human consumption. But in this case, since the defendant was fully aware that the goods had earlier been certified unfit for human consumption, he ought to have deduced that the remaining part might also suffer similar fate.

From the fore-going, it seems that this sub-section is not as rigid as the first, in view of the proviso to the sub-section. This might be the case, but this does not usually apply to consumable goods as mere examination cannot reveal whether they are fit for consumption or not.

### 3.1.5 Sale by Sample

Sale by sample is dealt with by section 15 which defines a contract of sale by sample as one where there is a term in the contract expressly or impliedly to that effect. Thus the mere fact that a sample is supplied does not make it a sale by sample. To qualify as a sale by sample, it must be so stated in the contract. In Sub-Section 2 three implied conditions are present. It states that:

In the case of a contract for sale by sample,

- (a) There is an implied condition that the bulk shall correspond with the sample in quantity.
- (b) There is implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample.
- (c) There is an implied condition that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

Fundamental conceptual objections have been recognized as to the meaning of “sample”. The views of several writers were outlined by Kanyip (2005). According to him, commentators agreed that sample is considered a special form of description as it represents statement in a non-verbal form about the subject-matter of the contract. He went further to posit the view of Hudson that the requirement that goods must correspond with both sample and description as stated in Sub-Section 2 could be considered an example of tautology except the non-verbal description in the sample include matters not included in the description. And sample and description are combined; it’s likely to give the buyer the opportunity of either accepting or rejecting the goods which ordinarily would not be available to him if the sale was one by description only.

Another issue also raised is as to what is meant by “reasonable opportunity”. It was well-answered that it means giving the buyer all the needed facilities and enablement to examine the goods and satisfy himself that they are merchantable (Igweike, 1980). And only defects which are apparent when this is done will be held against the buyer. And it was pointed out by Kanyip (2005) that a purchaser who buys by sample will still have to use due diligence to avail of all ordinary and usual means to ascertain the properties of that sample, and he will be equally bound by whatever he actually recognizes in the sample, and what he might by due diligence in the use of all ordinary and usual means have ascertained.

We concur with the above assertion that a buyer should not only be given a reasonable opportunity to examine the goods but also should be bound by whatever such examination ought to reveal. There is no hardship in this condition at all as it is like a double-edged sword both for the buyer and the seller in that a buyer is granted opportunity by law of comparing the goods with the intended sample. And also for the seller too because the buyer after due inspection of the goods can no longer reject them as being defective, if the initial examination or inspection of the goods ought to have revealed such defects. Whatever defects that cannot be seen upon ordinary examination cannot fall within this condition. And also the buyer should be assisted by the seller by giving him all the needed assistance to carry out this examination.

### 3.1.6 Deceit

Another civil measure put in place to ensure honest dealing in the marketing transaction is the common law tort of Deceit. The essence of this tort is to guard against fraud, thus when a seller induces a buyer to purchase a defective product or a product contrary to what the buyer wants stating otherwise, this is fraudulent. And it can give rise to an action under the tort of deceit or fraudulent misrepresentation under the law of contract.

To succeed in an action on deceit, there are vital ingredients that must be established:

- 1) First and foremost, the claimant must prove that the defendant made a representation of facts by words or conduct.
- 2) That the defendant intended that the representation be acted upon.
- 3) That he (the claimant) acted upon the representation and suffered damages as a result.
- 4) That the defendant knew the representation to be false or had no genuine belief in its truth. Per Lord Maugham in *Bradford Building Society v. Borders (1941) 2All ER 205 page 211*

As for the first element referred to above, the false statement may be by words spoken or written or even by conduct. It may also be the mere disclosure of the truth as silence could sometimes constitute fraud (Kodilinye,

1999). The statement of intention or of opinion could sometimes be treated as statements of fact if it is proved that the person that made it had no such intention provided he made it as to the existing state of his mind. And this way the situation in *Edington v. Fitzmaurice (1885) 29 Ch.D pg 459* where a person was induced to lend a certain sum to a company based on what was written in the company's prospectus that the money was required for the improvement of the premises and the extension of the company's business whereas, the directors wanted to use the money to settle the company's debt. The court held it to be a case of deceit stating that a man's mind can be determined as a matter of fact. And such misrepresentation as to the state of mind is a misrepresentation of fact.

Also in *Smith v. Chadwick (1882) 20 Ch.D pg 27* it was further stated that to succeed under this tort, the claimant must show that the defendant's false misrepresentation or deceit caused him to act to his own detriment. And while this tort is not actionable per se, he has to prove actual loss that emanated from it.

So, as explained, a person is said to commit the tort of deceit if he makes a false statement of fact knowingly or without believing in its truth intending that it should be acted upon by somebody who in fact did so and suffered damage. While this tort seems to be protective of the buyer, in actual fact, any buyer that suffers from the tort of deceit must prove the task of fraud and any damage he subsequently suffered to be eligible to any relief under the tort and if he fails to do this, the action is likely to fail and he will get no relief. However proof under the tort of deceit is not as stringent as that required in the tort of negligence.

### 3.1.7 Negligence

The tort of negligence is a civic wrong like contract and deceit. It imposes duties at civil law in various ways relevant to modern business activities. Rights in contract alone are not enough to protect users in a marketing transaction owing to the doctrine of privity of contract which states that only parties to a contract can bring an action on it. The tort of negligence is not as restricted as privity of contract in the sense that anybody affected by a defect in a product, whether a party to the contract that gave rise to the product or not can bring an action on it and get relief if successful. Negligence is defined as a breach of legal duty to take care which results in damage undesired by the defendant to the plaintiff. (Winifield and Jolowig, 1989)

This tort is said to be the commonest tort claim and it plays an important role in product liability as a person who suffers damages as a result of defects in product caused by another's carelessness has a right to bring an action under this tort (Adams, 2003). To be successful under this tort, the claimant must prove that there was a duty of care owed him by the defendant. Secondly, there was a breach of that duty. And as a result of that breach, he suffered some damages.

The first of the requirements, which is a duty of care is said to be owed by the defendant to the claimant if it is foreseeable that his action would cause harm to the claimant. This principle was laid by Lord Atkin in the celebrated case of *Donoghue v. Stevenson (1932) AC 562* that a manufacturer owes a duty of care to the ultimate consumer of the product.

To establish a duty of care, some factors are put into cognizance:

- a) First of which is "Reasonable Foreseeability". No duty of care will be deemed to exist unless it is foreseeable that if the defendant does not exercise due care, the plaintiff will be harmed.
- b) Proximity: There must be a close relationship between the act of the defendant and the injury suffered by the plaintiff.
- c) Public Policy: also plays a part as a duty will only be held to exist when it is believed to be in the interest of the public (Adams, 2003).

This public policy element was canvassed by Lord Wilberforce in *Anns Merton LBC (1977) 2 All ER 492 at 498-499* where he stated thus:

In order to establish that a duty of care arises in a particular situation, the question has to be approached in two stages. First one has to ask whether as between the alleged wrong doer and the person who has suffered damages, there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may likely cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the question is answered affirmatively, it is necessary to consider whether there are any considerations which ought

to be negative or to reduce or limit the scope of the duty or the class of persons to whom it is owed or the damages to which a breach of it may give rise.

Whilst it is said that the defendant owe a duty of care to the claimant or plaintiff, such duty of care is usually not imposed where the defect results in pure economic loss as such loss are considered contractual in nature and claim for it can only be brought under the law of contract. It is the physical damage to the claimant or his property that imposes those duty unless however the claimant is able to prove that he placed reliance on the manufacturer's expertise after due consideration.

### **3.1.8 Breach of the Duty of Care**

In addition to being owed a duty of care, the claimant must also prove that by objective standards, the defendant failed to take reasonable care or precaution to prevent the accident that occurred.

In considering breach of duty of care, several factors are taken into consideration by the court such as the seriousness of the risk. The greater the danger of an accident occurring, the more the standard of care that will be required from the defendant.

### **3.1.9 Consequential Damage**

In addition to establishing the duty of care owed him and breach of that duty by the defendant, the claimant must also prove he has suffered some damages as a result of that breach. The defendant is not liable for all consequential damages suffered by the claimant, if it is proved that the damage is too remote from the original act of the defendant. He is deemed to be only liable for reasonable foreseeable damage (Adams, 2003).

In proving consequential damage, two elements are involved:

- (a) Causation in fact: the question often arises as to whether it was the defendant's failure to take reasonable care that caused the damage to the claimant. The onus is on the claimant to prove that the injury he suffered would not have happened if not for the defendant's carelessness.
- (b) Causation in law: under this requirement, even if the damage was not too remote and the defendant is responsible for all the results of the breach, he will still be held liable if the type of damage which the claimant suffered is reasonably foreseeable. (Adams, 2003)

Having seen the three elements of negligence that must be proved before a claimant can succeed in its action, it is necessary to remember that a person owes another duty if it is foreseeable in the circumstances that another is likely to be harmed by his action or omission. This duty extends to manufacturers of product as well. In the case of *Donoghue v. Stevenson* discussed earlier, it was held that a manufacturer of a chattel owed a duty of care to whoever will be the end-user of his product and would be liable under this tort if person suffers harm as a result of any defect in the product. This principle was fully expressed as follows:

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

This principle was applied in *Osemobor v. Niger Biscuit Co. Ltd (1973) NCLR, 382* where the plaintiff bought a packet of biscuit. While chewing, she discovered a decayed tooth in her mouth. She fell ill and needed medical attention. She instituted an action against the manufacturers. In holding the manufacturers liable, the court held that since there was no probability of an intermediate examination of the biscuit before reaching the claimant, the submission of the defendant counsel that the claimant ought to have examined the biscuit before eating it was unfounded as it behooves on a manufacturer who produced goods for consumption to take reasonable care when producing such goods so that they can be used for the purpose or manner intended without causing harm to the user. Kodilinye (1999) itemised the original principle in *Donoghue's* case and how it relates to a marketer and his consumers by stating that:

1. "Manufacturer" has been extended to include repairs, assemblers and retailers who have to perform some work on the goods other than mere distribution.
2. "Products" is not confined to food and drink but includes e.g. industrial chemicals, underpants, cars, kiosks, etc.

3. "Consumer" includes the ultimate user of an article, any person through whose hands the article may pass and anyone who is within physical proximity to it.
4. Liability is not restricted to causes where the article reaches the consumer in the same sealed package or container in which it left one manufacturer, it is sufficient to show that it reached the consumer subject to the same defect.
5. The mere existence of an opportunity or intermediate examination will not exonerate the defendant manufacturer. He will escape liability only if there was at least a reasonable probability that an examination sufficient to reveal any defect would be carried out. Thus, if the manufacturer issues a sufficient warning that the article should not be used without prior testing or checking, he may avoid liability.
6. The manufacturer must take reasonable care to ensure that any label or instruction accompanying the article, which are necessary for its proper use, are sufficiently clear to ensure that the article can be safely used.
7. The principle in *Donoghue's case* is probably limited to cases where damage is caused to persons or property, so that damages cannot be recovered in tort (as opposed to contract) for purely economic loss caused by defective products.
8. The doctrine of *res ipsa loquitur* can be relied upon in establishing negligence on the part of the manufacturer.

Funny enough, most of the above principles outlined by Kodilinye as emanating from *Donoghue's case* have not been applied by the Nigerian courts. This clear departure is evidenced by the strict or rather rigid burden of proof demanded of claimant to prove the three elements of negligence i.e. duty of care, breach of that duty and resultant damages before getting remedy for breach.

Discharging this burden as required is not an easy task for the claimant due to the "fool proof production" rule which places the burden of proving the defendant's negligent act and the link between the negligent act and the injury subsequently suffered on him unlike *Donoghue's case* which was decided abroad and is one of simple liability. In a number of Nigerian cases, discharging this burden has been quiet difficult almost like the proverbial biblical camel passing through the eye of a needle. Apart from the *Niger Biscuit Case* earlier discussed, very few cases of negligence have succeeded in Nigeria. For instance, in the case of *Nigeria Bottling Company Plc v. Okweji minor & anor (1973) NCLR 382*, the first respondent claimed damages from both the appellant and the second respondent who was an agent of the appellant, the manufacturer of coca-cola; he sues for the injury he suffered as a result of drinking a bottle of contaminated Fanta Orange drink. He was hospitalized and after series of medical tests, was confirmed to have suffered from food poisoning for which he was treated and discharged. During trial, the medical doctor who treated him gave evidence and tendered report of treatment explaining how he sent both the Fanta drink and the 1<sup>st</sup> respondent feascal matter for laboratory test. The laboratory scientist was called upon and he also gave evidence of the result from the specimen sent to him. He further told the court that he couldn't tell when the specimen were collected and that it was possible to find the same bacterial in other food substances not sent to him. This however created doubt on the source of the poison.

The appellant company on their own led evidence as to their method of production which according to them was carried out under strict condition of an internationally recognized standard. They led evidence to the fact that the product consumed by the 1<sup>st</sup> respondent could have been fake and not from their factory as they had earlier published the same fact in the newspaper. And there were several ways of opening and corking bottled drinks without been discovered.

The court accepted the evidence of the appellant company as establishing a fool-proof production process which faults liability in negligence. In addition, the court reiterated the principle of the evidential burden of proof by stating as follows:

Those answers do not rule out the possibility that other agents not from the alleged Fanta caused the infection the plaintiff/respondent suffered from. There was no evidence from Pw2 and Pw4 at the trial that the alleged contaminated fanta orange drink caused the injury or illness revealed by both the medical practitioner and the laboratory test. It seems to me that there was a total failure to link the second defendant/appellant company with the alleged Fanta orange drink in question nor offence of negligence of duty of care.

Thus the court held that the second respondent was unable to discharge this burden of proof placed on him successfully.

This system of Nigerian courts relying on fool-proof system of manufacturing has been severely criticized. That for a court to arrive at an objective decision in such cases, it must move beyond this system. Monye (2005) suggests that the fool-proof system is not infallible going by the investigation of the Standard Organization of Nigeria over the years that have revealed cases of defects in products manufactured by companies who fell short of meeting the required standard. She also referred to Kanyip who believes that it is wrong to assume that a fool-proof production process negates liability as every production process admits of defective products, this rightly substantiates the opinion of the court in *Ebelamu v. Guinness Nig. Ltd FCA/1/101/82* that there is always the odd chance of a defect in production. And instead of this foolproof production rule adhered to by the courts which defeats the essence of justice, a strict liability rule as exemplified in the *Donoghue's case* in which the seller or producer is liable for any defective products which cause harm to the consumer should be adopted by the by the Nigerian courts as this will further reduce the reckless abandon in which producers especially consumable manufacturers allow with impunity defect in their products.

#### **4.0 REGULATORY AGENCIES**

There are several regulatory agencies put in place by the Nigerian government to help monitor commercial activities and to ensure that end-users of commodities are protected against product defects. Some of these agencies are the National Agency for Food and Drug Administration and Control (NAFDAC), the Standard Organisation of Nigeria (SON), Consumer Protection Council (CPC), National Insurance Commission (NIC). A few of these will be examined.

##### **4.1 Standard Organisation of Nigeria (SON)**

The Standard Organization of Nigeria (SON) was established by Decree No. 56 of 1971 as an integral part of the Federal Ministry of Industries with the sole responsibility of preparing standards for products and ensuring that such products correspond with the required standard.

SON's functions are enormous, as they include advising the government generally on national policy on standards, standard specifications, quality control and metrology; to designate; establish and approve standards in respect of metrology, materials, commonalities, structures and processes for the certifications of products in commerce and industry; to provide necessary measures for quality control of raw materials and products in conformity with the standard specification; to organise tests and ensure compliance with approved standards; to undertake investigations as necessary into the quantity of facilities, materials and products in Nigeria and establish quality factories, products and laboratories; to ensure reference standards for calibration and verification of measures and measuring instruments; to register and regulate standard marks and specification; to foster interest in the recommendation and maintenance of acceptable standards by industry and general public; and to undertake any other activity likely to assist in the performance of the functions imposed on the organisation by the enabling Act.

The highest decision-making body of the SON is the Nigerian Standard Council (NSC) responsible for ensuring competitiveness of Nigerian goods both at home and abroad by encouraging quality assurance practice. The eight directorates in the organisation are: Standards, Quality Assurance, Laboratory Services, Finance and Supply and Human Resources. The whole essence of this organisation therefore is to see that buyers and consumers alike are protected when they enter into commercial transactions and also help eradicate most uncertainties that parties encounter when buying and selling products/services (Agoma, 2005).

All the above-stated functions of SON have direct impact on the marketing transaction, in addition to the regulation of production and sales of product; it also ensures that these same products are consumable. Be that as it may, a pertinent problem has been identified with its standardisation function which is that of compliance by manufacturers of products and to solve this problem, a certification procedure whereby industries that comply with minimum standards of quality set are awarded various degrees of certificate ranging from gold, silver or ordinary certificate all depending on the number of years, the recipient had previously won such(Kanyip, 2005). The organization may need to inform the customers about these different certificates to impact on the patronage of the different products of the different companies which would indirectly ensure compliance.

##### **4.2 National Agency for Food and Drug Administration and Control (NAFDAC)**

The National Agency for Food and Drug Administration and Control (NAFDAC) was established in 1993 by the National Agency for Food and Drug Administration and Control Decree No. 15 of 1993. Its functions range

from regulating the information, exportation, manufacture, advertisement, distribution, sale and use of regulated products; undertaking their registration; compiling their standard specifications and guidelines for their production, importation, exportation, sale and distribution; undertaking inspection of their importation and establishing relevant quality assurance system including their certification and production sites; undertaking appropriate investigation into their raw materials so as to ensure quality; pronouncing on their quality and safety after appropriate analysis; issuing guidelines on, approve and monitor their advertisement; determining the suitability or otherwise of medicine, drugs, food products, cosmetics, medical devices or chemicals for human and animal use and to carry out such activities as are necessary or expedient for the performance of its functions.

These functions are implemented through NAFDAC product registration which ensures that any registered product by the agency is certified fit for human consumption. Like SON, the importance of this agency in ensuring that products meet their required standards cannot be over-emphasised. When the provision of its rules and regulations are breached, punitive measures such as revocation of registration license, closure of production industry and seizure of the defective products are taken against the defaulters.

To see that the products are fit for consumption, there is the product registration process which is a quality assurance process. It is assumed that any product registered by NAFDAC is certified fit to be consumed. But the question has been asked if in doing this, NAFDAC can be held liable on grounds of unmerchantability if the certified product turns out to be defective and harmful. (Kanyip, 2005)

Be that as it may, the zeal and rigidity of this agency in pursuing its desired aims and objectives is highly commended, manufacturers, for fear of the administrative sanctions backing the legal enforcement of this Agency are making conscious effort to comply with expected standards though many still fall short of this expectation but the number is highly minimised.

#### **4.3 Consumer Protection Council (CPC)**

This is another Agency established by law to see to the direct protection of end-users against defective goods and services. The Agency was established by the Consumer Protection Council Decree No. 66 of 1992.

Its statutory functions include providing speedy redress to consumer complaints through negotiations, mediations and conciliations; removing or eliminating from the market hazardous products and causing offenders to replace such goods with safer and more appropriate alternatives; publish from time to time list of products whose consumption and sale have been banned, withdrawn, severally restricted or not approved within or outside Nigeria; cause an offending producer to protect, compensate, provide relief and safeguards to injured consumers or communities from adverse effects of technologies that are inherently harmful, injurious, violent or highly hazardous; organize and undertake campaigns and other forms of activities as will lead to increased public consumer awareness; encourage trade, industry and professional associations to develop and enforce in their various fields quality standards designed to safeguard the interest of the consumer; issue guidelines to manufacturers, importers, dealers and wholesalers in relation to their obligation under the consumer protection council decree; encourage the formation of voluntary consumer groups or associations for consumers' well-being; perform such functions as may be imposed pursuant to the CPC decree.

To successfully carry out the above stated functions, CPC is empowered by law to apply to court in order to stop the circulation of products which are likely to be harmful to the public. And also to make manufacturers comply with all safety standards in manufacturing their products.

Added to the above stated functions, CPC has regulatory power to prevent the sale, distribution, advertisement of products that fail to meet required standards. Thus its main purpose is to prevent dangerous goods from reaching the market or if they do, to stop their sale.

As Kanyip (2005) rightly observes, CPC has a more direct mandate on the consumer than the previously discussed two agencies and if effectively harnessed will redress whatever complaints that exist in commercial transactions and thus enhances the end-users power.

#### **4.4 Nigerian Communication Commission (NCC)**

This agency is responsible for the monitoring of the telecommunication industries in Nigeria. It is responsible first and foremost for the creation of an enabling environment for competition among operators in the telecom industry and also for ensuring that these industries provide qualitative and efficient telecommunication service in the country. It has as its mission statement, supporting market-driven telecommunications industry and promoting universal access through the consistent enforcement of clear and fair policies that protect stake-

holders, ensure efficient resources management, share industry's best practices and deliver affordable quality telecom services.

To effectively achieve these, the commission in September, 2001, established the Consumer Affairs Bureau whose mission is to serve as the industry's watchdog and charged with educating, informing and protecting consumers in a professional and courteous manner. In other words, it serves as a link between the consumer and the telecommunicating industry and its main objective is to firstly, create a visible and credible Consumer Affairs Bureau that would serve as a one-stop upon which stakeholders can rely for information on the telecommunication industry in Nigeria. Secondly, it is to generate an unmatched awareness of consumer rights in Nigeria by establishing a strong bureau that would monitor and control telecommunication operators in order to protect consumers from unscrupulous practices in the country. And lastly, to explore all channels of communication in offering education to the subscribers on a continuous basis.

Essentially, this agency is charged with the responsibility of receiving and investigating complaints from people in relation with the industry but the major handicap here is largely its unpopularity as against the other three agencies afore-discussed. It leaves a huge distaste in that consumers ignorance of this commission makes them to suffer greatly in the hands of the service providers.

It is glaring that these regulatory agencies are established by the Nigerian government not only to ensure that the standards of products and services are duly complied with but also to guide and further protect the interest of the end-users so that producers and traders alike are honest and transparent in their dealings in commercial transactions.

## **5.0 MARKETING-LAW ISSUES**

All the above-discussed agencies have laws establishing them and delimiting their statutory functions. For instance, the Nigerian Standard Organisation is established by the Nigerian Standard Organisation Act 1971. These statutes make provision for either an administrative framework for regulating its functions or normative framework to protect these functions. (Kanyip, 2005). In spite of this, their impact in providing a legal framework for governing business or commercial transaction in Nigeria should be commended. As goods are increasingly being produced and sold to meet purchasers satisfaction though some sub-standard and fake ones cannot be ruled out completely. If the functions of these agencies are increasingly enforced, they will go a long way in eradicating fake and sub-standard products therefore ensuring that buyers get proper value for their money.

It is worthy of note that while essentially the Nigerian statutes setting up the agencies make provision for criminal redress, the common law which embodied the law of contract and tort, go by way of civic redress. The Director-General of Standard Organisation of Nigeria in his speech delivered when it appointed a technical commission on product liability standard in 2003, said that two options are open to an aggrieved party when there is a breach in the contractual transaction either to seek redress under the criminal law or the civil law. However, he noted that redress under criminal law may not only be unenticing as it is time-consuming but may not be cost-effective at all (Monye,2005).

It seems that the terms implied by the statute are too strict on the seller, but some have disagreed with this, giving reasons. Some of the reasons advocated for this strict liability are that sellers and even distributors alike should ensure that the goods sold are merchantable. And the seller is deemed by his skill and position to insure the goods against possible defect and by putting his products for sale impliedly guarantees its quality and should therefore be liable for any defect found therein

To further buttress this view on product strict liability, comment C to section 402A of the American Restatement (2d) of the Torts, 1965 had this to say:

On whatever theory, the justification for strict liability has been said to be that the seller, by marketing his product for use or consumption, has undertaken and assumed a special responsibility towards any member of the consuming public who may be injured by it, that the public has the right to expect and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods, that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them and be treated as a cost of consumption against which

liability insurance can be obtained; and that the consumer of such products is entitled to the maximum protection against injury at the hands of someone and the proper persons to afford it are those who market the products.

Apart from the implied terms in a contract of the sale of goods, it is worthy to know that parties are free to include or exclude whatever terms desirable by them. So whenever there is a breach in the contract whether of express or implied terms as to when goods delivered do not fit the description in the contract, unmerchantable or fail to match the sample of the goods, the innocent parties often seek remedies in respect of the defective goods. And whatever the aggrieved party is entitled to damages for the breach depends largely on the defectiveness or otherwise of the goods. And defectiveness has been defined as when goods are unmerchantable or unfit for the purpose for which they were bought (Woodroffe and Lowe, 1991). The mere fact that a particular product fails to meet the expectation of the buyer is not enough to say that the good is defective, if such goods meet the general standard for the product of that nature unless of course the particular purpose for which the buyer needed the product was made known to the seller beforehand.

It is imperative to state that it would be unjust to hold that a product is defective simply because it failed to meet the expectation, requirement or need of a buyer if the same product meets the required standard of product of that nature. Be that as it may, the fundamental problem with the contract of sale of goods, just like every other contract, is the doctrine of privity of contract. Often times, it is not the buyer of goods that ends up being the user or the one that gets affected. This doctrine simply posits that a contract cannot confer enforceable rights or impose obligations on persons who were not parties to it and have not furnished considerations. Lord Haldene in *Dunlop Pneumatic Tyre Co. Ltd v. Selfridge Ltd (1915) AC 847* elaborated more on this doctrine when he said:

My Lords, in the law of England, certain principles are fundamental. One is that only a person who is a party to contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as for example, under a trust, but it cannot be conferred on a stranger to a contract as a right in person to enforce the contract.

This doctrine imposes hardship on final user of products who were not the buyers. In the case of *Donoghue v. Stevenson*, Mrs. Donoghue had to seek remedy when she consumed a defective beer. Such an action couldn't be bought under the law of contract owing to this doctrine.

All that the sale of goods seeks to achieve is in relation to commercial transaction governing the relationship between the seller and buyer. It has no provision for a third party seeking redress as a result of a defective product who was not a party to the contract. The question that arises from this position is: how does an aggrieved user who was not a party to the contract of sale and who got affected as a result of using a defective product or goods get adequate compensation for the injury he suffered?, It looks as if the only option for remedy for him lies in the tort of negligence. However, even if an aggrieved third party cannot get a redress under the law of contract owing to the doctrine of privity of contract, not so with a buyer who discovered that the terms of the contract had not been fully complied with. There are several remedies available to him depending on the nature of the term breached. Among the options available to him are to:

- a) Reject the goods and repudiate the contract
- b) Bring an action for damages
- c) Sue for specific performance of the contract.
- d) Institute an action for money had and received.
- e) Bring an action in detinue or conversion.

Some of these rights have also been recognized by the statute. As to whether they are conditions or warranty, section 11 (c) (a) of the Sale of Goods Act started by saying that:

where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or may elect to treat the breach of such condition as a breach of warranty and not as a ground for treating the contract as repudiated.

While section 11 (1) (b) added that:

Whether a stipulation in a contract is a condition, breach of which may give rise to a right to treat the contract as repudiated or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated; depends on each case or the construction of contract.

As earlier noted in the course of this paper, the breach of a condition in the contract is a vital term of the contract which entitles the buyer to rescind the contract and sue for damages. Unless of course he waives this right and elect to treat it as a breach of warranty in accordance with section 11 (1) (a) or the breach might be a minor one which is a warranty and entitles him to sue only for damages. The choice therefore is the buyer's as to what remedy he intends to seek. But assessment of the defect or breach is usually based on the express terms in the contract and those implied by statutes.

Essentially, from the preceding sections, it can be observed that the Sales of Goods Act 1893 is geared towards the protection of rights under commercial transactions between sellers and buyers and to ensure that at the end of the day, the parties, especially the buyers are satisfied and received appropriate value for whatever consideration they had furnished.

## 6.0 CONCLUSION

We have in this paper examined the legal framework of marketing vis-à-vis the regulatory Agencies established by the government to regulate commercial transactions in Nigeria and their activities. Contractual law of Sales of Goods Act 1893 was examined and found that liability for breach can only be enforced if there is contractual relationship between the parties otherwise known as the doctrine of privity of contract which invariably excludes non-parties to the contract from the burden and benefit attached to the contract. However, while liability in contractual relationship is based on this doctrine which attach liability only to the contractual parties, not so in the law of Tort where liability is based solely on negligence which presupposes the existence of a nexus between the parties.

But negligence which was meant to be one of simple liability has become a difficult one in the Nigeria legal system. The burden of proof demanded by the courts is oftentimes too high especially with regards to the foolproof system of production and also the fact that there is no liability for economic loss that doesn't have to do with either the person or property of the claimant. This position of Nigerian courts is too rigid as compared with their counterparts in developed countries thereby favouring more the manufacturers of these defective products.

The Tort of Deceit was also briefly examined. The essence of this tort in a marketing relationship is to prevent fraudulent practices. This tort is akin to fraudulent mis-representation in the law of contract. However, a major problem associated with this tort is the burden of proof required. The requirement of proving fraud in order to succeed is in most cases a difficult one for the aggrieved party.

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