NEGLIGENCE IN NIGERIA- Not at claimant's beck and call.

By

Akhabue, D.A. (Esq.)

FACULTY OF LAW AMBROSE ALLI UNIVERSITY, EKPOMA, EDO STATE, NIGERIA.

E-Mail: danielakhabue@gmail.com

ABSTRACT

This paper examines the ingredients of actionable negligence. Against the background of international standards, the paper provides to the effect that what the civil wrong or tort of negligence involves in so far as it is susceptible to analysis is a duty of care, a breach of that duty and a loss arising from that duty. These ingredients do not exist separately or in vacuum. They overlap and interact. This means that for a claimant to succeed in a case of negligence in Nigeria, it is not sufficient to say that the product was defective rather the claimant must prove that the producer was negligent in the production of the product. The paper concludes that in developed nations of the world, a producer could be liable to pay damages to injured consumers by a defect in her product even if the producer exercises due care, diligence and skill in the production of her product.

Key words: Negligence, Claimant, Beck, Call.

INTRODUCTION

Definitions are sine qua non conditions as a working premise and for the sake of clarity and the avoidance of disputes. When many years ago Baron Alderson[1] said:

> *Negligence is the omission to do something which a reasonable man, guided upon those conditions which ordinarily regulate the conduct of human affairs, would*

do, or doing something which a prudent and reasonable man would not do,

He was using "negligence" in its ordinary non-legal sense without reference to a duty of care. It is common knowledge among Lawyers that mere negligence in itself is not a cause of action. To give a cause of action, there must be negligence which amounts to a breach of duty towards the person claiming.

Negligence is a broad head of tort from which liability has arisen on the part of the negligent party to the claimant, to whom he owes a duty of care. A tort is defined as any wrong, injury or damage not including a breach of contract for which a civil suit can be brought. Negligence as a tort is a wrong that constitutes a ground of legal liability, a wrong independent of contract, although it may also be a breach of contract if the contract itself calls for care[2]. Negligence is a term, which has been defined by the courts and also by textbook writers with exceeding frequency and in various terms. It is not a mere technical term, but a word of well known meaning. It is a conduct which falls below the standard established by law for the protection of others, against unreasonable risk of harm; it is a departure from the conduct expectable of a reasonable prudent person under like circumstances[3].

What the civil wrong or tort of negligence involves, insofar as it is susceptible to analysis is a duty of care, a breach of that duty and a loss occasioned by that breach[4]. But these ingredients do not exist separately or in vacuo. They will always be related to the particular facts of the case, they overlap and interact[5].

Thus, the ingredients of actionable negligence are as follows:

- The duty to take care.
- Breach of that duty and
- Loss arising from such breach.

DUTY TO TAKE CARE

Negligence as used here means a breach of duty to take care; imposed by common law or statute, as in the words of Bowen L.J.[6],

> *The ideas of negligence and duty are strictly correlative and there is no such thing as negligence in the abstract, negligence is simply neglect of some care which we are bound by law to exercise towards somebody.*

Wiles J. defined negligence as[7]

> *The absence of such care as it was the duty of the defendant to take.*

Talbot L.J. speaks of actionable negligence as,

> *Depending on the breach of duty owned by defendant to* claimant *[8].*

Lord Wright states[9],

> *In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or in commission; it properly connotes the complex of duty; break and damage thereby suffered by the person to whom the duty owns.*

Another definition of negligence in relation to breach of a duty to take care is that given by **Lord Porter[10]** thus

> *Negligence is the failure to use the requisite amount of care required by the law in the case where a duty to use care exists.*

R. O. Cooley[11] in his work on torts defines negligence as:

> *The failure to observe for the protection of the interest of another person that degree of care, precaution and vigilance which the circumstances justly demand whereby such other person suffers injury.*

Osborn's Concise Law dictionary defines negligence as the breach by the defendant of a legal duty to take care, which results in damage to the claimant. It also defines it as signifying a state of mind i.e. either a person's inadvertence to the consequences of his conduct or the deliberate taking of a risk without necessarily intending the consequences attendant upon that risk.

The Oxford English Dictionary defines negligence as want of attention to what ought to be or looked after, carelessness with regard to one's duty or business; lack of necessary or ordinary care in doing something. **Oxford Dictionary of law** defines negligence as carelessness amounting to the culpable breach of duty, failure to do something that a reasonable man (i.e. an average responsible citizen) would do, or doing something that a reasonable man would not do. It is also regarded as a tort consisting of the breach of a duty of care resulting in damage to the claimant.

Negligence can also be regarded as forgetfulness, carelessness, failure to exercise the proper care expected of a prudent person.

Glanville Williams[12] defines negligence as:

> *Failure to conform to the standard of care to which it is the defendant's duty to perform. It is a failure to behave like a reasonable or prudent man in*

> *circumstance where the law require such reasonable behaviour.*

Cross on the other hand defines negligence as:

> *Non-compliance with a standard of conduct and it involves blame worthy inadvertence to the circumstance and consequences mentioned in the definition of the act charged*[13].

Perkins[14] would rather understand negligence as:

> *Any condition intentionally or wantonly and wilfully disregardful of an interest of others which falls below the standard established by law for the protection of others against unreasonable risk of harm.*

Chambers English Dictionary defines negligence as:

> *To treat careless, to pass by without notice, to omit by carelessness, to fail to bestow due care upon omission of duty especially such cares for the interest of others as the law may require.*

Butterworth's medical Dictionary[15] defines negligence as:

> *An act of omission to do something which reasonable person would ordinarily do, or the doing of something which a reasonable person would not do.*

From the above definitions, one would humbly submit that for negligence to be actionable there should be a breach of duty of care.

The question that readily comes to mind here is when does a duty of care arise between the claimant and the defendant? This is a question that does not admit

confident answer. One view is that there must be a special relationship between the claimant and the defendant, such as doctor and patient and unless a given case is brought within that relationship, the duty to take care cannot arise[16].

Lord Aitkin's[17] statement of this principle is:

> *The rule that you are to love your neighbour becomes in law, you must not injure your neighbour, and the lawyer's question who is my neighbour? Receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called question.*

In this case, a person bought a bottle of Ginger beer and offered it to her friend who after drinking was ill as a result of the decomposed remains of snail contained in the bottle. The friend sued-though she was not a party to the contract. It was held that the defendant was liable as he failed in his duty of care to his neighbour – the ultimate user. In tort of negligence, you need not be a party to the contract to qualify to bring an action. But under the privity of contract, a person who is not a party to a contract cannot sue on it. The same principle of a consumer is your neighbour in law was applied in a Nigerian case in 1973[18].

Here, a person bought a packet of biscuit from the supermarket – manufactured by Niger biscuit Co. ltd. In course of eating, he felt something hard in her mouth which turned out to be a decayed tooth. As a result she became ill and required medical

attention. And it was held that the defendant company was liable, under the tort of negligence as the company failed in her duty to take care of her neighbour.

The reference to proximity of Lord Aitkin was criticized by Lord Wright[19]. According to him:

> *"Reference to proximity was apt to mislead, adding proximity can only properly be used to exclude any element of remoteness"*

But then the learned judge did not hesitate to condemn the seller of the under wear that causes demalities to the user. But today it is now a settled issue that proximity is the foundation of duty care in torts as in the words of **karibi Whyte J.S.C.**[20]

The ideas of negligence and duty are strictly correlative and there is no such thing as negligence in the abstract; negligence is simply neglect of some care which we are bound by law to exercise towards somebody per **Bowen L.J.**[21]

In strict legal analysis, negligence connotes[22]

> *"The complex concept of duty, breach and damage thereby suffered by the person to whom the duty owed"*

No formula for testing whether in a given situation a duty of care arises has proved satisfactory. There are guide lines, of which the foresee ability of harm is the most important, for it indicates a prima facie duty of care.

Even if the duty exists, to whom is it owed? In the case of the patient himself there is no problem, but what if a relative or third party suffers as a result of the doctor's negligence, either physically by way of nervous shock[23] or is injured by the patient[24] or suffers financial loss[25].

So it can be seen that, even in the medical negligence context, tricky questions as to the existence of a duty of care may arise.

There are unfortunately no clear rules to tell us when a duty of care will be implied. It is difficult to find in the English authorities statements of general application defining the relations between parties that give rise to the duty.

> *"The courts are concerned with the particular relations who come before them in actual litigation and it is sufficient to say whether the duty exists in those circumstances per Lord Aitkin. Lord Macmillan added in that same case; "the criterion of judgement must adjust and adapt itself to the changing circumstances of life",*

And that precedent can be used with some effect to show that in a similar previous situation the law has recognized a duty of care. The result of the essential non-academic and pragmatic approach of the English judiciary is that it is made more difficult both to present a coherent analysis for jurisprudential purposes and to predict the legal conclusions that will be reached on any given set of facts. The law governing the duty owed in the tort of negligence said Lord Asquith[26].

> *"Seems to have been built up in disconnected slaps, exhibiting no organic unity or structure".*

A BREACH OF DUTY OF CARE

The defendant must not only owe the claimant a duty of care, he must not be in breach of it. Thus negligence means more than headless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach and damages thereby suffered by the person to whom the duty owed. Where a person is engaged in a transaction in which he holds himself out as having professional skill, the law expects him to show the average amount of competence associated with the

proper discharge of the duties of that profession, trade or calling and if he falls short of that and injures someone in consequences, he is not behaving reasonably.

In deciding whether or not there was a breach, we use a reasonable man test. I.e. what will a reasonable man infer from the circumstances? As Lord Macmillan put it[27]

> *"It is left to the judge to decide what in the circumstances of the particular case, the reasonable man would have in contemplation and what, accordingly the party sought to be made liable ought to have foreseen".*

Whether or not there was a breach is a question, the answer to which must vary with circumstances. There must be a falling below the standard of care called for by the circumstances of the case. One of the objects of law is to prescribe rules of conduct so that the individual will know how to act in any given set of circumstances, and to direct him to act as a reasonable man will act, without telling him in more detail how a reasonable man is found by experience to act under those circumstances is to give him very little guidance.

In considering the breach of a duty to take care you considers the magnitude of the risk.

LOSS ARISING FROM A BREACH

This is one of the elements of actionable negligence. There must be a loss arising from a breach of the duty to take care. And it is the duty of the claimant to prove the damage. With regard to the claimant proving damage, there are two aspects of this requirement as follows:

- Causation in fact
- Remoteness of damage in law

Causation in fact

The question that readily comes to mind here is: is it the defendant's breach of duty of care that causes the damage? If the answer is in the affirmative, then the defendant may be liable to the claimant. And where the answer is not in the affirmative, the defendant may not be liable.[28] Here, a man after drinking some tea experience persistent vomits for three hours, with two other persons who drank from the tea. Following this, he went to the hospital that night. On getting to the hospital, he was told by the casualty officer that he should go home that night and that the following day he should come and consult his doctor. Some hours later, he died. The wife sued the hospital authority as employer of the doctor. Held, in failing to examine the deceased, the doctor was guilty of a breach of his duty of care, but his breach would not be said to have been a cause of his death because even if the deceased had been examined and treated with proper care, he would probably have still died of the arsenical poisoning. It could not therefore be said that "but for" the doctor's negligence the deceased would have lived. The words "but for" is a good test here.

REMOTENESS OF DAMAGE

The consequences of an act are too remote if a reasonable man would not have been able to foreseen them, usually the defendants are not liable[29]. As in the words of the judge, the damage claimed was not the foreseeable consequences of the breach and so recovery was precluded.

But a burglar driving the gateway car was not under a duty of care to drive with due care his fellow criminal[30]. Similarly, a claimant who knowingly and willingly embarked on a flight with a drunken pilot was held by the court of appeal to have waived his rights in respect of negligent flying[31].

Where a man recommended a friend to purchase a vehicle in which he himself has no financial interest, he is under a legal duty of care in relation to that recommendation[32]. A school was held to be under no duty of care to insure her pupils against sporting accidents[33].

NEGLIGENT MISSTATEMENT

The law distinguishes between a duty to take care in respect of act or omissions to act and the duty not to make careless statement. Though no logical reason was given for the distinguishing, but it has. I humbly submit here that it may not be unconnected with a way of finding solution to deceit of the society. Note however that, for a careless statement to be actionable the following conditions must be fulfilled:

- There must be a clear case of careless statement (negligent report)
- There must be a clear case of reliance on the report
- There must be a loss arising from the reliance

Thus where a careless statement is credited to a person and there is a loss arising from reliance on the careless statement, the defendant will be liable[34]. In that celebrated case, a Bank issued a certificate of credit worthiness to one of her customers. A company relied on it and entered into commercial transaction with the customer of the bank. Moment later, the customer went into liquidation. Held, the bank was liable.

It is now a settled issue that if in the ordinary course of business one person seeks advice or information from another in circumstances where that other would reasonably know that his advice is to be relied on, he is under a legal duty to take such care in giving his reply as the circumstances reasonably required. But for the duty to arise that particular relationship has to exist between the parties. It need not of course be contractual, it need not be fiduciary in the strict sense, but there need to be a sufficient

degree of proximity between the parties so that the element of reasonable reliance is present.

PROOF OF NEGLIGENCE

The Onus of proving negligence rest on the claimant who alleges and the Onus is as in all other civil matters which is not static, does not shift on to the defendant until the claimant proves the defendant's negligence[35]. It is settled that negligence is a question of fact and not of law. So, each case must be decided in the light of the facts pleaded and proved. No one case, is exactly like another[36]. Nevertheless, it has also been settled in a number of decided cases by the Supreme Court in Nigeria that a claimant, as a matter of law is required, in an action on negligence, to state or give particulars of negligence alleged in order to recover on the negligence pleaded in those particulars. It is not sufficient for a claimant to make a blanket allegation of negligence against a defendant on a claim of negligence without giving full particulars of the items of negligence relied on as well as the duty of care owed to him by the defendant[37]. The basic requirement of the law is that the defendant must owe a duty of care to the claimant. Where there is no such notional duty to exercise, negligence will have no legs to stand and any claim premised thereon will fail[38].

RES IPSA LOQUITOR

Res Ipsa Loquitor means the fact speaks for itself. In other to mitigate the hardship that the claimant normally encountered in having to proof negligence, the court evolved a method by drawing inference of negligence.

The maxim applies where an accident occurs. The significance of the principle is that it enables the claimant who has no knowledge or sufficient knowledge about how the

accident occurred to rely on the accident itself as evidence of negligence. Secondly, it prevents the defendant who knows what happened from avoiding responsibility simply by choosing not to give any evidence[39].

THE EFFECTS OF THE PLEA OF RES IPSA LOQUITOR

There are two effects of the plea of res Ipsa loquitor. They are as follows:

1. It raises a prima facie inference of negligence which requires the defendant to explain why the accident could have occurred without negligence by him. And where he cannot explain, he will be liable.
2. The plea res Ipsa loquitor has the effect of reversing the burden of proof[40].

CONCLUSION AND RECOMMENDATIONS.

In establishing cases of negligence in Nigeria, the claimant has the option to seek a redress by instituting a civil action against the defendant in a competent court.

However, in spite of the avenue of redress opened to victim, it must be noted that there are impediments on the road to justice in Nigeria. The process is quite expensive and almost beyond the reach of hoi polloi, time consuming and indeed utterly frustrating. Ipso facto that is by that fact; it is a common thing seeing some Nigerians resigning to fate instead of seeking redress.

To this end, some radical reformations are necessary. For the purpose of this article the following measures shall be suggested:

- Nigeria, being an underdeveloped country, there is undoubtedly a very high degree of poverty, against this background, most victims of negligence cannot cross the financial hurdle. It is therefore humbly suggested that a special **legal Aid Scheme,** restricted to victims of negligence should be set up. This of course

will be in consonance with section 46 (4) (b) of the 1999 constitution of the federal Republic of Nigeria as amended in 2011 which provides to the effect that:

The National Assembly shall make provisions……..

(a) For rendering of financial assistance to any indigent citizens of Nigeria where his right under this chapter has been infringed or with a view to enabling him to engage the services of a legal practitioner to prosecute his claim.

(b) For ensuring that allegations of infringement of such rights are substantial and the requirement or need for financial or legal aid is real.

Though the Consumer Protection Council Act[41] offers protection to the consumers who may have suffered loss from the use of a product, a comparison of the Act with international best practice, reveals that a lot has to be done to modify our Act to meet up with international standards. In the U.K for example, product liability directive had been transposed into U.K law[42]. The legislation imposes strict liability on producers/suppliers for harm caused by defective product. The 1999 directive was transposed in England and Wales by the consumer protection council Act, 1987 (product liability) (modification order) 2000. This means that people who have suffered loss by defective products can sue for compensation without having to prove the producer negligence provided that they can prove that the product was defective. The locus classicus of this principle is the English case of Rylands V. Fletcher[43] wherein it was stated that anyone who brings, collects and keeps on his property anything likely to do damage, if it escape is liable for the consequences of its escape. The English Court of Appeal did rule for the first time on the terms of the consumer protection Act going against the trend of judgements in lower courts that the product supplier though not negligent, the claimant was entitled to damages under the Act[44]. The gist of the case is that the claimant's mother purchased in 1990 a cosy toes sleeping bag, designed to be attached to a child's push chair with elastic straps. Shortly after the

purchase, the claimant who was aged 12 at that time, helped his mother attach the product to his younger brother's push chair. One of the elastic straps slipped and lashed back. The buckle attached to the elastic strap hit him in the eye causing serious permanent damage. The claimant sued Mother care, the supplier of the product, claiming damages in negligence and also under the consumer protection Act. Mother care conceded that it was the producer of the product within the meaning of part 1 of the Act. As part of its defence, Mother care argued that:

1. The product was supplied because there have been no previous instances of this type of injury and in 1990, consumers could not reasonably have expected the product to be designed differently so as to avoid the risk of the type of injury,
2. Even if the products were defective, the respondent was entitled to use the development risk defence in a product if the state of scientific and technical knowledge at the relevant time was not such that a producer might be expected to have discovered the defect,
3. For the same reasons, it did not act negligently in 1990 by supplying the product in that form and
4. The claimant acted carelessly in trying to attach the product and was therefore partly responsible for his own injury.

A consulting engineer retained as an expert witness by the parties concluded that in 1990, no manufacturer of child care products could reasonably have recognise the potential risk of this type of accident because at that time, even experts in the safety of child care product had not recognised the problem. The trial judge found that Mother care was liable for the claimant's injuries and rejected the claim of contributory negligence on the part of the claimant though the trial Judge did not make clear whether his ruling was based on common law negligence or strict liability under the consumer's protection Act or both. Mother care appealed. The Court of Appeal rejected Mother Care's appeal finding that whilst Mother Care had not been negligent, the

product was defective for the purposes of part 1 of the consumer protection council Act. The Court of Appeal also ruled that the respondent was not entitled to the benefit of development risks defence. The Court of Appeal accepted the expert's evidence that no prudent manufacturer would have anticipated the risk at that time. Therefore there had been no breach by Mother care of any common law duty of care. The Court of Appeal further held inter-alia that:

1. The producer was found liable under the consumer protection Act strict liability provisions even though it was not negligent, the exercise of all proper care will not necessarily protect the producer from strict liability if a consumer is injured by a defect in the product,
2. A manufacturer or supplier may be liable under strict liability even if the risk could not have been recognised at the time of supply,
3. The development risks defence will be available only where there has been some scientific or technical advance since the time of supply which enable the defect to be identified.

Though the strict liability provisions have not been encapsulated in our Act a customer who institutes an action under our consumer protection council Act can rely on this case as a locus classicus in the apparent absence of decisions on product liability in Nigeria. However, reliance can only be persuasive as the judges are not bound to follow. The advantage of relying on the locus classicus is that the claimant does not go as far as proving negligence; all the court expects is to prove that the actual product itself is indeed defective.

It is humbly submitted that the need to further modify our consumer protection council Act to align with international best practice cannot be over emphasised at this point. Nigeria being a superfluous emerging market with a large appetite for consumption needs a lot of protection against substandard goods.

REFERENCES

1 Blyth v. Birmingham Waterworks Co (1856) II Ex. CH 781
2 Matasow v. Camp Orinsekwe 280 N.Y.S. 620, 628
3 U.S. v. Ohio Barge lines Inc. 607f 2d 642, 632
4 Emphasis is mine.
5 Lewis C.J. medical negligence (A practical guide), 4th Edition, Butterworth, London 1998.
6 Thomas v. Quartemaine (1887) 18 Q.B.D 685, 694
7 Grill v. General Iron Screw Colliery Co. (1866) L.RIC P. 600, 612
8 Gurnard v. Antifyre ltd (1933) IK.B 551, 558
9 Roch gelly iron and coal co. v. Milan (1934) A.C. 1,25
10 Cole v. delchamps inc 152 so 2d 911 913
11 R.O. Cooley: Cooley on torts, published by Heinemann 1940
12 Op. Cit at 88
13 Cross R. An introduction to Criminal Law (London 1957) t 42
14 R. Perkins Criminal law (Brooklyn foundation press 1957) at 664
15 Butterworth's medical Dictionary (1st Ed) 1961
16 Pollock F; Pollock on Torts 15th Ed, (treite) 49 LQR
17 Donohue v. Stevenson (1932) A.C. 562, 580
18 Audrey Osemobor v. Niger biscuits co.ltd (1973) 6 CC HCJ 71
19 Grant v. Australian Knitting Mills ltd. (1936) A.C. 85 104
20 Abusomwan v. Mercantile Bank of Nigeria ltd (1983) 3 NWLR PT. 196 P. 198
21 Thomas v. Quatermaine (1887) 18 QBD 685,694.
22 Lochgelly Iron and coal co. V. McMullan (1934) A.C. 125
23 Mcloughlin v. O'Brian (1983) I.A.C. 410
24 Tarasoff v. Regents of the university of London of California 551 p. 2d 334 (CAL. 1976)
25 Evans v. Liverpool corpn (1906) IK.B 160
26 Candler v. Crane Christmas & co. (1951)2KB 164, 188
27 Glasgow corporation v. Muir (1943) A.C. 448, 457
28 Barnett v. Chelsea and Kensington Hospital Management Committee (1968) 1 A.E.R. 1068
29 Al-kandari v. J.R. Brown g co. (1988) Q.B. 665; White v. Jones (1995) 2 A. C. 207
30 Ashton v. Turner (1981) Q.B 137
31 Morris v. Murray (1991) 2 Q.B 6
32 Chaudhry v. Probbakar (1989) 1 WLR 29 CA
33 Van open v. Clerk to Bedford Charity Trustees (1990) WLR 235, CA
34 Hedley Byrne & co. Ltd v. Heller & partners ltd. (1964) AC 465
35 Hamza v. Kure (2010) Vol. 187 LRCN p. 143 at p. 148.
36 D.B Ltd., v. Partnership Inv. Co. Ltd (2010) Vol. 179 LRCN p.84 at p.89.
37 Ibid.
38 Supra footnote 35.
39 Crits v. Sylvester (1956) 1 DLR 2d 502 at 510
40 Henderson v. Henry E. Jenkins & sons (1970) A.C. 082
41 Cap C.25 LFN 2004
42 Part 1, Consumer Protection Council Act 1987.
43 (1886) K.B. 1 EX. 265
44 Abouzaid v. Mother care (U.K) ltd. 2000 B3/00/227.