



## Compensating Victims of Personal Injury in Tort: The Nigerian Experience So Far

Oluwakemi ADEKILE<sup>1</sup>

**Abstract: Objectives:** This paper is a critical evaluation of the compensation system for personal injury tort in Nigeria. The present compensation system under the law of tort leaves many victims of personal injury uncompensated in Nigeria. This stems from many factors, including the fact that traditional tort theory of no liability without fault has continued to be the principal basis for liability. This is in spite of the heavy criticisms of the tort regime as an ineffective mode of compensation. Through an analytical assessment of selected core heads of claims in tort, the paper reveals the inadequacy in the foundations of tort law and its regulation of claims for personal injury in Nigeria. **Implications:** It finds that fault as the primary foundation of tort law in Nigeria creates a large volume of uncompensated plaintiffs, who, without an efficient alternative social security to fall upon, have to personally bear their losses. In the light of this, the paper uses examples from other jurisdictions to recommend that tort law in Nigeria is in need of more legislative intervention. **Value:** The paper recommends that the provision of a sustainable compensation system for personal injury is imperative for social justice in Nigeria.

**Keywords:** Fault, Compensation, Tort law, Negligence, strict liability

### 1. Introduction

As one of the two core interests recognized as protected by tort law, protection from personal injury has been significantly inefficient in Nigeria. It can hardly be said that tort law has met either of the goals of corrective justice or deterrence. This is disturbing when it is realized that a high proportion of the Nigerian populace are victims of personal injury and even death. Usually, the mode of legal regulation of personal injury is a reflection of ideological positions shared between communitarian ideals of collective responsibility and social welfare on the one hand and individualistic ideals focused on the coercive mechanism (like the tort system) for enabling those injured to claim compensation if they want to on the

<sup>1</sup>PhD, BL, Senior Lecturer, Department of Private and Property Law Faculty of Law, University of Lagos, Akoka, Nigeria. Gsm: +234 803 302 4357. Corresponding Author: oadekile@unilag.edu.ng.

other hand. The Nigerian approach to compensation for personal injury remains individualistic. Consequently the basis of receiving compensation is basically by tort law although there are a few social security arrangements in place. (For example, under the Nigerian Social Insurance Trust Fund Act 1993<sup>1</sup> and the Employee's Compensation Act 2010).

This paper examines the legal framework in tort law concerning personal injury in Nigeria especially in the light of policy and legislative developments in select jurisdictions. The objective is to sensitize policy makers on the need for more legislative and policy driven intervention in an area that affects a significant number of Nigerians with a view for more robust social protection under law. While realizing that liability for personal injury covers intentional torts and the tort of negligence, the specific focus of the paper is on the tort of negligence as it applies to road traffic accidents, employment injuries and product liability as parameters for other forms of negligence liability.

It is important to note that most literature on tort law in Nigeria relate to the thematic heads of liability and little attempt has been made to treat the subject from the perspective of compensation system for victims of personal injury. This makes the present work significant as it provides a fresh impetus for the understanding of tort law as a weapon for the protection of personal injury. This will further better understanding of tort law as humanistic rather than a bundle of abstractions. Consequently, while the thematic topics like employers' liability and product liability are used in the work, the implications on the victims of personal injury is brought to light as a stimulus for more robust research in future.

## **2. Subject Overview**

As a term of law, personal injury connotes injury to the body, mind or emotions, as distinct from injury to property. However it is necessary to note that the word injury may have different connotations in different statutes. For example, it is defined as any disease and any impairment of a person's physical or mental condition in some statutes.<sup>2</sup>

Tort law is generally seen as the law relating to personal injury. Most claims for personal injury occur from road traffic accidents, work accidents, product defect, occupiers' liability for home and public building accidents and medical accidents. Personal injury is compensable by special or general damages in tort law.

Being a former colony of Britain, Nigerian law of tort is founded on the English common law of tort received into the country under different statutes.

---

<sup>1</sup> Cap 88 Laws of the Federation of Nigeria 2004.

<sup>2</sup> Section 1(6) Limitation Law, Laws of Lagos State 2003: s. 32 Workmen's Compensation Act 1987.

<sup>1</sup>Consequently tort cases decided in English courts form part of Nigerian law. However it has sometimes being necessary to have statutory modifications of the law in English law.<sup>2</sup> In such situations there will be no automatic repeal or amendment of the common law in Nigeria. Until local legislation in Nigeria makes equivalent repeal or amendment, Nigerian courts remain bound by the English common law position.

Nigerian law of torts straddles the uneven divide between strict liability and fault liability. The fault liability has entrenched within it two principles: first, that the person who causes injury by fault must compensate the victim: second that a person who causes injury, loss or damage without fault should not be required to compensate the victim. The proof that a defendant was negligent is necessary to establish fault. It is settled law that negligence connotes failure to take that degree of care which is reasonable in the circumstances of the case or failure to act as a reasonable person. The tort of negligence requires that defendant is at fault in failing to prevent the harm, not that he intended the harm.<sup>3</sup>

The second dominant tort principle is that of strict liability. Strict liability in tort imposes a duty not to injure without more on the defendant. Strict liability does not necessarily construe a conduct as wrongful in itself but the wrong consists in causing harm by engaging in certain types of risky activities. (Honore, 1995, p. 73) The premise is that while the law does not expressly forbid some activities, they are frowned upon such that in cases of resulting harm, liability will attach on the defendant without proof of fault for he acts at his own peril, and the plea that he could not by taking due care have prevented the harm will not avail him. Strict liability is not liability in the absence of fault but liability regardless of the absence or presence of fault. (Cane, 2006, p. 93)

In contradistinction, while strict liability is directed at the consequences of a person's conduct involving no judgment on a person's behaviour, fault liability concentrates on the behaviour of a person judged against the actions of the reasonable man. Strict liability operates both at common law<sup>4</sup> and under some

---

<sup>1</sup> See Interpretation Act Cap 123 Laws of the Federation of Nigeria 2004: the High Court Law of Lagos State Cap H1 Laws of Lagos State 2003: the High Court Laws of the Northern States Cap 49 Laws of Northern Nigeria 1963: the High Court Laws of Eastern States Cap 61Laws of Eastern Nigeria 1963.

<sup>2</sup> For example under the Law Reform (Contributory Negligence) Act 1945 which modified the defense of contributory negligence in England did not apply to Nigeria until local legislation was enacted to that effect under statutes like the Law Reform (Torts) Law Cap L64 Law of Lagos State 2003, s. 4 (1).

<sup>3</sup>Posner, R., "A Theory of Negligence" (1972) 1 *J. Leg. Studies* 29; Dworkin, R., *Laws Empire* (Cambridge: Mass Beilknapp Press, 1986).

<sup>4</sup>The Rule in *Rylands v Fletcher* (1868) LR. 3 HL 330.

statutes.<sup>1</sup> Strict liability is not a general theory for tort liability in Nigeria even though such has been canvassed elsewhere for common law.<sup>2</sup>

The tort of Negligence is used to characterize conduct involving unreasonable risk of harm to others. It consists of failure to take reasonable precautions against risks of injury to others that one ought to have foreseen and guarded against.<sup>3</sup> This connotes that the defendant paid insufficient attention to the interests of others in deciding how to behave, and has pursued his or her own objective at the risk of injuring other people or damaging their property.<sup>4</sup> The judge's task is to define the limits of individual conduct with the aid of the negligence formula.<sup>5</sup> The negligence formula requires the complex notion of duty of care, breach of that duty and damage resulting to the claimant.<sup>6</sup>

### 3. Negligence Claims for Personal Injury in Nigeria

Generally, tort law offers compensation for personal injury under intentional torts like assault and battery and the tort of negligence as well as strict liability torts like compensation for hazardous activities under the rule in *Rylands v Fletcher* and liability for keeping dangerous animals. Within the negligence principle, there are many heads of claims which encompass occupier's, liability, professional negligence, road and other commuting accidents, employers' liability and product liability *inter alia*. The paper limits itself to the last three as representative of the negligence liability regime and its challenges in Nigeria.

#### 3.1. Road Traffic Accidents

While road transportation is a core element of economic growth in modern nations, road accidents are its unavoidable drawbacks. Nigeria is heavily dependent on road transportation as successive governments have failed to harness its vast resources to develop other forms of domestic transportation. Road traffic accidents are a major source of personal injury claims in Nigeria.<sup>7</sup> Over thirty thousand road traffic accidents occur yearly on Nigerian highways, with over ninety persons

<sup>1</sup> The English *Animals Act 1981* and the *Consumer Protection Act 1987* impose strict liability, the latter for defective products.

<sup>2</sup> Epstein, R., "A Theory of Strict Liability" 1973 *J. Leg. Studies* 151; "Defences and Subsequent Pleas in a System of Strict Liability" 1974 *J. Leg. Studies* 165.

<sup>3</sup> *Blyth v Birmingham Water Co.* (1856) 11 Exch. 78.

<sup>4</sup> *Atiyah's Accidents.*

<sup>5</sup> *ibid.*

<sup>6</sup> *Ojo v Gharoro* [2006] 10 NWLR (pt. 987) 173 (SC).

<sup>7</sup> *Okeke v Petmag (Nig) Ltd* [2005] 4 NWLR (pt. 915) 248 CA; *Opakunle v Idowu* (1975) 2 CCHCJ 291; *Okuneye v Lagos City Council* (1973) CCHCJ 825; *Sanyaolu v Faribe* (1978) 1 LRN 327; *Okafor & Ors v Okitiakpe* (1973) 1 All NLR (pt. 1) 132; *Ediagbonya v Dumez Nig Ltd & Ors* (1986) 6 SC 149; *Management Enterprises v Otusanya* (1987) 4 SC 367.

killed daily or injured. <sup>1</sup>Between 1996 and 2006 in Lagos State alone, (Nigeria is a federation of thirty six states and a federal capital territory) a total of 44, 738 road accidents were recorded with 24, 757 injured and 7, 764 fatalities. <sup>2</sup>In 2010, the Federal Road Safety Commission of Nigeria recorded 7, 737 road crashes resulting in 1,056 deaths and 5, 000 personal injury within the first four months. With a view to reducing the high incidence of road traffic accidents, the Acting President Goodluck Jonathan (as he then was) once announced that the Federal Government had concluded arrangements to implement the G-8 rule of dedicating 10% of budgets for roads to safety components of road reconstruction. He recognized that the high percentage of road accidents affect the youth, the productive class. He also observed that Nigeria is the first country to activate its plan of action following the United Nations Declaration of 2011-2020 as a Decade of Action for the Reduction of Road Traffic Fatalities. The United Nations mandate is to reduce road traffic accidents by 50% by 2020. Unfortunately there is nothing to indicate a reduction in casualty figures due to the continued poor road maintenance and safety culture.

In Nigeria, the tort of negligence imposes a duty of care on motorists for the benefit of all road users. <sup>3</sup> Responsibility for infraction of this duty can also arise under the Fatal Accidents Law<sup>4</sup> (in situations of fatality). The key issue that motor accident claims generate in Nigeria is in establishing fault on the part of the defendant. This is a challenging requirement when it is realized that road traffic accidents represent one level of inter-personal relationship that, due to interplay of forces, it is difficult to establish where fault really lies, in the legal sense. Although Nigeria has a system of compulsory liability insurance in this area<sup>5</sup> which should promote a more more efficient compensation rate, it not necessarily so as the insurance sector is beset with its own challenges. (Agomo, 2003). The fallout of fault as the theoretical basis of liability for road traffic accident is that many victims are excluded from compensation. These include victims of uninsured or under-insured tortfeasors or where the tortfeasor cannot be traced, as in typical hit and run cases (which is very rampant in Nigeria) or where it is a pure case of accident. Tort law has no response to these victims, a situation that does not auger well for social coherence and social justice.

---

<sup>1</sup>Federal Office of Statistics, *Annual Abstracts of Statistics 1990-1999* Federal Government Press, 2000.

<sup>2</sup> Lagos State Central Office of Statistics, *Digest of Statistics 2007* (Ministry of Economic Planning and Budgets, 2007).

<sup>3</sup> *Fenton v Thorley (1903) AC 443 at 453; Ezeigbe v Agholor (1993) 9 NWLR (pt. 316) 128.*

<sup>4</sup> Cap F1 Laws of Lagos State 2003.

<sup>5</sup> By section 3 (2) of the Motor Vehicle (Third Party) Insurance Act Cap M22 LFN 2004 any person who contravenes the law is liable on conviction to a fine of four hundred naira or imprisonment for one year or both and a person convicted shall be disqualified from holding or obtaining a driving license for a minimum of twelve months from the date of the conviction.

### 3.2. Work Injuries

Work injuries include personal injury and death of a worker which arise out of and in the course of employment and represent another major source of personal injury claims in Nigeria. With increasing advancement in economic activities and technological developments, human resources are increasingly exposed to hazards of work with weak bargaining power due largely to a high rate of unemployment in Nigeria. Injury at work affects a sensitive section of a population- the working class, upon which (at least in the Nigerian context) the young and the aged are dependent. Its ripple effect is therefore far-reaching and may threaten the fundamental existence of any society.

At common law, workers injured in the course of employment had a right to compensation from their employer under a system of negligence liability which imposes personal liability and vicarious liability on such employers. Four duties are recognized within this personal duty ambit;<sup>1</sup> the employer must provide safe plant and machinery, a competent staff, a safe system of work and a safe place of work. The employer's vicarious liability is liability for the acts or omissions of the employer's servants in the course of their employment.

Like in most jurisdictions, the tort system has proved inadequate as a compensatory regime for work injuries due to its required need to establish fault against the employer before liability can arise. A case in point depicting the pathetic plight of the worker in Nigeria is *Chaguary & Anor v Yakubu*.<sup>2</sup> The claimant worker was employed as a driver by the second appellant and was attached to the first appellant. His work required that he drove two cooks of the first appellant to their residence daily between 8 and 9 p. m. On the day in question, after dropping them off and on his way back to the residence of the first appellant, he was attacked by robbers, who shot him in the face. Five of the six bullets lodged in his face were later removed. At the trial of his claim for compensatory damages from his employers, the medical doctor who treated him testified that nothing could be done to remove the remaining pellet and this would cause damage to claimant's face. Probably moved by the need to shift the loss from a faultless worker, the trial court held that appellants were not negligent but went ahead to award the sum of three hundred thousand naira as general damages. On appeal, the Court of Appeal held that in the circumstances, the employers had done all that a reasonable employer should do and damages could not legitimately be awarded against them. In other words the employer was not at fault in causing the injury and should not shoulder the loss. The fallout of this decision was that the loss had to be borne by the worker since no form of social security was available in the country to accommodate the loss.

---

<sup>1</sup>*Wilsons and Clyde Coal Co. v English* [1938] AC 57.

<sup>2</sup>(2006) 3 NWLR (pt. 966) p. 138.

The inequity in the tort system as depicted above might have given rise to propositions for strict liability in torts or statutory no-fault compensation scheme for the country. The possibility that strict liability may not be viable in Nigeria may have prompted the choice of the latter. Consequently, since 1942, the regulation of work injury has been shared by tort law and statutory no fault liability in Nigeria. The Workmen's Compensation Act 1942[WCA] provided the first statutory compensation regime for employment injuries. Thenceforth and under subsequent Workers' Compensation Acts,<sup>1</sup> an employment injury was compensated under a pluralised system. An injured worker had three options: he could bring a claim for compensation solely in tort; he could bring a claim for compensation solely under the statute: he could bring concurrent claims both at tort and under the statute with a caveat that once judgment is obtained in one, the right to a remedy under the other was foreclosed.<sup>2</sup>

Recent development in Nigeria has changed the legal framework depicted above for work injuries in the light of its inadequacies.<sup>3</sup> The Employee's Compensation Act 2010 [ECA] was enacted. It created a publicly administered no fault compensation regime for employment injury and death. The Act established a compensation fund from which injured employees may be compensated.<sup>4</sup> It is administered by the Board of the Nigerian Social Insurance Trust Fund. Under the ECA the tort option has been curtailed, as far as claims by workers against employers are concerned. By section 12(1): "*The provisions of the Act are in lieu of any right of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied, to which an employee, dependent or member of the family of the employee is or may be entitled against the employer of the employee, or against any employer within the scope of this Act, or against any employee, in respect of any death, injury or disability arising out of and in the course of employment and where no action in respect of it lies*".

This exclusivity provision of the ECA is not unique to Nigeria as it is applied in different forms in most statutory workers' compensation schemes globally. The effect of the provision is that as far as a direct claim from the employee is concerned, once the injury causing conduct of the employer, his servant or agent arose out of and in the course of employment, the Act will govern the claim exclusively to provide no-fault compensation to the employee. Accordingly, the privilege of dual litigation provided under the WCA is not retained under the ECA.

<sup>1</sup>WCA 1952 and 1987.

<sup>2</sup> S. 27(1) WCA 1942; s. 25(1) WCA 1987: Adeogun, A., "Thirty Years of Workers' Compensation in Nigeria" (1971) 5 *Nig. L. Journal* p. 70.

<sup>3</sup> Umukoro, B., (2010) "Workmen's Compensation: The Need for a Different Statutory Approach" vol. 3. No. 2 *Labour Law Review*.

<sup>4</sup> S. 56 ECA 2010.

Therefore the ECA operates a closed system, debarring the worker from by-passing the Act in order to obtain compensation from the law of tort.

The tort option is however available for an employee against third parties for work injuries in the light of section 12 (3) which gives a power of election. It provides that where the cause of death, injury or disability of an employee is such that an action lies against some person, other than an employer or employee, the injured employee or deceased employee's dependant may claim compensation or may bring an action, and if the employee or the dependant elects to bring an action in court, such shall be a bar to claim compensation from the Fund in respect of such injury, disease or death.

The ECA however creates subrogatory rights exercisable at the option of the administering Board, which may be beneficial to the employee. In this respect section 12(6) provides that if the employee or dependant applies to the Board claiming compensation under the Act, neither the making of the application nor the payment of compensation under it restricts or impairs any right of action against the party liable, but as to every such claim the Board is subrogated to the rights of the employee or dependant and may maintain an action in the name of the employee or dependant or in the name of the Board. The Board has exclusive right to determine whether to maintain an action or compromise the right of action and its decision shall be final.

It is doubtful if this policy of exclusivity is not ill-advised. Nigeria has a history of poor regulation and management of social security schemes. Tort law therefore provides a necessary insulation from the consequences of failure of the ECA. To have curtailed the access of workers to this regime is a reflection of the lack of clear perception of the issues germane to Nigeria. The ECA should have been suited to the needs of the Nigerian society. Even in more advanced nations exclusivity is viewed with suspicion and not embraced with open hands. For example American scholars made major efforts to undermine exclusivity of statutory workers' compensation as the only civil remedy available to injured workers.<sup>1</sup>

### **3.3. Product Liability**

Products liability can be based on a theory of negligence, contract or breach of warranty. With respect to tort law, it is settled that even in the absence of a contract, there may be a remedy in tort for defective goods provided the goods also present a threat of injury to health or safety. Lord Atkins gave the classic statement of the duty owed by a manufacturer to the ultimate consumer of its products in the

---

<sup>1</sup>Henderson, J. A. Jr. (2002-2003) "Why Negligence Dominates Tort" 50 UCLA L. Rev. 377.

case of *Donoghue v Stevenson*:<sup>1</sup> "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 product will result in an injury to the consumer's life, or property owes a duty to the consumer to take that reasonable care".<sup>2</sup>

Product liability in Tort is a manufacturer or seller's liability for any damage or personal injury suffered by a buyer, user, or bystander as a result of a defective product. The basis of liability in Tort is not just that the product is defective but that the defect has resulted in personal injury to the claimant.<sup>3</sup> Product safety is the key consideration in tort. The duty owed by the manufacturer, is to take reasonable care to see that no injury is done to the consumer or ultimate purchaser.<sup>4</sup> Injury from use of products are not uncommon in Nigeria and in fact a few years back global attention was on Nigeria in the face of the injury allegedly caused by a meningitis drug 'Trovan'. The trials of the drug in 1996 led to the death of eleven children and deformities including blindness, deafness, brain damage and paralysis in 189 others in Kano State of Nigeria.<sup>5</sup>

Instances of the application of tort principles to product defect have been reported in Nigeria. Such includes *inter alia* compensation for mental injury suffered on the discovery of decayed tooth in biscuit<sup>6</sup> and the presence of screwed up piece of paper in a bottle of sprite.<sup>7</sup> In spite of these pockets of cases giving compensation, product liability claims is still fraught with difficulties. For example compensation was denied where claimant was injured when the refrigerator she bought from the defendant exploded.<sup>8</sup> The difficulty of establishing a causal link between the act and the damage, the fault element, is a limitation to claimant's rights in Nigeria. Evidence from some internal sources, and detailed knowledge of the process of manufacture is required. Unless the plaintiff is able to prove that the defendant failed to exercise reasonable care his action will fail. In addition, in situations where scientific or technical knowledge has not advanced to make defendant aware of possible dangers, the action in negligence will also fail based on the 'state of the

<sup>1</sup>[1932] AC 502.

<sup>2</sup>*ibid* at p 599.

<sup>3</sup> Madden, M. S., *Products Liability* (West Publication Co. :London, 1988) p. 1, 1-2.

<sup>4</sup>Lewis J. in *Daniels v Williams* [1938] 4 All ER 258.

<sup>5</sup> Kano State filed civil and criminal suits against Pfizer demanding \$2. 75 billion in compensation and prosecution of staff for what it called illegal test of the drug. The parties eventually agreed on a \$75million settlement on the basis of no admission of liability by Pfizer.

<sup>6</sup>*Osemabor v Niger Biscuits (Nig) Ltd (1973) N. C. L. R. 382.*

<sup>7</sup>*Soremi v Nigerian Bottling Co. Ltd (1970) 12 CCHCJ 2735.*

<sup>8</sup>*Nigerian Bottling Co. Ltd v Ngonadi (1985) 1 N. W. L. R. (pt. 4) p. 739 SC.*

art' or 'development risk defence.'<sup>1</sup> This is a very potent danger in the light of Nigeria's low level of technological development.

The majority of cases in Nigeria on product liability are based on the general defect type-the presence of foreign matter in consumables. In such cases, it can be difficult to establish a link where for instance the effect is manifested after prolonged usage and not immediately. A case to buttress this is the Nigerian case of *N. B. C. Plc v Olanrewaju*<sup>2</sup> where the Court of Appeal (Ilorin Division) reiterated that a high standard of proof is demanded from food poisoning cases. There must be some direct link between the food/ drink ingested and the subsequent ailment of the complainant. According to the court, to make the standard less might open a floodgate of litigation based on spurious and untrue assertions against manufacturers. This would have the adverse effect of defeating the very mischief sought to be cured by placing a high burden of care on manufacturers of consumables.

To compound the problem of a complainant in Nigeria, it has been held that the doctrine of *res ipsa loquitur* does not apply to food poisoning cases in spite of its frequent application in Nigeria to other claims.<sup>3</sup> There is no law that if a plaintiff consumes food and he thereafter feels stomach discomfort, then the food is the source of the discomfort. There must be more direct and positive proof of the cause of the discomfort.<sup>4</sup> This position has been entrenched in English common law as far back as *Donoghue v Stevenson* where Lord Macmillan said that: "*The burden of proof must always be on the injured party to establish that the defect which caused the injury was present in the article when it left the hands of the party who he sues; that the defect was occasioned by the carelessness of that party, and that the circumstances are such as to cast upon the defendant a duty to take care not to injure the pursuer. There is no presumption of negligence in such a case as the present nor is there any justification for applying the maxim res ipsa loquitur. Negligence must be averred and proved*".

Nigerian courts have held on to this common law stipulation despite advancements made in other jurisdictions. Many claims in Nigeria are lost due to inability to establish the source of the defect. According to the court in the case of *Okonkwo v*

---

<sup>1</sup>*Roe v Minister of Health* (1954) 2 QB 66. There is now a line of cases which establish that if a danger becomes apparent after products have been put in the market-place, a manufacturer has a duty to warn potential users and in extreme cases to operate a system of product recall. This risk is insurable and a lot of manufacturers insure against it. An efficient system of product recall is also imperative. The Japanese manufacturers of Toyota brands of cars have recently exercised this option to recall some of their faulty brands alleged to be responsible for some deaths and personal injury in the United States.

<sup>2</sup> See also *Okwejjiminor v Gbakeji & N. B. C. Plc* (2008) 2 F. W. L. R. 2013 S. C.

<sup>3</sup>Cottrel J, "The Tort of Negligence in Nigeria" *Journal of African Law* vol. 17. No. 1 1973pp 30-39 at p. 35.

<sup>4</sup>*Boardman v Guinness* [1980] 1 PLR 583.

*Guinness (Nig.) Ltd.*<sup>1</sup> Where a manufacturer has parted with his product and it has passed into other hands it may well be exposed to vicissitudes which may render it defective or noxious, for which the manufacturer may not in any view be held to blame. There is no doubt that there is a need for a measure of rebuttable presumption of negligence against a manufacturer since in any case he has personal knowledge of the production process.<sup>2</sup> [Emphasis added]

It is due to the many problems that the common law is fraught with that have engendered the institution of strict liability regimes in countries like England.<sup>3</sup> Statutory liabilities for product defect operate a strict liability regime. The advantage of a regime of strict statutory liability is that it avoids the problems of proof under the negligence regime at common law. The imperative for a strict product liability is that public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards of life and health inherent in defective products that reach the market. It is apparent that the manufacturer can anticipate some hazards and guard against the occurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequence.<sup>4</sup>

What option presents itself to Nigeria in the face of the inadequacy? It is acknowledged that strict product liability regime is fascinating and has instrumental value that promotes safety and improves standards. It is however clear from the statement of the court above that the courts in Nigeria are not disposed to readily find manufacturers liable for product defect. Perhaps the take off point for tort reform should be in a rebuttable presumption of infraction of duty against the manufacturer in the light of the suggestion in Okonkwo's case above. However this may not be free from process considerations that may be too expensive for the system to accommodate. The floodgates argument is very real in Nigeria and this may be set strict liability with uncertainty.

#### **4. Limitations of the Negligence-Fault Principle**

The centrality of fault to compensation for personal injury in Nigerian law of tort is manifest from the foregoing analysis. This is in spite the heavy criticism of the system, which some have argued should even be abrogated completely. Atiyah is

<sup>1</sup>. (1980) 1 PLR 583.

<sup>2</sup>*Boardman v Guinness Nigeria (Ltd) 1980 PLR 583: Okonkwo v Guinness (Nig) Ltd.* (1980) 1 plr 583; *Enebelu v Guinness(Nig) Ltd FCA/L/101/82:Contrast Soremi v Nigerian Bottling Co. Ltd* [1977] 12 CCHCJ 2735.

<sup>3</sup>Consumer Protection Act 1987.

<sup>4</sup>*Escola v Coca Cola Bottling Co of Fresno* 24 cal. 2d. 453, p2d. 436 (1994).

one of the foremost critics of tort law He has argued that tort should be abolished across the board and people be left to purchase liability insurance. <sup>1</sup>

The major criticism of the fault principle derives ironically too from innate character, morality. (A person should not be liable if he is not at fault). It has been argued that the principle is anti-moral as it fails to compensate a victim of injury. As a device for compensating victims of personal injury, Atiyah lists the problems of the fault principle as follows; first that compensation bears no relevance to the degree of fault. The slightest infraction of the standard of care results in liability once the issue of remoteness of damage is settled. Second, that compensation bears no relation to the means of the tortfeasor, thereby underscoring the need for an effective legal and institutional framework in the insurance industry. Legal liability does not follow moral liability. The use of the reasonable man's test to measure the standard of care of the defendant means that personal traits of the defendant which can reveal the state of action is ignored. It has also been argued that tort pays no regard to the needs of the victim, illustrated graphically in the cases considered above.

From the report of the English Royal Commission under Lord Pearson, it was concluded that tort is the least efficient system of compensation. The report stated that tort law accounted for no more than one per cent of payments of compensation for personal injury. The inefficiency stems from the fact that it takes several years before settlements or court awards are made, during which time the plaintiff may well have to endure the pain sickness, poverty, hardship and the fear of impending litigation. It is a tortuous system of compensation. According to Uzodike, the dependence of tort liability on fault in road accidents in Nigeria, engages the plaintiff in lengthy litigation that is often expensive. <sup>2</sup> It is therefore not a surprise to observe that worldwide tort law has been relegated to a secondary position in the area of personal injury most especially with the emergence of social security.

Unfortunately in Nigeria, victims of personal injury have largely depended on family support, the benevolence of private persons, government bodies, religious bodies, corporate organizations or non-governmental organizations for relief from their misfortune. There is no effective private or social insurance in place to cover the loopholes in the tort regime. Where then should Nigerian law find inspiration for reform?

---

<sup>1</sup> Atiyah, P. S., *The Damages Lottery* Oxford: Hart Publishing, 1997.

<sup>2</sup> Uzodike, E. N. U., "Monetary Compensation in Respect of Personal Injury to Victims of Road Traffic Accident: A Case for Reform of the Nigerian System." (1986) *JPPL* p. 9 at 16-17.

## 5. Lessons from Other Jurisdictions

While many countries started from the fault perspective, many have advanced their law for better social protection of their citizens. For example, Germany introduced special rules on traffic liability since 1909. German law maintains strict liability for the registered user and the driver where damage is caused in the operation of a vehicle. The damage includes personal injury and property damage to other drivers, passengers, pedestrians and cyclists. Like in Britain there is also compulsory vehicle insurance for these classes of people. Insurance thus supports the law in all instance of strict liability.

France has one of the strictest forms of liability for traffic accidents. The French law Badinter 1985<sup>1</sup> creates a strict liability regime for road traffic accidents. A driver or keeper of a motorized vehicle is liable for losses sustained in road accidents. The defence of acts of God and acts of third party excluded. Contributory negligence is also excluded save for certain stipulated exceptional cases like on account of minority, old age. Generally, fault of either driver or victim is usually irrelevant to compensation for traffic accidents.

The problem of inadequate and non-comprehensive coverage for road motor accidents has been tackled in England. Since 1930 the country had introduced compulsory insurance for motor vehicles. In fact the state of disaffection with the fault requirement for traffic accidents met with the opprobrium of Lord Denning when he concluded years ago that in the present state of motor traffic, any civilized system of law should require, as a matter of principle, that the person who uses this dangerous instrument on the road- dealing death and destruction all around-should be liable to make compensation to anyone killed or injured in consequence of the use of it. He suggested that there should be liability without proof of fault as it constitutes the greatest injustice to require an injured person to proof fault. Many such people lack the wherewithal to proof it.<sup>2</sup>

The Bureau of Motor Insurers to takes up the claims of victims of personal injuries from uninsured or untraced drivers as a form of social security. The Bureau consists of motor insurers in Britain who make contributions to its fund. In its agreement with government ministries, the Bureau entered into the following undertakings: that if a judgment in respect of third party liability which is required to be compulsorily insured is obtained against any person and such judgment is not satisfied in full within seven days from the date upon which the judgment could be enforced, the Bureau will pay the judgment debt: that an application may be made to the Bureau for payment in respect of the death or bodily injury to any person caused by or arising out of the use of a motor vehicle on a road where the liability

---

<sup>1</sup>Loi no. 85-677 du 5 juillet 1985.

<sup>2</sup>Denning, A. (1982). "What Next in the Law" (Butterwoths, London, 128).

of the untraced driver to pay damages to the applicant is one which is required to be covered by issuance of a security under part iv of the Road Traffic Act 1972.

The New Zealand Accident Compensation Scheme is well acclaimed and instructive. The scheme was a product of the Report of the Woodhouse Commission. The Commission proposed an all-embracing no-fault system of compensation based on five guiding principles which are: community responsibility, comprehensive entitlement, real compensation (including non-pecuniary loss), the promotion of rehabilitation, and administrative efficiency. The proposals were implemented giving birth to the Accident Compensation Act 1972 as a national accident insurance scheme. The current law is now in the Injury Prevention, Rehabilitation and Compensation Act 2001. The scheme under the Act covers personal injury by accident, occupational diseases and personal injury by medical treatment injury.<sup>1</sup> Cases outside the scheme include mental injury not emanating from physical injury and sexual offences. Tort liability is abolished for cases that fall within the scheme but survives for cases outside the scheme. By this token, New Zealand became the forerunner in its complete abolition of the tort action for damages for personal injury caused by accidents. The no fault scheme is financed by the government taking revenue from a levy on vehicles. Under the scheme, anybody injured by the use of a vehicle receives compensation, whether or not he is culpable.

In the Canadian province of Saskatchewan, a person injured by an untraced driver can take action against the government insurance office for compensation. The scheme is funded by insurance premiums payable by owners of vehicles on registration and also on grant of vehicle licenses.

In South Africa, since 1997, the Road Accident Fund [RAF] established by statute<sup>2</sup> provides insurance cover to all drivers of motor vehicles in South Africa in respect of damage arising from the use of a motor vehicle. Insurance premiums are collected through a levy on motor vehicle fuel. RAF pays all the medical and related costs of victims, compensates victims or their family for loss of income and support as a result of the accident and indemnifies the wrongdoer from liability. It pays general damages to accident victims as compensation for pain and suffering, loss of amenities of life, disability and disfigurement. Funeral costs are paid to families of victims of fatal injuries. RAF performs the socio-economic role of re-integrating victims of road accidents into society, and protects at fault drivers from financial ruin.

---

<sup>1</sup> This replaced the former term of 'medical misadventure' with its twin components of 'medical error' (which Winfield and Jolowicz state is the same as common law negligence) or 'medical mishap' (severe adverse reaction to treatment).

<sup>2</sup>Road Traffic Act 1996.

It is clear that most modern nations have moved beyond the common law in terms of compensation for personal injury either by creating a strict liability regime or no fault compensation. It is imperative for Nigeria to seriously consider the best option for it in this globalized world. In the face of Nigeria's local challenges no fault compensation schemes are recommended to support the tort regime. This will provide a non-invasive form of compensation that will internalize accident costs.

## 6. Conclusion

All legal systems initially relied on tort law for compensating personal injuries. Most countries have created a strict liability regime or statutory no fact schemes to further advance the law. On the contrary, except for employment injuries, most personal injuries claims in Nigeria are based on the common law as there have been few statutory postulations of liability. The law of tort in Nigeria has, in the last five decades rigidly adhered to its traditional theory that fault is requisite to liability in negligence. There is a dire need for the tort fault system to be reformed and supported by other regimes. The fastest means of doing this is statutory regulation which over the years has tried to remove the inequities of common law, and in this respect Tort law in other countries. This is imperative as the present protection level in tort is weak and not comprehensive. Quite a lot of people do not fall inside any of the legal regimes identified in Nigeria; the unemployed; victims of criminal injury; victims of natural or unnatural disaster; victims of unidentified or untraced torts or crimes to mention a few. There is needed to take a cue from what other countries have done to ameliorate the problems of tort law. The time is ripe to rethink the law in this area by introducing social welfare schemes in the society. It is imperative for Nigeria to provide the necessary social security to the victims of personal injury as a matter of social justice.

## 7. References

- Agomo, C. K., (2011). *Nigerian Employment and Labour Relations Law and Practice* (Concept Publications Limited, Lagos).
- Aturu, B., (2001). *A Handbook of Nigerian Labour Laws*. Frederick Ebert Stiftung, Lagos.
- Calabresi, G., (1970). *The Costs of Accidents: A Legal and Economic Analysis* Yale University Press, New Haven.
- Englard, I., (1993). *The Philosophy of Tort Law*. Dartmouth.
- James, P., (1978). *General Principles of the Law of Torts*. London: Butterworths.
- Monye, F., (2005). *Law of Consumer Protection in Nigeria*. Ibadan: Spectrum Books.
- Munkman, J., (1990). *Employers' Liability at Common Law*. 11<sup>th</sup> London: Butterworths.
- Rogers, W. V. H., (2010). *Winfield & Jolowicz Tort* London Sweet & Maxwell, London.
- Vonk, G., & Tollenar, A, eds. (2010). *Social Security as a Public Interest*. Oxford: Intersentia.