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"THOU CAN HAVE A PIECE OF HIS FLESH, NOT A DROP OF HIS BLOOD: NIGERIAN CONSUMERS IN CONTEXT"

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DEDICATION

This Inaugural Lecture is dedicated to the memories of my parents, Late Chief and Mrs. S.O Odion, my foster mother-Barr(Mrs) A.O.Odion, my late elder sister-Madam Felicia Odion, my late niece and nephew –Frances Odion and Dr. Francis Odion as well as other members of the **ODION** family that have transited to be with our maker-God

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PREAMBLE

Mr. Vice-Chancellor sir, I cannot thank you enough for the opportunity given to deliver the 361st inaugural lecture in this great University. However, before I proceed, it is feting to give a background to my interest and research in the area of consumer protection law.

In my early days as a year three student at the then Bendel State University, Ekpoma, I was introduced by a quintessential Ghanaian scholar–then **Mr. K. A. Apori** and later **Professor K. A. Apori (of Blessed Memory)** to two important courses, the Law of Torts and Commercial Law. In the law of torts, there was a special topic that took almost a quarter of the semester i.e negligence. Under this topic, we examined a sub-topic, "manufacturer's Liability" the essence of this study was to underscore the point that a manufacturer could be negligent in the manufacture of a product, and such an error could prove disastrous and even fatal for the person using such a product in the long run. Accordingly, a manufacturer of goods was fixed with a duty of care to ensure that he takes adequate and reasonable care that the goods/products he manufactures are of sound quality and that they are not tainted with design or factory errors, before putting them into the market. Indeed, this topic fired my interest in seeking to understand better ways to protect the consumers of these products, in order to protect them from the physical injuries that they suffer as a result of the use of such defective goods.

Thereafter, in that same 3rd year, we were taught Commercial law and we examined an aspect of the course, 'Sale of Goods Law" and we equally examined a sub-topic "The Implied Terms of a Sale of Goods Contract". In the course of doing this, it became clear to me that a seller of goods could be held accountable/liable for the sale of defective goods, expired goods, fake products, and products especially food drinks that contain poisonous/deleterious substances etc. Specifically, the implied terms of merchantable quality and fitness for purpose, further increased my zest in this area of law, in order to protect the buyers/consumers of these goods subject to a sale of goods contract. It was in the course of my

understanding of the utilitarian values of these implied terms, that I discovered that a buyer of goods could reject goods sold by a seller if such goods do not meet up to his expected standard both in in quantity and quality.

However , a broader insight into the importance of these undergraduate courses became more evident when I commenced my Masters Degree in Law (LL.M) programme at the then Edo State University in 1993 and took the course "Consumer Protection Law". Once again, I met my quintessential lecturer, Professor K.A Apori**,** who this time around brought me up to speed on the expansive nature and scope of the course. I discovered that this course was specifically concerned about the rights of consumers and how the law could be used as an instrument to protect such rights. I discovered that in protecting the rights of a consumer, almost every branch of the law, both public and private law could be harnessed and used effectively. In the realm of public law, we discovered that specific legislations that criminalized acts that were inimical to the rights/interest of a consumer were abound. Whereas, in the realm of private law, we discovered that contract law, torts law and other variants of the law could be used to protect the consumer. It was in furtherance of my passion and drive for this area of the law that I majored in my Master Degree thesis in the field. My thesis at this level was entitled **"*The Sale of Goods Law and its Impact on Consumer Protection in Nigeria".*** Thereafter, in the course of my academic research and study I wrote several articles in furtherance of my passion to see how the law could effectively be used to protect the rights of consumers against the shylock and exploitative antics of the suppliers of goods and services in Nigeria.

When at some point in my academic career, the Ph.D Degree was literally forced down our throats as law academics in Nigeria, I took this passion and drive further, by focusing my Ph.D thesis in the field. My Ph.D thesis was entitled***, "An Appraisal of the Legal Framework for Consumer Protection in Nigeria: A Focus on the Rights of Consumers in the Communications (GSM) Sector.***

Accordingly, in this Inaugural Lecture, I shall be x-raying my works in

this field against the background of contemporary trends in Nigeria. The essence would be to determine if my research efforts and indeed those of other scholars in this field have yielded the desired impact in the protection of the rights of consumers in Nigeria. Ultimately, we shall be proffering additional suggestions on how we can improve the level of legal protection for the rights of consumers in Nigeria.

ABSTRACT

In this inaugural lecture, we examined the level of protection of the rights of consumers of goods and services in Nigeria. Specifically, we focused on the legal and institutional framework for the protection of the rights of consumers in Nigeria, against the business stratagems and exploitative antics of the producers and suppliers of goods and services in the Country. In achieving this set out objective, I have x-rayed some of my works in the course of my three decades as a law teacher and researcher, especially in the field of Consumer Protection Law, a course offered and taught at the Post-Graduate level in most universities in the Country. At the end of our research, it was revealed that in spite of these robust legal and institutional frameworks for the protection of consumers in the Country, they are still far from being adequately protected. We accordingly made useful recommendations for an improvement on the measures established for the protection of consumer rights in the Country. It was our desire that if some of these recommendations are implemented, the consumer would not have anyone coming after his "flesh" let alone his "blood".

1.0 INTRODUCTION / CONCEPTUAL CLARIFICATIONS

Who is a Consumer?

The central figure in our discourse is the 'consumer", therefore, it is apposite to identify him at this stage. Although, there are some debates as to who a "consumer" is or should be, it is gradually accepted that a consumer is not limited to a buyer of goods or one who pays for services and the likes (United Nations, 1985/1999). A consumer is now globally described as the "ultimate consumer", i.e the person or institution that ultimately consumes or uses the goods supplied or enjoys the benefit of the services rendered. It is immaterial if he or she paid for the supply of such goods or services. The traditional limitations of consideration to support a contractual undertaken and privity of contract is de-emphasized for the purpose of a holistic description/definition of a consumer (Odion & Okojie, 2009; Thorelli, 1981). More, specifically, section 167 of the (Federal Competition and Consumer Protection Council Act, [FCCPA], 2018, s. 167) defines a "consumer" as follows:

> Any person
>
> (a) Who purchases or offer to purchase goods otherwise than for the purpose of resale but does not include a person who purchases any goods for the purpose of using them in the production or manufacture of any other goods or articles for sale
>
> (b) To whom services is rendered

Thus, by this statutory definition, it is clear that a consumer includes both a natural person and an artificial person. A consumer is one that buys goods or pays for services to be consumed or enjoyed personally and in his/her private capacity. However, we have in our earlier work criticized this definition which appears not to have emphasized the point that a "consumer" includes a person who may not necessarily have "purchased" or "offered" to purchase the goods in question or the services. A consumer includes a person who has enjoyed the goods and/or services, even by way of a gift or other gratuitous circumstances (Odion & Okojie, 2009).

Why Protect the Consumer?

There has been a fierce debate as to the reasonableness of deploying the law to protect a consumer. Some scholars have quipped, why protect the consumer? Against what and whom are you protecting him? Are you protecting him from his naivety and gullibility that makes him to buy goods or pays for services at exorbitant and extortionate prices? Are you protecting him from his greed and insatiability that makes him buy goods or pay for services that he may not even need? Or are you protecting him from his own ignorance and haste that makes him buy goods without properly examining their condition and quality? Or are you protecting him from contracts for the sale of goods or contracts for the supply of services that he has consummated without carefully and properly reading and understanding its terms and conditions?

Accordingly, there has been this contending issue as to why a consumer ought to be protected. The traditional emphasis on laizez-faire and free enterprise had often been interpreted to mean that intervention in private undertakings was unnecessary and wasteful (Smith, 1776, as cited in Harvey & Parry). It was assumed that government should be more concerned with basic developmental issues like security, food and other basic economic and social amenities.

However, the renewed thinking and philosophy of 'Consumerism' is a social movement seeking to augment the rights and powers of the buyers in relation to sellers' (Kotler, 1972). Consumerism is further defined as movement or policies aimed at regulating the products, services, methods and standards of Manufacturers, sellers, and advertisers in the interest of the buyer (Encyclopaedia Britannica, 1981; Encyclopaedia Americana, 1981). Accordingly, it is the spirit and movement of Consumerism that has led to the interest of the state in its interventionist policies aimed at protecting the interest of the Consumer, therefore the concept of the "Consumer King" was jealously protected by the State.

Accordingly, it has become imperative for States to evolve an ideal legal framework for consumer protection with particular emphasis on the political, cultural and most importantly economic under-currents in the

respective countries.

However, what is not often remembered is that these basic duties of government cannot be reasonably achieved without commensurate and conscientious efforts at maintaining standard and equity in the supply of goods and services in the society. This point was aptly driven home by a notable commentator in the following words:

> ….the nature and extent of consumer regulations in a modern society, says a good deal about that society, about its social and economic development, about its legal values, about its sense of justice, about its political sophistication and maturity. Consumer protection is indeed about the fundamentals of our economic system of government, politics and priority setting (Kanyip, 2002, p. 29).

No doubt, the world is now adjudged a global village; inter-connectivity in the line of international trade has increased tremendously. Yet the developing countries, like Nigeria often find themselves at the receiving end of the industrial advances and at times the marketing antics of the developed countries. One area of the negative effect of increased exports by the developing nations is with regards to the way and manner goods are dumped on the third world countries by these developed countries (Aigbokhaevbo, 2007). In line with tide, it behooves on these developing countries to evolve a holistic approach to the protection of its citizens from the vagaries of these sub-standard imports. In addition, the local manufacturers and suppliers of these goods often lack the technical know-how to produce standard, safe and durable products, or at times the moral/ethical will to so do may be the underlining factor. In all these, a comprehensive legal framework for ensuring the standard of goods manufactured and supplied is imperative. State intervention in this regard can no longer be regarded as unnecessary or interventionist.

This view is corroborated by (Abdulwahab, 2023), who believes that the

consumer being a weaker party in the contract ought to be protected. He further opines that the ultimate aim of consumer protection should be the attainment of consumer welfare. He argues that market failures need to be corrected by some measure of judicial intervention in order to assist the weaker party-the consumer. The benchmark for assessing consumer welfare in his view is the efficiency of consumer transactions as well as the safety and health of the consumer. Incidentally, the notion that the law should be an instrument to liberate the weaker party who is often viewed as the oppressed has support from scholars even in the field of real property. Chianu (2007) captures this reasoning in his treatise on the metaphorical comparison of the weak as the ***yoke*** and the strong as the ***bull.*** Accordingly, the consumer as a yoke who is constantly "oppressed" by the manufacturer/ seller of goods and services (*the bull*) deserves to be protected by the law. Additionally, Agbebaku (1993) also considers the consumer a weaker party in contractual undertakings who cannot stand up to the business stratagem and intrigues of the businessmen. In her view, such contracts that are negotiated and consummated with the consumer either being a novice or in most cases an illiterate are therefore describable as "hard bargains". She therefore urges that the full weight of the law ought to be stretched to protect the consumer. Her analysis which is very instructive is based on the Supreme Court's decision in ***Egbase v. Orieghan (1985),*** which underscored the helplessness of the average consumer of credit in Nigeria. In that case, the Appellant who used his modest private apartment as a security for a loan facility he took from the respondent, lost the said apartment to the respondent, just because the said loan transaction was couched as a sale transaction instead of the loan transaction that was the intention of the parties. The Supreme Court affirmed the transaction as a sale in spite of the Appellant's plea of ***non est factum*** amongst other defences. The debilitating circumstance against the appellant was the fact that he was represented in the said transaction by a lawyer and that he indeed signed the said agreement willy nilly.

What are the Rights of a Consumer?

The basis for the protection of the consumer having been laid bare, it is

necessary at this stage to identify the rights and interest of the consumer that are deserving of recognition and protection by the law. This is important, because it is the nature and scope of these rights as well as the problems encountered by the consumer as a result of infractions on these rights that would determine the nature of the legal response to the protection of such rights. Invariably, it is how satisfactorily these rights are protected that would be the benchmark for assessing the adequacy or efficacy of the law in that regards (Khurana & Kharana, 2012).

These rights of the consumer are traceable to John .F. Kennedy's classic exposition in 1962 which led the then U.S congress to enact a bill on consumer rights (Steel, 2013). At that time the basic rights of the consumer were recognized to include: the right to safety, the right to be informed, the right to choose and the right to be heard. However, these rights have been broadened in scope with the United Nations intervention and its prescription for the extant eight basic rights of the consumer as encapsulated in its original guidelines of 1982 as amended (United Nations, 1985/1999). With the United Nations intervention, these consumer rights attained international status beyond the frontiers of municipal laws, accordingly are therefore recognized by member states and they ought to evolve appropriate measures to enforce these rights (Darle & Johnson, 1993; Thorelli, 1981).

The rights and interest that the consumer may desire to be protected by the law are multifarious, they are outlined as follows:

> Fundamentally, the rights to a good bargain under the supply contract would be uppermost in the mind of the consumer. He expects to get the right quantity of goods for the price paid under the bargain .It does not matter whether or not there is privity of contract between him and the seller. He equally expects the right quality of time in the case of services rendered (Steel, n.d.).

Most importantly, the consumer expects the right quality of goods and services to be supplied to him by the seller or supplier. Therefore, the supply of sub-standard products, edible products' containing deleterious as well as noxious substances would not meet this desire of the consumer (Ebelamu *v. Guinness Nigeria Ltd.*, 1983; *Okonkwo v. Guinness Nigeria Ltd.*, 1980).

However, in addition to these there are other basic rights of the consumer which inexorably have a linkage with his rights outlined above. Specifically, the right to choose which product or services is at the bedrock of consumer rights. To this end, the various advertisement laws and regulatory measures fall in place (Advertisement Practitioners Council of Nigeria Act, Cap A7, Laws of the Federation of Nigeria [LFN], 2004). In addition a comprehensive competition law would prevent monopoly in the supply of goods and services, open the market to competition and free enterprise and ultimately giving the consumer the best (Coase, 1960).

One other interest of the consumer is the right to equality of bargaining powers vis-à-vis the suppliers of goods and services. Unfair contractual terms, unconscionable dealings as well as discriminatory practices work to the consumer's disadvantage. There is therefore the need to evolve a legal framework for the protection of the consumer against the sharp practices of the manufacturer as well as suppliers of goods and services (Unfair Contract Terms Act, 1977; Mogaba, 2008).

Another right that inures to the consumer is the right to adequate user information about the goods and services they are supplied as well as the terms and conditions embodying them. This right includes the right to receive information in plain and understandable language to ensure that the consumer understands the agreements they enter into and to help them make informed decisions about the goods and services they desire (McLeod, 1981; Edegbo, 2006; Odion, 2008).

Allied to these rights is the consumer's right to privacy in his dealings with his supplier of the goods and services as well as his direct dealings

with the goods supplied. with this right, the consumer is able to limit all types of direct marketing either by requiring or demanding that the marketer discontinues the marketing or by choosing not to receive the marketing in the first place.

Furthermore, the consumer is entitled to a fair and responsible marketing; this emphasizes some moral standard in the advertisement as well as marketing ploy of suppliers of goods and services. Advertisements must not be misleading or deceptive or fraudulent. In this regard, customer loyalty programs, trade promotions as well as promotional competitions that may jettison the rights of the consumer and therefore needs to be carefully examined (Trade Malpractices (Miscellaneous Offences) Act, Cap T12, Laws of the Federation of Nigeria, 2004; Consumer Protection Act, 1987, U.K.).

Finally, the consumer has a right to be heard in complaint and obtain redress. This implies that in the Legal system there should be an elaborate as well as effective Administrative and judicial process for redressing the wrongs done to the consumer by the suppliers of goods and services (Monye, 2006).

2.0 MY CONTRIBUTION TO KNOWLEDGE ON HOW BEST TO PROTECT THE CONSUMER: THE FLESH AND BLOOD ANALOGY

No doubt, having underscored the need to protect consumers from the vagaries of the supply of goods and services, it becomes an arduous task determining how best to protect him. This exercise obviously involves a balancing act between the two extremes of "freedom of contract" and the other extreme of state interference in otherwise private undertakings. However, one thing is certain; the consumer deserves protection and should be so protected. Then, the most crucial question is, what manner of protection? It must be conceded at this stage that it is difficult, if not impossible to use the instrument of the law to afford a full protection to the consumer. He can only be protected to the extent that he makes himself available and amenable for protection, hence, the cliché ***"Thou can have his flesh, not a drop of his blood".*** Clearly, as depicted in the

Shakespearean classic ***"The Merchant of Venice" (Shakespeare, 1596/2001)***, the law can only protect the consumers' "blood" from the voracious and exploitative sellers and suppliers of goods and services but not his "flesh". However, how well the "flesh" of the consumer is protected will have a telling effect on how his "blood" may benefit from such protection. For lovers of literature, it would be recalled that in the "Merchant of Venice, Antonio, the merchant took a loan from Shylock, the moneylender for the benefit of his friend Bassanio. The condition for repayment was that if Antonio failed to pay back the loan as at when due, Shylock was to get a piece of his (Antonio's) flesh. On Antonio's default, Shylock actually sued for the enforcement of the penalty of getting Antonio's flesh. However, it took the legal ingenuity of Portia (Bassanio's wife) to save Antonio's life. She was able to convince the Court that the agreement for a piece of Antonio's flesh did not include a pint of his blood. So, how Shylock was to get a piece of Antonio's flesh without spilling his blood was the puzzle, the Court could not resolve in Shylock's favour.

Incidentally, as literary and comical this drama may seem, it actually depicted the exploitative and vindictive nature of moneylenders in mediaeval times and up till today. Scholars of consumer credit transactions will readily point to this drama as an epitome of the dilemma debtors faced in the hands of their "Shylock "creditors and why and how the law should be used (as Portia did) to save these debtors from the hands of the creditors. In a more global sense, it depicts the challenge faced by law and policy makers how best to protect consumers from the marketing ploys and exploitative business stratagems of the producers and suppliers of goods and services. This also brings to the fore the extent to which the law has been deployed to protect the consumer in all sectors of the economy in Nigeria and the success level of such protection.

3.0 USING PRIVATE LAW AS A PLATFORM FOR PROTECTING CONSUMERS

As revealed earlier, there are two perspectives of law to the protection of consumers, the private law and the public law perspectives. Whilst the

private law perspective is anchored on the law of contract and the law of torts, the public law perspective is based on criminal law. By way of a clarification, private law is the branch of law that regulates the relationship between individual or private citizens. Private law creates and protects private rights. On the other hand, public law regulates the relationship between the individual and the state (government). Public defines and circumscribes the rights of the citizens vis-à-vis those they have elected (through the social contract phenomenon) , to govern them (G. Kodilinye & O. Aluko, 1999).

Accordingly, in the realm of private law, the law of contract is the starting point for any inquiry into the scope of protection for consumers of goods and services. This is because, typically, the supply of goods and services start with a simple agreement between the parties involved. This is however without prejudice to instances of outright gifts or donations. As revealed in my earlier works, a typical pot of "*egosi soup*" is a product of several contracts involving the sale of goods. This is because the purchase of the *egosi* seeds, the protein that goes with as well as other ingredients that make up the soup are the products of distinct and separate contracts. Therefore , if it turns out that the "egosi" sold is machine made and not hand made as claimed by the seller, the buyer would have a recourse in the law of contract to sue for a breach .Thus, by understanding the basic principles of contract law, starting from the elementary principles of what constitutes a contract , the terms of a valid contract and the interpretation of these terms amongst other topics in this field, the relevance of contract law as a foundation for consumer protection is clear. However, more importantly, when the specialized contract involving the supply of goods is referenced and the law that governs this gene're of transaction is fully understand, then the journey is in full swing. This is because by virtue of the common law on sale of goods and the statute that govern it, there are profuse provisions therein that define the rights, duties/obligations of the parties to a sale of goods contract (Sale of Goods Law, Cap. 150, Laws of Bendel State of Nigeria, 1976; originally enacted as Sale of Goods Act 1893, United Kingdom). Sections 13–16 of this law encapsulate the implied terms placed on a seller of goods.

Accordingly, as a basis for the protection of a consumer is essentially premised on the fact that where the subject matter of the transaction is "goods", there is a sale of goods contract between the "buyer" and the "seller". Also, where the subject matter of the transaction is "services", there is a contract for the supply of service between both parties. However, in a more specific term, the "buyer" of the goods is the "consumer" in the context of our discussion, because, he has bought the goods either to consume directly or indirectly. Accordingly, the "buyer" as a consumer deserves protection from the law with respect to the title of the seller of the goods, appropriate/reasonable prices of the goods, the quantity and the quality of the goods supplied to him. Accordingly, it can be surmised that the buyer's expectations under the sale contract are in three fold;

(1) He expects that title or absolute ownership of the goods would be transferred to him by the seller free from encumbrances.

(2) The buyer expects the right quantity of goods in exchange for the price paid.

(3) There is also the all-important expectation of getting the right quality of goods, the buyer does not expect to be poisoned or injured by the very goods he purchased with his hard earned money.

However, it must be noted that the Court does not negotiate and impose terms on the contract. It is the province of the law to interpret the terms and conditions of the sale contract in order to enforce them. In ***D.P.M.S. Ltd v. Larmie, (1987),*** the Court of Appeal observed inter alia:

> For a term to become binding on parties to the contract it must be seen to have been brought to the notice of the party affected by it and he must expressly or impliedly assent to it before or at the time that contract is made. In order words mutual assent which is the meeting of the minds of both parties to a contract is vital…

Therefore, it is how well the Courts interpret and enforce the terms of the sale contract between the parties that will determine the extent to which the Courts are protecting or have protected the rights of the "buyer" (consumer). There are specific provisions in the Sale of Goods Law that touch on and protect the right of the "buyer" to the supply of the exact nature, description and quantity of the goods contracted under the agreement. For example, section 31 of the Sale of Goods Law provides as follows:

> Where the seller delivers to the buyer a quantity of goods less than he contracts to sell, the buyer must reject them, but if the buyer accepts the goods so delivered, he must pay for them at the contract rate

The importance of the supply of the right quantity of goods under the contract cannot be over-emphasized as it bothers on non-performance by the seller which is actionable in damages. Additionally, it is expected that the relevant statutes touching on weights and measures would be construed to give effect to the right of the buyer to the supply of the right quantity of goods under the contract.

The Relevance of the Implied Terms of Merchantable Quality and Fitness for Purpose to the Protection of Consumers

One major area that the law of contract plays a pivotal role in the protection of the rights of consumers is with respect to the supply of quality products and services to the consumer. Assuming that the problem of the right title to the goods supplied is settled and the question of the appropriate prices is resolved, the next step is to ensure that the consumer gets the right quality of goods and services for the money paid. In the context of the supply of gods, the Sale of Goods Law addresses this issue with its provisions for the implied terms (Sale of Goods Law, Cap. 150, Laws of Bendel State of Nigeria, 1976). Specifically, the implied term of merchantable quality as encapsulated in section 15(b) of the Sale of Goods Law is aimed at protecting the buyer from the vagaries of the supply of defective, sub-standard, expired and adulterated products. By the tenor of this provision, the seller in exchange for the

price paid by the buyer is obligated to supply goods of the right and satisfactory quality to the buyer. The failure to do this amounts to a breach of this implied term and the buyer can reject the goods and treat the contract as repudiated. In effect, a breach of this implied term is treated as a breach of a fundamental term and a total failure of consideration on the part of the seller (Odion 2016). As shall s soon be discovered this implied term ought not to be subject to any exclusion or limiting clauses as encapsulated in section 55 of the Law.

The implied term of "merchantable quality" has been defined variously. In some cases, it was defined to mean that the goods supplied by the seller was suitable for use by a "reasonable" buyer who accepts it after examining it (Odion and Odigie, 2011). In another breath, it has been asserted that goods are "merchantable" if they can be used for any of the purposes that goods of that description can be used for (Sale of Goods Law, Cap 150, Laws of Bendel State of Nigeria, 1976). Yet in another breath, goods are described as "merchantable" by reference to their price index. In other words, cheaper goods and "second hand" or "Belgium Goods" could be of less quality (Odion, 2016). Clearly, these multifarious definitions of this term have debilitating impact on the rights of buyers, who expend their hard-earned money to buy goods of their choices, but only to discover that they are not of the right or expected quality/standard. Incidentally, the Courts in Nigeria have not been able to come out with a clear-cut definition and scope of this implied term. In the celebrated case of ***Nigerian Bottling Co. Ltd. v. Constance Ngonadi (1985),*** the issue turned on the "merchantable quality" of a refrigerator "sold" to the respondent by the appellant in the guise of a marketing ploy. The appellants had given the respondent the fridge to boost her retails sales of its drink products. Unfortunately, however, the fridge exploded and caused the appellant severe body injuries, specifically first-degree burns. In an action for damages against the appellants for supplying to her a "defective" fridge that turned out to be a "time bomb", the trial court found in favour of the respondent. This decision was affirmed by the Court of Appeal, yet the appellants still proceeded to the Supreme Court which affirmed the con-current decisions of the lower courts.

Similarly, in the earlier case of ***Osemobor v. Niger Biscuits Ltd, (1973),*** the Court held that the presence of rotten tooth in the biscuit purchased by the plaintiff was enough evidence that the said biscuit contained deleterious substances and it was therefore not fit for human consumption. Similarly, in ***Okonkwo v. Guinness Nigeria Ltd (1980)***, the issue revolved around the presence of decomposing cockroach in the bottle of stout purchased and drank by the plaintiff. However, instead of treating this as a pure case of a breach of the implied term of merchantable quality, the plaintiff proceeded in a claim for negligence. Unfortunately, as shall soon be revealed, he failed in that regard. However, more recently, in the case of ***Fijabi v. Nigerian Bottling Co. PLC (2022)***, the Court re-affirmed the mandatory nature of the obligation placed on a manufacturer, distributors or sellers of goods to ensure that the goods supplied are of the right quality. In this case, the plaintiff bought some crates of Fanta drinks for export to the United Kingdom. This product had been certified fit for consumption by the regulatory agency- National Agency for Food and Drugs Administration and Control (NAFDAC). However, upon its delivery in the UK, the regulatory agencies over there confiscated the products on the grounds that it did not meet up to their standards for consumption. Specifically, their tests revealed that the Fanta drink contained too much Vitamin C (ascorbic acid) and this was revealed to have health implications. The plaintiff was livid and sued both the Nigerian Bottling Company and NAFDAC. His case was that NBC had supplied to him food drink that was "poisonous: and therefore not fit for human consumption and that NAFDAC had failed in its regulatory /supervisory responsibility to ensure that only quality food , drinks and drugs are manufactured and sold to consumers. Whilst NAFDAC claimed that the product complied with their standard, this revealed a possibility that the minimum threshold for quality assurance used by NAFDAC fell short of international standard. The fall out was that the Court (rightly in our view) held both the company and NAFDAC jointly liable for supplying the plaintiff the sub-standard product. Similarly, coming nearer home, a Benin High Court ***decision in Professor Izevbigie v. Nigerian Bottling Company Plc (2017)*** *illustrates this point*, also established the point that manufacturers /suppliers of goods can be held liable for the supply of

goods that do not meet up to the standard or quality they have vaunted about either in their advertisements or sales promotions. In this case, the plaintiff consumed the defendant's malt product which was described as low in sugar. The leaflet attached to the bottle revealed that it contained less sugar compared to the "regular" brands of malt drinks. However, the plaintiff claimed that in spite of drinking this brand, his blood sugar kept shooting up. He claimed that when he took the same brand of malt in the United States, his blood sugar was stable. As a renowned Biochemist, he carried out his independent analysis of the drink and discovered that contrary to the description given by the defendant, it contained a high percentage of sugar. On the strength of this he proceeded against the defendant for selling to him , malt drink that was not merchantable, because of its high sugar content. He specifically anchored his claim on the misrepresentation by the Defendant and more specifically for supplying him a product that was not in synch with its contractual description. The trial court agreed with him and entered judgment in his favour.

In reviewing this judgment, I emphasized the need for regulatory agencies like NAFDAC to be more up and doing in order to ensure that the content of food, drinks and drugs manufactured and sold in the country match the description proffered either in advertisements or the packages in which they are sold (Odion, 2020/2021).

Tort-Based Remedies as Alternatives to Protecting Consumers in Nigeria

Due to the limitations inherent in the use of the contract-based remedies, there has in some cases, being a push towards the use of tort based remedies. One of the limitations in the use of the contract-based remedies include, the problem of contractual privity, which limits the protection offered to only the actual buyers of the goods in question or the person that has paid for the services rendered (Donoghue v. Stevenson, 1932). This privity limitation makes it impossible to protect "consumers" in the real sense, because only "buyers" within the framework of the Sale of Goods Law can be protected. We referenced this challenge in one of our interventions in this subject matter and

suggested that recourse to tort-based remedies may be a better alternative for a more comprehensive protection of consumers in Nigeria (Odion and Okogie, 2009).

One other limitation of the contract-based remedies is the infusion of exclusion/limiting clauses to these sales of goods contract. To the extent that section 55 of the law permits the infusion of these exclusion/limiting clauses, buyers/consumers who rely on their remedies for the breach of these implied terms may be hamstrung. This is because it may be possible for a seller to supply sub-standard or defective products and yet, he is able to exclude/limit his liability for such a fundamental breach (Narumal and Sons Ltd v. Niger Benue Transport Co. Ltd., 1989; John Holt Ltd v. Ezeafulukwe, 1990; D.H.L. Ltd v. Udechukwu, 1994).

Yet again, one other limitation on the use of contract-based remedies is the scope of damages recoverable by a successful party in a claim for breach. As it is firmly settled, only special damages are recoverable in contract claims (Nigerian Bottling Co. Ltd. v. Ngonadi, 1985). Thus, a claim for the supply of a bottle of coke containing a deleterious substance may be compensated with a replacement of either the coke drink or its price equivalent. Similarly, a claim for the supply of a defective or sub-standard generating set may be recompensed with the replacement of the set or its money equivalent. However, where bodily injuries or even death result from the consumption or use of these defective or sub-standard products, the scope of damages recoverable can only be accommodated under tort law, specifically, negligence.

In the realm of Consumer Protection Law, tort-based remedies are often classified as product liability law (Blyth v. Birmingham, 1856). Product liability is anchored on negligence which is essentially a fault finding measure. There are three conditions for the proof of liability for negligence, to wit; the existence of a legal duty of care, a breach of this duty and the consequential damages resulting there from (Kodilinye and Aluko, 1999). In the words of Howell, 'product liability could be viewed as problematic for it uses the same mechanism to answer both questions concerning what products should be marketed and persons are injured

by products, who should pay compensation' (Howell 2000).

Thus, for a plaintiff to successfully maintain a claim in negligence he must establish the existence of these three conditions. However, as can be seen from a plethora of cases, it is more difficult to prove the breach of the legal duty as well as establishing the causal link between the breach in question and the resultant damages (Winterbottom v. Wright, 1842; Re Plemis, 1921; The Wagon Mound (No. 1), 1961). It is the establishment of a legal relationship between the consumer and the manufacturer and/or that would be the basis of establishing the legal duty (if any) of the manufacturer and/or the retailer (Grant v Australian Knitting Mills Ltd, 1936). There is equally the problem of the consumer establishing the breach. This would invariably involve proving the existence of a defect in the goods, the presence of deleterious substance in the food or drink (Nigerian Bottling Co. Ltd. v. Ngonadi, 1985; Osemobor v. Niger Biscuits, 1973; Okonkwo v. Guinness Nigeria Ltd., 1980). However, a more difficult problem for the consumer is identifying the culprit or the wrong-doer. This would equally involve questions of causation, the consumer must establish who as between the manufacturer or retailer is responsible for the defect in the goods in question or the presence of the deleterious substance in the food (Solu v. Total Nigeria Ltd., Unreported, Lagos High Court, Suit No. ID/619/85; Okeowo v. Sanyaolu, 1986). Finally, the consumer must prove that the resultant damages for example ill-health or bodily injuries resulted directly from the use of the defective product or the consumption of the contaminated food (Murphy v. Brentwood District Council, 1991; Muirhead v. Industrial Tank Specialties, 1986). It is in view of these monumental hurdles that a "plaintiff consumer" faces in the bid to prove the liability of a manufacturer/supplier of defective/sub-standard products, that we suggested that a strict liability standard be adopted in product liability cases (Odion, 2010).

However, the relevance of the law of torts to consumer protection came to light with a regime of product liability as espoused by Lord Atkins in the celebrated case of *Donoghue v Stevenson*, (1932). In this case the Appellant and a friend went to a café' to get some drinks. The drinks,

were bought by the Appellant's friend. Appellant consumed same and developed stomach problems. The problem was traced to impurities contained in the drink which was traced to the manufacturer. On a strict contractual basis the appellant as a non-purchasing consumer had no cause of action against the manufacturer or retailer. Even a purchasing consumer would have had similar problems suing the manufacturer. However, Lord Atkins illuminating dictum succeeded in broadening the scope of product liability by expanding the right of the appellant (a non-purchasing consumer) to a redress against the wrong of the retailer and the manufacturer. In his words;

> 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 of care to take reasonable care.

No doubt, this case apart from delimiting the liability of the manufacturer for defective, poisonous and dangerous products; it equally placed on them the duty to take all persons who come in contact with their goods as their "neighbour". On the part of the consumer, he had the responsibility of proving the manufacture's negligence by showing that the injury is not traceable to other supervening factors (Erhonsele 2000). In this context, the consumer had the burden of proving that the manufacturer owed him a duty of care, that there was a breach of that duty and that he (consumer) suffered consequential damages as a result of the said breach. Whilst the proof of the existence of a duty of care has been made easier by the decision in ***Donoghue v. Stevenson*** **(**1932), it is the duty of proving the said breach that has been the low point for the consumer. Highlighting the problems of the consumer in this regard, Kanyip observed inter alia;

> In the application of the Negligence concept

> in Nigeria, victims of Negligence (consumers for present purposes) have recorded both successes and failures in their respective actions. This fact raises the fundamental questions of the utility of the Negligence concept to Nigeria because cases where victims of Negligence have failed to succeed in their actions against offending firms are quite similar to *Donoghue v Stevenson* (1932) each involved a drink with contamination which caused injury when consumed (Kanyip, 1996–1998, 2002).

Incidentally, Lord Atkin's classic statement was accepted by the Nigerian Supreme court in Abusomwan v. Mercantile Bank Ltd, (1987), where Karibi-Whyte J.S.C observed as follows;

> The fog over remedies arising from breach of contractual obligations introduced into the law by what was conveniently regarded as the privity of contract fallacy was cleared by the brightness brought in lucidity of the argument of Lord Atkin's *Donoghue v Stevenson (1932*). The effect of the case is that a person injured as a result of performance by either party to a contract of which the injured person is not a party can obtain remedy by suing in negligence if the duty of care exist (*Abusomwan v. Mercantile Bank Ltd*, [1987]).

However, in spite of this expansive nature of tortuous remedy, one of its drawbacks is with respect to the technical hurdle of the burden of proof of the cause of his injury and the causal link between the act or omission causing the injury by the consumer. Several reasons have been advanced for this handicap of the consumer and these include the

illiteracy level of most consumers, their gullibility as well as the complex and intricate manufacturing process which makes it difficult for the consumer to either pinpoint the actual defect or cause of a defect in a product or identify the culprit. This problem is even compounded by the haste with which the courts accept the usual defence of "fool proof" manufacturing and supply process" often advanced by manufacturers as a defence to product liability claims.

An analysis of some decided cases would present a better picture of the problem identified above. In ***Okonkwo v. Guinness Nigeria Ltd (1980),*** the plaintiff drank a bottle of small stout brewed by the defendant. The plaintiff became suddenly ill and it was discovered that it was due to his consumption of some deleterious substances in the drink namely particles of roots, leaves and bark of tree. The plaintiff who could not establish how the said substances came about nor trace the culprit, sought to rely on ***res ipsa loquitur*** in proof of the aforesaid. On the other hand the defendant relied on a "*foolproof manufacturing system*" as a defence and claimed that the presence of such deleterious substances in the bottle meant that the drink may have been adulterated by third parties. This rather glib defence was accepted by the trial court judge who dismissed the plaintiff's claims. According to the Court;

> In conclusion, let me say this, *Donoghue v Stevenson (1932),* did not create a magic for the recovery of damages against manufacturers of drinks, A plaintiff in a case of this nature realizes that unless he has obtained admission of certain facts from those he sues, the burden which he has assumed of establishing his case is enormous; no presumption exists in his favor; all the ingredients of the case must be proved by credible evidence at the trial. If therefore he is not in a position to discharge such burden, it is pointless instituting the action at all

Similarly, in ***Nathaniel Ebelamu v. Guinness Nigeria Ltd. (1983)*****,** the plaintiff had a party to celebrate his tenth year marriage Anniversary and treated the guests` to food and drinks. Some of the guests who took the brand of beer developed serious stomach problems and started vomiting and were subsequently diagnosed of food poisoning. Two unopened bottles of the beer which were sent for laboratory analysis were found to contain deleterious substances. However, in spite of this overwhelming evidence, the court dismissed the plaintiff's claim and held that no nexus had been drawn between the opened bottles and the unopened bottles as well as the manufacturer. The trial court judge rejected the plaintiff's plea for the imputation of res ***ipsa loquitur*** to presume liability for the contaminated bottles by the manufacturer. In fact, the trial court judge went into the extreme to hold that a manufacturer owed no duty to ensure that the goods are perfect but merely to take reasonable care that no injury is caused to the consumer or ultimate purchaser.

In ***Nigerian Bottling Company Ltd v. Olarenwaju (2007),*** the plaintiff/respondent purchased two bottles of soft drink, a product of the appellant. Whilst taking the drink, he discovered some particles in the bottle; upon examining an unopened bottle he discovered that it equally contained similar particles. He was eventually treated for gastro intestinal complications. He instituted an action for damages and succeeded at the trial court. On Appeal, the Court of Appeal, Ilorin Division reversed the judgment and set aside the award of the trial Court. The Appellate court was of the view that he could not establish a direct link between the bottle he(respondent) drank and his resultant ailment. ***Oguwumiju J.C.A*** who read the leading judgment observed ***inter alia***:

> What is most relevant in the circumstances of this case is whether or not the respondent was able to prove on a balance of probabilities that he drank a contaminated bottle of coca-cola and became ill as a result of it……..Merely brandishing **Exhibit A**, an unopened but obviously a bottle of coca-cola is not enough

This trend continued in ***Boardman v. Guiness Nig. Plc (1980)*** where the plaintiff drank an unwholesome liquid content of beer in an ill-lit room. It was found to contain a considerable quantity of sediments which was confirmed by laboratory tests. The plaintiff then commenced this action in Negligence for damages. The defendant in its defence gave a detailed account of its manufacturing process to show that it had taken necessary precautions against its products containing deleterious materials. The court readily believed this manufacturing process and discountenanced the laboratory report which had confirmed that the deleterious material included bacteria. The court held that the plaintiff failed to prove the defendant's negligence in the manufacturing process.

In ***Soremi v. Nigerian Bottling Co Ltd (1977)*** the plaintiff bought a crate of mixed minerals bottled by the defendant and stored the bottles in the fridge. Thereafter, he took one bottle of coke in the afternoon and later in the day after his lunch he took a bottle of sprite to drink, only to discover that it contained deleterious substances. He did not take the drink, though he later vomited and was treated for stomach pains. In his suit against the defendants, they filed a memorandum of appearance but failed to partake in the trial. Accordingly, the trial court judge found in favor of the plaintiff. The trial court judge observed as follows:

> When a crate of soft drinks is bought with all the bottle-caps apparently secured in the bottle and without the possibility of inspection before purchasing. Then on the particular facts of this case there was no reasonable possibility of examination by Mr. Soremi before he took the bottle with the intention of consuming its contents. The defendant company therefore owed him a duty to take reasonable care.

However, a more recent case on the burden of proof of the manufacturer's liability for the manufacture and supply of defective or sub-standard goods is is the Supreme Court's decision in ***Okwejiminor v. Nigerian Bottling Company Plc, (2008).*** Here, the Appellant bought a

crate of bottled drinks from the respondent and drank a bottle of fanta from the crate. As he was consuming the drink, he discovered that the bottle contained a decomposing cockroach whereupon he started to experience stomach upset and was hospitalized. The result of the tests carried out on him at the hospital revealed that he had been infected with the deleterious substance contained in the drink.

In the course of the proceedings at the trial court, the remaining bottles of drink were tendered as Exhibits and it was discovered that each bottle contained a dead fly. Medical evidence tendered showed that the Appellant's stomach pains were traceable to the fanta drink he consumed. The trial Court had no difficulty in entering judgment in favor of the respondent. This was in spite of the Appellant's defence of the fool-proof system in addition to its suggestion that the Appellant's stomach pains could have been caused by the breakfast he took that morning.

On appeal to the court of Appeal, the Court of Appeal dismissed the Appeal and on further Appeal to the Supreme court, the Supreme court equally dismissed the Appeal and whilst reviewing the state of the law on the issue, held that the respondent(consumer) had succeeded in proving the negligence of the appellant in supplying him the 'Fanta' drink containing deleterious substance.

No doubt, these cases reveal the shortcomings of the use of negligence as a basis for product liability in Nigeria. As revealed through the cases there has been a consistent pattern (save in the last two isolated cases under reference) to foist upon the consumer plaintiff an onerous burden of proof almost insurmountable. This has made the tortuous remedy less attractive in spite of its potentials. It is however arguable that in cases of bodily injuries or even death resulting from the consumption of goods containing deleterious substances or the use of defective products like a automobile, the consumer would get more damages as special Damages if his claim is based on negligence. A claim in contract would limit his damages to the price of the goods in question or the cost of replacing same. Why then is the consumer-plaintiff almost rendered without a

tortuous remedy as gleaned from the cases under review?

The answers to this poser are multifarious, though it appears that the Nigerian courts are yet to come to terms with the liberal approach to the proof of the breach of the duty of care by the manufacturer as espoused in the *Donoghue's* case. No doubt the insistence on this traditional approach to Negligence in product liability also accounts for the reluctance by the courts for the imputation of ***res ipsa loquitur*** as an alternative means of proving the manufacturer's liability in this` regards. This point was aptly captured by Kanyip when he observed inter alia;

> In refusing to apply the res ***ipsa loquitur*** doctrine, the courts in the *Guinness* cases were unmindful of the fact that where a defect has arisen in the course of manufacturing, it will be virtually impossible for a plaintiff to show by affirmative evidence what went wrong (Kanyip, 2002, p. 289).

The problem here is the refusal of the court's to relax the requirements for the imputation of ***res ipsa loquitur*** in product liability law, there appears to be an insistence on the traditional burden of proof placed on a plaintiff in other civil actions without conceding that product liability claims are at best ***sui generis***. In ***Management Enterprises Ltd v. Otusanya (1987)***, the Court of Appeal reiterated this traditional approach in the following terms:

> if there is evidence the occurrence took place, an appeal to *res ipsa loquitur* is misconceived and inappropriate. There again, the defendant's negligence must be determined on the available evidence. In other words, the doctrine of *res ipsa loquitur* is not meant to supplant inconclusive evidence on the part of the plaintiff, it is meant to apply when there is no other proof

of negligence than itself

As argued elsewhere, even on a contextual analysis of this dictum, it ought to cover the consumer –plaintiff in product liability as there can be no other presumption than negligence for a fly to be found in a corked bottle of drink or for a brand new refrigerator to burst into flames a week after installation and usage. We therefore suggested that a presumption of negligence in favor of the consumer would have placed a burden on the defendant/manufacturer to disprove negligence by rebutting the presumption (Odion and Okogie, 2009, p. 38). Incidentally, leading English cases have long decided on the need for an extension of res ***ipsa loquitur*** to product liability law. In ***Grant v Australian Knitting Mills Ltd,*** *(1936),* Lord Wright whilst disagreeing with Lord McMillan gave a hint of the utility of this doctrine to product liability law, when he observed as follows:

> The presence of deleterious chemical in the pants due to the negligence of the manufacturer was a hidden defect just as much as the remains in the snail bottle. It could not be detected by any examination that could reasonably be made…..The garments were made by the manufacturers for the purpose of being worn exactly as they were worn in fact by the appellant. It was contemplated that they should first be washed before use.

4.0 PUBLIC LAW PERSPECTIVE TO THE PROTECTION OF CONSUMERS

Public law perspective to consumer protection is epitomized by state sponsored legislations that introduce a criminal or quasi-criminal standard to the supply of goods and services to consumers. These statutes are often prescriptive and penal in nature by imposing expected standards in the supply of goods and services and imposing penalties for breaches that may arise. Beyond the specific provisions in the respective

criminal and penal codes, there are an avalanche of statutes that criminalize consumer protection. These include but not limited to the following:

(a) The Price Control Act
(b) The Weights & Measures Act
(c) The National Agency for Food and Drinks Administration and Control (NAFDAC) Act
(d) The Standard Organization Nigeria (SON) Act
(e) The Trade Malpractices (Miscellaneous Offences) Act
(f) The Merchandise Marks Act
(g) The Federal Competition and Consumer Protection Council Act

These legislations amongst other reveal the attempts to use legal and institutional frameworks to protect the rights of consumers of goods and services in Nigeria. Whereas it is expected that the private rights of consumers should be more emphasized, public law perspective becomes more incisive in view of the need for some measure of regulation and supervision of the suppliers of goods and services, specifically for the benefit of the vulnerable consumers. For example, the Price Control Act, is useful when the discussion revolves around the payment of "reasonable" or "appropriate "prices for goods and services. This is more than pertinent now in view of the present under-current of economic hardship in the country. Accordingly, it has become necessary to confirm whether consumers in the Country are getting the right value for the money they pay for goods and services. It is equally now very important to interrogate the fact that most suppliers of goods and services in their "shylock" and greedy tendencies now overprice their goods and services, whilst blaming same on the government. More debilitating is the influences of market/trade associations who now position themselves as cartels and in the process fix/impose extortionate and arbitrary prices on goods and services. These associations/unions do this without recourse to the dynamics of the market and prevailing government policies. It was in this wise that we examined the possibility of government intervention through "price control" or "price regulation" in order to ensure that "buyers" and consumers of goods and services, especially the essential products get them at reasonable and affordable

prices (Odion, 2017). In my article under reference, I argued that with the enactment of the Price Control Act and it's for the establishment of a Price Control Board for the federation and Price Control Committees for the states, government can, through these institutions regulate the prices of goods and services in the Country, especially , the prices of staple foods like bread, garri, rice etc. This is because by the tenor of the Price Control Act, the Board or Committee is entrusted with the powers to ensure that the suppliers of these "controlled" or "regulated" products make reasonable profit and not outlandish and unreasonable profits. Specifically, the general powers of the Board in the imposition arid enforcement of prices on these goods so listed is succinctly addressed by section 5 (1) - (3) thereof which provides inter alia:

> The Board may by notice published in the Federal Gazette:
>
> a) Fix a basic price for any of the controlled commodity in accordance with sub-section (2) of this section and
>
> b) Fix the permitted 'variation for that, commodity in respect of any state in accordance with sub-section (3) of this section.
>
> (2) The basic price is the price which in the opinion of the Board properly represents,
>
> a) In the case of goods produced in Nigeria, the cost of production of the commodity plus the manufacturer's profit and,
>
> b) In the case of imported goods, die duty --paid landed cost plus the importer's profit
>
> (3) The permitted variation, in relation to any particular commodity is the amount

> representing transport and other cost plus the distributor's profit which in the opinion of the Board ought to properly be added to the basic price in order to represent a fair controlled price (wholesale or retail as the case may be) in any state.

Admittedly, economists and scholars of business administration would readily argue that government cannot fix or impose prices on the suppliers of goods and services. However, the counter argument that the concept of the forces of "demand" and "supply" determine the prices of goods and services only works where there is a "perfect market". But as observed, earlier, with the influx and the influence of market unions and associations causing artificial scarcity through hoarding and the likes and coupled with their fixing and imposition of arbitrary and extortionate prices, there is certainly not a single "free market" in Nigeria. Therefore, government must intervene to regulate the market through a price control mechanism in order to protect the poor and vulnerable consumers in the Country (Cayne & Trebilcock, 1973).

With respect to the role of the Standard Organization of Nigeria (SON) in the prescription and enforcement of the standard of goods that are either manufactured in Nigeria or imported and sold in Nigeria, we have argued that the organization needs to be more proactive in the discharge of its statutory duties (Odion, 2012). We reviewed the lay back attitude of these organization , especially with regards to goods imported into the Country and how its inability to fully and strictly enforce its SONCAP policy has led to the flooding of the market with sub-standard products , especially from the Asian countries.

We equally interrogated the role of the National Agency for Food and Drugs Administration Control (NAFDAC) and revealed that the question of the right personnel manning the agency is crucial to its successes. Specifically, it was revealed that much of the agency's

successes in the regulation of the quality of drugs, food and drinks products (that are either manufactured or imported and distributed in the Country) was in the era of the Late Professor (Mrs) Dora Akiyuli.(Odion 2012). Whilst her successors in office may not have enjoyed the media blitz she enjoyed at that time, it was our finding that the agency has been more proactive and frontal in its efforts to prevent the supply of fake or sub-standard drugs more than it has done in the area of food and drinks products. This is however understandable, given the importance of quality drugs to the quality of health care for the average citizen.

5.0 THE ROLE OF THE FEDERAL COMPETITION AND CONSUMER PROTECTION COUNCIL IN THE PROTECTION OF CONSUMERS

As revealed earlier, public sector regulation of the manufacturing, production and the supply of goods and services is epitomized by state sponsored legislations that are prescriptive and enforceable. This underlie the legal and institutional frameworks that are exemplified by such legal and institutional frameworks in the mold of the Price Control Act and the Board, the Standards Organization Act and the organization (SON), the National Agency for Food and Drugs Administration and Control Act and its agency (NAFDAC) amongst others.

Whilst the specific powers and functions of these institutions and their roles in the standardization of goods/products put in the market and supplied to consumers are well documented and have been the focus of my earlier research works, it is the strategic and important status and role of the Federal Competition and Consumer Protection Council that can be accommodated in details in this lecture (Odion, 2017; Odion, 2014/2015).

The Federal Competition and Consumer Protection Council is a regulatory institution established pursuant to the provisions of the Federal Competition and Consumer Protection Council Establishment Act of 2018. It replaced the Consumer Protection Council Act that was hitherto, the regulatory institution established during the military era, but retained as an existing law. The enactment of the FCCPC Act came

against the background of several agitations by numerous scholars for the enactment of a holistic and a generic competition law in Nigeria as against what had existed in the manner of sector specific competition policies and laws (Dimgba, 2009, Odion, 2014).

This campaign were very incisive in view of the fact that most scholars were in accord that instead of the approach of direct regulation as epitomized by the Price Control, Act, the Weights & Measures Act, SON Act etc, it is preferable to adopt an indirect regulatory approach by laying down a legal and institutional frameworks for competition and fair trading. This approach which emphasized the relationship between law and economics has been traced to the famous author Ronald Coase who in his landmark work adopted the economics standard of *pareto efficiency* to justify his position.(Coase, 1960). According to him, a law is not efficient if the cost of using it to solve a problem far outweighs the benefit derivable from its enactment and enforcement. (Odion, 2016) Accordingly, was revealed that when there is competition in the market, it is the market forces of demand and supply that will determine the quality/standard of goods and services supplied and the price at which these will be supplied. This proposition was fact checked with the regime of the specific competition provisions of the Nigerian Communications Act 2003, especially, its regulations of anti-competitive practices in the communications sector. The essence was to ensure that some players in the GSM sector did not adopt some anti-competitive practices like strained interconnectivity, refusal /failure to share equipment/facilities etc to frustrate other players in the sector. Additional provisions in the regulations preventing a monopoly in the sector or even assuming a dominant position in the sector were helpful in the sector and became a litmus test for the adoption of a generic competition law on a much more global scale. (Odion,2016, Dimgba, 2009))

Definitely, a manufacturer /supplier that is in the habit of supplying sub-standard/ inferior goods will not have customers or clients compared to the other who manufactures/supply quality, standard and durable goods. In the same vein, a supplier of goods and services that charges

extortionate and arbitrary prices will not gain any traction in the market. Thus, in this way, the market will regulate itself, without direct interference from government.

However, the challenge of this is that there is a presumption of a "perfect market", but this is rarely the case. There are distortions caused to the market through incidences like mergers of companies that result in monopolies or companies that assume a dominant position in a market, price racketeering/syndication. product and services hoarding, the existence of market cartels/associations that arbitrarily fix prices of goods and services etc. These market imperfections drastically truncate the effectiveness of the forces of "demand" and "supply", therefore, a legal and institutional framework to prevent these incidences and engender competition and fair marketing is inevitable (Odion, 2016).

Accordingly, it is in realization of the nexus between competition and consumer protection that the Federal Government enacted the FCPC Act in 2018. By so doing, it combined the regulation of the "supply" side of the transaction through the provisions on "competition" or "antitrust", whilst it regulated the "demand" side, through its prescriptions on "consumer protection" Whilst the wisdom in merging both may be questioned and the effectiveness of such a hybrid approach debatable, what is however worthy of note is the attempt to regulate competition for the benefit of consumers in Nigeria

Specific Provisions of the FCCPC on Consumer Rights and Protection

As revealed earlier, section 167 of the Act defines and circumscribe "consumers", thus, the dragnet now includes both natural and artificial persons. FCCPC just like its defunct CPC is the official "ombudsman" for all consumer related issues in the Country. It has the overriding powers of receiving and addressing all consumer complaints in the Country. Accordingly, it takes precedence over other sector specific consumer redress mechanism's that existed before now (Federal Competition and Consumer Protection Act [FCCPA], 2018, sections 17 and 18). For example, it is well noted that that the National Electricity

Regulatory Commission (NERC) has its inbuilt consumer redress mechanism and it established its "consumer parliament" for consumers in the energy sector. Similarly, the Nigerian Communications Commission (NCC) has its consumer protection mechanism embedded in its enabling law as well as its subsidiary legislations (National Electricity Regulatory Commission [NERC], 2005; Nigerian Communications Commission [NCC], 2003). In the same vein, the Nigerian Civil Aviation Authority has its consumer redress architecture for consumers in the aviation sector etc. However, the FCCPC is the central hub for receiving these consumer complaints and redressing them. To that, it inexorably wields some measure of over-sight functions over these sector specific consumer protection bodies.

Clearly, the impact of these broad powers of the FCCPC must not be lost on us, as an "Ombudsman", it can bridge the gap between "arbitration" and direct "litigation" in the Courts. The FCCPC is expected to work assiduously towards getting compensation for consumer victims, who have either complained of sub-standard, defective or malfunctioning products sold to them or the extortionate prices at which they were sold to them. As an ombudsman, the FCCPC ought to reach out to the manufacturer/supplier of such products and extract some of pecuniary compensation for the consumer. In this way, the FCCPC can ensure access to justice for such consumers, who may not have the financial wherewithal to brief a Lawyer for a full-blown litigation. The FCCPC will also save such a hapless consumer the burden and the rigours of litigation with its attendant cost and delays. Just imagine a consumer briefing a Lawyer to litigate a multi-national company for the supply of a bottle of soft drink containing deleterious material or a consumer suing a network service provider for drop calls or invading his privacy through unsolicited SMS and calls for sales promos etc, this is where the FCCPC is handy.

The Act encapsulates a broad spectrum of consumer rights that should be protected by the commission (Federal Competition and Consumer Protection Act [FCCPA], 2018, sections 114-133. These rights as indicated earlier range from his right to adequate information about the

goods/products he purchases or consumes, protection from misleading or false labeling/advertisement, the right to standard /quality products, etc. Where any of these specific rights of a consumer is violated, he/she can complain to the commission and it is expected that the commission will take necessary steps to address it. Conversely, the Act also imposes some specific duties/liabilities on the manufacturers, importers and suppliers of goods and services in the Country. This is an express codification of the implied terms placed on the sellers of goods under the Sale of Goods Law. Some of these duties include, duty to withdraw/recall a defective , sub-standard or a malfunctioning product from the market, once fixed with the requisite notice, the duty to only sell goods with a valid title to the buyer, the duty to sell goods that correspond with the contractual description/sample, the duty to supply goods of the right quality/standard at all material times (Federal Competition and Consumer Protection Act [FCCPA], 2018, sections 134 to 145).

In carrying out its functions effectively, the FCCPC is not supposed to stay idle and await consumer complaints. Accordingly, it is expected to engage its team of inspectors to visit manufacturing sites, markets and other distribution outlets to pre-empt the exploitation of consumers by the suppliers of goods and services (Federal Competition and Consumer Protection Act [FCCPA], 2018, sections 27 - 38). In the same vein, the commission has the status of a quasi-judicial body and can adjudicate on consumer complaints and impose sundry fines and penalties on defaulting manufacturers/suppliers where necessary (Federal Competition and Consumer Protection Act [FCCPA], 2018, sections 33 - 35). Accordingly, the Competition and Consumer Protection Tribunal is established as the body charged with the enforcement of the provisions of the Act with respect to competition and consumer rights (Federal Competition and Consumer Protection Act [FCCPA], 2018, sections 39 - 58). In addition to these, the Act makes profuse provisions on the procedure for consumer redress. An aggrieved consumer is expected to file a complaint at the closest FCCPC to him /her or to the industry or sector directly responsible for the goods of services complained about. Thereafter, such a complaint will be forwarded to the manufacturer or

supplier who must do the needful within a reasonable time. Failure to respond or address such complaints timeously attracts sundry fines/sanctions imposed by the commission (Federal Competition and Consumer Protection Act [FCCPA], 2018, sections 146 - 155).
Beyond its general powers of the protection of consumers from the supply of sub-standard or defective products, the commission has the specific power of regulating the prices paid for these goods and services. Accordingly, by the tenor of sections 88-91 of the Act, the commission is empowered to advise the President of the Federal Republic of Nigeria on the control of the prices of essential goods and services in the interest of consumers. Thus, when this specific provision is juxtaposed with the provisions of the Price Control Act, it is safe to say, that consumers of goods and services in the Country ought to be protected from the current incidences of arbitrary, extortionately high prices of goods and services.

The Commission is equally empowered to regulate the supply side of the transaction by promoting and institutionalizing competition in the market place. Accordingly, borrowing a leaf from the antitrust law and practice in the United States, the commission is empowered to regulate mergers, take-overs and amalgamation of companies in the Country (Investment and Securities Act, 2007). With this specific power of the control of mergers/take-overs, the commission can prevent the existence of monopoly in the marketplace or the emergence of companies with a "dominant position" in the marketplace (Investment and Securities Act, 2007, sections 70-87). As revealed elsewhere, the importance of preventing companies from assuming a monopoly status or a dominant position in the marketplace cannot be over-emphasized (Odion, 2016). This is because such companies with their share size, geographical spread/influence and most importantly their financial strength can influence and dictate the quantum of goods to be supplied, the manner in which services can be rendered and the prices to be paid by consumers. These companies will often than not get engaged in product hoarding, price racketeering/syndication and ultimately exploit the consumers.

6.0 CONCLUSION

This lecture was focused on an analysis of the legal and institutional frameworks for the protection of consumers of goods and services in Nigeria. Clearly, the lecture has been more direct on the supply of goods to consumers. This is deliberate because a higher percentage of consumer transactions in the Country revolve around 'Buying and Selling". Also, the vagaries of the supply of defective, expired, sub-standard or counterfeited/adulterated products are more pervasive. What is more, with the prevailing economic challenges, the preponderance of consumer complaints about price hikes and excessive costs, are in respect of goods, especially consumables.

Having defined the consumer and x-rayed his basic rights, we went further to extrapolate the law as it affects these rights. This was done with a view to revealing the extent to which the law has been stretched to protect him and the effectiveness of these laws in that regard. Whilst private law in the mold of the law of contract and the law of torts were perceived to be useful, they were fraught with too much technicalities and fault lines that the manufacturers /suppliers of goods may readily latch upon to escape liability. For example, we referenced the technicalities surrounding the definition, nature and scope of the implied term of 'Merchantable Quality'. That term as it still stands today, simply means that the goods are 'Sellable" or can be "recycled". So, as long as you can pass the goods to another "victim buyer', you are okay. What is more the traditional concept of contractual privity and the permissiveness of exclusion clauses in sale of goods contracts whittle down the impact of these contract based remedies. On the flip side, tort based remedies as epitomized by negligence, is even more burdensome on the consumer plaintiff, how is he going to prove the manufacturer's liability for the sudden explosion of a refrigerator? The presence of deleterious substances like decaying tooth in biscuits, cockroach in a malt drink etc, if he is not allowed to rely on *res ipsa loquitur?* Why are the Courts in a hurry to accept the defence of a "fool proof mechanism" by these manufacturers and ultimately lending them an escape valve? In essence, whilst the law attempts to protect the consumers' "blood" it unwittingly, sets his "flesh" free for "consumption" by these

manufacturer's/suppliers of these defective/substandard products. These sub-standard/defective products are not only harmful to the consumers , some have led to severe bodily injuries and even death of some consumers.

In the realm of public law, whilst we have identified a deluge of prescriptive laws and the regulatory institutions established to enforce them, the question of the effectiveness of these laws remain a burning issue. It was revealed that in spite of these avalanche of laws and institutions of government, consumers are on a daily basis exposed to the dangers of buying and consuming fake, sub-standard, defective and in some cases harmful and poisonous foods and drinks. This is in spite of the spirited efforts of regulatory agencies like NAFDAC, the SON and the FCCPC.

These is because some of these regulatory schemes focus more on the remedial approach to protecting the consumer rather than the proactive and preventive approach. The fall out of this is that these agencies focus more on the fines/penalties imposed on defaulting manufacturers/suppliers of these dangerous and harmful products rather than focusing more on inspections and interception of these harmful products before they hit the markets. Admittedly, there are pockets of documented interventions and arrests of some of these culprits, but on a comparative basis with the huge population in this Country, these successes are tips of the icebergs.

We have equally revealed that these direct regulatory measures through these prescriptive and penal legislations may not be the best option. Rather an indirect regulatory scheme anchored on competition policies and law may be a better option. Accordingly, in furtherance of this stand point, we examined the philosophy behind state sponsored legislation that regulates the market. Our postscript is that in order to prevent the incidences of “market failures”, it is imperative that a legislative framework be evolved for the enforcement of competition and fair trading in the market. Whilst we may have delayed in enacting a generic competition law, our attempt with the FCCPC Act of 2018 reveals the

enormous potentials for the entrenchment and sustenance of competition in the market, and ultimately a more efficient legal and institution framework for the protection of consumers in Nigeria.

7.0 RECOMMENDATIONS

Mr. Vice-Chancellor Sir,

We cannot but conclude but by rehashing some of the recommendations we have made over time in our works to strengthen and improve the level of protection of consumers of goods and services in the Country. These include but not limited to the following:

(a) Commerce and trade being an item on the residual legislative list, states should review and amend their respective Sale of Goods Law to make it more amenable to consumer goals. Specifically, here in Edo State, where we are still grappling with the Sale of Goods Law of 1976 (that is almost 50 years now), there is the need to revisit the Model Sale of Goods Law of 1987 that never saw the light of the day. We should enact a Sale of Goods Law that is consumer friendly and not skewed towards the interest of the "merchant" or "seller" Accordingly, as has been done in England since their Sale of Goods Law of 1979 and the Consumer Protection Act of 2005, the implied term of "merchantable quality" should be replaced with that of "satisfactory quality" . In this way, it is only when the goods sold 'satisfy" the needs of the consumer (at least a reasonable consumer), that such goods can be said to of the right quality and the seller having fulfilled his obligation in this implied term

(b) Similarly, beyond the generic FCCPC Act, specific consumer oriented legislations should be enacted to regulate both physical and online transaction that are now in vogue. Such legislations should address the crucial issues of privity of contract in goods sold and consumed by persons who may not be the direct buyer. Such legislation should also address the crucial issue of

exclusion/limiting clauses in contracts involving the sale of products that a consumed directly and not for the purposes of "retail" or "wholesales" etc. In this way, producers /sellers of goods, especially food and drinks product will no longer have the leverage to use these exclusion /limiting clauses to exculpate themselves in clear cases of the breach of these implied terms

(c) The FCCPC should maintain a more visible presence in the States and Local Government Councils in the Country. Given its enormous responsibilities to protect consumers in the Country, its limited presence in the F.C.T Abuja and some highbrow commercial cities in the country is not enough. Government should provide the needed funds to employ more personnel in the commission, create branches and outlets in the states and local government areas. Every consumer in the country should within a stone throw from his/her residence, have a place to lodge a complaint

(d) Also, since the Price Control Act is a subsisting legislation, states like Edo State can take advantage of its provisions to establish their "Price Control Committee". This committee will be helpful is the regulation of the prices of controlled products like kerosene, bread, and other staple food items like "garri, rice etc. If the prices of goods and services are slightly regulated and controlled, consumers will be saved from the exploitative prices of goods and services in the state.

(e) As a follow up to recommendation two, states like Edo State should immediately enact our domesticated version of the Competition and Consumer Protection Law with an established institution to enforce its provisions. In this way, the antics of market unions or associations in the hoarding of goods, price racketeering /syndication, the unlawful restriction/limitation of new entrants into any line of businesses will be curtailed .In the

long run, with more entrants into the market and producers and suppliers free to sell their wares at their chosen prices, extortionate/arbitrary prices of goods and services will be reduced.

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