

# Product Liability 2019

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# Product Liability

## 2019

**Contributing editors****Gregory L Fowler and Simon Castley**

Shook Hardy &amp; Bacon LLP

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Lexology Getting The Deal Through is delighted to publish the twelfth edition of *Product Liability*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Ireland.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Gregory L Fowler and Simon Castley of Shook Hardy & Bacon LLP, for their continued assistance with this volume.



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# Nigeria

Babatunde A Sodipo

Ajumogobia & Okeke

## CIVIL LITIGATION SYSTEM

### The court system

1 | What is the structure of the civil court system?

The structure of the civil court system is set out in the Nigerian Constitution 1999 (as amended). The courts of record, in order of hierarchy, are the Supreme Court (the highest appellate court), the Court of Appeal, the Federal High Court, the National Industrial Court, the state High Courts and the High Court of the Federal Capital Territory (FCT). Nigeria is divided into 36 states. Each state and the FCT has a High Court where civil cases are instituted. Product liability claims are usually instituted in these courts. Courts with summary jurisdiction over small civil claims are called magistrate courts in southern Nigeria and district courts in northern Nigeria. These courts are established under the laws of each state. Appeals from judgments of the magistrate and district courts lie to the state High Courts and the High Court of the FCT.

The Federal High Court has exclusive jurisdiction over specific subject matters, such as intellectual property, admiralty, mines and minerals, revenue-related matters to which the federal government or its agencies are parties and taxation, banking, etc. The National Industrial Court has exclusive jurisdiction over employment matters. State High Courts and the High Court of the FCT have jurisdiction over all other matters, including product liability. Appeals from judgments of the federal and state High Courts and the High Court of the FCT lie to the Court of Appeal. Appeals from the National Industrial Court lie to the Court of Appeal. All appeals from the Court of Appeal lie to the Supreme Court. In addition to its appellate jurisdiction, the Supreme Court exercises original jurisdiction over certain specific matters, such as disputes between governments. Judgments of the Court of Appeal are binding on all other courts in Nigeria, except the Supreme Court. Judgments of the Supreme Court are final and binding on all other courts in Nigeria.

### Judges and juries

2 | What is the role of the judge in civil proceedings and what is the role of the jury?

The Nigerian civil court system is adversarial. Parties to civil litigation present their cases before judges who preside over disputes, as independent and impartial arbiters. Judges hear and determine disputes on the pleadings and evidence presented by the parties and the application of the law thereto. A judge has no authority to assume an inquisitorial approach to adjudication in civil litigation.

There is no jury system in Nigeria. A judge sitting alone presides over civil proceedings in the federal and state High Courts.

### Pleadings and timing

3 | What are the basic pleadings filed with the court to institute, prosecute and defend the product liability action and what is the sequence and timing for filing them?

The applicable procedure in civil cases is governed by the civil procedure rules of the court where the action is instituted.

In Nigeria, product liability claims are commenced by filing a writ of summons and statement of claim at the state High Courts and the High Court of the FCT. The writ of summons is endorsed with the claims and the reliefs sought while the statement of claim contains the factual basis upon which the claimant's cause of action is founded and the reliefs sought.

Most states, such as Lagos, Ogun, Rivers, Kano and the FCT, as well as the Federation, have adopted reformed rules of court in their respective courts of first instance, which require a claimant to file documents accompanying the writ of summons and statement of claim. These accompanying documents, known as 'front-loaded processes', include lists of witnesses to be called and documents to be relied on at trial, written statements on oath of witnesses, copies of documents that the claimant intends to rely on at the trial and in Lagos, a pre-action protocol form (Order 3, Rule 2 of the High Court of Lagos State (Civil Procedure) Rules 2012 (the Lagos Rules)).

The defendant has a period of 30 (in most states and the FCT) or 42 (in Lagos) days (depending on the rules of the relevant court) from the date of service of the writ of summons and statement of claim to enter an appearance to the writ and file a statement of defence accompanied with the aforementioned front-loaded processes. The statement of defence is required to contain the defendant's specific denial or admission of alleged facts in the statement of claim. The defendant may file a set-off or counterclaim by incorporating it in the statement of defence, if he or she claims relief against the claimant. Such a defence will be filed with accompanying documents. Upon receipt of the statement of defence, the claimant may, if necessary, file a reply within a period of seven or 14 days (depending on the rules of the relevant court). Where a counterclaim is served, a claimant is required to file a defence thereto with accompanying documents within 14 days of the date of service and the defendant may file a reply to the claimant's defence to counterclaim within seven or 14 days (depending on the rules of the relevant court). Once the last pleading is filed or the time for filing it expires, pleadings are deemed to have closed.

In states where reformed rules have not been adopted, the rules of court prescribe an eight-day period for entering appearance. In such cases, the defendant has a period of 14 days from the date of entering appearance to file a statement of defence and the same procedure for filing and responding to a counterclaim applies. However, there is no requirement to file accompanying documents.

Where a party defaults in complying with stipulated deadlines, the time frame may be extended by the court, upon an application by the

party in default and, in states where reformed rules have been adopted, upon the payment of penalty for the days of default.

### Pre-filing requirements

#### 4 | Are there any pre-filing requirements that must be satisfied before a formal lawsuit may be commenced by the product liability claimant?

Under the Lagos Rules, a product liability claimant is required to comply with the Pre-action Protocol by filing a Pre-action Protocol Form 01 along with his or her writ of summons. In Form 01, the claimant describes the unsuccessful attempts that he or she had made to achieve amicable resolution of the dispute through arbitration, mediation, conciliation, or other dispute resolution options. The claimant must also state that his or her claim was set out in a written memorandum to the defendant and that he or she has complied, as far as practicable, with the duty of full and frank disclosure of all information relevant to the issues in dispute (Order 3, Rule 2(1) of the Lagos Rules). Failure to comply with the Pre-action Protocol will result in the court registry refusing to accept the writ of summons for filing (Order 3, Rule 2(2) of the Lagos Rules). There are no pre-filing requirements to be fulfilled by a product liability claimant before an action may be commenced in other states. However, where an action is to be commenced in any state or the Federation against certain statutory corporations or public officers, the claimant may be required by statute to serve the defendant with a pre-action notice, at least 30 days before commencing the action.

Also, Order 4, Rule 15 of the High Court of the Federal Capital Territory (Civil Procedure) Rules 2004 (the FCT Rules) requires a legal practitioner to certify that he or she has counselled his or her client on the strength and weakness of his or her case before filing an action.

### Summary dispositions

#### 5 | Are mechanisms available to the parties to seek resolution of a case before a full hearing on the merits?

The rules of court provide parties to product liability claims with various options to obtain judgment or dismiss an action without a full trial or, in some cases, without trial. These options are as follows.

### Summary judgment

A claimant may apply for judgment without trial. This procedure is adopted when the claimant is of the belief that the defendant has no defence to his or her claim. This is done at the commencement of the action by filing a writ of summons and all accompanying processes along with an application for summary judgment, which is supported by a written address and an affidavit stating the grounds of the claimant's belief that the defendant has no defence to the claim. Upon being served with the foregoing, the defendant, if he or she intends to defend the action, files a statement of defence with accompanying documents, a written address and a counter-affidavit to the claimant's application for summary judgment within the time stipulated for filing a defence.

At the hearing of the application for summary judgment, the judge may enter judgment against the defendants, or refuse the application and grant leave to the defendant to defend the action, if the judge is of the view that triable issues have been disclosed by the defendant. In such case, the action would then proceed to trial.

Judgment under this procedure is final and on the merits and may only be overturned on appeal.

### Default of appearance or defence

Under the rules of the various courts, where a defendant fails to appear in response to a writ of summons or defaults in filing a defence within

the stipulated period of time, and the claim is for unliquidated damages (as is usually the case in product liability matters) the claimant is at liberty to apply by motion for judgment in default of appearance or defence, upon establishing the service of the originating process on the defendant. In such circumstances, the quantum of damages shall be ascertained by the court before judgment is entered.

The judgment by default of appearance or defence is final and may only be set aside upon an application to a judge brought within a reasonable time (usually 14 days), explaining the reason for the default and proffering a defence to the action.

### Proceedings in lieu of demurrer

Demurrer has been abolished in Nigerian courts and replaced with proceedings in lieu of demurrer. This procedure permits a defendant to raise a point of law in his or her statement of defence, which may, on application, be decided by the judge before, during or after trial. Under this procedure, the defendant is deemed to have admitted all the facts pleaded by the claimant in the statement of claim, but nevertheless contends that the claimant is not legally entitled to the relief sought.

Where the judge is of the opinion that such point of law would substantially dispose of the action or any part of the action, the judge, upon hearing the application, may strike out the action in whole or in part or make an order that would meet the justice of the case.

### Motion to strike pleadings, etc

A claimant or a defendant may apply and a judge may, at any stage of the proceedings, strike out or amend any pleading or indorsement of any writ or any part thereof on the grounds that it discloses no reasonable cause of action or defence, whichever is the case, or that it is scandalous, frivolous or vexatious or may prejudice, embarrass or delay fair trial of the action or constitutes an abuse of court process. In the case of a defendant, the judge may order the action to be stayed or dismissed, or he or she may enter judgment against the claimant. In the case of a claimant, the court may strike out the defendant's pleading.

Where the defendant contends that no reasonable cause of action is disclosed, he or she would be deemed to have admitted all the facts pleaded by the claimant in the statement of claim, but nevertheless, contends that the claimant is not legally entitled to the relief sought, and no evidence is admissible at the hearing of the application (Order 15, Rule 18 of the Lagos Rules).

### Preliminary objection or motion challenging jurisdiction

This is a procedure by which a defendant may, at the earliest opportunity after service of the originating process, dispute the jurisdiction of the court to entertain the suit, without filing a statement of defence. The court may only examine the writ of summons and statement of claim in determining such applications. Such applications may be on the grounds that: the action is statute-barred, the court lacks subject-matter jurisdiction or the claimant lacks locus standi, etc. These applications are heard by the court, as a matter of priority, before the case proceeds to trial. Generally, if the application is successful, the suit will be struck out. However, if the court holds that the cause of action is statute-barred, the suit will be dismissed.

### Trials

#### 6 | What is the basic trial structure?

The Constitution provides that parties may represent themselves in court, or they may be represented by a legal practitioner of their choice. However, it is common practice that parties are represented by legal practitioners. The role of a barrister and solicitor is fused. Therefore, a legal practitioner offers both services. The legal practitioner conducts

the trial on behalf of his or her client. He or she is regarded as an officer of the court and he or she is required to uphold the law and maintain private trust and public duty.

Trials are conducted on the basis of pleadings and accompanying documents filed and exchanged by the parties and the oral testimony of witnesses or experts at the trial. The claimant commences trial by calling his or her witnesses or experts to proffer evidence on his or her behalf. In states where reformed rules have been adopted, the witnesses are required to adopt their written statements on oath and to tender documentary evidence. The defendant would be permitted to cross-examine the claimant's witnesses or experts. Thereafter, the claimant may re-examine the witnesses or experts to clarify any ambiguity arising from cross-examination, if necessary. The defendant would then open the defence by calling his or her witnesses or experts who will adopt their written statements on oath and tender documentary evidence in support of the defence. The claimant will be permitted to cross-examine these witnesses or experts. The defendant may re-examine the witnesses or experts, if necessary.

When the trial is concluded, parties file and exchange final written addresses in which they assess the evidence, apply the law to the facts of the case and analyse the strength of their case and the weakness of the other party's case. Parties adopt their final written addresses and the judge is required to deliver judgment within a period of three months from the adoption of written addresses.

Trials may be fixed to run on consecutive days or periodically, as the business of the court may permit. Trials are adjourned to a later date, when the business of the court makes it expedient to do so. Proceedings are conducted in public, except when the judge directs otherwise, for the protection of, for example, infants or national security, in accordance with statute.

### Group actions

**7 | Are there class, group or other collective action mechanisms available to product liability claimants? Can such actions be brought by representative bodies?**

Representative actions are permitted where a similar cause of action has accrued to more than one person, or the right of more than one person has been infringed, arising from the same or related circumstances. One or more of such persons is entitled to commence an action on behalf of or for the benefit of the others, against the person who infringed their rights, and to seek common relief against that person. This procedure also applies to numerous persons jointly defending a claim. The Supreme Court held in *Idise v William International Limited* [1995] 1 NWLR (Pt 370) 142 at 152-153 H-A that the prerequisite for sustaining a representative action is that the parties to be represented and those representing them must share a common interest and common grievance in the subject matter of litigation and must seek common relief beneficial to all. Thus, representatives may bring an action on behalf of claimants only if they share a common interest and common grievance with the claimants they represent and the relief or reliefs sought must be beneficial to all the persons represented. (See the decision of the Supreme Court in *Durbar Hotel Plc v Mr Abella Ityough & Ors* [2017] 7 NWLR (Pt 1564) 256 at 269-270.) Otherwise, such representation would be disallowed on the ground that the representative action is incompetent and the court lacks jurisdiction to entertain it. In such circumstances, the representative action would be struck out.

Most of the rules of the state High Courts on class actions do not apply to product liability claims. The FCT Rules stipulate, however, that class actions apply only to cases in which claimants apply for a declaration or order of injunction. Thus, product liability claims fall outside the scope of the rules of Nigerian courts on class actions, except for the FCT

Rules, which apply to product liability claims only where declarations or injunctions are sought in such claims.

Group actions are not provided for under Nigerian law.

### Timing

**8 | How long does it typically take a product liability action to get to the trial stage and what is the duration of a trial?**

The period within which a product liability action is set down for trial varies depending on the workload of the judge to whom the matter is assigned, the availability and number of witnesses, the complexity of the matter, the amount of documentary evidence involved, the disposition of counsel and the length of the pretrial conference. The pretrial conference is usually required to be completed within three months. However, this period is frequently extended by the chief judge of the court (or the judge, in Lagos state) on application by either party, where matters remain uncompleted at the expiry of the deadline. This frequently occurs when several contested interlocutory applications are filed by parties at the pretrial stage.

Ordinarily, parties may reasonably expect to secure trial dates within a period of six to eight months from the close of pleadings.

The trial may be concluded within six months to two years, if the facts in dispute are relatively straightforward.

## EVIDENTIARY ISSUES AND DAMAGES

### Pretrial discovery and disclosure

**9 | What is the nature and extent of pretrial preservation and disclosure of documents and other evidence? Are there any avenues for pretrial discovery?**

In states where reformed rules have been adopted, the rules of court provide for mandatory preliminary hearings called 'pretrial conferences', or 'case management conferences' in Lagos state (Order 25 of the Lagos Rules). The pretrial or case management conference is presided over by a judge and all interlocutory matters including discovery are concluded at this stage.

Relevance is the basis for discovery under Nigerian law. An application may be made, usually within seven days of the close of pleadings, for discovery on oath of any document that is or has been in the possession, custody or control of the other party relating to any matter in question in the suit. This procedure permits general discovery requests, provided that they are relevant to facts at issue in the case. The other party has a period of seven days to file an answer on oath exhibiting copies of the requested documents. If a party intends to object to the production of the requested documents, such a party may refuse to provide the requested documents and state the grounds for refusal in an affidavit – for example that the documents are not relevant to the facts in issue, as disclosed in the pleadings filed in the action, or that they are privileged.

The rules of court also provide for the delivery of interrogatories in writing on either party for his or her examination on oath on any issue related to the case, usually within seven days of the close of pleadings. The other party is required to file an answer on oath within seven days and in that answer may object to answering any of the interrogatories on the ground that it is scandalous, irrelevant, or tantamount to fishing. The objection would be heard at the pretrial or case management conference.

An application for discovery may be refused if it is considered unnecessary. In cases of default, the court may order the attachment of a party for disobedience. Counsel may also be the subject of attachment for disobedience, if it is shown that he or she neglected, without reasonable excuse, to give notice of the discovery request to his or her client.

## Evidence

### 10 | How is evidence presented in the courtroom and how is the evidence cross-examined by the opposing party?

During the examination-in-chief of a witness by counsel to the party on whose behalf evidence is to be proffered, evidence is presented in the form of written statements on oath. Introductory questions are directed at the witness during the examination-in-chief and he or she is required to adopt his or her written statement on oath. Aside from introductory questions, only questions that lay foundation for the tendering of pleaded documentary evidence are permitted.

Counsel to the opposing party has a right to cross-examine the witness for the purpose of testing his or her veracity or impugning his or her credibility. Thereafter, if necessary, counsel to the party that called the witness may re-examine him or her solely for the purpose of clarifying any ambiguity arising during cross-examination.

## Expert evidence

### 11 | May the court appoint experts? May the parties influence the appointment and may they present the evidence of experts they selected?

The court has the power to appoint an expert where it would be in the interest of justice to do so, to help reach a just conclusion of the dispute. This occurs where expertise is required in a particular field of science or foreign law relevant to the case. The expert may present evidence by oral testimony and written report. When appointed, the expert is a witness of the court and not that of either party to the proceedings. Parties to the suit may cross-examine the expert only with leave of the court.

Parties may appoint experts to present evidence on their behalf. Such evidence is usually presented in the form of oral testimony and may be accompanied by a written report. Generally, the role of an expert witness is to assist the court in gaining a proper understanding of the issues in his or her area of expertise, regardless of the party who selected him or her to give evidence. The procedure for examining, cross-examining or re-examining an expert witness is the same as for any other witness. The evidence of an expert must be proffered by way of a written statement on oath and the academic qualifications and experience of the expert must be set out therein. It is usual for pleaded documentary evidence in the nature of an expert opinion prepared by the expert to be tendered in evidence through him or her. The testimony of the expert is not binding on the court, as it is the duty of the court to determine the issues in question by, inter alia, evaluating the testimony of the expert in relation to the pleadings and the totality of evidence presented by the parties.

## Compensatory damages

### 12 | What types of compensatory damages are available to product liability claimants and what limitations apply?

The injured party in a product liability claim is entitled to damages for bodily injury, such as pain or illness, and for psychological injury such as agony, discomfort or negative feeling. Damages may also either be purely economic, such as loss of income, loss of or damage to property, loss of business or expectation of profit; or non-economic, such as loss of life expectancy. In addition, the injured party may also recover the cost of medical expenses and purchase of the defective product. On this point, see the decision of the Supreme Court in *Okwejinor v Gbakeji* [2008] 5 NWLR (Pt 1079) 172.

The guiding principle in the award of damages is the doctrine of *restitutio in integrum*. This means that the plaintiff would be awarded such monetary compensation, as will restore him or her to his or her former position prior to the injury suffered to such extent as is possible.

Under Nigerian law, damages are generally categorised as either 'general' or 'special'. General damages represent compensation for the direct natural consequence or probable consequence of the action complained of by the claimant. Special damages represent compensation for the exact or precise loss of the claimant, as proved by the claimant on the basis of pleadings and evidence presented before the court. There are other categories of damages such as nominal, exemplary, prospective or anticipatory damages.

There is no statutory limitation on the quantum of damages to be awarded. However, there are a few common law limitations that affect the wholesale application of the doctrine of *restitutio in integrum*. These limitations are that:

- a judge, eschewing sentiments, is expected to be fair and reasonable in the award of damages, having regard to the pleadings and evidence placed before him or her (see the decision of the Supreme Court in *Lagos State City Council v Unachukwu* (1978) 1 ANLR 92);
- a judge is required to give reasons for an award of damages based on his or her assessment of the quantum of such damages from evidence adduced before him or her (see *Lagos State City Council*);
- the award of damages must be on a case-by-case basis having regard to the individual facts and circumstances of the case;
- although, as a matter of law, there may be a presumption that general damages flow from a wrong complained of by the claimant, he or she must establish the quantum by evidence; and
- in negligence claims, once a claimant has established that the defendant owes him or her a duty of care and is in breach of that duty, which has caused damage, then he or she must demonstrate that the damage was sufficiently proximate to the breach to entitle him or her to compensation. The claimant must also show that the damage was reasonably foreseeable, otherwise this limits the extent of compensation accruable to the claimant.

## Non-compensatory damages

### 13 | Are punitive, exemplary, moral or other non-compensatory damages available to product liability claimants?

Punitive or exemplary damages are awarded sparingly, only in cases where the injury caused to a claimant is one arising from an intentional or malicious act of the defendant.

The Supreme Court, in *Odugu v AG Federation & Others* [1996] 6 NWLR (Pt 456) 508, held that punitive or exemplary damages are only awarded where they are specifically pleaded by the claimant, and the claimant must establish that the defendant acted with malicious intent, recklessness, cruelty, or with flagrant disregard of the law (see *Odiba v Azege* [1998] 9 NWLR (Pt 566) 370 at 382 B-F).

## LITIGATION FUNDING, FEES AND COSTS

### Legal aid

### 14 | Is public funding such as legal aid available? If so, may potential defendants make submissions or otherwise contest the grant of such aid?

The Legal Aid Act, Chapter L9 of the Laws of the Federation of Nigeria 2004 (the LAA) establishes the Legal Aid Council (LAC), which provides public funding for persons who lack the means to institute or defend an action. Product liability claims involving accidents may qualify for funding under the LAA. The LAA stipulates that only persons earning an income of less than 5,000 naira per annum shall be entitled to legal aid. It, however, empowers the President of Nigeria to make regulations for legal aid to be given on a contributory basis to persons whose income exceeds 5,000 naira per annum, subject to certain conditions. We are, however, not aware that such regulations have been made or published.

The LAA provides that a person receiving legal aid shall not be liable to pay fees pursuant to any rules of court and the LAC is under no obligation to pay costs awarded against a person receiving legal aid. There is no statutory requirement to notify the opposing party of this funding arrangement.

In Lagos state, legal aid is provided to indigent residents of the state by the Office of the Public Defender (OPD) pursuant to the Lagos State Office of the Public Defender Law (LSOPDL). Such aid may be provided in respect of any civil or criminal matter in which the cause of action or part thereof arises in Lagos state. Under the LSOPDL, a person receiving legal aid shall not be liable to pay fees pursuant to any rules of court and the OPD is under no obligation to pay costs awarded against a person receiving legal aid. There is no statutory requirement to notify the opposing party of this funding arrangement.

Nonetheless, a potential product liability claimant who lacks the means to fund an action may apply in writing to the chief judge of a state High Court for leave to sue in forma pauperis. Actions in forma pauperis are permitted by most of the rules of the state High Courts and the High Court of the FCT. An applicant applies to court for leave to sue in forma pauperis, deposing to an affidavit stating that he or she is unable to afford the services of a legal practitioner. If the application and the proposed action are considered meritorious, the court may admit the applicant to sue in forma pauperis by assigning a legal practitioner to represent the applicant and the applicant shall be partly or wholly exempted from paying court fees and any costs awarded. The procedure shall be revoked if it is subsequently discovered that the party suing in forma pauperis misrepresented facts to obtain such benefit. The rules of court do not expressly provide a procedure whereby the opposing party may object to an application to sue in forma pauperis, as it would appear that the application is required to be made before the action is filed and processes are served on the opposing party. There is no statutory requirement to notify the opposing party of this funding arrangement.

### Third-party litigation funding

#### 15 | Is third-party litigation funding permissible?

Under Nigerian law, third-party litigation funding is not permissible, as it would be treated as champertous, and therefore void, for being contrary to public policy.

### Contingency fees

#### 16 | Are contingency or conditional fee arrangements permissible?

Contingency fee arrangements are permissible in Nigeria. Rule 50 of the Rules of Professional Conduct for Legal Practitioners 2007 expressly permits them. Although Rule 51 prohibits a legal practitioner from funding his or her client's litigation, it permits a legal practitioner to, in good faith, advance expenses, either as a matter of convenience or subject to reimbursement. The foregoing arrangements constitute exceptions to the rules on maintenance and champerty, which exist in Nigeria.

The Rules of Professional Conduct require the following:

- a legal practitioner must advise his or her client of the details and effect of the contingency fee arrangement and must afford his or her client the opportunity of reviewing the arrangement before retaining him or her; and
- the contract for a contingency fee arrangement must not be drafted in a manner prejudicial to the interest of the client and the legal practitioner's remuneration must not be unreasonably excessive.

### 'Loser pays' rule

#### 17 | Can the successful party recover its legal fees and expenses from the unsuccessful party?

There is a 'loser pays' rule in Nigeria. However, real costs incidental to the conduct of legal proceedings, at both the interlocutory stage and final judgment, are not borne by the loser on an indemnity basis. Costs are awarded at the discretion of the court and tend to be nominal and insufficient to cover the successful party's counsel fees and expenses. There are only a very few instances of real costs being awarded by Nigerian courts to successful litigants.

## SOURCES OF LAW

### Product liability statutes

#### 18 | Is there a statute that governs product liability litigation?

There is no specific statute in Nigeria that governs product liability litigation.

### Traditional theories of liability

#### 19 | What other theories of liability are available to product liability claimants?

In Nigeria, the theories of liability available to product liability claimants are fault liability and strict liability. The main sources of product liability law are English common law, as adopted from the United Kingdom, domesticated by local statutes and further developed in Nigerian case law and Nigerian statutes. Product liability claims are usually based on contract and tort law, as well as Nigerian consumer protection statutes. Claimants mostly seek damages for breach of duty of care or negligence that results in damage.

The common law principle enunciated in *Donoghue v Stevenson* (1932) AC 562 constitutes the guiding principle on negligence in Nigeria. The principle was cited with approval and applied by the Supreme Court in *Nigerian Bottling Company Limited v Ngonadi* [1985] 1 NWLR (Pt 4) 739 and *Okwejiminor v Gbakeji* (see question 12). It postulates that, where a party has suffered injury as a result of a breach of duty of care owed by a manufacturer, the manufacturer may be liable to compensate the injured party if the injury is a reasonably foreseeable consequence of the act of the manufacturer. For a claimant to succeed in his or her claims, however, the injury must not be too remote from the act of the manufacturer.

Product liability claims may also be commenced under contract law where a party has breached the terms of a contract in respect of the specification of the goods supplied or has failed to supply goods that are fit for purpose or are of merchantable quality. A party need not have suffered any injury to institute a product liability claim under contract law.

### Consumer legislation

#### 20 | Is there a consumer protection statute that provides remedies, imposes duties or otherwise affects product liability litigants?

The following consumer protection statutes provide remedies and impose duties and obligations that affect product liability claims.

#### Consumer Protection Council Act, Chapter C25 of the Laws of the Federation of Nigeria 2004 (the CPCA)

The CPCA establishes the Consumer Protection Council (CPC) to:

- provide speedy redress for consumer or community complaints through negotiation, mediation and conciliation;

- seek means of removing hazardous products from the market and ensure offenders replace such products with safer and more appropriate alternatives;
- publish lists of products, the consumption and sale of which have been banned, restricted or have not been approved by Nigerian or foreign governments; and
- cause offenders to protect, compensate and provide relief and safeguards for injured consumers suffering adverse effects of harmful, violent or hazardous technologies.

The CPCA vests the following powers on the CPC, to:

- apply to court to prevent the circulation of any product that constitutes an imminent public hazard;
- compel a manufacturer to certify that all safety standards are met in their products;
- demand production of labels showing date and place of manufacture of a commodity, as well as certification of compliance;
- compel manufacturers, dealers and service companies, where appropriate, to give public notice of any health hazards inherent in their products; and
- ban the sale, distribution or advertisement of products that do not comply with health or safety regulations.

A consumer or community that has suffered loss, injury or damage as a result of the use of any good, product or service may make a complaint in writing and seek redress through a state committee. Upon investigation, if it is established that the consumer's right has been violated or a wrong has been committed by way of trade, provision of services or advertisement, which has caused injury or loss to the consumer, the council may take such action as it deems necessary, in addition to the right of the consumer to pursue legal action. The Act therefore provides relief that is supplemental to redress by way of litigation.

### Sale of Goods Law

The English Sale of Goods Act 1839 has been domesticated with relevant modification in the various states of Nigeria.

The Sale of Goods Law of Lagos State, Chapter S1 of the Laws of Lagos State 2015 (the SGL) stipulates that, where a contract provides for sale of goods by specification, an implied condition that the goods shall correspond with the said specification arises. Also, where the buyer has expressly or impliedly made known to the seller the particular purpose for which the goods are required, an implied condition arises that the goods shall be reasonably fit for such purpose and that the goods are of merchantable quality. If the seller breaches any of the implied warranties or conditions, the buyer may maintain an action against the seller for damages for breach of warranty or condition. It provides a supplementary cause of action to the rights of the consumer under common law. The SGL, however, expressly permits the insertion of exclusion clauses in contracts of sale with negative implied warranties or conditions. Over the years, Nigerian courts, in response to growing consumerism, challenged the efficacy of exclusion or exemption clauses in contracts of sale of goods by drawing a distinction between general implied warranties or conditions and those warranties or conditions that constitute fundamental terms of a contract. Fundamental terms were regarded as terms of a contract of sale that were so critical to its existence that they go to its root and neither party was permitted to resile from them. The breach of such terms entitled the innocent party to treat the contract as having been repudiated and to terminate it. In contrast, breach of a non-fundamental term would entitle the innocent party to claim only damages for the breach. (See *A Ogwu v Leventis Motors Ltd* (1962) NNLR 115.) Nigerian courts eventually softened their approach to exclusion or exemption clauses. In *Narumal & Sons v NBTC Ltd* [1989] 2 NWLR (Pt 106) 730 at 751-752 H-A and 768 E, the Supreme Court held

that an exclusion or exemption clause could, under certain circumstances, defeat a fundamental term of a contract, and that in each case, the question is one of construction of the contract as to whether the parties intended that an exclusion clause was to exempt the defaulting party from the consequences of a fundamental breach of the contract of sale. If the answer was in the affirmative, the exclusion clause would be upheld. Otherwise, it would be nullified.

### Law Reform (Torts) Law

The Law Reform (Torts) Law of Lagos State, Chapter L82 of the Laws of Lagos State 2015 (the LRTL) created a statutory cause of action by imposing strict liability on producers of defective products. It stipulates that a manufacturer or producer, importer, supplier or retailer is liable for damage caused wholly or partly by a defective product. The LRTL, however, prohibits exclusion clauses in contracts of sale of goods where the statutory cause of action created under the LRTL forms the basis for the claim.

### Consumer Protection Agency Law

The Consumer Protection Agency Law of Lagos State, Chapter C13 of the Laws of Lagos State 2015 (the CPAL) establishes the Lagos State Consumer Protection Agency (CPA). The CPAL contains provisions similar to those of the LRTL set out above mutatis mutandis. Additionally, the CPAL sets out the following functions of the CPA, inter alia:

- ensure the replacement of hazardous products with safe products and seek ways and means of eliminating hazardous products from the market in conjunction with the relevant government agencies;
- initiate investigation in its own name, whether upon the receipt of a complaint or not;
- cause an offending company, firm, trade association or individual to compensate or provide relief to injured consumers or communities as a result of adverse effects of harmful products;
- cause, where necessary, quality tests to be concluded on a consumer product; and
- apply to court to prevent the circulation of any product that constitutes an imminent public hazard, enforce and protect the rights of consumers, or seek relief or compensation for injured consumers where negotiation, conciliation or mediation fails.

There is also the Standards Organisation of Nigeria Act (No. 14 of 2015), which empowers the relevant government agency to formulate and apply standards in the regulation of both imported and domestically manufactured goods.

### Product-specific statutes

Certain statutes that address specific products provide remedies and causes of action. These include:

- the National Agency for Food and Drugs Administration and Control Act, Chapter N1 of the Laws of the Federation of Nigeria 2004;
- the Food, Drugs and Related Products (Registration, etc) Act, Chapter F33 of the Laws of the Federation of Nigeria 2004;
- the Tobacco Smoking (Control) Act, Chapter T6 of the Laws of the Federation of Nigeria 2004;
- the Trade Malpractices (Miscellaneous Offences) Act, Chapter T12 of the Laws of the Federation of Nigeria 2004; and
- the Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act, Chapter C34 of the Laws of the Federation of Nigeria 2004.

## Criminal law

### 21 | Can criminal sanctions be imposed for the sale or distribution of defective products?

Under the CPCA, any person who contravenes any Nigerian consumer protection statute by the sale or offering for sale of unsafe or hazardous goods, is liable upon conviction to a fine of 50,000 naira or imprisonment for a term of five years, or both. Further, all the statutes discussed in question 20 (except the SGL) impose criminal sanctions, such as imprisonment and fine for breach of duties, standards or obligations imposed or stipulated in relation to the sale or distribution of defective products.

## Novel theories

### 22 | Are any novel theories available or emerging for product liability claimants?

There are no novel theories available or emerging for product liability claimants, as product liability litigation is still evolving in Nigeria.

## Product defect

### 23 | What breaches of duties or other theories can be used to establish product defect?

Various statutes provide standards, regulations and warning requirements that a manufacturer must fulfil before its products are placed on the market. Any breach of such standards, regulations or warning requirements may be used to establish product defect (see question 20). An example is the SGL, which creates implied warranties that a product matches its specification, is fit for purpose and is of merchantable quality. A breach of the implied warranties may be a basis for establishing product defect. Also, a breach of the Tobacco Smoking (Control) Act's requirement that the packaging of tobacco products must bear warnings and a description of the content of the product could result in liability under the statute. Further, a breach of the duty of care under the law of tort in addition to the resulting damage will establish product defect (see question 19).

## Defect standard and burden of proof

### 24 | By what standards may a product be deemed defective and who bears the burden of proof? May that burden be shifted to the opposing party? What is the standard of proof?

Each statute referenced in question 20 sets product standards for manufacturers and sellers. A product is deemed defective when these standards are not met.

The burden of proof is borne by the party claiming to have suffered injury as a result of a defect in the product. The general principle is that the onus of proof is on the one who asserts, not on the one who denies (section 131 of the Evidence Act (No. 18 of 2011)). In civil litigation, while the legal burden of proof is fixed on the claimant, the evidential burden shifts from one party to the other. The evidential burden of proof lies on the party against whom judgment would be given if no further evidence were adduced. The burden oscillates until all the issues in the parties' pleadings are exhausted. However, the legal burden may lie on the defendant if the plaintiff pleads the doctrine of *res ipsa loquitur* ('the thing speaks for itself') in a claim for negligence. The doctrine of *res ipsa loquitur* may not apply in all cases of negligence. Its applicability is dependent on the peculiar circumstances surrounding each case. The Court of Appeal, in the case of *Nigeria Breweries Plc v David Audu* 52 NIPJD [CA 2009] 235/2005, held that, for the doctrine of *res ipsa loquitur* to apply, 'there must be reasonable evidence of negligence' and certain conditions must exist. These are:

- proof of the occurrence of an unexplained event;
- the occurrence would not have happened without the negligence of a party other than the plaintiff; and
- the circumstances must point to the negligence of the defendant specifically. See *Etukudo Ekefere Nsima v NBC* (2014) LPELR-22542 (CA) in which the Court of Appeal held that 'the essence of the maxim is that an event which in the ordinary course of things, was more likely than not to be caused by negligence was by itself evidence of negligence depending, of course, on the absence of explanation'.

Hence, the doctrine was not applied in *Nsima v NBC* because an explanation for the occurrence of the event complained of was offered by the claimant in his pleadings and evidence. In *Nigerian Bottling Company Plc v Olanrewaju* [2007] 5 NWLR (Pt 1027) 255 at 269 C-F, the Court of Appeal held that a higher standard of proof applies in food poisoning cases. The claimant must establish a direct link between the food or drink ingested and the subsequent ailment that he or she suffered. The rationale for the foregoing is the imperative of stemming a floodgate of spurious claims against manufacturers of consumables that would defeat the very mischief sought to be cured by placing on such manufacturers a duty of care to consumers of their products.

The standard of proof in civil cases is proof by a preponderance of evidence on a balance of probabilities.

## Possible respondents

### 25 | Who may be found liable for injuries and damages caused by defective products?

In a claim for negligence, the liability for injuries and damages caused by defective products is borne by those persons that the claimant proves owed him or her a duty of care. This usually includes the seller or retailer and the distributor of the defective product, the wholesaler and any other person in the chain of distribution, up to the manufacturer, producer or importer. The Supreme Court in *Okwejiminor v Gbakeji* (see question 19) held that an injured party may commence a product liability action against a manufacturer or its agents.

In a contractual claim, liability is borne solely by the defaulting party to the contract. In the case of consumer protection statutes in which statutory causes of action with strict liability have been created, the manufacturer or producer or any other participant in the chain of distribution may be found liable for injuries or damages caused by defective products.

## Causation

### 26 | What is the standard by which causation between defect and injury or damages must be established? Who bears the burden and may it be shifted to the opposing party?

The claimant must establish that the injury or damage suffered was a direct consequence of the defect in the product. Thus, a claimant is required to establish a connection between the defective product and the injury suffered to succeed in a product liability action. In doing so, he or she must prove that the damage is not too remote and that it is a foreseeable consequence of the defendant's action.

See question 24 regarding burden of proof.

### Post-sale duties

- 27 | What post-sale duties may be imposed on potentially responsible parties and how might liability be imposed upon their breach?

Under the CPCA, manufacturers and distributors, on becoming aware of any unforeseen hazard arising from the use of a product, which they placed on the market, are required to immediately cause the product to be withdrawn from the market. If directed by the CPC, manufacturers, dealers and service companies are required to give public notice of such danger. Failure to comply with the foregoing or any other corrective actions renders the defaulter liable, on conviction, to a fine of 50,000 naira or imprisonment for five years, or both.

## LIMITATIONS AND DEFENCES

### Limitation periods

- 28 | What are the applicable limitation periods?

The limitation periods applicable in a product liability action would depend on whether the cause of action is one arising out of contract or tort. Each state of Nigeria has enacted a limitation law. The Limitation Act (Decree No. 88 of the Laws of the Federation of Nigeria 1966) is applicable in the FCT. There is a slight difference in the periods of limitation in certain states. In Lagos state, claims founded on contract or tort are subject to a limitation period of six years from the date the cause of action accrued. Claims for damages arising from negligence or breach of duty of care involving personal injury must be instituted within three years of the date the cause of action accrued.

### State-of-the-art and development risk defence

- 29 | Is it a defence to a product liability action that the product defect was not discoverable within the limitations of science and technology at the time of distribution? If so, who bears the burden and what is the standard of proof?

This defence is not recognised under Nigerian law.

### Compliance with standards or requirements

- 30 | Is it a defence that the product complied with mandatory (or voluntary) standards or requirements with respect to the alleged defect?

Compliance with statutory standards does not constitute a defence to product liability claims predicated on common law, once it is shown that the duty of care owed by the defendant to the claimant was breached and the breach resulted in damage to the claimant.

### Other defences

- 31 | What other defences may be available to a product liability defendant?

The traditional defences in tort actions are available to a product liability defendant. These defences are negligence of the claimant or contributory negligence, intervening force, failure to mitigate loss, remoteness of damage or an act of a third party. In contract, the defendant may rely on limitation of liability clauses, express waivers or disclaimers. Generally, a defendant may raise the defence of limitation of actions.

### Appeals

- 32 | What appeals are available to the unsuccessful party in the trial court?

Under Nigerian law, any party that is dissatisfied with the decision of a court has a Constitutional right of appeal to an appellate court. As discussed earlier, the Court of Appeal has jurisdiction over appeals from the state and federal High Courts. In turn, the Supreme Court is the court of final appeal. It has appellate jurisdiction over all appeals from the Court of Appeal. The final decision of a trial court sitting at first instance and an interlocutory decision on grounds of law may be appealed as of right while an interlocutory decision on grounds of fact or mixed law and fact may be appealed with leave of court. The final decision of the Court of Appeal on grounds of fact or of law and fact may be appealed to the Supreme Court with leave of court, while appeals on grounds of law, are appealed as of right.

## JURISDICTION ANALYSIS

### Status of product liability law and development

- 33 | Can you characterise the maturity of product liability law in terms of its legal development and utilisation to redress perceived wrongs?

There is no specific legislation on product liability litigation in Nigeria. The CPCA does not impose strict liability for default. The federal legislation on legal aid does not cover product liability claims and there are no court rules on class or group actions in product liability claims. The foregoing demonstrates a need for further development of product liability law in Nigeria. Nevertheless, product standards and safety regimes have been strengthened in terms of monitoring, recall and enforcement by the relevant government agencies and this has provided protection to consumers on a broader scale.

The Supreme Court, by entering judgment for the consumer in *Okwejiminor v Gbakeji* (a case of consumption of a contaminated beverage (see questions 19 and 25)), will encourage consumers in similar circumstances to explore the possibility of recompense through civil litigation and we may soon begin to experience more robust challenges by consumers against manufacturers, importers, distributors and retailers of defective products.

Thus, Nigerian product liability law is evolving and it is expected that it will develop substantially when the legislature intervenes with the passage of a product liability litigation statute providing legislation-based remedy for breaches of consumer rights, the introduction of strict liability default and provision for legal aid in respect of product liability claims.

### Product liability litigation milestones and trends

- 34 | Have there been any recent noteworthy events or cases that have particularly shaped product liability law? Has there been any change in the frequency or nature of product liability cases launched in the past 12 months?

At present, there are no events or cases in this regard and there is no apparent change in the frequency or nature of product liability cases filed in the past 12 months.

**Climate for litigation**

- 35 | Describe the level of 'consumerism' in your country and consumers' knowledge of, and propensity to use, product liability litigation to redress perceived wrongs.

The enactment of several pieces of legislation regulating product standards has increased the level of consumerism in Nigeria. Relevant government agencies have also intensified public awareness campaigns on consumerism and introduced regulations and programmes designed to protect the interests of the consumer, such as the 2005 regulation made by the Consumer Protection Council requiring all products manufactured, imported, advertised or sold in Nigeria to be registered with the Consumer Protection Council, the Products and Services Tracking System introduced in 2011 for the monitoring of products and services in Nigeria, and the introduction of liability insurance.

With the advent of active consumer protection organisations, such as the Consumer Rights Advocacy League, it is hoped that the level of consumerism in Nigeria will increase significantly.

**Efforts to expand product liability or ease claimants' burdens**

- 36 | Describe any developments regarding 'access to justice' that would make product liability more claimant-friendly.

There are no known developments regarding access to justice.

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