

STREN & BLAN PARTNERS' UPDATE

ALIGNING NIGERIA'S PRODUCT LIABILITY LAWS WITH INTERNATIONAL STANDARDS: EXPLORING THE NEW EU PRODUCT LIABILITY DIRECTIVES



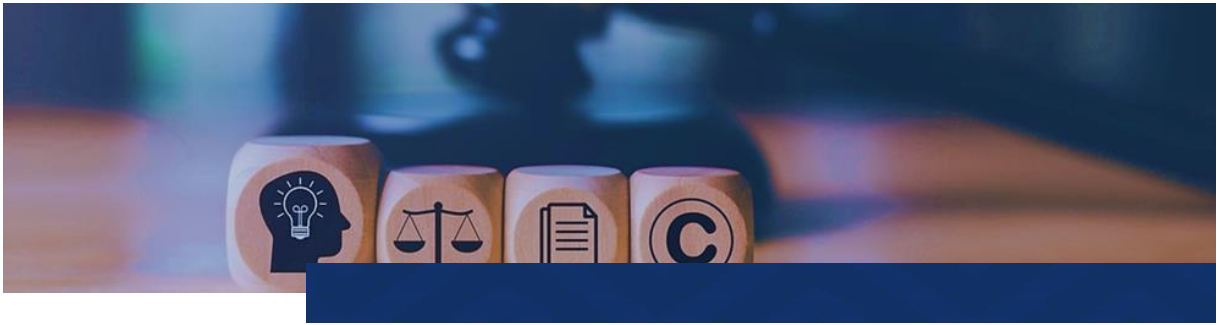
INTRODUCTION

On 12th March, 2024, the European Parliament enacted the New Product Liability Directive ("PLD" or "the Directive"), a revolutionary legislation that marked a significant transformation of the European Union's Product Liability landscape. This Directive was the outcome of intense negotiations culminating in a political agreement reached in October 2023. Through the PLD, the EU aims to update its Product Liability framework to keep pace with the digital age and the rapid development of technology. The Directive makes it easier for consumers to obtain compensation for damages arising from defective products including software products and Artificial Intelligence (AI). This is a major transformation of the EU's product liability landscape, which had remained unchanged for the last 40 years.

In Nigeria, before 2018, civil liability for product defects was essentially fault-based under the law of Contract and the tort of Negligence. This made it extremely difficult for consumers to recover damages against manufacturers and sellers of defective products and constituted a serious deterrence to consumers seeking redress for loss or damage resulting from the use of defective products. Nigeria, however, witnessed a transformation of product liability claims following the enactment of the Federal Competition and Consumer Protection Act (FCCPA) in 2018. Through this legislation, Nigeria moved from the traditional fault-based contract and negligence to a non-fault-based approach to product liability claims, or in other words, a strict liability regime. Despite the enactment of the FCCPA, most product liability cases in Nigeria are still decided based on the tort of Negligence, indicating that a fault-based approach is still prevalent in the Nigerian courts.

Nonetheless, both the EU and Nigeria have taken significant steps towards improving their product liability regimes to better protect consumers, with the new EU Directive, the EU has positioned itself as a haven for safe products and possibly the centre for product liability claims.

Nigeria could perhaps benefit from adopting features of the new PLD to further advance its product liability laws. This discourse delves into Nigeria's current product liability laws and the extent to which they conform to international standards, particularly in light of the PLD. More so, this analysis aims to identify the innovations introduced by the New Directive. Ultimately, the goal is to examine opportunities for harmonization and improvement, thereby enhancing consumer protection and promoting fair competition in Nigeria.



THE NEW PRODUCT LIABILITY DIRECTIVE (PLD) AND THE PRODUCT LIABILITY LANDSCAPE IN THE EUROPEAN UNION (EU)

Before the PLD, the last significant change in the legal framework was when the first Product Liability Directive was adopted in 1985, and when the scope of liability was extended to include agricultural and fishery products in 1999. Following at least four (4) reports from the Commission to the European Parliament, the Council and the European Economic and Social Committee on Product Liability for Defective Products; the EU aims to change, update, and modernize the existing legal framework with the new PLD.

The proposed changes include, among others, Article 4(1), which introduced a new definition of a "product", the clarification of the concept of "defect", the expansion of the scope of liability to include digital content, and the strengthening of the rights of victims to bring claims against producers. These changes are expected to have a significant impact on the product liability landscape in the EU and will require producers to take additional measures to ensure compliance with the new regulations.

Likewise, some of the significant updates to product liability claims in the EU following the adoption of the new PLD can be summarized as follows:

- The PLD has widened the scope of potentially liable entities for products or components of products, including software and related services. The scope of the PLD now includes services integrated into a product but generally excludes standalone services – Article 1(2), (3) and (4). This means that companies in the EU that offer business-to-business products, importers, authorized manufacturers' representatives, or fulfilment service providers may be liable for product liability claims under the new PLD.
- The PLD has firmly established the State-of-the-Art defence in the EU. The State-of-the-Art defence exempts manufacturers from liability where the state of scientific and technical knowledge at the relevant time (that is, the time the product was manufactured) was such that the defectiveness could not be discovered – Article 11(1). However, Member States have the discretion to omit this exemption when implementing the PLD – Article 18.
- The PLD mandates that companies must provide disclosure to claimants, even in collective product liability claims. This disclosure must be made available across all Member States – Article 9.

- The PLD has been updated to provide compensation for additional types of damages to natural persons. This includes damage to mental health that has been medically recognized, as well as damage resulting from the loss or corruption of data, but this only applies if the data is not used for work purposes – Article 6 (1).
- The PLD has been updated to include standalone software, including artificial intelligence (AI), with only a few limited exceptions. The PLD aims to ensure that products, particularly those from the Artificial Intelligence (AI) Industry, are safe and free from defects that could potentially harm consumers, requiring companies to take the necessary steps to comply with the PLD to avoid any legal or financial consequences – Introductory Paragraphs (13).
- The PLD outlines specific scenarios where a product is believed to be faulty or where there is a connection between a defect and the harm it causes. This is intended to assist those seeking compensation, including groups represented by a qualified representative, in pursuing legal action. The criteria for triggering rebuttable presumptions around a product's defectiveness and the link to damage seem relatively low. Additionally, other presumptions apply in cases where the claimant faces significant difficulties in proving the defect or the causal link due to the product's technical or scientific complexity – Article 10.
- The PLD outlines a fresh set of parameters that courts must evaluate to determine if a product is defective. These parameters include assessing whether the product adheres to pertinent safety requirements, such as cybersecurity protocols, and can acquire new features after deployment – Article 7.



THE LEGAL LANDSCAPE OF PRODUCT LIABILITY IN NIGERIA

As earlier stated, Nigeria operates both the fault-based and strict liability approach to product liability, with the majority of cases being decided on the Tort of Negligence. However, it is important to understand that product liability can arise from various scenarios, such as the distribution and sale of defective or hazardous products, breach of post-sales and pre-sale duties, representations, express or implied warranties, and most commonly, Negligence. Hence, it necessitates the need to comprehensively understand

the current and evolving jurisprudence of product liability in Nigeria. There is no sole statute dealing with the rights and obligations of parties concerning product liability in Nigeria. While the country lacks a dedicated enactment consciously addressing product liability, the existing laws and principles provide considerable insight into where and on whom liability lies, they are;

1. Common Law

In Nigeria, the common law principle explicated in *Donoghue v Stevenson* (1932) AC 562 serves as the guiding principle for negligence. This principle has been cited with approval and applied by the Supreme Court in *Nigerian Bottling Company Limited v Ngonadi* [1985] 1 NWLR (Pt 4) 739 and *Okwejinor v Gbakeji* [2008] 5 NWLR (Pt. 1079) 172 SC at 196. The principle provides that where a manufacturer breaches their duty of care, and such breach results in injury to another party, the manufacturer may be held liable to compensate the injured party if the injury is a reasonably foreseeable consequence of the manufacturer's act. However, for the claimant to successfully pursue their claims, the injury must not be too remote from the act of the manufacturer.

2. Law of Contract

In addition to tort law, product liability claims may also be pursued under contract law. Such claims arise where a party has breached the terms of a contract about the specification of the goods supplied, or has failed to provide goods that are fit for their intended purpose or are of merchantable quality. It is noteworthy that a party need not have suffered any injury to initiate a product liability claim under contract law. The mere fact of a breach of agreement by either party could warrant a cause of action to claim damages. Thus, it is essential for businesses and individuals to be cognizant of their contractual obligations and to ensure that they supply goods that meet the agreed **specifications and are fit for their intended purpose.**

3. Federal Competition and Consumer Protection Commission Act (FCCPCA), 2018

If a consumer sustains loss, injury, or damage stemming from the use of any good, product, or service, they have the right to file a complaint with the Federal Competition and Consumer Protection Commission (FCCPC). Upon a thorough investigation, if it is established that a consumer's rights have been violated or if a wrong has been committed in the course of trade, service provision, or advertising resulting in loss or injury to a consumer, the FCCPC may take such action as it deems necessary, in addition to the consumer's right to pursue legal action. Pursuant to sections 136-138 of the FCCPA 2018, manufacturers are subject to strict liability if a consumer sustains injury as a consequence of using their products. It is important to note that under the Act, any individual who contravenes a Nigerian consumer's rights, in the case of a natural person, is liable to imprisonment for a term not exceeding five years or to payment of a fine not exceeding 10 million Naira or both. In the case of a body corporate, the penalty is a fine of **NOT LESS**

THAN 10 million Naira or 10 percent of its turnover in the preceding business year, whichever is higher. Each director of the body corporate is liable to be proceeded against and dealt with in the same manner as that of a natural person. The FCCPA, therefore, furnishes supplementary relief to consumers beyond that which is available via litigation. By providing an effective means of redress, the FCCPA affords consumers enhanced protection against infringements of their rights.

4. The Law Reform (Torts) Law of Lagos State, 2015 (LRTL)

The Statute creates a cause of action by imposing strict liability on producers of defective products. It mandates that a manufacturer or producer, importer, supplier, or retailer is accountable for any damage caused wholly or partly by a substandard product. Conversely, the LRTL precludes the use of exclusion clauses in contracts of sale of goods when the basis of the claim is the statutory cause of action established under the LRTL. It is important to note that the LRTL is intended to provide consumers with greater protection by restricting the ability of suppliers to avoid liability for defective products. Any attempt by suppliers to limit their liability by contractually excluding the statutory cause of action created under the LRTL would be contrary to the policy objectives of the LRTL. Consequently, the prohibition of exclusion clauses in contracts of sale of goods is a crucial component of the LRTL's consumer protection framework.

5. The Sale of Goods Law (SGL) of Lagos State

The Act sets out that when a contract involves the sale of goods based on a specification, there is an implied condition that the goods should match the said specification. Additionally, if the buyer has made it clear to the seller the intended purpose of the goods, there is an implied condition that the goods are fit for said purpose and of merchantable quality. If the seller violates any of these implied warranties or conditions, the buyer can take legal action for damages. This Act supplements the consumer's rights under common law. The SGL permits exclusion clauses in sales contracts that negate implied warranties or conditions. However, the Supreme Court ruled in **Narumal & Sons v NBTC Ltd [1989] 2 NWLR (Pt 106) 730 at 751-752 H-A and 768 E**, that an exclusion clause can cancel a fundamental term of a contract under specific circumstances. The interpretation of the contract will determine whether the parties intended the exclusion clause to excuse the defaulting party from the consequences of a fundamental breach of the contract of sale. If so, the exclusion clause would be valid; otherwise, it would be invalid.



ALIGNING NIGERIA'S PRODUCT LIABILITY LAWS WITH INTERNATIONAL STANDARDS

Nigeria is one of the largest markets in Africa, but its laws on product liability are not as advanced as those in other continents, particularly the European Union. Although Nigerian courts are taking steps to address this issue, the absence of conscious and concerted efforts will only result in minimal progress over extended periods. This underscores the need to compare the EU's new directive on product liability with Nigeria's current situation, with pointers to what is yet to be done.

Some recommendations include:

1. Enacting a Legislation solely addressing Product Liability in Nigeria.

As previously stated, one of the significant limitations of Nigeria's Product Liability Jurisprudence is the lack of a dedicated legislation that specifically addresses issues related to Product Liability and Claims in Nigeria. This absence of a specific law impedes the development of novel legal theories available for product liability claimants and instead forces them to rely on scattered provisions on product liability, especially on the Tort of Negligence, found in other laws. The absence of clear and comprehensive legislation on product liability means that claimants are left with limited legal options when seeking compensation for damages resulting from defective products. It also makes it difficult for manufacturers to determine their legal obligations and potential liabilities regarding product safety. They also do not provide a clear framework for determining the standard of care required of manufacturers, the nature of defects that can lead to liability, and the extent of damages that can be claimed by the injured party. This can lead to inconsistent and unpredictable outcomes in product liability cases and can ultimately undermine consumer protection and safety.

Therefore, there is a need for Nigeria to develop comprehensive legislation on product liability that provides clear guidelines and standards for manufacturers and consumers alike. Such a law would help to promote product safety and consumer protection and ensure that claimants have an effective legal remedy for damages resulting from defective products.

2. The Inclusion of the “State of the Art” Defence

Incorporating a “State of the Art” defence into the Nigerian legal framework would bring a new dimension to the existing laws that govern manufacturers and retailers. This defence would provide a protective environment for manufacturers and retailers against any claims of liability for defects in their products arising from the non-existence of scientific knowledge at the time of manufacturing.

The current liability regime under the FCCPCA 2018 adopts the Strict Liability Principle, which holds manufacturers and retailers responsible for any defective products they produce or sell. However, the State-of-the-Art” defence would exempt manufacturers and retailers from liability if they can demonstrate that the current scientific knowledge was insufficient to detect the defect or that the defect was impossible to detect in the future. The defence would require manufacturers and retailers to prove that they used the best available technology, knowledge, and practices in the production and sale of their products.

This would provide a level of protection for manufacturers and retailers against any claims of liability arising from defects in their products. The defence would also encourage manufacturers and retailers to invest in research and development to keep up with the latest technology and practices.

Conversely, the defence would be a significant addition to the Nigerian legal system. It would provide a more balanced approach to liability for manufacturers and retailers while encouraging innovation and investment in research and development.

3. Expansion of the definition of “Product”

The software market in Nigeria is projected to experience a significant growth rate of 13.62% between 2024 and 2028, which would result in a market volume of US\$1.80bn in 2028.

This growth would position Nigeria as one of the largest software markets in the world. However, the rapid growth of the market also brings to light the need for adequate protection for its burgeoning consumer base. It is concerning that under the Federal Competition and Consumer Protection Commission (FCCPC) 2018, the definition of “product” only includes “goods and services”. This means that software and related products and services integrated into a product are not considered products under the current framework. This creates a significant gap in Nigeria's product liability landscape, leaving its consumers at risk. It is vital to address this gap in the framework as it is essential to safeguard the interests of the consumers.

While Nigeria may not have been aware of the need to expand the definition of products to include software, the PLD has brought this need to the fore and as such, it is expedient to expand the definition of "product" to include software and related products and services integrated into a product. This would be a crucial step towards protecting Nigeria's growing population. This would provide the necessary legal framework to ensure the accountability of software product manufacturers and service providers.

4. Adoption of the Principle of the Presumption of Fault

The principle of "presumption of fault" places the burden of proving fault on the manufacturer or retailer rather than the victim. This principle is a significant departure from the usual burden of proof in legal cases, where the victim is required to prove the fault of the other party. The Presumption of Fault should apply primarily to products that use overly advanced technologies or those where the claimant would face significant challenges in proving the defect or establishing a causal link due to the product's scientific or technical complexity.

This legal principle is expected to create a middle ground between fault-based and strict liability principles, making it easier for the person responsible to prove their actions rather than placing the burden of proof on the victim.

By placing the burden of proof on the responsible party, the presumption of fault creates a more equitable legal system, as it is often easier for the wrongdoer to prove what they did than for the victim to establish a case against them. Overall, this legal principle is an essential tool in ensuring that manufacturers and retailers remain accountable for their products' safety and quality.

5. Compensation for natural persons to new types of damage

As the world becomes more digitized, it's essential to ensure that the legal regime on product liability keeps pace with the changing landscape. In Nigeria, the use of digital products and software is growing rapidly, making it increasingly important to update the legal framework to reflect this new reality.

One area that requires attention is the issue of mental suffering caused by these products. Digital products and software can pose unique risks to users, from cyberbullying to online harassment as a result of a breach in user's data, which can cause significant emotional damage. Unfortunately, the current legal framework does not provide compensation for those who have had to endure such mental anguish.

To address this gap, the legal regime on product liability in Nigeria needs to be updated to include compensation for mental suffering caused by digital products or software, like its European counterpart. By including this form of compensation, the legal framework can provide a fair and just solution to those affected by the harmful effects of digital products or software. This would help ensure that individuals are adequately protected from the emotional harm caused by these products and software, while also promoting responsible use of these technologies.



CONCLUSION

While Nigeria has significantly improved its laws in recent years, there is a need to further update the laws and regulations to align with present-day global standards, considering the significant gap in its product liability jurisprudence. The European Union's latest directive on product liability presents a valuable benchmark for Nigeria to aspire to.

However, it is imperative to prioritize Nigerian solutions to Nigerian issues. The country must adopt tailor-made solutions that consciously fit into its needs while being at par with international standards. This is particularly crucial, given Nigeria's role as a significant player in Africa's market, which underscores the need for the country to prioritize product safety. Doing so will further enhance Nigeria's economic growth and global reputation.

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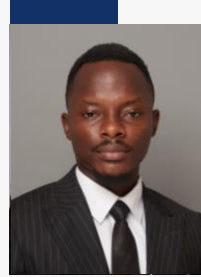
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