

# **Influencers Endorsements Gone Wrong: Liability for Defective Products**



## INTRODUCTION

The marketing landscape has evolved profoundly, revolutionizing how products and services are promoted and sold. A key aspect of this transformation is the strategic partnership between brands and social media personalities, including influencers and brands with substantial online visibility. By leveraging the endorsement power of these influential figures, businesses aim to tap into their vast audience, build credibility, and drive consumer engagement. Most times the ultimate goal is to outshine competitors, expand market share, and captivate a larger segment of the target audience. From a business perspective, the promotional benefits of a brand influencer endorsement are often seen as more economically advantageous compared to traditional radio and television advertising jingles . The increased exposure and credibility from such partnerships can significantly enhance a brand's marketability, leading to business success. This idea is

often captured by the saying "All publicity is good publicity," meaning that any attention, whether positive or negative, can boost a brand's visibility and appeal. In the event of a product defect, the law of product liability identifies specific individuals and entities responsible for the harm caused. This legal framework holds accountable manufacturers, distributors, suppliers, retailers, and other parties involved in making products available to consumers, for any injuries or damage resulting from the use of these products. The law does not expressly address the liability of brand influencers, thus creating ambiguity as regards their liability. Therefore, this article aims to clarify the liability of brand influencers for product defects; and explore potential defences that may absolve them from liability, while proposing recommendations for improving our legal framework in this area.

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<sup>1</sup> Qlear Insight. (2023, May 18). The State of Influencer Marketing in Nigeria 2023. Accessed 12th August 2024.

# BRAND INFLUENCERS AND PRODUCT DEFECTS: ON WHOM DOES THE BURDEN LIE?

Product liability is not novel within the legal jurisprudence as the Court has handed down judicial decisions on the principle. Notable of these judicial pronouncements is the evergreen case of **Donoghue v Stevenson**<sup>2</sup>, which establishes that, for a claim of negligence to succeed, the affected party must establish by thorough evidence the three essential ingredients of negligence, which are:

- a) That a duty of care was owed by the manufacturer, supplier, retailer, or distributor;
- b) That the duty of care was breached;
- c) That damage occurred as a result of the breach of the duty of care.

Based on the principle in **Donoghue's case**, one may want to ask that where a consumer who had been influenced into buying a particular product has suffered injuries or loss as a result of the effect of that product how then can such aggrieved consumer proceed against a brand influencer and get redress. Hence, the fundamental question will be whether a brand influencer who was involved in the promotion or advertisement of a defective product can be held liable.

In determining the liability of the brand influencer, first recourse should be had to the contractual document giving rise to such brand engagement. The contractual document which is usually referred to as an endorsement contract (or brand ambassadorship agreement) between the brand influencer and the Company or Business Entity being

offered the influencing services, should be scrutinized to decipher the various roles, responsibilities, and expectations of both parties. In many cases, while this contract establishes a clear understanding between the brand influencer and the brand, it often does not impose direct liability on the brand influencer for any issue that may arise. Instead, the contract often limits the brand influencer's obligations to promote the brand, while the brand retains responsibility for product quality, customer satisfaction, and other liabilities. In this instance, a brand influencer may argue that the role is solely that of promotional services and thus is exempted from liability for product defects.

In such case of limitation of liability, the brand influencer limits his liability through his endorsement contract, and the parties are bound by their contractual terms. For instance, the presence of an indemnity or exclusion clause in a contract between a brand influencer and a brand, limits or excludes parties' liabilities for certain events or actions<sup>3</sup>. An exemption clause has the effect of exempting a party from a liability which he would have ordinarily borne but for the clause. This could be protection from a contractual and/ or tortious liability. See the case of **Chevron Nig Ltd v. Titan Energy Ltd**<sup>4</sup>. These clauses play a significant role in determining what the parties in a marketing or endorsement contract would be responsible for and often specify instances where the influencer is not liable.

<sup>2</sup> 1932 [AC] 562.

<sup>3</sup> The Case for Increased Responsibility and Liability of Brands in Social Media Influencer Marketing blogs.law.ox.ac.uk Assessed 21-08-2024

<sup>4</sup> (2013) LPELR-21202(CA)

Thus, an influencer may be excluded from liability for indirect or consequential losses or issues arising from the brands, own actions such as liability for product defects. Brands may also shift liability on brand influencers for misrepresentations solely made by the brand influencer during product marketing under an indemnity clause. In such cases, it is important to note that where such an agreement contains an indemnity clause, it may not avail a brand influencer who has exceeded their role of traditional brand influencing and has engaged in direct profit sharing or misrepresented facts, while having knowledge of the defects. This may expose such influencers to product liability.

Another perspective is hinged on the principle of privity of contracts. Some legal commentators have likened the role of brand influencers to an "invitation to treat"<sup>5</sup>. An invitation to treat is known as a preliminary step to an offer. An offer to chaffer, an offer to receive offers. Therefore, when a brand influencer engages in promotional advertisements, it can be construed as an invitation to a potential buyer to make an offer to the manufacturer. Conversely, another perspective contends that brand influencers are not necessarily the offeror or the offeree and as such are not privy to the contract between the manufacturer and consumer and they cannot be held liable for product defects.

## THE NIGERIAN PERSPECTIVE

While contractual terms and agreements may dictate who product liability lies on, and although Nigeria lacks "explicit laws" that place liability on brand influencers

for defective products, an implied obligation can be inferred through a holistic perusal of the Federal Competition and Consumer Protection Act 2018 (FCCPA). Although, the FCCPA did not expressly mention "Brand influencers", its provisions suggest their liability can be implied. For instance, the FCCPA imposes liability on an entity or any person acting on behalf of it that makes a false, misleading, or deceptive representation to a consumer or fails to

correct a consumer's misunderstanding while marketing any goods or services<sup>6</sup>. The entity must compensate any person harmed and may be ordered to make monetary restitution<sup>7</sup>. The FCCPA further forbids any agreements or contract terms that waive a customer's rights or absolve the undertaking<sup>8</sup> or its representatives (including brand influencers) from liability. This applies when a customer has relied on false, misleading, or deceptive representations or opinions<sup>9</sup>.

<sup>5</sup> Mishra Amrita "Manufacturer and Endorsers? Liability: shifting the onus Approach (March 2020)

<sup>6</sup> Section 125 of the FCCPA 2018.

<sup>7</sup> Ibid.

<sup>8</sup> Section 167 of the FCCPA 2018 defines "undertaking" includes any person involved in the production of, or the trade or, goods, or the provision of services.

<sup>9</sup> Section 127 of the FCCPA 2018.

Similarly, the Advertising Regulatory Council of Nigeria Act (ARCON) and the Nigerian Code on Advertising (6th Edition) mandate that advertisements on goods and services be honest<sup>10</sup> truthful, respectful and is devoid of any form of misinformation or disinformation<sup>11</sup>, by giving a broad definition of the concept of advertisement under ARCON Act, it can be implied from the wording of the law that the intention behind the provision includes any promotional content created by brand influencers on any digital or physical medium<sup>12</sup>. Undoubtedly, these laws provide certain obligations and impose liabilities for contravention of the same, however, the

enactment of a law or review of existing regulatory frameworks that specifically address product liability is essential. In other jurisdictions such as India, legislation has been enacted to address this issue. The Consumer Protection Act of 2019 (CPA) of India aims to reduce the menace of brand influencers encouraging the public to use a particular product and attempting to escape liability where such a product is defective. The CPA 2019<sup>13</sup> explicitly states that brand Influencers would not be exempted from liability when a product appears to be defective except where due diligence is proven.

## CONCLUSION

In the face of expanding economic spheres, it is highly recommended that the legislature resolves and clarifies any ambiguity, by making express and clear laws where a brand influencer can be liable for product defects. Times are changing and the law should adapt to changing times. Also, brand influencers should endeavour to conduct thorough due diligence on goods or services that they intend to promote, this is to simply help serve as a viable defence when push comes to shove. Additionally, brand influencers should ensure that where endorsement contracts are

drafted, they are airtight and where exclusion clauses are inserted, the extent of liability must be clearly stated. The clause should also cover the liability in question, and it must not be prohibited by statute. Manufacturers of products should take all reasonable care to ensure that the products they put out to the public are safe and non-hazardous and importantly, whatever representation they make regarding the product has to be correct and a true reflection of the effect of the product.

<sup>10</sup> Article 3 of the Nigerian Code of Advertising.

<sup>11</sup> Section 8(d) of the ARCON Act 2022.

<sup>12</sup> Section 63 of the ARCON Act 2022 defines advertisement to mean 'a notice, announcement, exposure, publication, broadcast, statement, announcorial, informercial, commercial, hype, display, town cry, show, event, logo, payoff or trademark to promote, advocate, solicit, showcase, endorse, vote or support a product, service, cause, idea, person or organisation with the intention to influence, sway, actuate, impress, arouse, patronise, entice or attract a person, people or organisation by an identified sponsor irrespective of media, medium or platform.'

<sup>13</sup> Section 21 of the Consumer Protection Act 2019.



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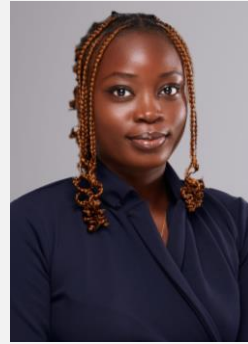
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