

A CRITIQUE OF SECTION 136 (1) OF THE NIGERIAN COMMUNICATIONS ACT (NCA), NO19 2003, AS A CONTRADICTION TO THE DOCTRINE OF ASSAULT AND DUTY OF CARE IN LAW.*¹

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Abstract

Efforts have been made over the centuries not to assign criminal blame, liability or responsibility to fictional entities. The law acknowledges that corporations as well as individuals persons are capable of inflicting harm on others intentionally or otherwise either in the course of corporate activities or daily relationships. Consequently, with an increase in the rate of serious hazardous corporate activities often times resulting in the violation of rights, loss of lives, property and public funds the need to fix strict criminal responsibility on corporations has become a legal concern. Therefore, efforts should be made to discourage any legislation that encourages the infliction of harm on individuals, no matter how minimal. Section 136 of the Nigerian Communications Act (NCA), No.19 2003 is one of such legislations. It empowers a licensee, in installing its network facilities, to take all reasonable steps to ensure that he causes as little detriment and inconvenience, and does as little damage, as is practicable. This is rather a paradox to the doctrine of duty of care known to our laws and the law prohibiting assault. The concern of this paper is to examine whether the Nigerian telecommunications industry, by the provision of Section 136 (1) of the Nigerian Communications Act (NCA) 2003, enjoys immunity over industrial activities amounting to assault. It will further discuss the extent to which the said Section 136 (1) of the Nigerian Communications Act (NCA) contradicts the doctrine of assault and duty of care under corporate criminal responsibility.

Keywords: Critique; Section 136 (1); Nigerian Communications Act.

1.1. Introduction

The main objective of any technological revolution is to improve the quality of human life. Consequently, good laws are made to protect and implement that objective and achieve that purpose. Laws lose their onion when they become hostile to human life and/or fail to adequately protect the general public, their rights and interests. To that extent such legislation becomes a terror in disguise. The Nigerian Communications Act (NCA) 2003 was signed into law by Former President Olusegun Obasanjo on July 8, 2003 after it was passed by the National Assembly. The Act regulates the operations of the telecommunication industry in Nigeria.² In fact the Act strengthened the capacity of the Nigerian Communications Commission(NCC) in carrying out its activities as an independent regulator of the telecommunication industry in Nigeria. However, as much as the importance and relevance of telecommunication³ cannot be over-emphasised, especially since the influx of modern telecommunication services, it is pertinent to say that since the coming into force of the Act, various legal issues governing

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² There is no doubt that providers of telecommunication services in Nigeria are corporate bodies with juristic personality for example, MTN. Nigeria Communications.

³ In the health, educational, agricultural, aviation and transport sectors of our world.

telecommunications installations, services, management and operations in Nigeria have arisen in various forms. In order to take the full advantage and benefits of this system there is the need to put in place a comprehensive legal and regulatory framework to engender the growth and development of the industry and safe enjoyment by Nigerian consumers. It points to the fact that a review is inevitable. Like any good law, one of the objectives of the Nigerian Communications Act (NCA) 2003 is to protect the rights and interest of service providers and consumers within Nigeria.⁴ One of the rights consumers, including Nigerians, crave for is the right to safety and a safe environment. It is rather worrisome that Section 136 of the Nigerian Communications Act(NCA) 2003 rather authorises a licensee, in installing its network facilities, to take all reasonable steps to ensure that he causes as little detriment and inconvenience, and does as little damage, as is practicable. Yet the Act takes this as a provision for duty of care. From the statutory provision, it is obvious that rather than provide for the duty of care needed, the section is rather encouraging and/or inciting assault by telecommunication service providers. Notwithstanding that the telecommunications industry owes its consumers the general duty of care which the Act imposes upon them,⁵ by its Section 136(1) the Act encourages service providers to take every reasonable step to breach the said duty of care⁶ by some acts of assault,⁷ thereby legalising corporate assault. This is certainly contradictory to the provisions of the Criminal Code.⁸ Under the said Code, the term “applies force” includes the case of applying heat, light, electrical force, gas, odour, or any other substance or thing whatsoever, if applied in such a degree as to cause injury or personal discomfort. It is our humble view that the protection offered by the said Section 136 of the Nigerian Communications Act (NCA) 2003, as a duty of care rather seems to be a mirage when juxtaposed with the doctrine of assault and the general duty of care in law.

1.2. Meaning, Historical Perspectives and Relevance of Telecommunication industry in Nigeria

Telecommunications is the transmission of information over significant distances to communicate. It makes use of electrical devices such as telegraphs, telephones, radio and microwave communications, fiber optics⁹ and their associated electronics, in addition to the use of the broadcasting satellites and the internet.

⁴ Section 1(g) of the Nigerian Communications Act (NCA) 2003(herein after referred to as “the Act” or the ‘NCA 2003’)

⁵ Ibid.

⁶ According to Lord Atkin in his celebrated judgment in the locus classicus case of *Donoghue v Stevenson* (1932)AC 562, a duty of care is owed to ones neighbor. The duty of care demands that “you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor”. In answering the rhetorical question, who then in law is my neighbor? He said, “persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question”.

⁷ These acts of assault which could otherwise be called or result in the payment of some damages.

⁸ The Criminal Code Schedule to the Criminal Code Act. Cap. C38 *Laws of the Federation of Nigeria (LFN) 2004*, applicable to Southern Nigeria, (to be herein referred to as the C C) s 252. It provides that a person who strikes, touches, or moves or otherwise applies force of any kind to, the person of another, either directly or indirectly, without his consent, or with his consent if that consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without his consent, in such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect his purpose, is said to assault that other person and the act is called assault.

⁹ Fibre optics is the transmission of light through fine flexible glass or plastic fibres, especially as a medium for communication networks.

It is also the transmission between or among points specified by the user of information without changing anything in the form or content of the information as sent and received.

According to history, the development of telecommunications actually commenced in Nigeria in 1886, to address the communication needs of the colonial government. There was the need to connect and communicate with other colonial administrations in Ghana, Sierra Leone, the Gambia and England. By 1893, the use of telecommunication services was extended to colonial government offices in Lagos, Jebba and Ilorin. Gradually, a national telecommunication network began to emerge. In 1923, the first commercial telephone service between the towns of the Itu and Calabar was established. Between 1946 and 1952, a three channel line carrier system was commissioned between Lagos and Ibadan and was extended to Oshogbo, Kaduna, Kano, Benin and Enugu. It connected the colonial office in London with Lagos likewise the commercial centres in the country with local authority offices.¹⁰ It marked the beginning of the positive effect of the established telephone service system and communication link between the above named towns and ignited the need for the telephony system in the colonial Nigeria.¹¹ This led to the 1955-62 development programme which precisely was the first serious attempt at planning telecommunication services in Nigeria. Consequently, from the primitive coordinate pegboard switching system it progressed through manual switchboards of different sizes, shapes and capacities to stronger and more manual exchanges. This marked the beginning of automatic telephone switching in Nigeria. Independence witnessed the establishment of automatic exchanges at the main centres, as well as a subscriber trunk dialing system between Lagos and Ibadan.¹²

With the attainment of independence in 1960, there were demands to meet the needs of the fledging commercial and industrial growth of the young nation and with this developmental expansion of the network became obvious. The expansion of the trunk dialing facilities to link the major urban centres that were springing up then led to the establishment of Nigeria External Telecommunications (NET) Limited. This body was responsible for external telecommunication services. However, the expansion plan met hitches due to inadequate funding and the effect of the Nigerian Civil War. However, that notwithstanding it succeeded in the installation of microwave radio transmission systems to link the cities of Lagos, Ibadan, Enugu, Benin, and Port Harcourt.¹³ The 1970s, witnessed the reconstruction and rehabilitation of telephone equipment and other infrastructure damaged during the civil war. However, plans for the national telex network were later completed. The Department of Posts and Telecommunication was in charge of the internal network.

In the 80s, tremendous achievements were made in the area of transmission. There was the introduction of the Domestic Satellite and other transmission links.¹⁴ Thus, various areas in the country were provided with telephone and mobile exchanges, the Domestic Satellite (DOMSAT) Earth Station project was completed, and work started on the aerostat balloon.¹⁵ A second

¹⁰ E I Nelson and Ekere Ibang, 'Telecommunication In Nigeria' www.1stAttorneys.com accessed 12 April 2017.

¹¹This is the act of sound transmission via the electromagnetic spectrum.

¹²GO Ajayi and others, 'A Century of Telecommunications Development in Nigeria- What Next?' www.vii.org/papers/nigeria.htm accessed 20 February 2018.

¹³ Ibid.

¹⁴ The DOMSAT Project was meant to provided television and sound broadcasting but was later modified to accommodate telephony and teletype services between states.

¹⁵ This project was later abandoned following the strenuous expenditure.

satellite antenna was built which increased the global coverage of external services. An International Telephone Switching Centre (ITSC) was installed at the Nigerian External Communication (NECOM) house in Lagos. Also, within this time, a new Microwave link was provided between Lagos and Cotonou (Republic of Benin), then computerised telex, telegraph, and data switching centres were provided at NCOM House. In 1985, the telecommunications arm of the Department of Posts and Telecommunications was merged with the Nigerian External Telecommunications (NET) to form the Nigerian Telecommunications Limited (NITEL).¹⁶ This was a limited liability company that administered both internal and external telecommunications services in Nigeria. Then NITEL was fully owned by the government. It operated then under a board appointed by the government to serve various interests. The administrative and policy matters of communication remained with the Ministry of Communications, which represented the country at the International Telecommunication Union and other international telecommunications organisations. The Ministry regulated NITEL¹⁷ until 1992 when the Nigeria Communication Commission (hereinafter, 'the Commission or 'the NCC') was established. In the mid 90s, about twenty one (21) states, the capital, Abuja and some local government headquarters were connected to the national network.

The Commission was charged with the duty of regulating the telecommunication sector. The NCC became operational in September, 1993.¹⁸ However, in 1992 the cellular phone was introduced into the country. This was also the same year that NITEL was commercialised as a result of the deregulation policy of the Federal Government while the Nigerian Communication Commission (NCC) was established. When the NCC became operational, it made the telecommunication sector open to the private sector. Before then, NITEL was the only national carrier which had a monopoly on the sector but it was synonymous with epileptic services and poor management. The Nigerian telecommunication sector was grossly under-developed before the sector was deregulated under the military regime in 1992, with the Nigerian Communication Commission (NCC) left to oversee the sector.¹⁹ Following his assumption of office on May 29, 1999 during the democratic dispensation, Former President Olusegun Obasanjo's administration embarked on deregulating the telecommunication sector especially granting licences to the Global System for Mobile Communications (GSM) service provider and privatising NITEL.²⁰ This approach paved the way for the influx of GSM providers into the country.²¹ It is interesting to know that telecommunications has always been an item of concern in each of the development plans of Nigeria. Thus, record has it that since the year 2000, the Nigerian Communications Commission(NCC) has licensed mobile service providers, several Private Telephone Operators,

¹⁶ G.O. Ajayi (n12).

¹⁷ Today, the NITEL company is more or less moribund or has gone into extinction.

¹⁸ Ajayi (n12).

¹⁹ T Adeyinka and others, 'Stakeholders' Perceptions Of The Impact Of A Global System For Mobile Communication On Nigeria's Rural Economy:Implications For An Emerging Communication Industry.' accessed 12 December 2016.

²⁰ The Global System for Mobile Communications (GSM).

²¹ The oldest Network provider in Nigeria include: Mobile Telecommunication Carrier Network Nigeria Limited (MTN) Nigeria Communications Limited, ECONET(and its successor, V-mobile), NITEL, GLOBACOM. Today, we have: MTN, GLO Mobile, Etisalat Nigeria, Airtel, Nigeria Mobile Telecommunication Ltd.(M-Tel), etc.

Fixed Wireless Access(FWA) Operators, two Long Distance Operators, Internet Service Providers, etc.²²

Nigeria as a matter of fact is widely recognised as one of the major markets for telecommunication business opportunities in the world.²³ With the effect of the government's deregulation policy, the world-wide trend of rapid development in telecommunication, the potentials of the Nigerian telecommunication market, as well as the elasticity of development in the Nigeria telecommunication sector is quiet commendable. It extends to the health, education, agricultural, communication sectors and indeed every other sector. The emergence of the GSM, for example, has led to improvements in general efficiency and productivity in industries, quality communication, reductions in transport costs, increased service innovation and improved quality of life for rural dwellers. Indeed, it has improved the living standards of many. It is glaring that having a robust telecommunications network is important for the economic growth of nations and constitutes a base infrastructure that supports the world economy.²⁴ Yet in spite of the liberalisation of the sector, its relevance and developmental potency, the government still has a vital role to play to see to it that human life is not compromised or sacrificed on the alter of development and growth. This role is achieved through the enactment of progressive policy and legal framework for the safe operational activities of the sector and the establishment of a strong independent regulatory authority, hence the NCC 2003 and other regulatory laws.

1.3. Legal Framework/Institutions for Telecommunication in Nigeria

A country with a growing economy like Nigeria has every need to ensure adequate regulatory measures to guarantee a reliable, dependable, efficient and stable telecommunication system. In Nigeria, therefore, laws and regulations have been put in place to regulate the activities of the country's telecommunications industry ranging from licensing, installation of equipment and facilities, dispute resolution up to numbering and competition practices. They are discussed hereunder:

1.3.1. The Nigerian Communication Act (NCA) 2003

The Nigerian Communication Act (NCA) 2003 was signed into law by Former President Obasanjo on July 8th, 2003 after being passed by both Houses of the National Assembly. The Act repealed the 1992 Decree and all previous enactments. It has 158 sections and it established the Nigerian Communications Commission (NCC).²⁵ Among other provisions of the Act is Section 136 (1) of the Nigerian Communications Act No.19 2003; under this section, the Act empowers a **licensee** in installing its network facilities, to take all reasonable steps to ensure that he causes as little detriment and inconvenience, and does as little damage, as is practicable. This is the bone of contention in this paper but it will be discussed later in detail.

²² EE Ndukwe, 'The role of telecommunications in National development'. (19th Omolayole Annual Management Lecture Victoria-Island, Lagos, Nigeria. 05 December 2003).

²³ A Otubu, 'The Regulator and the Regulated: An Examination of the Legal Framework for Telecommunication in Nigeria'. bullet20042003@yahoo.com, accessed 13 December 2017.

²⁴ Ibid.

²⁵ NCA s. 3.

1.3.2. National Environmental Standards and Regulations Enforcement Agency (NESREA) Act 2007.

The National Environmental Standards and Regulations Enforcement Agency (NESREA) was established pursuant to the National Environmental Standards and Regulations Enforcement Agency (NESREA) Act which was enacted on 30th July, 2007. This Act repealed the Federal Environmental Protection Agency (FEPA) Act.²⁶ The birth of the agency was an answer to the clarion call by the Constitution of the Federal Republic of Nigeria, 1999 (as amended)²⁷ to protect and improve the environment and safeguard the water, air land, forest and wild-life of Nigeria. The Agency is a parastatal of the Federal Ministry of Environment. The Agency is saddled with the responsibility of enforcing environmental standards, rules, regulations, policies and guidelines.²⁸ In accordance with its mandate, the Agency developed, among many other regulations, the National Environmental (Standards for Telecommunications and Broadcast Facilities) Regulations, 2011. According to Regulation 2 of the statute, the main thrust of the Regulations is *inter alia* to ensure consistent application of environmental laws, regulations and standards in all sectors of the telecommunications and broadcast industry in Nigeria.²⁹

1.3.3. Environmental Impact Assessment (EIA) Act 1992

The Environmental Impact Assessment (EIA) 1992, Act is an Act to set out the general principles, procedure and methods to enable the prior consideration and assessment of the impact that certain public and/or private projects will have on the environment in Nigeria. It was enacted on 10th December 1992. The goal and objective of environmental impact assessment is to establish, before a decision is taken by any person, authority, corporate body or unincorporated body, including the Government of the Federation, State or local government intending to undertake or authorise the undertaking of any activity, those matters that may likely or to a significant extent affect the environment or have an environmental effect on those activities. Furthermore, another objective of environmental impact assessment is also to promote the implementation of appropriate policy in all Federal Lands (however acquired), States and Local Government Areas (LGA), consistent with all laws and decision-making processes through which the above mentioned goals and objectives may be realised. Also, the objective of the Environmental Impact Assessment (EIA) Act 1992, is to encourage the development of procedures for information exchange, notification and consultation between organs of government and persons, when proposed activities are likely to have significant environmental effects across boundaries or trans-State or on the environment of bordering town and villages. Section 13 of the Act is very relevant to telecommunication installation as it relates mainly to the Environmental assessment of projects.

1.3.3.1. Nigerian Communications Commission (NCC)

This body was established in July, 2003 by the Nigerian Communications Act (NCA) 2003. It has all incidence of a company incorporated under the Company and Allied Matters Act (CAMA) Cap C20 *Laws of the Federation of Nigerian* (LFN) 2004. In other words it can sue and be sued; it is a body corporate with perpetual succession; as well as a common seal so,

²⁶ NESREA Act- 2007,s. 2.

²⁷ Ibid s. 20.

²⁸ Ibid s 1.

²⁹ T Ogboru, 'Nesrea and NCC Regulations on Telecommunication Masts: Implementing the Precautionary Principle'[2015] (5) (1) *Afe Babalola University: Journal of Sustainable Development Law and Policy* 6.

it can acquire and deal with property as it deems fit. However, such dealings must align with the functions the Commission is empowered to perform. The Nigerian Communications Commission (NCC) is saddled with the duty of regulating all aspects of communications in Nigeria.³⁰

1.3.3.2. National Frequency Management Council

The Nigerian Communication Act (NCA) 2003, also provides for the legal aspects of licensing telecommunications in Nigeria by creating the National Frequency Management (NFM) Council.³¹ This body is to advise the Minister in the representation of Nigeria at international and regional spectrum allocation bodies like the International Telecommunications Union. The body will also advise and assist the Minister on the preparation and negotiation of bilateral³² and multilateral³³ spectrum allocation treaties with other sovereign administration or other functions.³⁴

1.4. Condition for the Grant of a Telecommunication Licence.

The conditions for the grant of a Telecommunication Licence are not actually specified but the Commission is given extensive powers to make guidelines in the form of declarations spelling out the conditions, terms and benefits of any given licence. However before such guidelines can be valid it must be registered and the licensee must be notified. The last of such guidelines known to this writer was issued in 2009, namely: Guidelines on Advertisement and Promotions 2009; Guidelines on Technical Specifications for the Installation of Telecommunication Masts and Towers 2009; Guidelines on Commercial Satellite Communications; Quality of Service Regulations 2007; Dispute Resolution Guidelines; Consumer Protection Regulations; Competitions Practices Regulations; Regulations for the Registration of Telephone Subscribers etc.³⁵ These guidelines provide standards to be adopted by telecommunications service providers or operators when installing telecommunication towers so as to ensure environmental safety and sound engineering practices.³⁶ The conditions in the guidelines and regulations are subject to the type and nature of the licence. Most of the guidelines and regulations conform to the national policy on telecommunication provision.

1.5. Procedure for the Grant of Telecommunication Licence

The Nigerian Communication Commission (NCC) is empowered by the Nigerian Communication Act (NCA) to issue regulations spelling out the procedure for the grant of a licence. There are two classes of licence namely individual licence and class licence. The requirements and procedures are spelt out under the Act.³⁷ First, the applicant has to register a company under the Companies and Allied Matters Act, (CAMA) Cap C20 *Laws of the Federation of Nigerian* (LFN) 2004, and include as its object of business, telecommunications. Secondly, the applicant has to obtain an application form for each

³⁰ NCA 2003, s 4.

³¹ Ibid s 26.

³² Bilateral Investment Treaty (BIT).

³³ Multilateral Investment Treaty (MIT)

³⁴ NCA 2003 s 28.

³⁵ Nelson (n10)5.

³⁶ NCC Guideline 2009, s1.

³⁷ NCA 2003, s 33.

license required at the prescribed cost only payable in bank draft, to the Nigerian Communications Commission (NCC). Thirdly, the applicant has to complete the original application form and produce copies (as applicable). Fourthly, the applicant has to submit the completed form with the following documents (in each copy) namely Certificate of incorporation, Certified True Copy (CTC) of Article and Memorandum of Association, Tax Clearance Certificate (TCC), Feasibility Reports on the proposed service where applicable, passport photograph of authorised representative and then the applicant has to pay a non-refundable administrative fee, which is 5% of the relevant licence fee. It is payable in bank draft upon submission of the application. Licences are granted either by auction, selection process, public tender and competitive bidding. An application may pass through any of the following phase. Where the criteria above have been met the licence will be granted and registered in the Register of individual licence or Register of class licence depending on which type the application is being made for. It is important to know that the licence can be revoked and/or suspended. However, the only licence subject to surrender, revocation and suspension is the individual licence, the class licence can only be deregistered. Therefore, a holder of an individual licence may, by a written notice, surrender his licence at any time and such surrender will take effect on the date of submission of the individual licence and written notice to the Commission.³⁸ The Commission can only revoke and suspend a licence by a declaration. The declaration must also state reasons for the withdrawal of the licence. These reasons could be as a result of failure to pay the licence fee; failure to comply with the terms and conditions of the individual licence; failure to comply with any other law relevant to the communications industry; the licence has failed to comply with any instrument made by the Commission such as guidelines, regulations and declarations; as well as where the licensee has become bankrupt, entered into receivership or liquidation or entered into any scheme of arrangement or compromise all under the Companies and Allied Matters Act, and/or for public interest.³⁹

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Any suspension or revocation will take legal effect only if the licensee has been given a written notice within 60 days and a statement was included in the notice that such a breach be rectified, yet the licensee fails to rectify such breach. The licensee would then be permitted to make a written submission to the Commission, arguing his case or defending his position. Where the Commission is not satisfied after due consideration, the Commission will then issue a declaration of suspension and revocation on the licence and communicate to the licensee the duration of the suspension and penalties to be paid. Revocation would amount to withdrawal and the licence would be wound-up eventually. The licence will consequently be removed from the Register of individual licence.

1.6.Overlapping Functions for the NCC and the NESEAR

It is pertinent to say that the NCA 2003 and the NESEAR Act have provided for overlapping functions for the two agencies and this has caused a lot of frictions in the system. It has been the cause of the recent clash⁴⁰ between the NCC and NESREA over

³⁸ Ibid s 44 .

³⁹ Ibid s 45.

⁴⁰ Crisis in the Telecoms Sector: The FDI implication' *Vanguard* (Lagos, 21 August 2012) <www.vanguardngr.com/2012/07/crises-in-telecom-sector-the-fdi-implications> accessed 21 August 2012; E Okonji, 'NATCOMS Faults NESREA over the Sealing of Base Stations' *This Day* (Lagos, 13 June 2013)

breach of environmental laws by MTN.⁴¹ While Regulation 5(4)(1)(b) of NESREA Regulations, 2011 stipulates that all new facilities shall have a minimum set back of 10 metres from the perimeter wall of any premises to the base of the mast/tower, the NCC Act stipulates that a mast should be built 5 meters away from residential buildings. Furthermore, according to the NCA 2003 all **licensees** shall, in connection with the installation of their respective network facilities, take all reasonable steps to protect the safety of persons and property, and ensure that the activity interferes as little as practicable with the use of land and environment.⁴² However, for the NESREA Act, the agency shall be the enforcement agency for environmental standards, regulations, rules, laws, policies and guidelines.⁴³ The NCA permits the NCC to regulate licensed telecommunications operators in the entire country but the NESREA Act empowers NESREA as overall regulator of the nation's environment. These instances of function overlap and differences in function implementation among others, has remained a big challenge and leaves the Agency and the Commission in a continuous power tussle arena to the detriment of the entire society. According to Omobola Johnson, the truth of the matter is that though the laws setting up the NCC gives it overwhelming powers to regulate the telecommunication sector, the NESREA Act also empowers it to regulate the environment even in cases involving telecommunications companies with regard to their infrastructural drive.⁴⁴ This is because it concerns environmental hazards. There is therefore a need for harmonisation. Where agencies with overlapping jurisdictions are applying different regulations in the same controversy, it is up to the courts to determine who has proper jurisdiction and as such whose laws and regulations apply.

1.7. Section 136 (1) of the NCC Act and the Impact of Telecommunication Facilities on the Environment and Persons

The Nigerian Communications Act (NCA) 2003, in providing for the duty of care expected of telecommunication service providers in Nigeria states that:

A licensee shall, in installing its network facilities, **take all reasonable steps to ensure that he causes as little detriment and inconvenience, and does as little damage, as is practicable.**⁴⁵ It further it states that “all licensees shall, in connection with the installation of their respective network facilities, take all reasonable steps to— (b) protect the safety of persons and property... (d) protect the environment.”⁴⁶

A perusal of the two provisions under this section of the Nigerian Communications Act (NCA) 2003, will better qualify the last two provisions as a façade to pool the wool across the mind of a casual reader, hindering him/her from grasping the implications of Section 136(1) of the Act.⁴⁷

<www.thisdaylive.com/articles/natcoms-faults-nesreaover-sealing-of-base-stations/150210> accessed 1 July 2013. See also Ogboru (n 29) 60.

⁴¹ O Johnson, 'When NCC, NESREA Flex Muscles over Regulatory Issues', www.thisdaylive.com accessed 13 March 2018.

⁴² NCA 2003, s136(3).

⁴³ NESREA 2007, s 2. See (n26).

⁴⁴ Speaking as the then Minister of Communications.

⁴⁵ NCA No.19 2003 s 136 (1).

⁴⁶ Ibid s 136 (3) (b)(d).

⁴⁷ Ibid s 136(3)(b) and (d).

A duty is a legal obligation that is owed or due to another that needs to be satisfied. It is an obligation for which somebody else has a corresponding right.⁴⁸ A duty of care as espoused in the celebrated case of *Donoghue v. Stevenson*⁴⁹ by Lord Atkin, demands that the person who owes that duty of care to the other must take reasonable **care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor**. This is as opposed to the “so called” duty of care as provided under Section 136(1) of the NCA 2003. In answering the rhetorical question, who then in law is my neighbor? Lord Atkin said:

persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation, as being so affected, when I am directing my mind to the acts or omissions which are called in question.

What the above quotation implies is that before one engages in any cause or conduct, or refrains from acting, one must ask oneself ‘how will my act or omission affect my neighbor?’ If ones act or omission will injure ones neighbour then one must refrain from acting or face the consequences in tort.⁵⁰ The “neighbor” in this context is not restricted to ones geographical neighbour as the text is not one of proximity.⁵¹ In the case of *Chief Patrick Abumsomwan v. Merchantile Bank of Nigeria Ltd*⁵² the Supreme Court held:

Where a person is injured from a transaction arising from the contract of two persons, the third party is not precluded from bringing action on the grounds that he was not a party to the contract the misperformance or non-performance of which has resulted in the damage. The duty imposed here is not because there was a contract but because the defendant had impliedly undertaken not to injure the plaintiff. The rational in truth is that, even though not so expressed, the obligations towards the contracting party extended to all such persons who were likely to be injured by the acts or omissions of the defendant. They are the neighbours in contemplation or ought to be in contemplation of the defendants....

The duty of care known to our laws does not charge a person to take all reasonable steps to ensure he does harm or cause injury to his neighbour, no matter how infinitesimal the injury. It rather compels the person on whom the duty lies to take all reasonable steps to avoid causing injury to the neighbour. Where the Nigerian Communications Act(NCA) 2003 encourages telecommunications service providers to take all reasonable steps to cause detriment and inconvenience as possible to the neighbour, such a provision is obviously against the spirit of a good law, in the objective view of every reasonable man on the street. Furthermore, such a law is contrary to the doctrine of duty of care and good neighbourliness under the Law of Tort. The objective question here is, ‘what is the perimeter for determining what amounts to a little detriment and inconvenience under Section 136(1) of the Act?’ Obviously, what is called a ‘little detriment’ for a young healthy lady may be a big damage for a pregnant woman and what is a ‘little detriment’ for an adult may be disastrous for a one or two year old baby.

Furthermore, apart from the duty of care in tort, Section 136(1) of the NCA 2003 is a contradiction of the doctrine of assault in criminal law. Section 252 of the Criminal Code provides that:

⁴⁸ BA Garner, (ed) Blacks Law Dictionary (7th edition. St Paul Minnesota: West Publishing Co 1999).

⁴⁹ (1932) AC 562.

⁵⁰ AN Hercy and LA Atsegbua, *An Introduction to the Nigerian Law of Tort* (Benin: University of Benin Press) 48.

⁵¹ Ibid.

⁵² (1987) 3 NWLR (Pt 60) 196.

A person who strikes, touches, moves or otherwise applies force of any kind to, the person of another, either directly or indirectly, without his consent, or with his consent if that consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without his consent, in such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect his purpose, is said to assault that other person and the act is called assault.

The term “applies force” includes the case of applying heat, light, electrical force, gas, odour, or any other substance or thing whatsoever, if applied in such a degree as to cause injury or personal discomfort.

Section 253 of the Criminal Code, however, states that an assault is unlawful, and constitutes an offence, unless it is authorised, justified or excused by law. The question then is: ‘when is an assault authorised, justified or excused by law?’ The answer to this question is found in Section 284 of the Criminal Code.⁵³ The Criminal Code states that any person who unlawfully assaults another and thereby does him harm is guilty of a felony and is liable to imprisonment for three years.⁵⁴ The conflict here is that both the section of the Criminal Code that provides for assault and the section of the Nigerian Communication Act (NCA) 2003 that provides for duty of care are all federal laws enacted by the National Assembly. Where two federal laws are in conflict the latter is always the law, but this research is not advocating for an implied repeal of Section 252 of the Criminal Code. Neither does it advocate for a change in the doctrine of duty of care known to the law. This certainly is not a case of an implied repeal of the relevant section of the Criminal Code that provides for assault; rather it calls for a review and re-drafting of Section 136(1) of the Nigerian Communications Act (NCA) 2003 for the good of the consumers.

It is obvious that by Section 136(1) of the Nigerian Communications Act, (NCA) 2003, telecommunication service providers have been authorised to inflict harm or injury on their Nigerian consumers irrespective of the fact that the harm or injury is qualified. It is, therefore, submitted that it is a misnomer to categorise infliction of harm by a service provider on a consumer as a duty of care. It has to be placed where it belongs. A provision of a law that authorises a service provider to harm his consumers who are his immediate neighbours, in Lord Atkins dictum on duty of care is a bad law and an affront to the “law.” This is because law, in itself, is protective. It protects both the weak and the strong. The said provision in Section 136(1) of the Nigerian Communication Commissions Act(NCA) 2003, is against public interest which every telecommunication service provider is called to protect and therefore it is a contradiction to Section 136(3) (b) and (d) of the same Act. It portrays the level of indifference of the

⁵³ Provocation is a valid and complete defence to a charge of assault under Section 284 of the Criminal Code (CC). It provides *inter alia* that a person is not criminally responsible for an assault committed upon a person who gives him provocation for the assault, if he is in fact deprived by the provocation of the power of self control, and acts upon it on the sudden and before there is time for his passion to cool; provided that the force used is not disproportionate to the provocation, and is not intended, and is not such as is likely to cause death or grievous harm. See *R v Blake*.

⁵⁴ With reference to CC, s 355 we want to state categorically that an incorporated telecommunication company has legal personality capable of taking action through its alter egos, capable of incurring liability, to sue and be sued. With the evolution of corporate criminal responsibility it is trite that corporation are capable of committing assault.

draftsman who prepared that law. It is indeed a bad law and calls for a review, a re-draft and possibly an expunging from the Act.

1.8. Conclusion

According to research, both mobile phone base stations and telecommunications towers emit radiofrequencies which are forms of electromagnetic radiation for a certain distance.⁵⁵ There are claims that these electromagnetic radiations are injurious to health and the environment.⁵⁶ However, these claims have not enjoyed the support of many on the ground that the weight of international scientific opinion is that there is no substantiated evidence that radiofrequency emissions associated with living near a mobile phone base station or telecommunications tower poses a health risk. Most importantly, the World Health Organisation (WHO) has also declared that the levels of radiofrequency exposure from Base Stations and wireless networks are so low that the temperature increases are insignificant and do not affect human health.⁵⁷ Nonetheless, the WHO has always encouraged extensive research in this area, through its research agendas. However, while telecommunication operators in Nigeria, though with little or no scientific research, insist that electromagnetic radiations emitted by telecommunication facilities are harmless and are safe for humans.⁵⁸ It is commonsensical to say that users of cellular phones have been warned severally on how to avoid direct radiation contact with their phones, how much more a base station that controls millions of phones in Nigeria? There are equally instances of medical reports that have linked illnesses to radiation emitted by telecommunication masts.⁵⁹ This too has not been scientifically proven. Radiation generally is not healthy for the human body, a lot of sickness such as brain tumor, depression, miscarriage, Alzheimer's disease and other deadly illnesses have been linked to radiation. Therefore, Nigerian citizens who are consumers of telecommunication services deserve to be protected. Prevention is always better than cure and a stitch in time saves nine. Section 136(1) of the NCA 2003 as it is today is a bad law and fails to properly protect the people. It is a bad law, and should be expunged from the Act and/or be reviewed for better reconstruction and effective implementation.

⁵⁵ This is often a self-supporting structure such as a robust concrete pole or a lattice tower that houses single or multiple antennas, which appear as vertically, elongated rectangular panels. Base stations are required to transmit and receive radio signals from mobile phones and other wireless devices. Without a base station in a subscriber's vicinity, it would be impossible to make or receive calls and maintain the calls as the subscriber moves or drives around. See Association of Licensed Telecommunications Operators of Nigeria's Submissions in respect of NESREA's Draft Environmental Regulations for the Telecommunications Industry 2010 (ALTON's Submissions) 1,7 See, Ogboru (n 29) 60.

⁵⁶ SJ Genuis, 'Fielding a Current Idea: Exploring the Public Health Impact of Electromagnetic Radiation' [2008] (122) (2) *Public Health* doi: 10.1016 A Atili, 'Are Telecom Masts harmful to Health?' *The Nation* (Lagos, 11 July 2012) www.thenationonline.net/2011/index.php/business/infotech/53111-are-telecoms-masts-harmful-to-health.html accessed 20/6/17.

⁵⁷ World Health Organisation: <http://www.who.int/peh.emf>, accessed 22 July 2017.

⁵⁸ Global GSM Association: www.gsmworld.com/technology/other accessed 22 July 2017.

⁵⁹ A case in point is a medical report issued to Mr Afolabi Oyekanmi (who has a mast sited within his premises) at the Ado Ekiti University Teaching Hospital which stated that 'It is apparent that locating a telecom mast too close to his house is detrimental and hazardous to his medical condition if not the cause'. The doctors at the University College Hospital, Ibadan linked the emission of electromagnetic impulses from the masts located close to the homes of the Adebusola Ogundipe family of Ibadan, to their ailments. The health of the whole family is said to be in danger. The matriarch of the family suffers from sensation of pain and tingling in her legs and in addition she has been diagnosed to have developed leukaemia. Her children suffer memory loss, dizziness and bleeding from their noses. It is obvious that these ailments are not coincidental see again, Ogboru. (n 29).