

Corporate Criminal Liability for Defective Products and Poor Quality Services under the Cameroonian Law: A Critical Appraisal

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Abstract: The paper seeks to establish when corporate bodies could be criminally liable for the manufacturing of defective products or for the supply of poor quality services to consumers in Cameroon. To achieve this, Cameroon in the area of product liability has made conscious efforts through legislation to show when a corporation could be criminally liable for any defective goods and poor quality services put onto the market. The liability is guaranteed by the 2011 Cameroonian Consumer Protection Law and the Penal Code, all of which have expressly provided penal provisions against anyone that intentionally supplies defective goods or poor quality services injurious to the plaintiff's health or property. The relevant provisions of the law examined were sections 32, 33, 35 and 36 of the 2011 Consumer Protection Law as well as Articles 74, 258, 279, 280 and 281 of the Penal Code. These provisions revealed that corporate criminal responsibility is in two ways, that is, imposition of fine and punishment with imprisonment. In the first place, since a company cannot be put behind bars for adulterating its products, the most convenient direct penalty is fine. With the second class of penalty being imprisonment, since *Salomon v. Salomon*, it has been understood that a company upon incorporation acquires an identity distinct and separate from that of its shareholders, with separate rights and liabilities and being a fictitious person, a corporation works through its agents in the real world. As such any action in excess of what is provided in the objects clause amounts to an *ultra vires* act for which the agents or managers will be liable. The punishment preferable here is imprisonment of the directors because no memorandum of association can lawfully authorize a company to commit a crime. For all this to be possible, the constituent elements of *mens rea* and *actus reus* were examined while suggestions for reform were made.

Keywords: Cameroonian Consumer Protection Law, corporate bodies, poor quality services.

1. INTRODUCTION

Criminal law is a body of rules and statutes that defines conduct prohibited by the state because it threatens and harms public safety and welfare and that establishes punishment to be imposed for the commission of such acts.² Criminal law defers from civil law, whose emphasis is more on dispute resolution than in punishment. The term criminal law generally refers to the substantive criminal law which defines crimes and prescribes punishments.³ In contrast, criminal procedure describes the process through which the criminal laws are enforced. Personal safety, particularly security of life, liberty and property, is of utmost importance to any individual. Maintenance of peace and order is absolutely important in any society for human beings to live peacefully and without fear of injury to their lives and property. This is possible only in states where the penal law is effective and strong enough to deal with the violators of law. Any state, whatever be its ideology or form of government, in order to be designated as a state, should certainly have an efficient system of penal laws in order to discharge its primary function of keeping peace in the land by maintaining law and order. The instrument

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² See Faiz Kazi, Project on the constituent elements of crime in the Indian Penal Code, [http://www. Academia.edu/4374274/Constituent-Elements-of-Crime](http://www.Academia.edu/4374274/Constituent-Elements-of-Crime), p. 1

³ Ibid

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by which this paramount duty of the government is maintained is undoubtedly the penal law of the land. Thus, the prime object of criminal law is the protection of the public by the maintenance of law and order.

This paper is thus intended to ascertain the extent to which product accidents can be cut down in Cameroon and holding corporate bodies involved in the manufacturing of defective products or that supply poor quality services liable for all forms of injuries intentionally caused to the consumer. Furthermore, the discussion is also aimed at ensuring that the threat of liability may compel corporate bodies to improve upon their products and services. Finally, we also intend to propose feasible solutions to improve on the legal policy standards that would enhance the protection of the consumer in Cameroon against defective products and services supplied by corporate bodies.

It must be noted that corporate criminal responsibility for defective products and poor quality services under the Cameroonian law is some how chequered, considering the fact that criminal liability cuts through more than one legislation and non of the laws has defined some key words that feature prominently in this Article like product and service. The pieces of legislation under consideration will be the revised Penal Code,⁴ the new Criminal Procedure Code of the Republic of Cameroon 2005⁵ and the Cameroonian 2011 Consumer Protection Law.⁶ The chequered nature also arises from the fact that some of the applicable provisions of the law do not directly mention the words corporate bodies nor companies, but where a broad interpretation is given, then one may come to the conclusion that liability for defective products and poor quality services will definitely extend to the activities of corporations. There is therefore the need to briefly define some of these key words like corporation, products, services, defect and consumer, all in a bid to give the reader a broad understanding of the discussion.

Both the Penal Code and the 2011 Consumer Protection Law have not defined a corporation or a corporate body. We may turn to the OHADA Uniform Act on Commercial Companies and Economic Interest.⁷ Article 4 of that Uniform Act defines a company as an association of two or more persons that come together to carry out a certain activity and such persons must be bound by contract, with the objective of sharing the profits that accrue from the said activity. We must add that the association or company in the quest of carrying out its activity must not violet any conduct prohibited by the state, particularly where such conduct threatens and harms public safety and welfare.

The term “product” is one of those words which text writers have constantly used but non has bothered to define. The same is true with legislation in Cameroon. The assumption is probably that since most people are familiar with the word, they ought to know what it means or stands for. This should not necessarily be the case as every word is capable of being understood in the context in which it is used. Consequently, the word ought to be understood and defined in the context of “product liability law” for the purpose of consumer protection in Cameroon. In the absence of any local legislation that defines the word, recourse may be made to foreign legislation particularly the English and the French consumer protection laws, giving the persuasive and sometimes authoritative nature of English and French statutes and authorities, a consequence of the English and French speaking regions being part of the common and civil law heritage respectively. In the light of the foregoing, s. 2 (1) of the English Consumer Protection Act, 1987 defines “product” as:

...any good or electricity and (subject to sub-section 3) includes a product which is comprised in another product, whether by virtue of being a component part, raw material or otherwise.

The scope of this definition is not very clear as it uses words like “goods” which will further need to be defined and the word product and goods could sometimes be used interchangeably. Also, the words “product comprised in another product” are ambiguous. In this light, s. 45 (1) of the same Act defines goods as:

...substances, growing crops, and things comprised in land by virtue of being attached to it and any ship, aircraft or vehicle.

⁴ Law No. 2016/007 of 12th July 2016

⁵ Law No. 2005/007 of 27th July 2005.

⁶ Law No. 2011/012 of 06 May 2011 also known as FRAMEWORK ON CONSUMER PROTECTION IN CAMEROON.

⁷ Law No. 90/031 of 10th August, 1990 to Regulate Commercial Activities in Cameroon-OHADA Treaty, (Organisation for the Harmonisation of Business Laws in Africa better known by its French Acronym as OHADA Treaty signed in Port Louise in 1993).

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The term product could also be understood to mean: Any tangible article, property or components thereof produced or distributed for sale that is used for personal, family or household purposes, and not for business.⁸

The definition of the French Civil Code, Article 1386 (3), is similar to that provided under the English Consumer Protection Act. The reason is that Britain in 1987 incorporated into its consumer protection law, Directive 85/374/EEC, which Directive was equally adopted by Article 1386 (1) – (18) of the French Civil Code in 1998. The Directive provided a guide in terms of meaning and Member-States of the European Union were only required to make slide modifications to suit their local needs and could not deviate from the natural and general understanding as provided by the Directive.⁹ French law has however not made any distinction between products and goods. It has added as its own modification to the definition animal husbandry products, as well as hunting and fishery products.¹⁰ French law has also considered as intangible products, computer software programmes considered to be “defective” when contaminated by virus. In this light any company or corporation that invents and puts into the market a software or computer programme, with the intention to crash or destroy the users’ systems ought to be responsible for the “defectiveness” of the software. In the absence of a local definition that wins popular acclamation, one may be constrained to adopt the foreign definitions examined above considering the common law¹¹ and civil law¹² heritage of Cameroon by various laws. Hence, for the purpose of this Article, the term “product” or “goods” could be construed in their ordinary meaning to embrace a wide variety of objects such as cloths, motor cars, ship, machinery, furniture, intangible products like internet, computer software programmes, anti virus devices, available in the form of services and industrial growing crops that have been severed in the form of chattels and buildings as well as services provided through inventions or technology.

With regard to service, it is unfortunate that the 2011 Consumer Protection Law has extensively used the word but failed to define it. We may derive some meaning from the word by consulting the Oxford Advanced Learner’s Dictionary of Current English.¹³ There, services is defined as, “...the work that someone does for an organization; the particular skills or help that a person is able to offer”. In other words, services refer to the exhibition of some skills by a service provider to the beneficiary, and which skills should not be detrimental or harmful to the consumer’s health or property. A good example here is the services of communication companies in Cameroon like MTN, CAMTEL, NEXTEL and ORANGE to the general public. They offer communication and internet services amongst others and CAMWATER¹⁴ charged with the production of clean portable drinking water. While ENEO¹⁵ is charged with the supply of electricity within the country.

The next word that calls for definition is defect. In every product liability lawsuit, the first and most important question is whether the product complained of, contains a defect or the service provided was poor? Cameroonian law has not defined the word but the French and English laws are in unison in terms of definition and understanding. In a bid to avoid repetition the word as understood under the French law could be examined and this will provide the guide required in this paper. According to Article 1386 (4) of the Civil Code, a defect is an imperfection that renders the product unsuitable for the purpose for which it was demanded. Articles 1641 and 1643 of the same Code have equally considered a defect as a vice which may or may not be hidden and the vice must render the product unfit for its intended purpose. Vivienne Harpwood,¹⁶ writing on English law of torts, considers goods to be defective if their safety is not such as “persons

⁸ <http://www.cpsc.gov/businfo/cpsa/pdf>.

⁹ It is unfortunate that in June 2016, Britain in a referendum voted to quit the European Union and final negotiations on Brexit are still ongoing and it is hoped that as soon as final negotiation are concluded, the English Consumer Protection Act, 1987 will be amended to reflect only the local laws of Britain. We await the final negotiation with a lot of enthusiasm.

¹⁰ Article 1386 (3) of the French Civil Code.

¹¹ See s. 11 of the Southern Cameroons High Court Law (SCHCL) 1955, which permitted the two English Regions of Cameroon to apply the principles of common law, the principles of equity and the Statutes of General Application that were in England before 1st January 1900.

¹² See Articles 1 and 2 of the French Decree of 16 April 1924 that permitted French Cameroon and Senegal to apply the French Civil Law.

¹³ 6th edition, p. 1075

¹⁴ Fully known as Cameroon Water Utilities Corporation.

¹⁵ The Energy of Cameroon.

¹⁶ *Principles of Tort Law*, London - Cavendish Publishing Ltd., 3rd ed. (1997), p. 271.

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generally are entitled to expect, taking into account all the circumstances". No matter therefore the perspective from which the word is examined, common assertion is that the manufacturer (corporation) who creates the demand for goods and services ought to be responsible to determine that the product and the service have the qualities represented to the public and must stand by the product or service where it is found to be defective.. This is our position in line with statutory provisions.

It must be noted that a corporation will not be liable for defective products and poor quality services unless the consumer is harmed and complains of such injuries. The question thus is, who is a consumer for our present purpose-? According to s. 2 of the 2011 Cameroonian Consumer Protection Law, a consumer is:

Any person who uses products to meet his own needs and those of his dependents rather than to resell, process or use them within the context of his profession, or any person enjoying the services provided.

We may also compare and contrast the above definition with that provided under the 1990 Law,¹⁷ as both laws appear to be similar in contents and meaning. Section 19 of that law defines a consumer as:

Any person who uses goods to satisfy his own needs and those of his dependents. Such a person shall not resell or process the goods or use them in his occupation. A consumer is also the beneficiary of services.

The above two definitions are timely and self explicit. The merits of the definitions stems from the fact that the consumer or his dependents (wife, children and friends) would be permitted in law to sue the producer or the service provider for any damage suffered or caused by the producer's goods or related services. The dependents in this case will not be required to establish any contractual nexus with the producer or service provider. The definitions have expressly knocked off the old hurdle of "privity of contract" which the law hammered upon,¹⁸ and here, the claim of a consumer's dependent that was not a party to the contract but is injured will hardly be defeated or rejected. What is left to be shown is how corporate bodies could be liable for defective products and poor quality services under the Cameroonian Law.

2. WHEN CAN A CORPORATION BE CRIMINALLY LIABLE FOR DEFECTIVE PRODUCTS AND POOR QUALITY SERVICES IN CAMEROON?

In other words, how does corporate criminal responsibility respond to the protection of consumers of products, services and technology? Who can be responsible for the criminal acts of the company, if at all? An excursion to a brief history of corporate criminal responsibility will be necessary if the above questions must be answered. Thus, criminal prosecutions of corporations and other fictional entities have occurred routinely in the United Kingdom since the 19th century and in the United States of America since the beginning of the 20th century. During the late 20th century the Netherlands, Canada, and France enacted standards for holding fictional entities criminally liable.¹⁹ Elsewhere in the world, legislative bodies and courts are being urged to recognize corporate criminal liability by advocates who point to the major role played by organizations in modern day life and argue that active prosecution of organizations is essential to effective crime control efforts.²⁰ Even so, because of theoretical and practical problems in prosecuting fictional entities, corporate criminal responsibility is controversial. The debate centers on the issues of how to measure a fictional entity's liability, how to sanction a fictional entity, and whether criminal prosecution of organizations is effective. Originally, the prevalent view was that a corporation or a body incorporate, which has a separate legal entity, cannot be charged of offences because of procedural difficulties. The obvious reasons were that a corporation could not be either arrested or compelled to remain

¹⁷ See Law No. 90/031 of August 10th, 1990, Regulating Commercial Activity in Cameroon.

¹⁸ See the old English cases of *Winterbottom v. Wright* (1842) ER 282 and *Cavalier v. Pope* (1906) AC 428

¹⁹ See Bucy, Pamela. H., "Corporate Criminal Responsibility". Encyclopedia of Crime and Justice. 2002.

Encyclopedia.com. 25 Sep. 2014<<http://www.encyclopedia.com>>. See also Ngwafor Ephraim, *Corporate Criminal Liability*, Institute of Third World Art and Literature, (1985) p. 18, who has drawn a graphic picture of the history of the concept in English, Canadian and French law.

²⁰ Bucy, Pamela. H., Ibid

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present during criminal proceedings.²¹ It, owing to the absence of “mind”, could not form the required “intention” to commit a crime as no bodily injury could be inflicted on it.²² Writing generally on a company’s position at criminal law Blackstone had this to say²³:

A company can neither maintain nor be defendant to an action in battery or such like personal injuries, for a corporate can neither beat nor be beaten, in its body politic. A corporation cannot commit treason, or a felony. It is not liable to corporate penalties nor attainder, forfeiture or corruption of blood, neither can it be committed to prison, for its existence being ideal, no man can apprehend or arrest it.

2.1 The corporation as a real entity

The evolution of corporate criminal responsibility is a striking instance of judicial change in law. The non liability of a corporation soon gave way to the idea that it can be made liable for non-feasance, i.e. an omission to the act. If a statutory duty is cast upon a corporation or body incorporated, and not performed, the corporation can be convicted of the statutory offence. It is in this light that the Bombay High Court in the Indian case of *State of Maharashtra v. Syndicate Transport Co. Ltd.*,²⁴ did not see any reason for exempting a corporate body from liability for crimes committed by its directors, agents or servants while acting for or on behalf of the corporation.²⁵ A similar view was taken by the U.S. Supreme Court in the case of *New York Central & Hudson River Railroad v. United States*.²⁶ In this case, the Supreme Court inter alia, concluded that the criminal liability could be imputed to the corporation based on the benefit it received as a result of the criminal acts of its agents. By mid-nineteenth century, English courts were willing to hold corporations criminally liable for wrongful acts as well as wrongful omissions. English courts had thus developed an “identification” doctrine by which corporations were prosecuted for crimes of intent. This doctrine merges the personalities of the corporation and its controlling individuals, and holds a corporation criminally liable for crimes committed by persons who “represent the directing mind and will of the corporate entity”.²⁷ Thus, in the English case of *R v. ICR Haulage*²⁸, the court of Criminal Appeal in the United Kingdom held that there is no reason in law why indictment alleging a common law conspiracy to defraud should not lie against a limited liability company. The court arrived at this decision on the basis that since a corporation cannot commit unlawful conduct intentionally or negligently except through their representatives and cannot be punished directly, the corporation will only be punished indirectly either by fines or through their representatives. While Atangcho²⁹ has added that since a company has not got blood and flesh it can only exist and function through humans.

As a systematic concept in the West, Prosser has it that the first series of English criminal statutes imposing penalties upon marketers of corrupt food and drinks for immediate consumption saw the day of light in 1266.³⁰ At this period,

²¹ See Faiz Kazi, Project on the constituent elements of crime in the Indian Penal Code, http://www.academia.edu/4374247/Constituent_Elements_of_Crime

²² Ibid. See also Atangcho Nji Akonumbo, “Foreign Direct Investments and Legal Policy Option in Cameroon”, Thesis submitted to the University of Yaounde II, Soa, Department of Common Law, in partial fulfillment of the requirements for the award of the degree of Ph.D. in Law, 2008, at p.568.

²³ Blackstone, W., *Blackstone’s Commentaries on the Laws of England Chicago*, University of Chicago Press Vol. 1 (1965) at p. 464.

²⁴ 12 AIR 1964 Bom 195

²⁵ However, a corporation cannot be convicted for the offence, which by nature cannot be committed by a corporation but can only be committed by an individual human being e.g sexual offences, bigamy, perjury etc, etc.

²⁶ C1909).

²⁷ Doelder and Tiedemann, “Criminal Liability of Corporations. The Hague, The Netherlands”: *Kluwer Law International*, 1996. See also the 2008 China Milk Scandal, where over 22 companies involved in the manufacturing of infants powder milk were closed down and some of their directors imprisoned having used melamine a chemical used in the manufacturing of plastics and fertilizer in a bid to boost up the protein level of the milk. Hundred of Thousands of infants that consumed the milk suffered from various injuries including the destruction of kidney stones that are very rare in children.

²⁸ (1944) 1KB 551

²⁹ Op.cit, at p. 567.

³⁰ Prosser. W.L. “The Assault Upon the Citadel (Strict Liability to the Consumer)”, *69 Yale L.J.* (1960), 1099 at 1103.

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although the statute said nothing about civil liability, it was recognized at common law that there was a general principle that those who failed to show the degree of skill prevailing in their trade or calling were subject to liability in an action on the case (negligence).³¹ Cameroon on her part has not been left out as criminal statutes have equally been enacted in a bid to sanction corporations whose products are injurious to human and animal health. This is shown in the discussion that follows below.

2.2 Penal provisions for defective products and poor quality services

2.2.1 Penal provisions under the 2011 Law

From the foregoing discussion, Cameroon in the area of product liability has made conscious efforts through legislation to show when a corporation could criminally be liable for any defective goods and harmful services put onto the market. The first question whether a corporation can be criminally liable under the law of product liability is yes. It is gratifying to note that the 2011 Consumer Protection Law and the Penal Code³² have expressly provided penal provisions against anyone that supplies defective goods and poor quality services injurious to the plaintiff's health or property. But firstly, before considering penal provisions under the 2011 Law, the possibility of holding a corporation liable for any criminal offence is established by s. 59 (1) of the Cameroonian Criminal Procedure Code,³³ which states that:

The commission of any offence may lead to the institution of criminal proceedings and, as the case may be to a civil action.

In response to s. 59 (1) of the Cameroonian Criminal Procedure Code above, s. 32 (1) of the 2011 Law provides:

Whoever gives false information on the quality of technology, goods or services supplied to the consumer shall be punished with imprisonment of from six months to two years or with a fine of from 200.000 (two hundred thousand) to 1.000.000 (one million) francs, or with both imprisonment and fine.

We must comment that s. 32 (1) above does not directly use the words any corporation but rather uses the words, "whoever gives false information on the quality of technology, goods or services ..." The term "whoever" could be interpreted or construed to mean an "individual", or a "corporation" which produces goods or offers services to the public. The requisite element of giving information is probably intended to comply with s. 10 (2) of the 2011 Law, which makes it obligatory for the vendor, producer, or supplier of technology, good or service to ensure that their supply is accompanied with a manual, receipt or any other document that can provide information that can guide the consumer on the technical features, mode of protection, utilization and warranty. Section 32 (1) cannot therefore be read in isolation of s. 10(2). Thus, the absence of a manual guide or receipt could even constitute an offence. Section 32 (1) is therefore deemed to be breached or is considered to be harmful, where in trying to comply with s. 10 (2), the corporation provides in a manual or receipt, information that is false probably as to the merchantability quality of the product, service or technology, reasonable fitness for the purpose, corresponding with description and sample. Here, it must be established that the false information may be intended to deceive the consumer as per the quality of the goods or services. It is a fundamental misrepresentation which influences a consumer to go in for products or services which he would have avoided. It is then arguable that the consumer might not have gone in for the products or services if he had correct and adequate information on the nature of the products or services, risk involved or with regard to the satisfaction derived from the goods and services and their side effects. In the light of the foregoing, adverse side effects and risk can easily be avoided or controlled where enough and adequate information about the general nature of the products or services is provided.

³¹ Ibid. See also Winfield P.H. , "The History of Negligence in the Law of Torts" 42 *LQR* (1926), 184.

³² See the New Penal Code of Cameroon – Law No. 2016/007 of 12 July 2016.

³³ Law No. 2005/007 of 27th j uly 2005.

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Furthermore, s.33 of the 2011 Law has added more bite by doubling the punishment provided in s. 32 (1) where related offences are committed by the executives or employers of corporate bodies in the exercise of their functions within the structure. According to s.33:

Corporate bodies may, without prejudice to the criminal liability of the executives or employees of sales, supply or service, technology or commodity companies, be sentenced to double the fines provided for in s. 32 above, if their executives or employees committed offences during or in the exercise of their functions within the structure.

Section 36 is also very important when it provides:

Corporate bodies whose executives are found guilty of offences under this law may be subject to additional penalties laid down by the Penal Code.

The offences referred to under s. 36 above are those involving product and service contamination but whose penalties are not prescribed by the 2011 law, to be discussed below.

The burning question is, why would the executives or employees of the outfit be punished instead of punishing the corporation itself? The argument here is that since a corporation is a fictitious entity even though granted legal status, any acts of the directors that are ultra vires are deemed to be outside the corporation and, therefore, not acts of the corporation, as the corporation itself does not exist here and would not have committed the crime if it was a legal person.³⁴

2.2.2 Penal provisions under the Penal Code

The general criminal liability of corporate bodies under the Penal Code is declared by s. 74 (1) (a) which provides:

Corporate bodies shall be criminally responsible for the offences committed on their behalf by their organs or representatives.

By the provisions of s. 74 (1) (a), corporate bodies or their agents involved in the manufacturing or supply of defective products or services shall be criminally responsible. In line s. 74, s. 258 (1) punishes anybody or corporation that adulterates any foodstuff, whether for human or animal consumption, when it provides:

Whoever either adulterates any foodstuff, whether for human or animal consumption, or beverage or medical substance intended to be sold, or keeps any substance designed or fit only for the purpose of effecting such adulteration, shall be punished with imprisonment for from three months to three years and with fine of from five thousand to five hundred thousand francs.

It should be noted that, s. 258 (1) has also extended liability to persons and corporations that are involved in illegal sale, falsification and adulteration of medication. Thus, according to the extension:

Whoever sells any medication without lawful authority ; sells any counterfeited, expired or unauthorized medication; keeps for sale, any medication that is falsified, adulterated or harmful to health, shall be punished with imprisonment for from 3 (three) months to 3 (three) years or with fine from CFAF 1 000 000 (one million) to 3 000 000 (three million).The confiscation provided for in Sections 35 and 45 of this Code shall apply.

It is arguable that the extension of s. 258 (1) to the falsification and adulteration of medication is intended to kick out and punish persons and corporations involved in the manufacturing and sale of illicit and counterfeit drugs that are harmful to health. These adulterated drugs have over the years actually constituted a big health hazard to Cameroonians. Despite the

³⁴ See once again the outcome of the 2008 China Tainted Milk Scandal, op.cit.

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stiff penalties provided above, adulterated and road-side drugs are still visibly being manufactured and sold by quacks that possess very little knowledge on the harmful effects of their activities.

In all, the provisions of s. 258 (1) have revealed that the Penal Code equally frowns at producers, including corporations that put onto the market defective products like drugs, foodstuff, and beverages.

From the provisions of sections 32, 33 and 36 of the 2011 Law and ss.258 and 74 (1)(a) of the Penal Code, it is clear that corporate criminal responsibility for defective products and services in Cameroon is no longer in dispute. Punishment for corporate criminal responsibility is thus principally in two ways, that is, imposition of fine and punishment with imprisonment. In the first place, since a company cannot be put behind bars for adulterating its products contrary to s. 258(1) of the Penal Code, the most direct convenient penalty is fine, apart from any forfeiture of property³⁵, cancellation of licence, confiscation³⁶ and destruction of offending products. Indeed no difficulties should arise in ascribing criminal liability upon companies for offences of whatever description that are punishable by the infliction of a fine or as an alternative punishment. In other words, corporations cannot commit unlawful conduct intentionally or negligently except through their representatives and they cannot be punished directly, but only indirectly either by fines or through their representatives.

The second class of penalty is punishment with imprisonment. Since *Salomon v. Salomon*,³⁷ it has been understood that a company, upon incorporation acquires an identity distinct and separate from that of its shareholders, with separate rights and liabilities. Besides a fictitious person, a corporation works through its agents in the real world. Its objectives are stated in the memorandum of association but are executed through the human agency on behalf of the corporation. These human agents may be the directors, managers or servants of the company and must manage the corporation in accordance with the powers conferred in the objects clause of the corporation. Any action in excess of what is provided in the objects clause amounts to an ultra vires act for which the managers will personally be liable. The punishment preferable here is imprisonment of the directors because no memorandum of association can lawfully authorize a company to commit a crime. The argument here is that since the corporation is a fictitious entity even though granted legal status, any acts of the directors that are ultra vires are deemed to be outside the corporation and therefore not acts of the corporation, as the corporate body itself does not exist here and would not have committed the crime if it was a legal person. The corporation cannot therefore be vicariously liable for such ultra vires acts. According to Ngwafor,³⁸ the early recognitions which we may regard as exceptions to the vicarious liability rule were limited to the prosecutions for misfeasance for public nuisance. It would be illogical to hold a corporation liable for wrongdoing when it exceeds its powers, especially because it is illogical to presume that a corporate body has authorized its directors to do what the corporate body itself has no power to do. According to Salmond,³⁹ a legal person is as incapable of conferring authority upon an agent to act on its behalf, as doing the act in propria persona. The authority of the agents and representatives of a corporation is therefore conferred, limited and determined, not by the consent of the principal, but by the law itself. It is the law that determines who shall act for a corporation and within what limits his activity must be conferred. Any act which lies beyond these legally appointed limits will not be imputed to the corporation, even though done in its name and on its behalf.

2.3 Corporate criminal responsibility under the vicarious liability theory

Vicarious liability is basically a civil law of torts principle whereby a principal becomes automatically liable for the wrongs committed by his officers, employees and agents acting within the scope of their authority or employment. Thus, companies will be liable for the misdeeds of their employees to the same extent as a human employer would be. In the eyes of the law, a corporation is not regarded as so abstract as not to lead to a master and servant relationship. It has the capacity to act and, therefore, an ability to form such relationship. Being an artificial person, a company may act or form an intention only through its directors or servants. As each director or servant is also a legal person quite distinct from the company, it follows that the liability of a company for consequences flowing out of the unlawful intentions and acts of its directors or servants may be visited upon the company only vicariously. The company is bound by the torts of the

³⁵ See s. 258(3) of the Penal Code

³⁶ Sections 35 and 45 of the Penal Code.

³⁷ (1897) AC 22

³⁸ Op cit at pp 10-13.

³⁹ *Salmond's Law of Torts*, London - Sweet and Maxwell, 10th ed. (1945) 345.

There is therefore a resemblance between section 32 (1) of the 2011 Law and s. 258 of the Penal Code because false information given about the quality of a product or service as provided under s. 32 (1) will be detrimental to the consumer just like when foodstuff, beverage or medicaments are adulterated, or left to deteriorate and thus become harmful to human health. All of the above will definitely militate against the implied condition as to merchantable quality and suitability for the intended purpose.⁴⁶ On the other hand, where the offence committed by the executives of the corporation is that of assault, which in our case is constructive, then the remedies must be those provided by the Penal Code. Examples are assault occasioning grievous harm⁴⁷, simple harm⁴⁸, slight harm⁴⁹ and unintentional killing and harm⁵⁰.

It must be noted that in given situations the victim may join the prosecution as a civil party to the action. The question thus is what is the place of the victim joining the prosecution as a civil party to the action? In the first place, the right of the victim to join the prosecution as a civil party is provided by s. 61 of the Criminal Procedure Code which provides that, "a civil claim may be made along side a criminal action before the same court so long as they arise from the same offence". In this light, the victim can join the prosecution by filing a civil suit through the legal counsel for damages. The right for damages is provided under s.59 (3) of the Criminal Procedure Code which provides that, "civil action is intended to provide compensation for damages resulting from an offence". The issue of legal counsel or legal representative is one of formality. For instance, where the action is before a Court of First Instance with summary jurisdiction, the victim who may not be represented by a legal counsel may orally demand for damages, which oral application will be taken into consideration by the prosecution. It is more advantageous for the victim to join the prosecution as a civil party because both civil and criminal charges will be disposed of simultaneously. Whereas if the civil claim is brought separately from a criminal action, the court seized of the civil matter shall stay proceedings until a final decision on the criminal action has been pronounced. The possibility to join a civil action with a criminal claim is authorized by s. 59 (1) of the Criminal Procedure Code which provides that, "the commission of any offence may lead to the institution of criminal proceedings and, as the case may be, to a civil action".

2.4 Constituent ingredients of a crime

The fundamental principle of criminal liability is that there must be a wrongful act, *actus reus* combined with a wrongful intention, *mens rea*. This principle is embodied in the maxim, *actus non facit reum, nisi mens sit rea*, meaning, "an act does not make one guilty unless the mind is also blameworthy". A mere criminal intention not followed by a prohibited act does not constitute a crime. Similarly, mere *actus reus* ceases to be a crime as it lacks *mens rea*. No act is *per se* criminal; it becomes criminal only where the actor does it with guilty mind. No external conduct, however serious in its consequences, is generally punished unless the prohibited consequence is produced by some wrongful intent, fault or *mens rea*. With this general view in mind, we may then proceed to a full discussion of *mens rea* and *actus reus*, in order to show how they interplay as constituent ingredients of a crime in the context of corporate criminal liability for defective products and poor quality services in Cameroon.

2.4.1 Mens rea as an element of crime

Mens rea or guilty mind is the state of mind indicating culpability, which is required by statute as an element of crime. It is commonly taken to mean some blameworthy mental condition, whether constituted by intention or knowledge or otherwise, the absence of which on any particular occasion negatives the intention of a crime. Thus, one of the main characteristic of our legal system is that the individual's or corporate liability to punishment for crimes depends, among other things, on certain mental conditions. This is provided by s. 74 (2) of the Penal Code which provides:

Criminal responsibility shall lie on him who intentionally commits each of the ingredient acts or omissions of an offence with the intention of causing the result which completes it.

⁴⁶ See Article 224 of the OHADA Uniform Act Relating to General Commercial Law.

⁴⁷ S. 279 of the Penal Code

⁴⁸ S. 280

⁴⁹ S. 281

⁵⁰ S. 289

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The liability of conviction of a corporation in accordance with s. 74 (2) of the Penal Code depends not only on the corporation having done some outward acts which the law forbids, but on the corporation having done them in a certain “frame of mind” or with a “certain will”. Again, the term mens rea could mean violation, which is the motive force behind the criminal act. There can be no crime of any nature without mens rea or an evil mind. Every crime requires a mental element and that is considered as the fundamental principle of criminal liability. In our present situation, the corporation must have been aware of those elements in its activities which make the crime with which it is charged.⁵¹ Mens rea is therefore proved when the manufacturer (corporation) of a product intentionally contaminates or adulterates a product with the intention of hurting the consumer of the said product. Mens rea could also be proved where it is shown that a service provider carelessly provides a service with the intention of hurting the user of the service.⁵²

The gist of this discussion is that blame worthiness of the mind must exist before there can be a conviction. Thus, the requirement of mens rea is in accordance with natural justice and modern trends in penology. For, why should a corporation be guilty of an offence which it did not intend to commit? To this effect, Lord Reid succinctly observed the contention in the English case of *Sweet v. Parsely*⁵³ thus:

There has for centuries been a presumption that parliament did not intend to make criminals of persons who in no way were blamed in what they did.

The burden of proof of mens rea lies on the prosecution as the corporation will be presumed to be innocent. This is established by s.8 of the Criminal Procedure Code.⁵⁴ According to s. 8(1):

Any person suspected of having committed an offence shall be presumed innocent until his guilt has been legally established in the course of a trial where he shall be given all necessary guarantees for his defence.

While sub-section (2) provides that:⁵⁵

The presumption of innocence shall apply to every suspect, defendant and accused.

Section 9 (1) of the same Code defines a suspect as:

...a person against whom there exist any information or clue which tends to establish that he may have committed an offence or participated in its commission.

One pertinent issue worthy of understanding is that the term mens rea is used to refer to a general principle of statutory interpretation of criminal responsibility wherever a court is considering the definition of an offence. It must be presumed that the definition requires proof of guilty mind of the accused until the contrary is proved. It is in this light that s. 8(2) cited above makes the accused person (corporation) innocent until the contrary is proved by the prosecution. Moreover, s. 74 (4) of the Penal Code also appears to limit liability for criminal offences when it provides that:

Except as otherwise provided by law, there shall be no criminal responsibility unless subsection (2) of this section has been satisfied.

The tenor of s. 74 (4) is that other ingredients may replace the element of intention. This implies that even an erring corporation could go scot free because it was not aware of those elements in its act which make the crime with which it is charged.

⁵¹ For instance, adulteration of foodstuffs, beverages or any medication meant for either human or animal consumption, contrary to the provisions of s. 258 of the Cameroonian Penal Code.

⁵² For instance, where a mechanic (CAMI-TOYOTA) negligently fits or mounts the plaintiff’s tyre knowing fully well that it will come out while the plaintiff is driving, CAMI-TOYOTA must be criminally liable if the tyre comes out and the plaintiff’s car runs into a ditch.

⁵³ (1969)1 All ER 374 at 351.

⁵⁴ Established by Law No. 2005/007 of 27th of July 2005.

⁵⁵ Ibid

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Although there are divergent views by legal scholars on the elements of mens rea, the following could be identified as common elements of mens rea: intention, motive, knowledge and negligence.

2.4.1.1 Intention

To intent is to have in mind a fixed purpose to reach a desired objective. It is used to denote the state of mind of a man or of a corporation which does not only foresee but also desires the possible consequences of its conduct. For example, s. 32 (1) of the 2011 Cameroonian Consumer Protection Law provides that, “whoever gives false information on the quality of technology, goods or services supplied to a consumer shall be punished...”. From the foregoing, the individual or corporation will not be punished unless it is shown that he or she intended to achieve the purpose of his or her act. With regard to the provisions of s. 32 (1), the false information must be intended to deceive the consumer as far as the quality of the product, service or technology is concerned. Where false information is given as per the quality of the goods, services or technology, the interpretation could be that, the producer or service provider intends through the false information to certify that the goods, service or technology which are probably harmful are suitable for the purpose in accordance with Article 224 of the OHADA Uniform Act Relating to General Commercial Law that insists on the merchantability nature of the goods or products. The consumer is thus misled and acquires a product or service that is harmful.

From the above discussion, we may note that while a consumer in Cameroon is protected and can sue in tort (civil action) where the implied condition as to merchantable quality is breached as provided under the OHADA Uniform Act, the breach of that same implied condition will constitute a criminal offence under s. 32(1) of the 2011 Consumer Protection Law. The false information could thus be contained in a leaflet, brochure, adverts in newspaper and media. What is important is the fact that the defendant (corporation) must have made the false information with the knowledge that it was false and with the intention of deceiving the consumer. In this light, the corporation must foresee as well as desire the consequences of its action or conduct. This is deduced from the provisions of s. 74(2) of the Penal Code which states that, “criminal responsibility shall lie on him who intentionally commits each of the ingredient acts or omissions of an offence with the intention of causing the result which completes it”. An act is thus intentional if, and insofar as it exists in idea before it exists in fact, the idea realizing itself in the fact because of the desire by which it is accompanied.

Intention is a foresight of the consequence and desire that the consequence ensues. Accordingly, in the English case of *Cun Liffe v. Goodman*,⁵⁶ the court observed that:

An intention...connotes a state of affairs which (X) decides, so far as in him lies to bring about and which in point of possibility he has a reasonable prospect of being able to bring about by his own act or volition.

Apart from cases where an accused person confesses his intention, it is in most cases proved by circumstantial evidence. The expression, “a man intends the natural consequences of his action” still makes good sense. Proving intention is a difficult task as even the devil himself knoweth not the mind of a man. Also, it was observed that, “there is no art to find the minds construction in the face...”.⁵⁷ This is apt in the sense that no one is capable of seeing into another’s mind and being able to state with absolute certainty what is intention.

It is when a man himself confesses what he intended to do or what he foresaw can one come closer to being sure of what it was, although, even then one may not always be certain because he may not be understood as he may consciously deceive one or may unconsciously deceive himself as to what his real state of mind was. Intention could also be inferred from the facts of any particular situation also known as the surrounding circumstances of each case. Thus, in the West African Court of Appeal case of *Setrena v. R*,⁵⁸ the court held that: “Intention is not capable of positive proof - it can only be implied from overt acts”. An intention to injure the consumer can also be inferred from the severity of the consumer’s illness after consuming the contaminated product with poisonous substance.⁵⁹

⁵⁶ (1950) 2 KB 237.

⁵⁷ Macbeth : New Swan Shakespeare, p. xx.

⁵⁸ (1851) 13 WACA 132

⁵⁹ See sections 258, 279, 280,281 and 289 of the Penal Code.

It is therefore the duty of the prosecution to get as close as possible to discovering by such implication what the accused himself (corporation) intended.⁶⁰ This is often called the subjective approach to the ascertainment of intention. In doing this, the court may resort to what a hypothetical reasonable man's mind would be in a given circumstance. Intention therefore will not mean ultimate aim and objective nor is it a synonym for motive.

2.4.1.2 Intention and motive

Intention and motive are often confused as being one and the same. The two, however, are distinct and have to be distinguished. The mental element of a crime ordinarily involves no reference to motive. A bad motive cannot be a reason for convicting a person. Similarly, a good motive can be an excuse for acquitting him. In criminal law, motive can be defined as that which leads or tempts the mind to indulge in criminal act or as the moving power which impels to act for a definite result. Motive therefore is the reason for taking a particular line of action and considered here as evidence of intention and not in itself intention.⁶¹ Intention on the other hand is the state of mind that foresees and desires the consequences of a conduct.⁶²

However, s. 75 of the Penal Code appears to provide that motive is not material to criminal responsibility when it states:

Neither ignorance of the law nor motive shall be material to criminal responsibility.

What this means is that motive should have no effect by way of compelling a reduction of penalty or altering the nature of an offence. This is the principle but in a given and fit case, motive may be pleaded as a mitigating circumstance thereby compelling a reduction of the penalty if properly pleaded.

Motive involving criminal trials associated with the supply of defective goods or the provision of poor quality services injurious to the consumer, may be motivated by a particular act, even though the same motive may not act as a defence for the same crime. In the light of the foregoing, an Australian High Court in the case of *R v. Plomp*,⁶³ held that in criminal offences punishable with death, motive in fact should be taken into consideration.

Under the Nigerian Criminal Law, s. 9 of the Evidence Act emphasizes generally the importance of motive in criminal trials by providing that:

*Any fact is relevant which shows or constitutes a motive or reparation for any fact in issue or relevant fact.*⁶⁴

Moreover, motive can go a long way to prove criminal intent as stated by Ademola C.J.F., where he said:

*If there is motive it strengthens the case for the crown and becomes part of it.*⁶⁵

We may conclude that motive as an element of mens rea will be very useful to the prosecution in Cameroon, in criminal trials where the producer or service provider admits the commission of the alleged offence but tries to justify its commission by pleading a defence irrespective of the provisions of s. 75 of the Penal Code. Here motive will serve as an exception to s. 75, since it may go a long way to mitigate the alleged offence committed. Therefore, it will not be out of place to state that the acceptance of the producer's or service provider's defence under the Cameroonian Penal Code will be based on the motive where goods or foodstuffs are adulterated in accordance with the provisions of s. 258 of the Penal Code. Motive here is the intent behind the offence. In other words, the manufacturer of the defective product pleads his guilt but tries to justify the reasons for the adulteration of the goods or foodstuffs. Examples under the Penal Code are

⁶⁰ For instances, the end result or natural consequences of his act.

⁶¹ See s. 75 of the Penal Code.

⁶² See Jean Laarguier, (2005) Procédure D'Indemnisation des Victimes dans les Assurances de Dommages et de Personnes, at p. 51.

⁶³ (1963) 37 A.L.TR 191.

⁶⁴ Evidence Act, LFN 2004.

⁶⁵ See the case of *Adetola v. R* (1960) W.R.W.L.R. 26.

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lawful defence,⁶⁶ provocation,⁶⁷ and the state of necessity.⁶⁸ Lawful defence is a complete defence once it is properly pleaded, while provocation and state of necessity are defences which will only diminish responsibility and reduce the penalty of a person who has committed an offence but justifies why he committed the offence. The same role will be available as well as applicable to manufacturers of defective products and service providers. Where the defence is accepted and responsibility diminished, then the court is said to be convinced by the motive (justification) advanced by the accused. Motive will therefore strengthen the prosecution's case as well as guide the court as a mitigating circumstance in the award of punishment. It equally influences the reduction of a penalty depending on how it is pleaded.

2.4.1.3 Negligence as mens rea

If anything is done without any advertence to the consequent event or result, the mental state in such situation signifies negligence. The event may be harmless or harmful. If harmful the question may arise whether there is legal liability for it. In the law of tort, it is decided by considering whether or not a reasonable man in the same circumstance would have realized the prospect of harm and would have stopped or changed his course so as to avoid it. If a reasonable man would not, then there is no liability and the harm must lie where it falls. Negligence strictly is not a state of mind at all and the final results are not often desired. It means just a want of due care in a situation whereby an ordinary and reasonable producer (corporate body) or service provider would act diligently. The justification for punishing a negligent corporation here as already stated is that, a corporation ought to be very careful in the manufacturing of the products which she intends to put into the market. Consequently, criminal negligence is the failure to foresee and avoid a consequence (in this case defects) which a reasonable and prudent corporation (man) in the circumstances would have foreseen and avoided.⁶⁹ Here, the reasonable man test should be used to determine whether the corporation was negligent in its conduct or not. The reasonable man's test comes in on its own and as such, there is no room for subjective test. The application of the test is not without problems because there may be made standards of reasonableness. According to Okonkwo and Naish, "should an accused be held negligent according to the standards of the reasonable man of his standing in life or according to a higher standard in relation to a particular profession"?⁷⁰

We think that the standard should be that in relation to a particular profession. For instance, in a charge of manslaughter against a corporation that prepares a concoction in the form of "liquid medicine" that injures the consumer's health, the standard used has been that the skills of such a corporation or company must be measured against the skills of a reasonable qualified company whose skills are in conformity with those set out by World Health Organization-WHO. It should be noted that manslaughter does not appear in our Penal Code and its equivalence may be found in s. 279. According to s. 279 (2):

Where use is made of a weapon, of any explosive, corrosive or toxic substance, of poison, or any act of witchcraft, magic or divination the imprisonment shall be from six to fifteen years.

From the foregoing provisions of s. 297 (2), a corporate body must not use any corrosive or toxic substance like melamine that will render its products defective as this might be tantamount to criminal negligence. This was the situation in the 2008 China Tainted Milk Scandal in which over 22 companies involved in the manufacturing of infant powder milk used melamine, a toxic industrial chemical or substance used for producing plastics and fertilizers. The used of melamine rendered the milk defective with well over 300 000 babies affected. Thus, responsibility should be based on a higher standard in relation to the particular profession embarked upon by the corporation or producer.

In conclusion therefore, the simple lack of care or mere inadvertence is not enough to amount to criminal negligence in Cameroon though this may give rise to a civil liability action in negligence. Therefore, for there to be a conviction resulting from negligence by a corporation, the negligent conduct must have been gross or of such a high degree as the

⁶⁶ S. 84

⁶⁷ S. 85

⁶⁸ S.86

⁶⁹ See Jean Larguier, op cit at p. 54. See equally Articles 121, 122, and 123 of the French Penal Code that provide penal provisions for punishing persons guilty of criminal negligence.

⁷⁰ *Criminal Law in Nigeria*, Ibadan - Published by Spectrum Books Ltd., 2nd edition, (1980) at p. 56.

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conduct of the officers of the dairy products in the 2008 China Milk Scandal. The conviction of four chief executive officers in the 2008 China Milk Scandal for the leading role played by each of them should serve as a lesson to chief executive officers of companies in Cameroon who have sometimes managed the affairs of the companies in total disregard of the safety measures set out by the law. The courts in Cameroon should also be bold enough and emulate the Chinese courts and should order for closure of outfits as well as sanction erring executive officers through imprisonment jails, irrespective of the owners of the companies or personality involved. The adoption of the Chinese example will serve as a deterrent to erring corporations in Cameroon and may on the other hand lead to an improvement in the manufacturing process through research and innovations. Strictly speaking, negligence may not be a form of mens rea. It is more in the form of a legal fault. However, it is made punishable for a utilitarian purpose of hoping to improve people's standard of behaviour, particularly corporate bodies and individuals involved in the manufacturing and supply of goods and services.

2.4.1.4 Recklessness

This means rashness in taking unjustified risk but though not desiring that anything adverse should happen.⁷¹ In other words, recklessness is a convenient term coined to describe a state of mind short of intention. It connotes a state of mind of a person (corporate body as a fictitious entity) or a producer in the context of this Article who is confident of himself in pursuing a course of action which results in injury to another person or who in a way displays total disregard to human life in relation to the products and services put to the public. It is a state of mind between intention and advertent negligence because the accused, that is, the corporation saw the consequences of his conduct and risked it. Though not desired, the corporate body does not give a damn as to whether or not a prohibited consequence results from her action. A good example is where a company recklessly manufactures a product using chemicals and ingredients without testing such to ascertain their likely effect and reaction to human beings.

In a lucid explanation of the word "Recklessness", Turner J.C.W. said:

Intention cannot exist without foresight but foresight can exist without intention for a man may foresee the possibility or even the probable consequences of his conduct and yet not desire them to occur nonetheless if he persists on his course, he knowingly runs the risk of bringing about the unwished result. To describe this state of mind the word "reckless" is the most appropriate.

We may wish to commend here that Turner's assertion could serve as a good guide to corporate bodies in Cameroon, as they must give themselves enough time to think and reflect on what they intend to produce, as well as adopt good manufacturing practices and quality assurance measures. The quest to make money should only be conceived after good manufacturing practices have been adopted. Where the corporation or service producer becomes reckless and does not foresee that its failure to respect good manufacturing practices would lead to injury to the consumer, then such a corporation or service provider should be seen to have intended the consequences of the reckless act which were foreseeable but were not guided against.

2.4.1.5 Knowledge as mens rea

Knowledge is awareness on the part of the corporation concerned, indicating its "mind". Knowledge is an awareness of the consequences of the act. It is the state of mind entertained by the corporate body with regard to existing facts which she has observed or the existence of which has been communicated to the corporation by persons whose veracity the company has no reason to doubt. Knowledge is essentially subjective. The demarcating line between knowledge and intention is no doubt thin, and one can hardly distinguish it from intention but perhaps one can imagine an accused company knowing that her action will cause prohibited results.

The requirement of knowledge as a category of mens rea depends on the definition of the particular crime. However, it is sometimes inferred from the circumstances of the case and the duty to make such inference belongs to the judge. In *Roper v. Taylors Central Garages*,⁷² Delvin. J. identified three categories of degrees of knowledge. The first he called actual

⁷¹ See Jean Languier, *Supra*, at p. 54.

⁷² (1951) 2 T.L.R. 284.

acknowledge which the judges may find through an inference from the nature of the acts done, because no man can prove the state of another man's mind. The second is where the defendant-corporation had every reason and means to know of a risk and the consequences that were obvious but it did not bother to see how the risk could be avoided. The third he referred to as constructive knowledge which is not actual but implied from knowledge resulting from surrounding circumstances. These three categories of knowledge will equally be useful in Cameroon in matters involving criminal liability for defective products and services.

2.4.2 Actus Reus as an element of crime (the physical element)

Actus reus is a physical result of human conduct.⁷³ It literally means the outward or external manifestation of a crime, the prohibited conduct. It is thus the very act which the law seeks to forbid or prohibit. To Curzon, actus reus refers not only to an "act" in the usual sense of that term as it has a much wider meaning. Thus, according to him:

*It involves the conduct of the accused person, its results and those surrounding circumstances which are included in the definition of the offence. The actus reus comprises, therefore, all the elements of the definition of the offence, save those which concern the condition of the mind of the accused person.*⁷⁴

To Glanville Williams, actus reus is:

*the conduct that is forbidden by the rule of the Criminal Law on the assumption that any necessary 'mens rea' is found to exist...the external element of the offence including the negative defences.*⁷⁵

In Cameroon, actus reus is very relevant in criminal charges including charges involving defective or contaminated products and services. For instance, the prosecution of a corporation charged for adulteration of foodstuffs whether for animal or human consumption punishable under s. 258 of the Penal Code will be futile, unless the prosecution established both the mental (mens rea) and physical element (actus reus) against the defendant. Prove of one is not enough. In other words, it is the combination or culmination of the physical and mental element that gives rise to the offence. Thus, a corporation may not be guilty of the offence of adulteration of foodstuffs punishable by s. 258 of the Penal Code where it only manifests the intention to commit the offence without actually executing its intention which is fulfilled by assembling the physical materials, that is, the foodstuffs in question, the toxic or poisonous substances and mixing them up with a view of achieving the goal (actual administration), which results to injuries to the plaintiff or consumer. Actus reus compliments mens rea and the existence of one depends on the other and what follows next is a discussion on the various forms of actus reus and their relevance to suits involving defective products.

2.4.2.1 An act

An act refers to the external manifestation of an intention to contaminate or adulterate a product. Intention to commit a crime alone is not enough to constitute a crime unless such intention is put into execution. A good example is where toxic substances are used in the manufacturing of a product with the intention of hurting the consumer. Therefore, it is only when a manufacturer who intends to commit a crime begins to put his intention into execution by means adapted to its fulfillment and manifests the intention by some overt acts (putting together the raw or physical materials of the product with the toxic substance with the intention of transforming them into a finished form) that the law will hold him guilty of an attempt to commit that offence. The main reason for this principle is that to control a person's state of mind alone is exceedingly difficult, and to try to do so is to set too narrow a limit on individual freedom.

⁷³ With respect to a corporate body, the manifestation of the human conduct is through its directors and other agents in general who represent the corporation to the external world.

⁷⁴ Curzon L.B (1977) Criminal Law ; 2nd ed. Published by M & E Handbooks, at p. 31.

⁷⁵ Glanville Williams (1974) Criminal Law ; 2nd ed. Stevens publishers –London at p. 27.

For a clearer understanding, the categories of “act” being one of the forms of actus reus leading to the commission of the offence of adulteration of foodstuffs punishable either by s. 258, s. 279, s.280, s.281 of the Cameroonian Penal Code are as follows:

- i) A consequence of an act divorced from other factors. For example, a poisonous substance added to the product which injures or causes death if the victim dies, like melamine used in the production of fertilizers and plastics added to infant powder milk, contrary to the provisions of s. 279 (2) of the Penal Code that punishes assault occasioning grievous harm. The subsection punishes anyone who with the intention of hurting the plaintiff makes use of a weapon, of any explosive, corrosive or *toxic substance*, or any act of witchcraft or divination. The corrosive or toxic substance or poison constitutes the physical element of the offence, without which the offence may not be said to have been committed.
- ii) Initial act plus other factors, for example, in an offence of manufacturing poisonous drinks, the mere proof of manufacture of the drinks will be insufficient, for the prosecution must also prove that the goods were actually manufactured by the defendant and were in fact poisonous. The act should be capable of causing either assault occasioning simple or slight harm punishable by ss. 280 and 281 of the Penal Code respectively. According to s.280: “Whoever by or interference causes intentionally or unintentionally to another any sickness or inability to work lasting more than thirty days shall be punished with imprisonment for from six months to five years or with fine of from five thousand to two hundred thousand francs, or with both such imprisonment and fine”. The sickness or the inability to work may result from the effects of toxic or poisonous substances that may render the product unsuitable for the intended purpose. A good example is the adulteration of pharmaceutical products and the aftermath effect may be paralysis, mental disorder, body itches or rashes and stomach off-set to mention just a few.

Assault is constructive. It may be assault occasioning grievous, simple or slight harm depending on the degree of injury suffered. Assault here is constructive since it is not direct. It is the consequence of the corporate body putting up for sale products which are harmful (toxic or poisonous) for consumption and which products are bought or offered to the consumer, who uses same and suffers personal injury as a result.

2.4.2.2 Omission

To determine when an omission can constitute the actus reus of an offence of adulteration of foodstuffs punishable under s. 258 of the Penal Code or Article 32 (1) of the 2011 Consumer Protection Law, which punishes anyone that gives false information on the quality of technology, goods or service supplied to a consumer, the definition of each offence has to be considered. Under the Penal Code omissions are hardly punished. For example, s.74 (3) provides that:

Except as otherwise provided by law no criminal responsibility shall arise from the result, though intended, of an omission.

However, the same Penal Code provides instances where omissions are punishable. These situations could be viewed as exceptions to s. 74 (3). For instance, s. 74 (2) provides:

Criminal responsibility shall lie on him who intentionally commits each of the ingredient acts or omissions of an offence with the intention of causing the results which completes it.

The above sub-section implies that where the omission to act reasonably is done with the intention of causing the result which completes the offence, the omission here becomes criminal and thus punishable. A good example is where the information given by the corporation as per the quality of the goods or products in accordance with Article 32 (1) of the 2011 Consumer Protection Law is false, unreasonable and intended to deceive or hurt the consumer. Also important is where the adulteration of foodstuffs with toxic or poisonous substances is intentionally done with the view of injuring the consumer. The adulteration is an omission to act reasonably.

Moreover, even though s. 74(3) states that “...no criminal responsibility shall arise from the results, though intended of an omission”, the first part of that sub-section provides an exception to the second part just quoted above. The first part which states that, “except as otherwise provided by law” implies that omissions are not completely excusable. For, except

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where the law provides otherwise, omissions to act reasonably will remain punishable where the plaintiff suffers injuries resulting from the failure of the defendant to avoid the act.⁷⁶

Can an omission to introduce leaflets, manuals, receipts or notices in foreign language be construed as violation of the 2011 Law? Generally, the 2011 Law has insisted on the provision of general information on leaflets, receipts and manuals as per the general state and nature of any goods or products, service or technology supplied to consumers. This implies that the failure or omission to comply with the provisions will be construed as a violation of the 2011 Law. In the first instance situation provided by s. 10 (2):

The vendor, supplier or provider of a technology, good or service provided or delivered must be accompanied by a manual, receipt, or any other document containing, inter alia, information on technical features, mode of operation, utilization and warranty.

Similarly, s. 11 provides that:

Where defective, used, reconditioned or repaired goods are sold to consumers, mention must be expressly, clearly and distinctly made thereof on invoices, receipts, vouchers or accounting documents.

The non compliance with sections 10 and 11 of the 2011 Law by a corporation as per the state of its products, services or risk involved will definitely constitute an omission which is punishable. The omission to provide information on the state of goods, the mode of application and the risk such goods pose, could render goods that were not initially defective to be very dangerous when wrongly applied or administered. Medicare and pharmaceutical products present this example. For instance, the omission to supply a leaflet that indicates the mode of application of a particular drug by the manufacturing company, could lead to a wrong application with attendant consequences that could be very deadly. In the same manner, the information must be in a language understood by the consumer. The 2011 Law has tackled this issue and has expressly provided that in Cameroon, information must be provided in French and English⁷⁷ so as to reflect the bilingual status of the nation. This implies that the supply of the information only in one language is an omission or a violation of the 2011 Law. But the extent to which corporate bodies and producers in Cameroon have complied with the provisions of s. 18 (1) cannot be ascertained in this paper.

It has also been observed that an omission to perform a duty imposed by contract may constitute an offence.⁷⁸ A good example is where the corporate body supplies adulterated goods that are not merchantable to the consumer or fit for the purpose, which goods injure the consumer. This is amply provided by s. 224 of the OHADA Uniform Act Relating to General Commercial Law. The non compliance with the provisions of the Uniform Act becomes an omission related to product liability particularly where the defective products were adulterated with the intention to hurt the consumer.

2.5 Conclusion

In conclusion, a crime is an act or omission prohibited by the state which extends to the law of product liability and consumer protection in general by virtue of Article 32 (1) of the 2011 Cameroonian Consumer Protection Law and sections 258, 279, 280 and 281 of the Cameroonian Penal Code. By these characteristics, it is only these acts or omissions which the state considers sufficiently injurious or harmful either to itself, or to the entire society. The provisions of these laws have equally revealed that corporate criminal responsibility for defective products and poor quality services in Cameroon is no longer in dispute. Punishment for corporate criminal responsibility is thus in two ways, that is, imposition of fine and punishment with imprisonment. The corporation is punished because being a "fictitious person", it works through its agents in the real world and is vicariously liable for any crimes committed by them within the scope of their employments.

⁷⁶ See once again s. 32 (1) of the 2011 Law, sections 258, 278, 280 and 281 of the Penal Code respectively. It should be noted that the provisions of these laws punish offences related to product liability.

⁷⁷ See s. 18 (1) of the 2011 Law.

⁷⁸ *R v. Pittwood* (1902) 12 L.T.R. 37.

2.6 Suggestions

2.6.1 Imposition of accessory penalties

The Penal Code and the 2011 Law have provided penalties that could be meted onto erring corporations involved in the production and supply of defective goods and poor quality services. The penalties of fine and imprisonment are not deemed enough as Cameroonian markets are still flooded with defective as well as sub-standard goods and services. Accessory penalties will thus reinforce the penalties of fine and imprisonment. Accessory penalties are numerous and will include: closure of the outfit, prohibition on further production of infringing article, publication of judgments, confiscation, as well as interim measures or interlocutory rulings consequential upon ex parte applications or hearing on motion. In the first case, closure of the outfit is a very drastic measure but the results are faster and final. Where the effects of the contaminated products and services are serious on the society and the state, quicker results can only be achieved by the closure of the company involved in the production of the offending products or the outfit offering the services.

Secondly, the producer or service provider could be prevented from further production of infringing articles or services through prohibitory injunctions which impose on producers to discontinue the production of the articles. The purpose for this is that since normal actions may take a longer time to be decided by the courts, the production of the offensive products could be suspended through such interim measures until such a time that the court will dispose of the matter. Other interim measures will include interlocutory rulings upon ex parte applications or hearing on motion. By such applications, the court may order the discontinuity of the offensive product where there is imminent danger to life without necessarily serving the producer or parties involved.

Publication of judgments is another class of accessory penalty that can be meted on an erring producer involved in the production of contaminated products. This implies that where a producer or company has been established to be involved in the production of defective goods, the court should publish its verdict so that consumers and the general public should know that the company or producer has been reprimanded or black listed. The consequence on the company is that consumers will likely shun its products or services. In addition to losing its customers, the publication of such judgments should be at the expense of the corporation or the offending company.

Finally, where a producer has been convicted for the manufacturing of any products injurious to human beings or their property, the court could also order for the confiscation of any property, movable or immovable, belonging to the offender and attached, which was used as an instrument of its commission or is the proceeds of the offence.

2.6.2 Product recall

This is one of the most important measures that could be taken to eradicate the presence of adulterate and defective products in Cameroon's markets. The measure of product recalled is completely ignored in Cameroon. For instance, in most shops and patent medicine stores within the country, one could still find expired drugs still being sold to consumers, while expired canned foods and drinks are visibly found in the markets and consumers rush for them simply because their prices have considerably been reduced and in complete ignorance of the health hazards these products pose. In this vein, Government should put up a committee, as well as set up a well equipped laboratory that meets international standards, to constantly check the quality of the products produced within the country. The committee should be vested with wide powers of investigation, testing, prosecution and the power to recall the product from the market where it is has been established that the product is hazardous and does not meet up with international standards.

2.6.3 Establishment of codes of practice as a consumer protection device

In Cameroon, self-imposed codes have been established by most organized professions and some trade associations. These are codes of practice which set out ethical behaviours for members in their dealings with their clientele. These will include the code of ethics of the legal profession, the medical profession, transporters' unions and associations and advertising practitioners. In similar vein, a manufacturers' association code could also be established in Cameroon to regulate defective goods related problems. In this light, when a member violates the code in dealing with the client or the proper production method, he should be censured and should be barred in appropriate cases from further practice or production of the said products, items or goods or the provision of such services. To be more meaningful, the industrial codes must expressly or impliedly comply and be made a part and parcel of any transaction involving a consumer.

2.6.4 Government should encourage corporate bodies to take insurance

It has been noticed that very few companies in Cameroon take insurance, to cover their machines, production techniques and research. This has led to the production of low and sub-standard goods, most often not suitable for their intended purpose. An insurance cover will thus encourage a company to fund research as well as improve on its production techniques. This will lead to the production of high quality products free from defects and the quality of services provided to consumers will also improve consequent to high research techniques. The truth about this recommendation is that the cost of production will increase or will be higher. But both the producers (corporate bodies) and service providers can always resolve this problem through increased prices of their products and services thereby passing the high or extra cost of production onto the consumers. For this to be achieved, Cameroon Government must ensure that claims are promptly paid by insurance companies in Cameroon. The current trend within the country is a delay in the payment of insurance claims by insurance companies. The non respect of such a vital engagement has discouraged so many companies that would have taken insurance policies to cover their businesses. The outcome is low quality as well as defective goods and services since the corporate bodies cannot fund research nor adopt modern production techniques. In this vein, erring insurance companies should be made to pay huge fines or have their licences suspended or withdrawn. Until Government takes these measures, the insurance of outfits and businesses in Cameroon by corporate bodies will remain an illusion.

Finally, the courts will also play a vital role if this recommendation must be achieved in Cameroon. For instance, the courts should ensure a quick dispensation of insurance matters instituted by corporate bodies. There has been a general delay orchestrated by the courts in the dispensation of insurance matters and because of this only very few companies are willing to insure their businesses. Legal practitioners should equally cooperate and avoid the prolongation of insurance suits through frivolous and vexatious adjournments.

To achieve an improved system of consumer protection, all operators of the system must carry out their functions with utmost sense of responsibility. Corporate bodies should see their roles beyond financial rewards. The interest of the consumers should be paramount in whatever they take. Indeed, their loyalty should be to the consumer. The cooperation of consumers as well, is equally needed for an effective protection. They should be prudent in all their transactions and also obey directives issued by corporate bodies in receipts and brochures as per the mode of use and application of the products and services supplied. The judiciary on the final note can be a veritable tool in the protection of consumer rights in Cameroon, despite the delays witnessed in delivering judgments. The courts should therefore advance the course of the consumer in deserving cases.