Beyond The Mere Witness: Compelling Third-Party Disclosure to Identify Wrongdoers in Nigeria

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Introduction

For most of the history of our received civil procedure, a person who stood wholly outside a dispute, who had done no wrong and owed no duty, could not be drawn into a separate action brought solely to extract information from him. This was the mere witness rule: information could not be obtained by discovery from one who would in due course be compelled to give that same evidence as a witness at trial.[1]

Discovery was auxiliary, dependent on an existing cause of action, and no freestanding suit lay merely to gather evidence or unmask a wrongdoer from a stranger to the controversy.

The rule answered two main concerns: preventing harassment and preserving the structure of litigation. The first, allowing any person with a tangential link to an issue to be sued or examined merely because he might know something useful would license oppressive fishing expeditions against innocent bystanders. The second, preserving the ordinary architecture of litigation, in which discovery binds the parties while witnesses are compelled only within proceedings already on foot.

It is this deadlock that has driven courts, increasingly in Nigeria, to compel disclosure from third parties mixed up in a wrong. This article examines that departure as it relates to private persons, corporations, and government agencies.

The Traditional Mere Witness Rule: Origin, Rationale, and Limits

Discovery, the compelled disclosure of facts or documents before or during trial, was unknown to the old common law courts of England. Relief lay only in the Court of Chancery, through the bill of discovery, a separate suit in equity whose sole office was to extract from an opponent, or a third person, matter that would assist the moving party.[2] Strictly auxiliary, it created no substantive right but aided a party with a cause of action recognised elsewhere, and it reached only parties or those implicated in the transaction, never a stranger holding relevant information. That confinement hardened into the mere witness rule, resting, as Lord Reid later explained, on the assumption that the evidence would be available at trial, compellable by subpoena once proceedings were properly constituted.

The rule was never absolute. Equity recognised early that a person who had participated in or facilitated a wrong, without incurring liability, stood differently from the true bystander. In

[1] Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 133 (HL) 175 (Lord Reid), where the mere witness rule is restated and its leading exception established.

[2] Daniel Morman, 'The Complaint for a Pure Bill of Discovery: A Living, Breathing, Modern Day Dinosaur?' (2004) 78 Florida Bar Journal 50

Upmann v Elkan[3] disclosure was ordered against a carrier holding counterfeit goods, and in Orr v Diaper[4] against shipping agents who had unwittingly forwarded infringing goods. These authorities marked a spectrum from the immune mere witness, through the facilitator mixed up in the wrong, to the party properly sued, the line between the first two still contested.

Nigerian civil procedure, drawn from the English rules, likewise confines discovery and interrogatories to the adverse party in a pending suit,[5] reaching a stranger only by subpoena after filing. The presumption against a party who suppresses evidence, under section 167(d) of the Evidence Act 2011, assumes an adversary already before the court,[6] and offers nothing where the wrongdoer hides behind a bank, a carrier, or the Corporate Affairs Commission. That gap the departure below is designed to fill, received through equity administered under the High Court Laws.[7]

Norwich Pharmacal: An Equitable Exception to the Mere Witness Rule

The breakthrough came in Norwich Pharmacal Co v. Customs and Excise Commissioners.[8] The patentees found from customs records that other people were importing their patented compound in breach of the patent. They could prove that a wrong was being done. They could not name a single importer. Without a name they could not sue. Only the Commissioners of Customs knew who the importers were. When asked, the Commissioners refused, relying on the mere witness rule. The question was whether they could be made to disclose.

The House of Lords held that they could. Lord Reid did not abolish the mere witness rule. He accepted it as a sound rule but held that it did not apply here. The rule assumes that the evidence will later be available in a case. Here there could be no case at all until the importers were named. He also refused to go to the other extreme. A court cannot compel information from anyone who merely happens to hold it. The Commissioners stood in between. They were innocent and acting under a statutory duty, yet the goods passed through their hands, and without them the wrong could not have been done. Hence the principle that one who "gets mixed up in the tortious acts of others so as to facilitate their wrongdoing" must assist the party wronged by disclosing the wrongdoers' identity.[9]

Two points define the jurisdiction. First, the departure is real but limited. A true bystander who only holds relevant information stays protected. Only a third party who has helped the wrong can be compelled. Secondly, the duty rests on justice, not fault, so innocence is no defence. Being equitable, the relief stays discretionary, guided by the factors Lord Cross set out.[10]

The modern remedy is the Norwich Pharmacal order. Its three conditions were stated by Lightman J in Mitsui & Co Ltd v Nexen Petroleum UK Ltd [11] an arguable wrong by a wrongdoer; a real need for

[3] Upmann v Elkan (1871) LR 12 Eq 140, affirmed (1871) LR 7 Ch App 130
[4] Orr v Diaper (1876) 4 Ch D 92
[5] CFAO (Nig) Plc v Sanu (2008) 15 NWLR (Pt 1109) 1
[6] Evidence Act 2011, s 167(d); Kwenev v State (2022) 13 NWLR (Pt 1847) 273.
[7] High Court Law of Lagos State, ss 11 and 13.
[8] Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 133 (HL).
[9] ibid 175 (Lord Reid).
[10] ibid (Lord Cross of Chelsea).
[11] Mitsui & Co Ltd v Nexen Petroleum UK Ltd [2005] EWHC 625 (Ch), [2005] 3 All ER 511 [21] (Lightman J).

the order so that the wrongdoer can be sued, the relief being a last resort;[12] and a respondent who helped the wrong and can supply the information needed. It remains exceptional, never a licence for a fishing expedition.

Private Individuals and Compelled Disclosure:

Compelling a private individual to disclose information concerning another person's wrongdoing raises difficult questions about civil procedures. Unlike banks, telecommunications providers, digital platforms, and public regulators, private individuals do not ordinarily collect or retain information because the law requires them to do so. They may acquire information accidentally, through personal relationships, or by witnessing an event. The law must therefore balance a claimant's need to identify a wrongdoer against the privacy, autonomy and freedom from unnecessary litigation of an innocent third party.

Historically, the mere witness rule restricted pre-action disclosure against persons who were strangers to the dispute. In *British Steel Corporation v Granada Television Ltd*[13], the House of Lords reaffirmed that a person who merely possessed relevant information could not ordinarily be made the subject of separate proceedings solely to compel disclosure. The rule reflected the adversarial character of civil litigation: the claimant bore responsibility for investigating the claim, while third parties generally became involved only when their evidence was required during substantive proceedings.
It therefore prevented innocent witnesses from being transformed into investigators for private litigants.

The development of equitable disclosure, particularly following *Norwich Pharmacal Co v Customs and Excise Commissioners*[14], has nevertheless qualified the rigidity of the mere witness rule. The jurisdiction recognises that a person who becomes sufficiently involved in wrongdoing may, even without being personally liable, be required to provide information necessary to identify the wrongdoer. The critical issue is therefore not simply whether the respondent possesses useful information, but whether the respondent's connection with the wrongdoing makes disclosure necessary in the interests of justice.

This distinction is particularly significant in Nigeria's increasingly digital economy. Information relevant to cybercrime, electronic fraud and identity theft may be held by individuals whose accounts, identities or conduct have formed part of the mechanism through which wrongdoing occurred. A person who knowingly permits a bank account to receive fraudulent proceeds, for example, occupies a different position from a passer-by who merely witnesses the transaction. Similarly, an individual whose identity documents are used to register a SIM card, or digital account may possess information arising from a connection with the wrongdoing, even where that person is not the principal wrongdoer.

Private individuals may therefore be considered in three broad categories. First are genuine mere witnesses, whose knowledge is entirely accidental and whose conduct neither facilitated nor

[12] Mitsui & Co Ltd v Nexen Petroleum UK Ltd [2005] EWHC 625 (Ch), [2005] 3 All ER 511 [21] (Lightman J).
[13] Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 133 (HL).
[14] Ibid

contributed to the wrongdoing. Courts should be slow to compel disclosure from such persons because usefulness alone should not expose ordinary citizens to litigation. Secondly, there are people who have become “mixed up” in wrongdoing, whether innocent or otherwise. Their involvement may justify disclosure where their information is necessary to identify the wrongdoer or pursue an effective remedy. Thirdly, there are voluntary intermediaries or representatives, such as informal agents, escrow holders, private accountants, or persons entrusted with property or documents. Their possession of information arises from responsibilities they voluntarily assumed and is therefore distinguishable from purely accidental knowledge.

Nigerian courts should accordingly adopt a cautious, structured approach to Norwich-type relief against private individuals. The claimant should demonstrate a credible basis for alleging a legal wrong; establish that the respondent's connection extends beyond accidental possession of information; show that the information sought is genuinely necessary; and demonstrate that it cannot reasonably be obtained from another source. Even where these requirements are satisfied, the court must consider proportionality and the respondent's constitutional rights.

This is particularly important under section 37 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)[15], which protects privacy in specified aspects of citizens' personal lives and communications. Norwich-type disclosure should therefore not become a general investigative mechanism. Properly controlled, however, the jurisdiction can reconcile the protection of innocent third parties with the legitimate need of victims to identify wrongdoers and obtain effective remedies.[16]

Corporations: Banks, Telecoms, Platforms and Other Intermediaries

The position of corporations presents a more complex question because they increasingly act as institutional custodians of information through which modern wrongdoing can be identified. Banks, telecommunications providers, payment processors and digital platforms routinely create, authenticate, process and retain information concerning transactions, accounts, communications and users. This challenges the traditional conception of the “mere witness”, since information necessary to identify a wrongdoer may now be generated and controlled by an intermediary rather than possessed by an individual eyewitness. Jaani Riordan observes that internet intermediaries frequently acquire information concerning allegedly tortious activity which may identify an anonymous user or provide evidence of the acts complained of, making access to such information essential where the underlying tortfeasor remains unknown[17]. The significance for the mere witness rule is considerable: the problem is no longer simply that evidence happens to be held by another person, but that modern commerce and communication may place decisive identifying information exclusively in an intermediary’s hands.

Banks provide a clear example. A victim of electronic fraud may know that money was transferred into a particular account without

[15] Constitution of the Federal Republic of Nigeria 1999 (as amended), s 37.

[16] Jaani Riordan, *The Liability of Internet Intermediaries* (OUP 2016) 69–112 (ch 4, ‘Identity Disclosure’). Riordan specifically examines the importance of intermediary-held information in identifying anonymous wrongdoers

knowing who controls it. The bank may hold the account-opening and transaction records necessary to identify that person, thereby becoming the evidential bridge between victim and wrongdoer. This helps explain the use of Norwich Pharmacal applications in banking and commercial-fraud contexts.

However, possession of relevant information does not automatically make a bank, telecommunications provider or digital platform susceptible to Norwich Pharmacal relief. The institution must be sufficiently connected with the wrongdoing to move beyond the status of a mere witness. In *Various Claimants v News Group Newspapers Ltd*, the court emphasised that the essential question is whether the respondent is a mere witness or whether its engagement with the wrongdoing is sufficient to make it more than a bystander.[18] Similarly, possession of identifying information by a telecommunications provider does not, without sufficient involvement, automatically justify disclosure.[19]

This limitation prevents institutional possession of information from becoming a substitute for involvement. A telecommunications provider does not necessarily facilitate wrongdoing merely because its network enables communication, just as a bank does not necessarily become mixed up in fraud because a fraudulent payment passes through its systems. The relevant question is whether the intermediary's relationship with the transaction and wrongdoing is sufficiently close to justify equitable intervention. Institutional custody may strengthen an application, but cannot alone determine its outcome.[20]

The distinction is particularly important for digital platforms, which may possess account-registration data, IP information, transaction records and communications capable of identifying anonymous actors. Such information may be indispensable, but disclosure must remain tied to a viable claim, the intermediary's involvement, necessity and competing privacy interests. A Norwich Pharmacal order should therefore facilitate identification of a wrongdoer, not permit unrestricted investigation or speculative access to an intermediary's records.[21]

Confidentiality and proportionality are equally important. Banks and other regulated entities may owe contractual, statutory or regulatory duties concerning customer information, but confidentiality should not necessarily create immunity from judicial disclosure[22]. Instead, the court may impose safeguards, including limiting the information disclosed, requiring confidentiality undertakings or restricting its use[23]. The court should also ensure that disclosure is precise and proportionate, particularly given the compliance costs imposed on corporations.[24] As *Mitsui*

[18] Jaani Riordan, *The Liability of Internet Intermediaries* (OUP 2016) 69–112 (ch 4, 'Identity Disclosure'). Riordan specifically examines the importance of intermediary-held information in identifying anonymous wrongdoers

[19] See *Collins v Vodafone UK Ltd* [2021] EWCA Civ 26, discussed in the context of the limits of Norwich Pharmacal relief against telecommunications providers. The decision illustrates that possession of identifying information does not, without sufficient involvement in the wrongdoing, take a provider outside the mere witness rule.

[20] Ibid

[21] Ibid

[22] *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461, 473–74; *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133, 175–76.

[23] *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133, 175–76; *Rugby Football Union v Consolidated Information Services Ltd (Viagogo Ltd)* [2012] UKSC 55, [2012] 1 WLR 3333 [18]–[19].

[24] *Bankers Trust Co v Shapira* [1980] 1 WLR 1274, 1282–83

confirms, relief against innocent third parties is exceptional and should be a remedy of last resort where they are the only practicable source of information.[25]

Accordingly, corporations occupy an intermediate position between the traditional mere witness and the ultimate wrongdoer. Their institutional role may make them indispensable sources of information, but indispensability does not eliminate the legal threshold for disclosure. The proper question is whether their relationship with the wrongdoing and the information is sufficiently substantial to move them beyond mere bystander status. Where that threshold is crossed, and disclosure is necessary and proportionate, the mere witness rule should not prevent relief merely because the corporation is innocent of the substantive wrong.[26]

Government Agencies and Regulators: From Confidential Custodians to Disclosure Obligations

Government agencies and regulators present the most difficult category because their possession of information often arises from statutory authority rather than private choice. Regulatory authorities may hold information concerning corporate ownership, licensing, registration, taxation, identity, telecommunications, financial activity or other regulated conduct which cannot readily be obtained by private litigants[27]. The issue therefore extends beyond the relationship between a claimant and a private witness to the interaction between equitable disclosure, statutory confidentiality, governmental functions and the public interest. A government agency should not, however, be regarded as categorically immune from *Norwich Pharmacal*[28] jurisdiction merely because information was obtained pursuant to public authority. The foundational case illustrates this principle.

In *Norwich Pharmacal Co v Customs and Excise Commissioners*[29], the Commissioners were not themselves wrongdoers; their statutory functions enabled them to obtain information concerning the importers responsible for patent infringement. The House of Lords nevertheless recognised an exceptional jurisdiction to compel disclosure because, without the information, the claimant could not identify the people against whom its rights could be enforced.[30]

The case therefore demonstrates that the mere witness rule cannot operate as an absolute bar where an innocent public authority possesses information essential to identifying a wrongdoer.

The public character of the respondent nevertheless introduces considerations distinct from those applicable to private individuals or corporations. Government-held information may be subject to statutory confidentiality, public-interest immunity, national-security considerations, protection of investigative methods or the need to preserve effective regulatory functions. The court must therefore consider not only whether disclosure is

[25] *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch), [2005] 3 All ER 511 [30]–[31].

[26] *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133, 174–75; *Ashworth Security Hospital v MGN Ltd* [2002] UKHL 29, [2002] 1 WLR 2033 [57]– [58].

[27] *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2010] EWCA Civ 65, [2011] QB 218 [149]– [152].

[28] Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 133 (HL).

[29] Ibid

[30] *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2010] EWCA Civ 65, [2011] QB 218 [132].

relevant and necessary, but whether it would undermine the statutory purpose for which the information was obtained.

In *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*, the application of Norwich Pharmacal principles to government-held information demonstrated the particular importance of public-interest considerations where sensitive intelligence material is involved.[31]

Government agencies should consequently not be treated simply as another category of institutional intermediary. The court should examine the statutory basis on which information is held, the purpose for which it was obtained and any restrictions governing its use. Information collected for ordinary registration or administrative purposes may present fewer difficulties than information obtained confidentially through intelligence gathering, criminal investigation or regulatory enforcement.[32]

The role of regulators as information gateways is increasingly important. Modern wrongdoing may involve a chain in which the wrongdoer can be identified only by connecting information held by different institutions. A regulator may hold information linking a regulated entity to an individual, while a registration authority may connect a company to its directors or beneficial owners. Where a claimant establishes that a government agency is the only realistic source of information necessary to identify the wrongdoer, the policy underlying the mere witness rule may lose much of its force.

The claimant is not seeking general access to government records, but narrowly defined disclosure necessary to prevent a recognised legal wrong from becoming practically incapable of redress[33] nor should Norwich Pharmacal relief become a substitute for freedom-of-information procedures, discovery, statutory investigative powers or general access to public records. The claimant must establish a specific legal wrong and a genuine need for particular information capable of identifying or pursuing the wrongdoer. Any order should therefore be confined to what is necessary for that purpose. Broad requests for governmental records merely because they might contain relevant information would risk transforming an exceptional equitable remedy into a general investigative jurisdiction.[34]

The appropriate approach is therefore one of proportionality. Public institutions should not become repositories behind which wrongdoing can be concealed merely because information is confidential; equally, courts should not compel disclosure where doing so would prejudice legitimate governmental functions or defeat

[31] *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2010] EWCA Civ 65, [2011] QB 218 [132].

[32] *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 (HL), 175–176 (Lord Reid); see also *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29, [2002] 1 WLR 2033 [35]– [36].

[33] On the distinction between information held for ordinary administrative purposes and information acquired in the course of law-enforcement or intelligence functions, see *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1)* [2008] EWHC 2048 (Admin), [2009] 1 WLR 2579; *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2010] EWCA Civ 65, [2010] 3 WLR 554.

[34] See generally *Ashworth Hospital Authority* (n 1) [35]–[36]; *Totalise* (n 2) [27]–[30]. The remedy is directed towards identifying the wrongdoer or obtaining information necessary to pursue a recognised cause of action, rather than providing general pre-action discovery.

statutory confidentiality. The stronger the claimant's case, the greater the necessity of the information and the less intrusive the disclosure, the stronger the justification for intervention. Conversely, substantial public interests, peripheral information or available alternative sources weaken the case for relief.

The progression from private individuals to corporations and government agencies therefore supports a graduated approach to the mere witness rule. The decisive question should not simply be whether a third party is a witness, but the quality of its relationship with the wrongdoing and the information sought. Involvement, necessity, alternative sources, proportionality and the nature of the information should determine whether the protection of the mere witness must yield to the demands of justice.

Conclusion: towards a Nigerian doctrine of third-party disclosure

A distinctly Nigerian doctrine of third-party disclosure should be rooted in equitable principles, adapted to constitutional and statutory safeguards, and responsive to the realities of digital commerce and cyber-enabled wrongdoing. While the mere witness rule should remain the default position, courts should be empowered to compel disclosure where it is necessary to identify wrongdoers or facilitate justice. Future reforms should include express civil procedure rules on non-party disclosure, inclusion of third-party disclosure sections in relevant statutes with necessary safeguards and greater harmonisation with data protection and sector-specific confidentiality regimes.

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