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Liability of Legal Practitioners in Nigeria: The True Position of The Law

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Abstract

The issue of liability continues to be a critical aspect in every professional field. The duty of care forms the basis of the entire relationship between a professional and a lay man. In this discourse, an attempt was made to highlight the position of the law on the issue of liability of a legal practitioner in Nigeria, particularly for the conduct of a case in the face of the court. The rationale for the old common law position was discussed considering the circumstances prevailing at that point in time. Based on the premise that one of the most important characteristics of law is its dynamic nature, argument was then advanced highlighting the impracticability of maintaining that position in the 21st century in the face of increased commercialization, globalization and industrialization. A comparison was drawn between the English legal system and the Nigerian legal system and it was submitted that there is no longer any public policy justification for maintaining the courtroom immunity for barristers. Unfortunately, there is still a belief amongst the legal circle in Nigeria that an advocate can get away with whatever quality of performance he/she exhibits in the face of the court. This has led to intellectual laziness and a lack of enthusiasm for the one-time cherished courtroom advocacy especially amongst young advocates. It was also argued that as a matter of public policy there is a desire for uniformity of liability among all professions. Finally, the position of the law on the issue in different countries (both developing and developed) was highlighted and discussed briefly.

Keywords: Nigeria, liability, legal practitioner, law

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Introduction

The Concise Oxford English Dictionary (12th edition) defines a professional as a person having impressive competence in a particular activity. From this definition, we can infer that a professional is someone who has undergone a long period of training or rigorous apprenticeship and who has been certified to have acquired enough knowledge and skills as to be deemed competent or proficient to render services in a given vocation. In every profession, there exists a set of rituals, formalities, code of conducts, ethical standards, and moral obligations that have been established over many years with the aim of uplifting such profession to a dignified standard and to ensure that the profession remains in touch with modern realities. The legal profession is one of such professions. It is a vocation that is based on expertise in law and its applications and is guided by rules, principles of engagement and professional ethics. This code of ethics regulates and controls the affairs of the members of the profession. It expresses in broad terms the standards of professional conduct expected of lawyers in their relationship with the public, the legal system, and the legal profession (Kwaku, 2013). A legal practitioner has been defined by the Supreme Court in *Oketade v. Adewumi* (2010) and by the Legal Practitioners Act (1975) as a person entitled in accordance with the provisions of this Act to practice as a barrister or as a barrister and solicitor, either generally or for the purposes of any particular office or proceedings. The issue of liability of legal practitioners has been a subject of debate over the years due to the outdatedness of the existing law governing the legal profession in Nigeria and lack of adequate literature addressing the issue.

Liability of Legal Practitioners

The first sense of liability of a legal practitioner is as regards professional misconduct committed by him in the course of practicing the profession. One of the numerous responsibilities of the Body of Benchers is the exercise of disciplinary jurisdiction over members of the legal profession (Legal Practitioners Act, 1975). This duty is performed through the Legal Practitioners Disciplinary Committee (LPDC), which is a committee of the Body of Benchers (Legal Practitioners Act,

1975). Thus, in Nigeria, a legal practitioner shall be liable for punishment by the LPDC where he is found guilty of infamous conduct in a professional respect; or obtaining enrollment by fraud; or conduct not amounting to infamous conduct but which is incompatible with the status of a legal practitioner; or where he is convicted in Nigeria of an offence which is incompatible with the status of a legal practitioner (Okoye, 2015). The punishment for these offences ranges from suspension of a legal practitioner from practice for a period of time to striking out his name entirely from the roll (Legal Practitioners Act, 1975).

The second sense of liability of legal practitioners is liability for professional negligence, and it is this sense of liability that we are concerned about in this discourse. Hitherto, it was thought that it was a matter of public policy to exempt lawyers from liability in negligence as far as the conduct of a case before a court or tribunal is concerned. This means that only barristers are entitled to enjoy such exemption. However, in the face of increased modernization, globalization, and new commercial trends, the former position is no longer tenable and now the rule under common law is that all legal practitioners are not exempted from liability in negligence where they fail to exercise care which ultimately results in damages to their client.

Liability for Professional Negligence

Negligence generally may be defined as the breach of any duty of care which results in damages to the party to whom the duty is owed. Professional negligence in this sense refers to the reckless or careless conduct or omission on the part of the legal practitioner who is usually indifferent to the consequences of his actions, and which results in loss or damages (whether pecuniary, proprietary, or otherwise) to his client.

Under the common law, there was never the issue of whether or not solicitors could be liable for negligent performance of their duties. In *Cocottonpoulos v. P.Z. Co. Ltd* (1965), it was held that a solicitor is under a duty to show reasonable diligence and caution and ought to warn his client against the initiation of a case that is purely speculative and devoid of merit. The position was similar in Nigeria, and in *Bello Raji v. X (a legal practitioner)* (1947), it was held that counsel was liable for gross negligence for misadvising his client to bring an action that was status barred. Also,

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in *Fitzpatrick v. Batget & Co. Ltd* (1967), the court held that the plaintiff's solicitor was liable for negligence for inordinate delay in the prosecution of the case.

The question that has always been debated is whether or not barristers are also liable for professional negligence in the cause of appearing on behalf of a client in a court of law. This question was answered by the House of Lords in the celebrated case of *Rondel v. Worsley* (1967). The plaintiff in that case was tried and convicted on a charge of causing bodily harm. The defendant, a barrister-at-law, had accepted a dock brief and defended the plaintiff unsuccessfully. The plaintiff brought the action against the defendant for professional negligence. The issue for determination was whether or not an action for negligence could lie against a barrister. The court answered the sole issue in the negative. The court stated that the immunity from action for negligence against barrister was based on public policy which constitutes three elements:

- a. That the administration of justice required that a barrister should be able to carry out his duty to the court fearlessly and independently;
- b. That action for negligence against barristers would make for the re-trying of the original actions inevitable and so prolong litigation. And;
- c. That a barrister was obliged to accept any client, however difficult, who sought his services (Cab Rank rule).

In 1978, the House of Lords still affirmed their earlier stand in *Rondel's* case (1967) and in fact extended its application in *Saif Alli v Sydney Mitchell* (1978), where it held that a barrister's immunity from suits for negligence extended to those matters of pre-trial work, which were so intimately connected with the conduct of the cause in court, that they could fairly be said to be preliminary decisions affecting the way that cause was conducted when it came to hearing. Thus, the rule of law was established that a barrister was immune from an action for negligence at the suit of a client in respect of his conduct and management of a case in court and preliminary work connected therewith such as drawing of pleadings (Osita, 2013).

In Nigeria, by virtue of the provision of Section 9(1) of the Legal Practitioners Act (1975), the general rule is that a person shall not be immune from liability for damages attributable to his negligence while acting in his capacity as a legal practitioner. However, the rule of law as established in *Rondel's* case (1967) and *Saif Alli's* case (1978) was imported into in Nigeria by virtue of the provision of Section 9(3) of the Legal Practitioners Act (1975) which provides:

‘nothing in subsection (1) of this section shall affect the application to a legal practitioner of the rule of law exempting barristers from the liability aforesaid in so far as that rule applies to the conduct of proceedings in the face of any court, tribunal, or other body’

This statutory immunity under the Legal Practitioners Act (1975) therefore recognized and acknowledged the rule of law which existed in England exempting barristers from liability for negligence, and no doubt sought to uphold such rule of law.

However, presently in England, Rondel’s case (1967) has since been overruled and there is no longer any form of immunity for negligence in favor of barristers. In *Arthur JS Hall v Simons* (2000), three cases were involved and appeals from the cases were treated together by the House of Lords. The three cases involved liability for negligence by advocates and immunity from such liability. The major issue for determination, therefore, was whether or not the immunity for an advocate in respect of and relating to the conduct of legal proceedings as enunciated by the House of Lords in *Rondel v Worsley* (1967) was to be maintained in England. The House of Lords, after reviewing its former position in *Rondel’s case* (1967) and *Saif Alli’s case* (1978), overruled the two cases in so far as they conferred immunity from liability for negligence on barristers.

The House of Lords reasoned that such immunity was not needed to deal with collateral attacks on civil and criminal decisions. Rather, the public interest was satisfactorily protected by independent principles and powers of the court. A collateral civil challenge to a subsisting criminal conviction, for example, would ordinarily be struck out as an abuse of process. And furthermore, the principles of *res judicata*, issue estoppel, and abuse of process should be adequate to cope with the risks of collateral challenges to subsisting decisions.

Furthermore, according to the Court, immunity was not needed to ensure that advocates would respect their duty to the court. The mere performance by an advocate of his duty to the court, to the detriment of his client, could never be described as negligent, and there would be no possibility of the court holding an advocate to be negligent if his conduct was bona fide dictated by his perception of his duty to the court. Moreover, the abolition of the immunity should strengthen the legal system by exposing isolated acts of incompetence at the Bar. In the words of Lord Steyn (p. 574), who read the judgment of the Court:

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“...on the information available and developments since *Rondel v Worsley*, I am satisfied that in today’s world, that decision no longer correctly reflects public policy. The basis of the immunity of barristers has gone.”

That marked the glorious end of the time-honored *Rondel v Worsley* (1967) and the immunity of barristers from actions for negligence in the conduct of a civil case.

The next question that arises is whether or not the above position also applies in respect of criminal matters i.e. can an accused person who has been convicted of a criminal offence maintain an action for professional negligence against his lawyer?

It would seem that by virtue of the decision in *Hall v Simons* (2000), the answer would be in the affirmative. However, where a person is convicted, a collateral attack in a civil action on the ground of negligence by the convict would prima facie be regarded as an abuse of court process (Okoye, 2015). Where, however, an appeal by the accused person against his conviction is successful, and he is acquitted, such action for negligence against his counsel in the criminal case would be sustainable. In the words of Lord Browne-Wilkinson in *Hall v. Simmons* (2000) (p.579):

“It follows that, in the ordinary case, an action claiming that an advocate has been negligent in criminal proceedings will be struck out as an abuse of process so long as the criminal conviction stands. Only if the conviction has been set aside will such an action be normally maintainable. In these circumstances there is no need to preserve an advocate’s immunity for his conduct of a criminal case...”

Current Position of Nigerian Law on Liability of a Legal Practitioner

The liability of a legal practitioner in Nigeria is governed by the provisions of Section 9 of the Legal Practitioners Act (1975) and it provides as follows:

- (1) Subject to the provisions of this section, a person shall not be immune from liability for damages attributable to his negligence while acting in his capacity as a legal practitioner, and any provision purporting to exclude or limit that liability in any contract shall be void.
- (2) Nothing in subsection (1) of this section shall be construed as preventing the exclusion or limitation of the liability aforesaid in any case where a legal practitioner gives his services without any reward either by way of fees or disbursement or otherwise.
- (3) Nothing in subsection (1) of this section shall affect the application to a legal practitioner of *the rule of law* exempting barristers from the liability aforesaid in so far as that rule applies to the conduct of proceedings in the face of any court, tribunal, or other body.

These provisions merely preserve the common law position on liability of lawyers for negligence which is the prevailing rule of law on the matter.

By subsection (1), lawyers are generally liable for negligence in the general performance of their professional duty, and any provision in any contract which limits or excludes this liability is void. In effect where a legal practitioner renders any of his services (which include rendering legal advice, preparation of documents, representation of clients in court etc.) for a fee, he may be liable for negligence.

By subsection (2), however, where a legal practitioner renders any of such services for free i.e. without any remuneration, he may limit or exclude his liability in negligence by an express contract. Thus, where he fails to limit or exclude his liability, he will be liable for negligence notwithstanding that the services were rendered gratuitously (Osita, 2013). This particular provision of the law has altered slightly the position of the law obtained under the common law as laid down in the case of *Lawanson v Siffre & Mati* (1951) which is to the effect that liability cannot be limited or excluded in respect of gratuitous services.

As regards Subsection (3), the question that arises is what exactly was meant by the phrase ‘the rule of law’. Does it mean a reference to the English Common law as it exists from time to time? Or the rule of law as interpreted by Nigerian Courts? This point has not been addressed by the

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Nigerian Courts or even by many legal commentators. Nevertheless, it is hereby submitted that the draftsmen in 1962 (when the Legal Practitioners Act was first enacted) recognized and acknowledged the rule of law in England. Therefore, it is respectfully submitted that since the rule of law on liabilities of barristers in England had since changed with the decision in *Hall v Simons* (2000), the position of the law in Nigeria has followed suit. Consequently, under Nigerian law, a barrister is also liable for negligence for the conduct of proceedings in the face of the court. Thus, it can be said that there is no longer at the moment, any rule of law conferring immunity from action in negligence on lawyers in respect of what is done or omitted to be done in the face of the court (Osita, 2013).

On the other hand, even if it argued that the phrase ‘rule of law’ is the rule of law as determined by Nigerian courts, then the decision of the House of Lords in *Hall v. Simons* (2000) is a strong persuasive authority.

Although a learned author has submitted that there is no liability for negligence committed when conducting a case in court e.g. failure to call a witness or to cross-examine a witness (Yusuf, 2010), it is respectfully submitted that the learned silk is wrong on the current position of the law in Nigeria. It was also noted that Ogwezzu (2013) in his argument in support of immunity totally ignored the fact *Rondel v Worsley* (1967) had been overruled for more than a decade before his paper was published. Unfortunately, today, there is an overwhelming number of legal practitioners who believe they can get away with whatever quality of performance in the discharge of their professional obligations. Sadly, this has led to a deterioration of the hitherto high standard of legal practice in Nigeria. Oko (1991-1993) opined that exposing professionals to liability in negligence has proved to be one of the most potent weapons for addressing poor quality services in most jurisdictions. Exposing lawyers to negligence arising from the conduct of litigation will not only enhance lawyers’ accountability to clients but will also serve as an inducement for lawyers to strive for more ethical and competent practice.

Nwauche (2002) also argues that the rule of immunity in Nigeria was not developed in light with unique Nigerian conditions but as a result of a legal system in transition from colonial heritage. The writer also argues that maintaining such immunity contravenes one of the basic foundations of 1999 Nigerian Constitution and the African Charter which both guarantee that no citizen is unduly privileged. The immunity enjoyed by legal practitioners clearly breaches the concept of

equality before the law because it gives undue privilege to legal practitioners over other professionals. According to Oldham (1996), the desire for uniformity of liability among the professions is a most compelling and logical policy argument. It is both preposterous and abhorrent that in the face of a powerful social ethos centered on professional accountability, the advocate remains precious and removed from the same levels of scrutiny encountered by other professionals. Imagine the chaos a law which is to the effect that medical doctors shall be immune from liability for surgeries conducted in an operating theatre will cause. Thus, just as a doctor can be tried in relation to his/her administration of health care, an aggrieved client ought be able to sue his/her advocate for negligence 'in court'--the courtroom being an 'advocate's operating theatre'.

At this point, it is pertinent to note that even in the *locus classicus* case of *Rondel v. Worsely* (1967), Lord Reid was quick to point out the rule enunciated therein is peculiar to England and is subject to change. In his words (p.227):

I think it is clear that the existing rule is based on considerations of public policy. But public policy is immutable, and doubts appear to have arisen in many quarters whether the rule is justifiable in present day conditions of this country... I shall confine my attention to England and Scotland... I do not know enough about conditions in any other country to express any opinion as to what public policy may there require

It is therefore submitted that even if the immunity of legal practitioners in Nigeria could be justified in 1962, so much has happened in the past 5 decades or so that it is no longer tenable to hold that position in the 21st century.

Conclusion

This discourse will be incomplete without highlighting the practice in other countries. In Australia, the High Court of Australia followed the decision in *Rondel V Worsely* (1967) in the case of *Giannarelli v Wraith* (1988) and was recently preserved in the case of *D'orta-Ekenaike v Victoria Legal Aid & Anor* (2005). The position was similar in New Zealand, by virtue of the decision in

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Rees v Sinclair (1974) where it was held that barristers were immune from liability. However, in the landmark case of Chamberlains v Lai (2006), the Supreme Court of New Zealand held that any barrister or solicitor before a Court in New Zealand may be liable in negligence for their actions and despite being a civil case, the court held the ruling would apply to barristers both in civil and criminal proceedings. The countries highlighted above are considered to be developed countries.

Against this background, the examples of Ghana and Kenya, as developing countries in Africa will provide for a better comparative analysis with Nigeria. In Fodwo v Law Chambers & Co (1965), the Supreme Court of Ghana held that a lawyer could be sued in negligence on his conduct of a case. In justifying its decision, the court noted (p.374-375):

[In] a fast developing country like our own, where the numerical strength of the legal profession is on the increase, it is in the public interest that professional standards should be closely watched and that lapses in lawyers must be seriously viewed and where as in here they result in grave financial losses to lay clients, they must be adequately compensated.

As in Ghana, there is an astronomical rise in the number of enrolments of legal practitioners in Nigeria. Between 1960 and 1990, the number of lawyers rose from 963 to 16,500 (Nwauche, 2002). In the past five years, yearly enrollment averaged about 4,000. In 2018 alone 4,779 legal practitioners were called to the Nigerian Bar (The Body of Benchers & The Council of Legal Education, 2018).

In Kenya, it was held in the case of National Bank of Kenya Limited v E. Muriu Kamau & Anor (2009) that an advocate may be liable to his client for negligence. The Advocates (Professional Indemnity) Regulations, 2004 imposed a requirement for a professional indemnity cover to be purchased by every Advocate practicing on his own behalf. The cover professional indemnity for lawyers and advocates is to be used in the compensation of clients for loss or damage from claims in respect of any civil liability or breach of trust by the Advocate or his employees. The Kenya Society of Law (LSK) has asked all practicing lawyers to take the cover each year they renew their license. Under the rules no practicing certificate shall be issued to an Advocate without evidence of the required amount of professional indemnity insurance cover. Additionally, an advocate who proceeds to engage in practice without maintaining the required level of professional indemnity insurance can face disciplinary action for professional misconduct.

Impressively, some new High Court Rules have created personal liability for lawyers who are negligent. For instance, Order 55 Rule 13 of Kwara State High Court (Civil Procedure) Rules 2005, Order 56 Rule 13 of the High Court of The Federal Capital Territory, Abuja (Civil Procedure) Rules 2018 and Order 53 Rule 14 of the Lagos State High Court (Civil Procedure) Rules 2019 have all created personal liability clause against lawyers who are negligent in the conduct of cases in the courts.

Finally, it must be pointed out that there is an urgent need for the legislature to revise the existing laws regulating the practice of law in Nigeria. All relevant stakeholders, especially the judiciary and the Nigerian Bar Association, must lead this drive for change. Indeed, one of the most important characteristics of law is its dynamic nature. Law as an instrument for the regulation of human relation in all aspects of life must be able to keep up and adapt to the ever-changing conditions of mankind. Many countries, including the custodians of our most cherished common law, have recognized the need to do away with the rule of immunity exempting barristers from liability in the face of court and as it has been observed, various Courts in Nigeria are leaning towards that position too in their respective Rules of Court.

References

- Arthur JS Hall v Simons (2000) 3 ALL ER 673
- Bello Raji v. X (a legal practitioner) (1947) NLR 74
- Chamberlains v Lai [2006] NZSC 70
- Cocottonpoulous v. P.Z. Co. Ltd (1965) LLR 170
- D'orta-Ekenaike v Victoria Legal Aid & Anor (2005) HCA 12
- Fitzpatrick v. Batget & Co. Ltd (1967) 1 WLR 76
- Fodwoo v Law Chambers & Co (1965) GLR 363

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Giannarelli v Wraith (1988) 81 ALR 416

Kwaku F. 'What is wrong with the Rules of Professional Conduct for Legal Practitioners?' A paper presented at the NBA Academic Forum Working Session of the NBA Annual General Conference in Calabar, Cross Rivers State on 28th august, 2013

Lawanson v Siffre & Mati (1951) 2 KB 343

Legal Practitioners Act, CAP L11, LFN 2004 § 8

Legal Practitioners Act, CAP L11, LFN 2004 § 9

Legal Practitioners Act, CAP L11, LFN 2004 § 11 (1)

National Bank of Kenya Limited v E. Muriu Kamau & Anor (2009) eKLR

Nwauche, E. (2002). The Need to Review the Immunity of Legal Practitioners for Negligence in Nigeria. *Journal of the Indian Law Institute*, 44(4), 569-576. Retrieved April 28, 2020, from www.jstor.org/stable/43951844

Ogwezzy, M. C (2013). The Legal Practitioners Act: A Code for Regulating the Conduct of Lawyers in Nigeria. *AGORA International Journal of Juridical Sciences*, 7(3), 108-119.

Oko, O.C (1991-1993). Lawyers' Professional Negligence in Nigeria. *Nigerian Juridical Review*, 5

Okoye, A.O (2015) Law in Practice in Nigeria (Professional Ethics and Skills) 2nd Edition Snaap Press Ltd, Enugu.

Oldham, M (1996). The Advocates' Common Law Immunity. *Deakin Law Review*, (3)1, 55-66. Retrieved May 5, 2020, from www.austlii.edu.au/au/journals/DeakinLawRw/1996/4.pdf

Osita, N. O (2013) Modern Nigerian legal System. Snaap Press Ltd, Enugu.

Rees v Sinclair (1974) 1 NZLR 180

Rondel v. Worsley (1967) 1 QB 443; 3 WLR 1666 House of Lords

Saif Alli v Sydney Mitchell (1978) 3 ALL ER 1033

Stevenson, A., & Waite, M. (2011). *The Concise Oxford English Dictionary*. Oxford University Press.

The Body of Benchers & The Council of Legal Education (2018). Call to The Bar Ceremonies for The Successful Candidates at The August 2018 Bar Finals Examination

Yusuf O. Ali (2010), “Recent Developments in the Liability of Lawyers to Clients and Third Parties: The Nigerian Perspective”
https://www.yusufali.net/articles/RECENT_DEVELOPMENTS_IN_THE_LIABILITY_OF_LAWYERS_TO_CLIENTS_AND_THIRD_PARTIES.pdf accessed 28th April, 2020