

Full Length Research Paper

The potential of the law of torts and the protection of Nigerian school children

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This paper explores some possible avenues in the law of torts to protect and care for Nigerian children and young people in schools. It sets out the approach of the English Court in formulating a means of protection through the law of nuisance to a harassed and vulnerable student, and as it is applicable in Nigerian school settings. These, and the occasional recognition of harassment as a public problem, are set against a refusal to impose accountability where resources are involved.

Keywords: Law of Torts, Protection, Duty of Care and Nigerian School children.

INTRODUCTION

A tort in law refers to a "civil wrong" and the term tort is a Norman French word meaning "a wrong". It is a crime for which an injured person can bring actions in court to recover damages against those who committed them. The law of torts in Nigeria is of great importance because it is designed to protect individuals and organisations, such as educational institutions, from civil wrongs other than breach of contract. A knowledge of tortious liability is particularly important in education law and to teachers and other education officials in Nigeria. This is because most of the cases resulting from school activities belong to the category of civil actions.

In a paper published in the *Alternative Law Journal*, Barbara (1996) addressed some implications of the United Kingdom's Children Act. The author asked how the dominant principle underlying the legislation, that of safeguarding the welfare of the children, could be met with the limited resources available to the relevant local authorities in the era of privatisation and economic rationalism. It is the major purpose of this paper to look at some further legal dimensions to the protection of children in schools as applied to Nigerian school settings. The narrow focus is on tort law, but the broader aim is to look towards human rights law as it is in fundamental rights of Nigerian citizen entrenched in chapter 4 of the constitution of the Federal Republic of Nigeria (1999).

Certain aspects of care and protection in relation to children are meritably problematic in the tort context because they are so resource dependent. They therefore fall foul of the uncertain distinction between policy and operational decisions formulated in several major cases.

This has been a major theme in negligence law.

In Nigeria, there is a number of reported incidents in the school system that amounts to gross negligence on the part of the teachers and/or school heads. For instance, in the National Concord of Wednesday, November, 8, 1989, in Nigeria was the front page caption "Pupil, 13, Guns Down Classmate". The report by one Lanre Sorunke has it that a tragedy struck at a primary school at Erin village in Ogun State when a 13- year – old primary four pupil shot dead his classmate, one Murtala Musibau.

The deceased was said to have been engaged in a hot argument over an undisclosed issue with the other pupil when the incident happened. It was said that the dane gun used in committing the crime belonged to the class teacher and it was kept at a corner in the classroom. The report said the class teacher engaged in hunting expedition after school hours.

A principal who fails to provide for an adequate arrangement for the supervision of the school's activities, e.g. morning assembly, closing, extracurricular activities and so forth, may be held liable for tort of negligence if tragedy occurs. For example, in Omafidon et al. and Edugun et al. (1981), both parties were students of Okhulaihe Grammar School, Okhulaihe, in Bendel State. There occurred a free- for all fight between the class V boys and girls concerning the control by Form V boys over Form IV girls. The fight took place on the school premises after school. The girls trooped to the police station, Abudu, and the boys were arrested and charged for assault and battery. Until the principal was invited to give evidence, he had no knowledge of the incident, even

though he lived on the premises. This case typified lack of “high duty care” on the part of the principal, thereby jeopardizing the children’s right to the protection of life and property. The court, however, discharged the defendants and warned them to be of good behaviour. The principals, no doubt must have learnt a lesson (Nwagwu, 1985).

Law of torts and parental responsibility

Essentially, the 1989 Nigeria Act introduces an extended concept of parenthood while attempting to enable parents to both retain and exercise their responsibilities, and to remain closely involved with their children, in so far this is compatible with the children’s welfare. The duty of the state involves an obligation of care in the event of need, while the duty of parents is formulated under the rubric of new legal concept called parental responsibility which is transferred to the teacher in the school hours within and outside the school environment in the doctrine of *in-loco parentis*, in the place of the parents, having some of the rights and duties of a parents (Orr, 1995). The legal philosophy behind the legislation would appear to replace the emphasis on care proceedings with a streamlined emphasis upon an overall strategy of child care and protection.

In Nigerian schools especially at the nursery and primary levels re potentially are hazardous setting. This fact, however is often overlooked. A critical examination of the various activities which children engage in under the auspices of the school will make this fact more apparent. Except school personnel realises this fact in their supervision of activities in the school, “the high duty of care” required of them may be taken for granted, with all of its attendant legal implications/consequences.

Teachers need to be concerned with the safety of the children whatever area of duty they are assigned to work or supervision in gymnasium, playfields or playgrounds, science laboratory, votech workshops, home – economics workshops, field trips and so on. Generally, it is advisable for teachers to strictly follow approved practices or guidelines in the supervision of activities because they may provide the defence in law against action of negligence. In translating family autonomy into the legislative pivot termed parental responsibility, the Act seeks to achieve a balance previously neglected when weighing up the welfare principle. The Act seeks to protect children both from the harm, which can arise from failures or abuse within the family and from the harm, which can be caused by unwarranted intervention in their family life. There is a tension between those objectives, which the Act seeks to regulate so as to optimise the overall protection, provided for children in general (Barbara, 1996).

Equally, however, Kayode (1984) has argued that there is a tension inherent in terms of the legislation, and in the provision for children in Nigeria school under three headline areas: welfare, protection and rights. Factors,

which are external to the legislation, will inevitably intensify the policy dilemmas which surround its implementation. Also, there is a conflict between the ideological emphasis on parental responsibility and family based problem solving, including the economic and social pressures inherent in increasing child poverty and family breakdown.

The significance of nuisance, harassment and special protection

The use of the law of torts in family situations is long standing but is not commended upon widely in legal texts. However, as Nwagwu (1985) has noted, tort law is for the most part a fluid and flexible area of law in Nigeria which provides the judiciary with considerable scope for policy, decisions within the parameters of the relevant legal doctrines and concepts.

“Tort law is characterized by loose sets of relatively abstract principles which allow maximum discretion to be exercised (in the main) by reference to ‘common sense’ values” (Fakayode, 1985).

This fluidity may give the law some potential but it is difficult to assess the precise potential of the law in future family situations. There has however been some theoretical comment about the potential applicability of the law to deal with a range of harms. That range of harms may well include situations that are now recognized as potentially likely to lead to violence against women or children. Yet there are difficulties associated with the use of the law. As Sinha has noted in a consideration of a tort of sexual harassment and tort law’s concept of the “reasonable person,” “formulating separate standards based on each and every social inequality would lead to a seemingly endless proliferation of categories of reasonableness.” More generally, Kodilinye (1990) has argued that tort law sees injury within an individualistic framework and has as its essential purpose to “compensate individuals one at a time for mischief which befalls them as a consequence of the one-time ineptitude or nastiness of other individuals.” By this view, tort law “considers individual and compensable” something which is “fundamentally social and should be eliminated.”

Other dimensions to tort law for protection

A relatively recent dimension to the law concerns liability of local and school authorities. Although it might be argued that there are now recognizable pockets of local authority case law involving negligence as pointed out by Stapleton (1991) in his duty of care and economic loss. What is interesting about recent cases in this area of tort law for protection is the uniformity with which they hack back to the reliance principle and often to broader principles in “*Hedley Byrne v Heller*.” This reliance principle if expanded further may provide another tort avenue of protection for young children from any risk prove beha-

viour of their peers or those in control in and out the school hours. Translating that further into liability of local authorities as regards care, resources and protection has been presaged but is yet to emerge as a pocket of case law.

The principle emphasized a special relationship of proximity due to reliance upon the information and advice a stronger position where the harm suffered is physical. The duty imposed is one that falls within the principle for the local authority official who acts as the authority nursery and child minding advise and is the only person employed in that area. The local officer as in the local education officers in Nigeria, is consulted and spoken of as a professional officer possessed of special knowledge and responsibility in control of education. This could be an avenue for parented obligation in particularly vulnerable young people in Nigeria school system as pointed out by Nwagwu (1987).

The special relationship principle

It is well established that tort law may impose a duty of care where a special relationship exists between the plaintiff and the defendant. In some cases, this duty can extend to third parties, where damage is caused to that third party by a person under the care and control of the defendant (Nakpodia, 2007). For the purposes of protection of children, the two relationships of particular interest are that of school/pupil and parent/child. Interestingly, the duty placed on schools, who are essentially acting in loco parentis, is more onerous than that placed on parents, if, indeed, such a duty is placed. It has been suggested that the reason for this anomaly is because schools can and do insure against liability, whereas parents cannot and do not. With respect, it is submitted that this type of justification is typical of the lack of compassion evidenced by the judiciary, implying as it does that economics are more important than the care and protection of children.

The school/pupil relationship

The duty imposed on a teacher, and through them, a school, is to take reasonable care to protect the children under their care and control from a reasonable fore-seeable risk of injury. While the duty does not extend to placing the schools in the position of being an insurer against all harm, it does require the school to take positive steps to ensure the safety of its pupils. In *Richards v Victoria* (1969), the plaintiff, a sixteen-year-old school student, received injuries, which resulted in spastic paralysis, in a fight in a classroom with another school-boy. The evidence established that the teacher, who had been present but did nothing to stop the fight, had failed to maintain discipline for a number of months prior to the altercation. The Supreme Court of Victoria held that the teacher was guilty of negligence for failing to take steps

to stop the fight. Chief Justice Winneke held that it is "now clearly established" that a schoolmaster is under a duty to "take reasonable care to avoid harm being suffered." His Honour went on to say that foreseeability of harm is relevant to breach of that duty, but it is not relevant to the existence of that duty, which "arises from the relationship of teacher and the child." It has since been pointed out by Peretomode (1992) that this duty care on children in Nigeria centred around the question of adequate supervision, commences from the time the school gates open in the morning, irrespective of whether this is outside normal school hours or not. As a result, teachers need to be concerned with the safety of the duty they are assigned to work following the due process of law.

In cases where such a special relationship has been established, the defendant will also owe a duty of care to all those whom it is reasonable may suffer injury or damage if he or she fails to take reasonable care to control the party with whom the defendant has a special relationship. In a sense, this provides avenue for tort law to protect children, in that it prevents liability attaching to children for committing acts they may not be aware wrong, or may not be capable of being aware of consequences which may follow from their actions (Barrell, 1975).

However, the Nigeria courts have prevaricated in considering the nature of any duty owned by a school to parents and a strong relationship for parents and the schools known as Parents Teachers Association. This is because an important aspect of tort is that a tort of negligence which is the concept of "your neighbour" in law. According to Rogers (1979), this law requires an individual to take reasonable care to avoid acts or omissions which he can reasonably foresee and is likely to injure his neighbour. "Neighbour" here refers to "persons who are so closely and directly affected by your act that you ought reasonably to have them in contemplation as being so affected when you are directing your mind to the acts or omissions which are called in question".

Alexander (1980), in alluding to the principle of "Your neighbour" in law as it applies to the school setting' in Nigeria, the observation that generally, the law holds that a person is not liable for an omission to act affirmatively when another person is in danger and where is no definite relationship between the parties e.g., passers-by and victims of auto wrecks. In the same vein, while a teacher has no more of a duty than anyone else to be a "good Samaritan" to the general public, he does have an obligation or duty to help a student under his jurisdiction when injured at school. Because of the teacher- student relationship, "a teacher may be liable for an omission to act as well as an affirmative act". Thus, in education law, the teacher and the students are considered as "good neighbours". This special relationship between the teacher and student imposes a duty upon a teacher to aid or protect a student in danger. Smith (1991) points out that this special relationship carries with it special privileges and special' responsibilities. He illustrates this special rela-

tionship succinctly thus:

The same conduct toward children may be proper for a teacher but legally improper for others. For example, teachers may direct and control pupils in and out of school, but ordinary citizens may not... The special relationship carries with it special responsibilities and duties which may impose liability on teachers beyond that imposed on others-- what might constitute reasonable care by the general public may not be reasonable for the teacher. Teachers, for example, may be obliged to intervene in school playground fights and might be charged with negligence for failure to act if a child were injured thereby. The ordinary citizen would have no legal duty to intervene

Duty of care owed by a teacher

Barbara in paper published in the *Alternative Law Journal* (1996), citing a case, opined that the English court has prevaricated in considering the nature of any duty owed by a school to parents. In *Van Oppen v Clerk tot eh Bedford* that the Court of Appeal was confronted with a pupil seriously injured playing rugby football at school only five months after the mooted introduction of an obligatory insurance scheme for personal accident insurance for pupils that would cover all sporting activities, but before the actual introduction of the scheme. The Court of Appeal refused to impose a greater duty on the school in relation to a pupil than rested on the pupil's parents. According to Barbara (1996) the circumstances were not seen to give rise to a duty on the school to have regard to its pupils' economic welfare by advising on the dangers of the football or taking out insurance. In the absence of such a duty on the school, it could not be said to have voluntarily assumed a duty to advise parents on the question of insurance against injury. Quite why the case was characterised, as an economic loss is not clear: had it been seen as physical injury the issues would have been more straightforward.

However, under "Hedley Byrne" the reliance principle could have been expanded. In any event, there was considered to be no evidence that the parents relied on the school for advice in connection with insurance against personal accident. Accordingly, the defendant school trustees were held not liable in negligence. In the same vein in a Nigeria school, Bori High court was confronted with a girl called Magdalene Dappa. Vs. Nte.

According to Peretomode (1992) In Magdalene, girl from Opobo, was a student of Opobo Secondary School a River State Government- owned School and controlled by the State Ministry of Education. While in School, Magdalene got married and became pregnant shortly before her W.A.E.C. Examination. Going by the Ministry of Education's regulation, she was prevented by a Mr. Nte from writing the examination. She later took an

action against Mr. Nte. The presiding High Court judge, in dismissing the case, held that both the school teachers and the principal were agents of the Rivers State Government (Ministry of Education) and not the teacher or principal.

It should be pointed out here that it is not always, that any employee can hide under the cloak of "his employer's responsibility for torts committed by his employee". If a teacher does something which he is not employed to do at all or specifically prohibited to do, he is not acting in the course of his employment. In such a situation, his employer may not be held responsible for his tortuous acts. In other words, unless the wrong done falls within the course of the servant's employment, the master is not liable. For instance, most state education laws on English prohibit teachers from administering corporal punishment on students, except the principals or his delegate. If a teacher, unauthorized, administers the cane, thus causing serious injury to a child, and if sued, he may wholly be responsible for the damages. Besides, his employers (the Schools Board) may as well discipline him appropriately for violating the Board's regulation forbidding teachers to administer corporal punishment.

It cannot be overemphasised that what is particularly interesting most in this case is the influence of the reliance analysis upon the legal outcome. Whether the plaintiff relied upon the school to give advice was considered material (by judges in High Court of Appeal) in assessing the scope of the duty owed by the school to the plaintiff. The plaintiff was, of course, contending that a duty existed not only to take reasonable care for his health and safety as a pupil at the school but further to provide information. This duty was said to arise from a general obligation on the school to have regard to the economic welfare of the pupils in its care. Another related duty – to advise – was claimed to advise either as a consequence of failure to provide information or as a result of the actions of the school's officers in relation to the insurance issue. The third claimed duty – to ensure – was to arise either as a consequence of the failure to advise or again as a result of the actions of the school's officers. The plaintiff's case is summarised by Balcombe as depending on the existence of either: (a) a duty to have regard to the economic welfare of its pupils arising from the relationship of school pupil; or (b) a duty arising from an assumption by the school of specific responsibility in relation to personal accident insurance (Barbara, 1996). Therefore, the court considered whether liability in negligence can ever arise under *Hedley Byrne* principle where there has been a mere failure to speak or a failure to provide information in the school situation.

Furthermore, according to Balcombe, the results of the imposition of the duty to insure or protect economic welfare, which was contended in *Van Oppen*, would be to enlarge the scope of the duty resting upon the school. The case clearly illustrated a problem with the increasing use of the term proximity as legal currency in the determi-

nation of both duty and breach of duty. For it is clearly acknowledged by the court that there was a proximity between Bedford School and the pupils as in the case of Magdalele. Dappa Vs. Nte in Opobo, in Nigeria whereby the Education Laws of Rivers State made the court to dismiss the case.

Furthermore was another question of a duty of care owed by a teacher to a pupil was also considered in a case between Elizabeth Aliri (Suing by her friend) Benadeth Aliri (plaintiff/respondents) vs. John Ekeogu and others including the State schools management board in Owerri, Nigeria (J. Ogu Ugoagwu) 16/11/89- suit No. HOW/200/89 on Corporal punishment – Assault and battery and Negligence- A teacher who commits a felonious Act cannot take cover under the officers Protection Law.

The plaintiff /respondent was primary five pupil of Community Primary School, Ohekelem, Imo State and the applicant/defendant was a teacher at the said school and the teacher of the plaintiff/respondent. On 2nd December, 1985, a thief was caught in a palm produce depot near the Community Primary School Ohekelem where the applicant was a teacher and the respondent was one of his class pupils. The thief was being beaten up by irate members of the public. The applicant instructed his class pupils, including the plaintiff (i.e the respondent to) to go and see how thieves are treated so as to learn a lesson from there. The class pupils obeyed and went to the said depot. Soon after the bell rang for the pupils to resume classes, all of them, including the respondent, began to run back to the school. As they were doing so the applicant respondent, began to run back to the school. As they were doing so the applicant picked a cane and began to flog the pupils. In the pro-cess he landed the cane on his left eye of the respondent injuring the left eye. He abandoned her wife she was cry-ing out in pain and anguish. Another pupil, Ngozi Nweke, acted as a good Samaritan and took the respondent home on a motorbike for treatment of her injured left eye. The respondent lost the eye in spite of treatment given to her. The applicant/defendant admitted the above facts.

In her writ of summons filed on 20/7/87 (about 18 months, 2 weeks and 4 days after the injury occurred) the respondent claimed against the applicant, 2nd and 3rd defendants jointly and severally:-

“The sum N100.000. (One Hundred Thousand Naira) being special and general damages for assault, battery and negligence, in that on the 2nd day of December, 1985, the 1st defendant who is a servant of, and under control and employment of the 2nd defendants, as a teacher at the Community Primary School, Ohekelem, Ngo Okpala within jurisdiction which resulted in the loss of her left eye.

The 1st defendant/applicant filed a motion on notice on 12th April, 1988, praying the Honourable Court for an order dismissing the plaintiff/respondent’s suit on grounds of law to wit:

That the action instituted by the plaintiff/respondent against me 1st defendant/applicant is a nullity as it statutorily time- barred Section 2 of the Public Officers Protection Law Cap 106, Laws of Eastern Nigeria, 1963 as applicable to Imo State.

The applicant who is a public servant by virtue of his being employed as a teacher with the Imo State School Management Board was seeking to be protected in his action by the Public Officers Protection Law 106 Section 2 which provides as flows:

- “Where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance or execution or in tended execution of any law or of any public duty of authority, or in respect of any alleged neglect or default in the execution of the any such law, duty or authority, the following provisions shall have effect.”
- The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within 3 months next after the act, neglect or default complained of, or in case of a continuance of damage or in jury, within three months next after the ceasing thereof”.

Common law duty of care

In the category of common law duty of care, the claim alleged either that a statutory duty gives rise to a common law duty of care owed to the plaintiff by the defendant to do or refrain from doing a particular act, or (more often) that in the course of carrying out a statutory duty the defendant brought about such a relationship between themselves and the plaintiff as to give rise to a duty of care at common law (Startion, 1993). This claim was varied by the plaintiff claiming that whether or not the authority owed them a duty of care, of his servant in the course of performing the statutory function which was under a common law duty of care and the authority was vicariously liable for breach of that duty. Lord Browne-Wilkinson according to Barbara (1996) suggests the impossibility of identifying any general principles applicable in determining the circumstances in which the law would impose a common law duty of care arising from the exercise of statutory powers of duty. However neither the wide range of authorities nor academic writings assist in formulating “any such principle de novo.” For statutory duties now exist over a wide range of diverse activities and take so many different forms that no one principle is

capable of being formulated as applicable to all cases. Certain points of importance are, however, identified as significant in the resolution of this issue (Smith, 1991).

Co-existence of statutory duty and common law duty of care

The first factor co-existence of statutory is the “broad distinction” between whether it is alleged that the authority owes a duty of care in the manner in which it exercises a statutory discretion and cases in which it is alleged that a duty of care arises from the manner in which the statutory duty has been implemented in practice. This point is illustrated with reference to the difference between a decision whether or not to exercise a statutory discretion to close a school and the actual running of a school pursuant to the statutory duties (Kayode, 1984). A common law duty to take reasonable care for the physical safety of the pupils arises as a result of the proximate relationship between a school and the pupils it has agreed to accept. The distinction is between taking care in exercising a statutory discretion whether or not to do an act and having decided to do that act, taking care in the manner in which it is done.

Direct liability and vicarious liability

Apart from direct liability, it has also been noted that certain claims in some cases in law of tort and the protection of Nigerian school children were based on the vicarious liability of the local authority for the negligence of its servants. One basic rule in tort law is that “he who acts through another, acts for himself”. That is to say that a person may be liable for a civil wrong not only when one committed it, but also when one authorised another person to commit it on his behalf (Frank, 1975). Redmond and his colleagues put it this way, “person who authorises the commission of a tort”. Liability so arising is referred to as vicarious liability. Thus, this rule generally arises from a contract of service between the employer (Master) and the employee (Servant).

The principle of vicarious liability implies that it is the Master’s responsibility of for torts committed by his servant. A master is responsible in this way not only where he expressly authorized a servant to commit a civil wrong, but also where he has not given express authority to the servant but the servant committed the wrong (civil or criminal) in the course of his employment. This is why in most school law cases involving wrongs committed by a teacher or a principal or headmost, the wrongdoer and the appropriate schools board, and sometimes including the Ministry of Education, are often joined in the suit as co-defendants (Smith, 1991).

It is clear that guidelines in this area will not be readily available from the courts. Some of the incoherence of children protection stems from the long-standing elevation of negligence claims against public authorities to a

special category Davies (1995). Undermining this, and of increasing significance in recent cases, is the policy/operational distinction whereby discretionary decisions remain outside the ambit of negligence scrutiny. The essence of policy decision-making lies in its resource-based core, but the case law which is the accumulated body of court decisions that form an important part of the law of a particular subject, is far from coherent on the matter.

Conclusion

It is the contention that looking at this selection of case law means confronting the need for tortious remedies for a range of harms. Where one thinks more broadly about the uses of the law of torts, one would have to confront Abel’s contention, which can also be linked to feminist contentions. It is that: “Tort law fails almost entirely to pass moral judgement on the infliction of risk and injury. Negligent behaviour is a public as well a private wrong since it endangers many people besides the change victim.” (Kodilinye, 1990).

Yet confronted with shrinking public resources, there is a prevailing reluctance to impose liability upon public authorities and little consideration seems to be given to parental obligations. Perhaps, it is appropriate at this stage to look to human rights laws and to the volume of protection developed in relation to criminal trials

Clearly, the law of torts may provide only minimal protection to children from the range of harms that await them in various communities. However, if the law is to be confined to the private context, what about parents? In what context should one consider the responsibilities of parents? In some respects, their power seems overwhelming, because parents of children in school age, together with patients in the health care system, are the most powerless groups in our society.

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