

ETHICS

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Liability for an Associate's Malpractice

In our previous discourse, we explained the role of the associate in a law firm and expounded on the ethical dilemma faced by an associate including conflict of interest arising from private practice, not having the required skills to handle a client's case and being faced with unethical instructions from a partner in the law firm. Now, we will examine the firm's liability for an associate's malpractice. Essentially, the issue being discussed here regards vicarious liability and the situations in which the law firm or its partners and senior associates will be held accountable for the acts and omissions of an associate.

What is Vicarious Liability?

Simply put, the doctrine of vicarious imposes liability on employers for the wrongful conduct of their employees. Generally, an employer will be liable for any tort committed in the course of the performance of an employee's duties. This rule makes the employer liable to third parties with whom they had no direct contact. Understandably, the employer is not liable for acts committed outside its scope of authority which the courts have described as the employee going on a "frolic of his own".

This is referred to as the reasonable degree of control test which was applied in the case of **PERFORMING RIGHTS SOCIETY v MITCHELL & BOOKER LTD (1924)** here; the defendants were sued for the breach of copyright by a jazz band, in determining whether the defendants were liable for the actions of the jazz band. The court had to take into consideration, whether the band was an employee by examining the regular hours worked by the employees. There was a fixed period of employment and the band had been told where they should work. They had exclusivity of service; there was also a right to dismiss the band for the breach of any fair instructions or requirement. Essentially, the court looked at the "nature and degree of detailed control over the person alleged to be a servant" and the band was held to be an employee of the defendant.

Lord Thankerton in **SHORT v J & W HENDERSON LTD (1946)** itemised four important factors to determine the degree of control in the master and servant relationship this includes: (a) The master's power of selection of his servant; (b) The payment of wages or other remuneration; (c) The master's right to



control the method of doing the work; and (d) The master's right of suspension or dismissal."

Furthermore, Lord Denning in **STEVENSON, JORDAN AND HARRISON LTD v MACDONALD AND EVANS (1952)** opined that "it is often easy to recognise a contract of service when you see it, but difficult to say wherein the difference lies. A ship's master, a chauffeur and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi-man and a newspaper contributor are employed under a contract for services. One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business; whereas, under a contract for services, his work, although done for the business is not integrated into it but is only accessory to it."

The Nigerian courts seem to have adopted the reasonable degree of control test. In **MADAM ADEBUSU ODEBUNMI v ALHAJI ISA ABDULLAHI** the court stated that: "unless an employer could otherwise explain his non-liability, he as employer of the servant is vicariously liable for the negligence of his servant in the performance of his duty, where

such negligence occurred in the normal course of his business."

Additionally, the Supreme Court in **SSCO LTD v AFROPAK NIG LTD, 2008** stated that for an individual to be identified as an employee of an organisation, certain factors such as the type of remuneration received by the employee, the hours of work stated in the employment contract, the conditions of service and whether the employee could delegate would have to be taken into consideration by the court.

However, an employer is not liable for the acts and omissions of an independent contractor. An independent contractor has been described as a person who performs services for another person under an express or implied agreement and who is not subject to the other's control, or right to control, over the manner and means of performing the services. Slessor J explained the difference between an employee and an independent contractor in **HONEYWILL AND STEIN LTD v LARKIN BROTHERS LTD [1934]** thus "the determination whether the actual wrongdoer is a servant or agent on the one hand or an independent contractor on the

other depends on whether or not the employer not only determines what is to be done, but retains the control of the actual performance, in which case the doer is a servant or agent; but if the employer, while prescribing the work to be done, leaves the manner of doing it to the control of the doer, the latter is an independent contractor."

Conclusion

Ordinarily, a law firm is liable for the acts and omissions of an associate performed in the course of employment under tort law. However, in certain instances the law firm or its partners will not be liable for the acts and omissions of its lawyers.

The Nigerian Rules of Professional Conduct are silent on whether a partner or the law firm is vicariously liable for the acts and omissions of other members of the law firm. But the American Bar Rules of Professional Conduct Rule 5.1 (Responsibilities of Partners, Managers and Supervisory Lawyers) provide that:

' (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action'

These rules place a responsibility on all partners or lawyers exercising managerial or supervisory authority in a law firm to ensure that all lawyers in the firm conform to the rules of professional conduct. Drafting a similar provision will go a long way in restoring ethical conduct among members of the Nigerian Bar.

THE LEGAL POSITION ON THE CONTROVERSY ON BUHARI'S EDUCATIONAL QUALIFICATIONS CONTINUED FROM PAGE 12

in section 106 (c) of the Constitution. What is required under the law is that there must be evidence that a candidate is educated up to the school certificate level, and not that he must produce a certificate to that effect. (Pp. 542-543, paras G-D)".

On whether the candidate needs to possess a school certificate to be eligible to contest, the same court held in the same ruling as follows:

"I agree that since there is evidence that the 2nd respondent sat for the school certificate examination on May/June 1975, this is sufficient to satisfy the requirement of section 10(c) of the Decree. While the acquisition of sound education may be desirable to enable one discharge the functions as Chairman of Local Government Council, it is not absolutely necessary that such a person must possess a certificate to enable him function effectively." (P. 545, paras. B-D)".

The other issue that is relevant is the person who has the burden to prove such qualification whether it is the candidate who is aspiring for the office that must show that he has passed through a secondary school or the person alleging otherwise that must show that the aspirant does not hold such a

qualification? The answer to this poser was given in the case of **HASKE v MOGAJI** (supra) where the court held on the question of onus to prove as follows:

"It is both legal and logical that the mere fact that a party has pleaded in his petition that the other party is not qualified to contest an election, because he lacked the requisite educational qualification is not sufficient for the Tribunal to latch onto it and decide on it, in the absence of cogent and credible evidence of such non-qualification or disqualification being placed before the Tribunal. In the absence of evidence, such a plea in the petition ends and/or terminates with the petition".

It is clear from the foregoing that it is the person alleging non-qualification of the candidate that has the responsibility of showing by cogent/convincing evidence that the aspirant never attended any secondary school as alleged.

The foregoing analysis may have revealed the following:

(a) Buhari's eligibility to contest for the office of the President of Nigeria can only be challenged if those making the allegation can show either that he has never attended any secondary school, that he never possessed

any primary school leaving certificate, that he has never served in any public service for a period of 10 years in addition to his primary school certificate or that he has never sat for any school certificate examination. It is immaterial whether he passed or failed such examination. To succeed, they must also show that he does not possess any higher qualification above the minimum requirement of secondary school certificate. In other words, they must show that all certificates acquired by the General in consequence of his military training at home and abroad culminating in his rising to the position of a Major General in the Nigerian Army were certificates below secondary school level or certificate. It is those making these allegations that must prove the allegations against the General. It is not the General who must show that he possesses such qualifications. The law is, 'He who asserts must prove'.

(b) The army authorities had publicly admitted that they have records of General Muhammadu Buhari's educational qualifications in their custody. The army being a public institution can furnish the Certified True Copies of General Muhammadu Buhari's educational qualifications to appropriate

authorities including INEC at the request of those making the allegations without bothering the General with such obligations.

It can be said that those who have raised the issue of the General's qualifications and eligibility may have served patriotic intentions, but they need to do more by showing through concrete, cogent, compelling and believable evidence that the General neither attended any secondary school nor possesses any primary school leaving certificate including showing that his period of service in the army including service as Head of State of Nigeria in total do not add up to 10 years for them to succeed in their patriotic crusade.

Finally, having raised the constitutional issue of qualification, no doubt an issue based campaign, those interested in taking the issue further are advised to be guided by judicial pronouncements quoted copiously above if they want to be taken seriously. However, if they are basing their conclusion on speculations not backed up with empirical evidence, it is wise to advise them to consider the issue as closed while moving to other issues in the campaign that ought to be dictated by issues and not sentiments.

Shittu, writes from Lagos