



THE KADUNA STATE TORTS LAW PROVISIONS ON FATAL ACCIDENTS AS AN ATTEMPT AT DOING JUSTICE IN DIVERSITY: A CRITICAL REVIEW

1.1 INTRODUCTION

The Kaduna State torts Law was promulgated as an Edict in 1987 but later adopted as a law in 1991 and hence, contained in the laws of Kaduna State 1991 at its Chapter 12. Part 1 of the law deals with fatal accident claims. Apart from satisfying two of the basic reasons for legislation, viz; ensuring regulated conduct and catering for the welfare of citizens, the law framers appear to have made a modest attempt at making provisions that will take care of the diversity of the state in the areas of religion and ethnicity or tribe. This is because its provisions cover people who are not subject to any system of customary law, people who are subject to ethnic customary law and people who are subject to Islamic law. To the extent that the law take into account, these deferring cultural and religious backgrounds, the framers of the law have also, to some extent, satisfy another important consideration in making a law namely, that the law should as much as possible be in conformity with the value systems of the people within which it shall operate. The question however is; has the law substantially delivered on this area? In other words, is the incorporation of the religious and cultural diversities of the people to extent that one can say all groups have been adequately catered for or it is a mere window dressing? The foregoing poser is the basic task of the paper. And to deliver on the task, key sections of the law relating to fatal accidents shall be critically analysed under suitable sub-titles.

2.2 RIGHT OF ACTION

The right to institute an action in respect of death resulting from the wrongful conduct of another is provided for under section 6(1) of the law.¹ The provisions are as follows:

Whenever the death of any person is caused by the fault of any other person and the fault is such as would (if death had not occurred) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not occurred shall be liable in an action for damages, not withstanding the death of the person injured.

From the above provisions, it is dear that an action can be instituted against a person who caused the death of another, through his wrongful conduct. Those empowered to institute such actions are the executors, administrators³ or the beneficiaries⁴ of the compensation to be paid. Executors are the ones to institute the act action where there is a will in which executors are appointed. Where there is no will then administrator(s)



appointed to administer the estate of the deceased take up that responsibility. The beneficiaries only come in the matter of instituting action in the absence of executor or administrator⁵ or where either the executor or administration fail to institute such action for up to a period of six months after the death of the victim of the accident.⁶

However, the fact that provisions are made at all granting rights of action, it goes without saying that before the enactment of the law that right does not exist. Therefore, it means for Northern Nigeria (including Kaduna State) there is no law to protect the interests of dependants of persons killed as a result of reckless or negligent conduct of others before 1963.⁷ This is because the torts law provisions on fatal accident seemed to be an adopted law from the former Northern regional law i.e. law of Northern Nigeria 1963. This kind of situation is possible because, both the Northern regions fatal accident law and the Kaduna state torts law provisions on fatal accident have their origin in England. To understand the root cause of the problem properly a brief excursion will now be taken into the development of fatal accident claim in England.

In England, torts was initially wholly regulated by the common law. Statutory provisions started coming as late as the 18th century. And the common law, according to Flemming⁸ "with Singular harshness, disclaimed all concern with tort losses in the wake of wrongfully inflicted death". This simply means that no action could then be brought by third parties who suffered loss through the wrongful killing of another.⁹ The reason for this initial position of the common law is said to be the now discarded rule¹⁰ That, where an act constitute both civil and criminal wrong, no civil action can be instituted until the wrong doer has been prosecuted for criminal aspect of the act. Therefore, since at the formative period of the English legal system, at one time, a criminal was punished with death and all his properties forfeited to the crown, it was reasoned that suing for civil claim in respect of an act that caused death is a futile effort.¹¹

The locus classicus for this common law position is the case of *Baker v. Bolton*¹² in which Lord Ellenborough categorically stated that "in a civil court the death of a human being could not be complained of as an injury." This position of the Common Law led to the then popular taunt that "it is cheaper to kill than to maim"¹³

However, with the advent of the railways and the consequential increase of fatal accidents, it became obvious that a reform has to be carried out. To this end, in 1846 parliament passed the fatal accident Act popularly called Lord Campbell's Act which brought substantial relief to dependants of wrongfully killed persons by conferring them right of action for compensation in such cases.¹⁴ The Lord Campbells Act was later amended and renamed the fatal accidents Act 1976.¹⁵ Infact the provisions of the two laws are almost identical, which betray the fact that it is from the former that the latter got its origin.



The crucial question to ask at this stage however is; with the provisions of right of action in Northern region fatal accident law and section 6 of the Kaduna State torts law does it mean that before the enactments of this laws, in Kaduna State (Just as elsewhere in the North) there were no laws that recognised claims in respect of fatal accidents? The Laws that were in operation in Northern (and hence Kaduna State) were the Islamic law and ethnic customary laws of the various tribes. It is therefore pertinent to examine these laws for the purpose of answering the above poser.

The authority for compensation in cases of fatal accidents arising from the tortious wrong of another under Islamic Law is found in the Quranic verse which states that:

Never should a believer kill a believer but, if it happens by mistake, compensation is due: if one so kills a believer, it is ordained that he should free a believing slave, and pay compensation to the deceased family.¹⁶

The above verse has clearly established that compensation in cases of fatal accidents is recognised under Islamic. Therefore, since before independence there was full application of shariah in the Northern states, it goes without saying that there was an Islamic law rule to regulate fatal accidents cases. The situation under customary law is however, fluid firstly, because the multiplicity of tribal laws makes it difficult to know the applicable laws on accidental killings in all the tribal societies. The second problem is that most customary killings even in circumstances that seems to be without intention are treated as crime because of the high regard placed on the sanctity of human life. However, even with that difficulty, payment of compensation was well recognised.¹⁷ Therefore, the problem was limited to clearly delineating what was civil or criminal in the killing of a person.

It is, thus the position of this writer that the provisions of the torts law on the right of action has its value limited to only helping in making accidental killings which, under customary, would have been treated as murder to be treated as civil actions for which compensation can be claimed by deceased dependants. For Islamic Law however, it did not confer any advantage but rather it confirms what has already been in existence.

3.3 PERSONS ENTITLED TO BRING ACTION

Persons entitled to institute action in respect of fatal accident claim are specified under section 7 (1) (2) and (3) as follows:

Section 7 (1) If the deceased was immediately before his death subject to a system of customary law or Islamic Law relating to administration of estates the action shall be brought at the option of his immediate family, by and in the name of such person as the court is satisfied, is



under the customary law or Islamic law, entitled or empowered to represent the deceased person or his estate.

S.7(2): The action shall be brought by and in the name of the executor or administrator if the deceased person was not subject to a system of customary law or Islamic Law.

S.7(3) if:

there is no executor or administrator of the deceased; or

no action is brought within six months after the death by and in the case of an executor or administrator of the deceased, the action may be brought by and in the name of all or any of the persons for whose benefit the action would have been brought.

From the above provisions, it is clear that three types of representatives (for the purposes of court action) are envisaged for three different situations. In the first instance, if the deceased is a person who is subject to a system of customary law or Islamic law relating to administration of estates, the immediate family members can choose one of them to maintain an action in court for compensation provided that such a person is qualified under the laws to represent the person or his estate. The second situation is where the person is not subject to either customary law or Islamic law, in which case, such an action is to be brought by and in the name of the executor or administrator of his estate. The third and last situation is where there is either no executor or administrator or where there is either of the two but no action is instituted within six months after the death of the deceased, in which case it is to be instituted by and in the name of all or any of the persons for whose benefit the action would have been brought.

Starting with the first situation, one would say that the option of choosing a person to institute an action in his own name may only be tenable under Islamic law where the prospective beneficiaries are either minors or under some mental or other disabilities. This is because under Islamic law, upon death, the balance of the estate of the deceased upon settlement of liabilities immediately devolves to his heirs to be shared among them in accordance with the prescribed percentages in the Quran. In such a case, therefore, and except under the exceptional condition already mentioned, it will not be legally right for only one person to institute an action in his own name for that purpose. This is because such a situation could give rise to another cause of action; the suitor may collect the money and 'eat' without rendering account to the beneficiary (or other beneficiaries as the case may be). The best option therefore is for a joint action to be instituted, except where the action is brought in representative capacity.¹⁸

The same position is hereby canvassed for the customary law situation with the exception being where (as it is the case under some customary laws), the person instituting the action has assumed the role of the head of the family, so that every body including the wife(ves) of the deceased are now taken over by him.



With regard to the second situation, it seem the law is only continuing with the age long policy of our colonial masters of making it possible for natives who wish by reason of their education or status, to move generally or in respect of particular transaction/relationships out of customary law into English Law.¹⁹ It is submitted that this colonial legal policy whose motive was apparently that of undermining and hence, reducing the influence of customary/Islamic law, has succeeded only in creating problems. In the case of a muslim who is an adherent of Islamic law, such a person risked being looked upon by fellow muslims as either a nominal muslim or even an apostate for opting for a system of law which is not in consonance with the Islamic Law. This is so because Islam and hence, Islamic Law is by its very nature imperialist. It seeks to uproot existing laws and cultures and supplanting it with its own. And once its laws are accepted it enjoins total compliance. In this regard the Quran categorically provides:

It is not fitting for a believer, man or woman, when a matter has been decided by God and his Apostle, to have any option about their decision.²⁰

The Quran then urged believers to judge between them only with what God has revealed.²¹ For those who refuse to so judge God has grouped them into three in accordance with the level (sic) of their violation namely, unbelievers, wrongdoers and rebels.²² This, therefore, is the consequences that awaits a muslim who exercise the right of opting out from Islamic law to English law. Adherents of Customary Law who decide to exercise that option also suffer the risks of being treated as outcasts in their communities. To avoid that, most of them try, particularly with regard to marriage, to please both sides, that is, please their kinsmen by conducting the transaction (marriage for instance) under customary law and themselves by later re-conducting it in accordance with the marriage Act. But for a matter such as the fatal accident claim, it appears that adherents of customary law may not have problem because it seems to be rather an advantage to them in the sense that it helped in clearly establishing for them death which is civil in nature and for which compensations are to be paid as distinct from the death which is the result of a criminal act thus, clearing the ambiguity of the past.

Concerning the third situation, it seems both customary law and Islamic law rules are not opposed to appointment of executor or administrator of estate. For instance, under Islamic law, since writing of will is not prohibited,²⁴ it ipso facto means that some one can under the will also appoint for it an executor. The law also approve of the management of the property of the deceased who left very young or disabled heirs by a person who stands in the position of a guardian to them²⁵ until they become matured or the disability is cured before the property is released to them.²⁶ This has thus established the validity of the appointment of administrator of estate under Islamic law where it



becomes necessary. It is therefore, the view of this writer that allowing ample time (such the six months prescribed under S.7 (3) (b) to pass before the beneficiaries can themselves take up the matter as a result of perceived neglect or reluctance on the part of either the executor or the administrator is in order.

4.4 BENEFICIARIES

Beneficiaries of the compensation to be paid by the defendant (where liability is established) are stated under section 6(2) of the law to be "members of the immediate family of the deceased person". As to who constitute "immediate family" subsection 3 (a – c) of the afore stated section shade light on them as follows:

in relation to a deceased person not subject to a system of customary law, or Islamic Law, includes

husband

wife

parent

child

brother and

sister

In relation to a deceased person subject to Islamic law, means the persons entitled to share in the award of Diyya prescribed by Islamic Law.

in relation to a deceased person who was subject to a system of customary means in addition to any of the persons specified in para (a) any other relation recognised as such by the customary law to which the deceased was subject.

As can be seen, the provisions here are broad enough to take care of virtually all persons that loss their bread earners through accident. Those who are not subject to either Islamic Law or native customary laws are to move under situation a, in which case their parents, wife(ves) children brothers and sisters are to be beneficiaries. Those subject to customary law are to have their compensation claimed in accordance with the particular customary law they are subject to. This means that if an Ibo man is killed in Kaduna, unless his relations decide to opt out of customary law, it is the Ibo customary law that will apply in determining the beneficiaries. Consequently additional relations could be brought in where necessary to satisfy the position of that law. And finally if the deceased was subject to Islamic, it is that law that will apply in determining beneficiaries. The only snag with the provision is that the meaning of family with regard to non adherents of either Islamic or customary law seemed to have widen the scope of family under English²⁶ law. This means that if a Briton is killed through accident in Kaduna state the beneficiaries of his death claim will include his brother(s) and sister(s) whereas under English law family is limited to husband wife and child or children.



5.5 JURISDICTION AND EFFECTS ON CLAIMS BY PARTIES

In the law, reference to court has been interpreted to mean "any court other than a customary court or an Area Court by or before which any claim falls to be determined"²⁷ This means that suits for claims in respect of fatal accident can be instituted in District courts, Magistrate Courts or High Courts (depending on the amount claimed) but not either in Area court (shariah court) or customary courts. The problem this creates is that there is subtle negation of the rights granted to parties who are not adherents of English Law to institute action for compensation in respect of their killed relations. This is because maintaining an action in English type courts means that it is English law that will apply to determine the claim of the suitors. Customary or Islamic Laws can only apply at the point of sharing the money amongst family members, that is, to determine who qualify as members of the "immediate family of the deceased." The implication of this to muslims as adherents of Islamic law (whose procedural and substantive provisions are different from that of English Law)²⁸ is that of compelling them to institute their actions in English type courts and hence claiming in accordance with English law (not Islamic Law). This is not fair, more so as Kaduna State is one of the states that have proclaimed the application of Islamic law.

With regard to customary law, it seems again that there are no adverse affects. This is because in the first place, even in customary courts judges do not follow customary law procedure, the law is applied through English law procedure. And since the establishment of right of action in respect of fatal accident had played the role (as we have seen earlier) of at least in the case of fatal accidents differentiating what is criminal killing and what is accidental killing, it seems claiming under English Law will not pose a serious problem. It must however, be added here that where there is in existence a provision on the nature of compensation to be paid under a particular customary law, then it would be a more preferred thing to have the compensation paid in accordance of that law.

6.6 CONCLUSION

The analysis made in this paper has revealed one important thing about the legislative policy involved in the enactment of the Kaduna State Torts Law as related to fatal accident, that is the policy of integration. The term integration has been defined as the fusion of rules of customary law and English law to produce a single system of law.²⁹ What we have seen from the analysis made in this paper however is no integration as required by the above definition.

Though there is allusion to all the three types of laws viz English law, Islamic law and customary law but when it comes to the application of rules, we find that apart from allowing distribution of claim to beneficiaries and appointment and maintenance of actions by executors and administrators, every other thing is regulated by English law. There is thus, no fusion of the laws as required but rather an apparent case of super imposition of English law on the other laws (i.e Islamic Law & Customary) thereby creating a situation of mere window dressing that give the semblance of the Kaduna State torts law provisions on fatal accident incorporating indigenous laws into its



provisions but the true position being the suppression of these laws by English law.

In that situation the Islamic law suffered must because (as opposed to customary law) it has its own clear cut provisions on fatal accident claims but because it is subjected to English law, these provisions cannot be applied.



ENDNOTES AND REFERENCES

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That is Kaduna State torts law cap 152 law of Kaduna State 1991

Ibid, Section 7(2)

Ibid Section 7 (1 and 2)

Ibid Section 7 (3)(b)

Ibid Section 7 (3) (a)

Ibid Section 7 (3) (b)

The Fatal accident law of the Northern Nigeria which seemed to be the basis for the Kaduna States torts law provisions on fatal accident was made that year.

In his book; the Law of Torts, the Law book company, Sydney, 1977 at P. 647.

See Salmond and Heuston; On the law of Torts; Sweet and Maxwell, London, 1966 at P. 341. Also, the Case Baker V. Bolton (apparently the locus classicus of the principle) where Lord Ellenborough categorically declared that "in a civil court the death of a human could not be complained of as an injury."

Popular called the rule in Smith V. Selwyn

See Fleming Op. cit at

Supra.

Fleming op. cit.

bid Pp. 648-9

Ibid.

Q. 4:29

Read generally, Ellias T. O: The nature of African Customary Law Manchester University press, 1956 Pp. 110-129.

As required by sub Section 5 of section 7 of the Torts Law Op. cit. Once that is done fears expressed earlier with regard to the person to bring the action "eating" the money will be allayed.

See Allot A. New Essays in African Law; Butter worth, London, 1970 P. 14

Quran 33:36

Quran 5:49

Quran 5:44-47

Only that if it is in respect of money or money worth what is to be given out a legacy it should not be more 1/3 of the total amount or value. See Doi, A. R; Shariah, the Islamic Law Taha Publisher London 1984 P. 329.

See Quran 4:6.

This is because under English Law a family consist of only the husband, wife and child/children.

See the case of Hyde v. Hyde. (1866) L. R. P & D 130.

See Section 3 Op. cit

Under Islamic Law One is required to pay compensation in addition to freeing a slave. The compensation is paid with stated number of Golds or their values. It does not require assessing damages under the various heads of damages stated in English law.

See Azinge E.: Codification of Customary Law: A mission impossible? In: Towards a Restatement of Nigeria Customary laws, Federal Ministry of Justice, Lagos, 1991 P. 287.