



Confluence Journal of Private and Property Law

A Publication of the Department of Private and Property Law,
Faculty of Law, Kogi State University, Anyigba.
(CJPPL) Vol.3, Part 1, 2009.

Contributors	Articles	Pages
Oguche, S.	DEVELOPMENT AND POLICY USE OF CRIMINAL JUSTICE INFORMATION AND STATISTICS	1-11
Ijohor, T. A.	THE STATUS OF THE RECIPROCAL ENFORCEMENT OF JUDGMENTS ACT OF 1922	12-20
Orimogunje, O.O.	PROCEEDINGS IN LIEU OF DEMURRER: A CASE FOR SWIFTER DISPENSATION OF JUSTICE IN CIVIL LITIGATION	21-32
Ayeni, A.M.	COMPARATIVE ANALYSIS OF THE PROCEDURES FOR HUMAN RIGHTS ENFORCEMENT AND FULFILLMENT UNDER THE OPTIONAL PROTOCOL TO ICCPR, EUROPEAN CONVENTION ON HUMAN RIGHTS, INTER-AMERICAN CONVENTION ON HUMAN RIGHTS, AND THE AMERICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE AID OF RELEVANT DECIDED AUTHORITIES	33-42
Oguche S.	LEGAL FRAMEWORK OF INDUSTRIAL AND LABOUR RELATIONS IN NIGERIA: AN EXAMINATION OF SELECTED STATUTES AND THE NATIONAL INDUSTRIAL COURT	43-59
Orimogunje, O.O.	LIABILITY OF OCCUPIERS OF PREMISES FOR TORTS AGAINST VISITORS AND THEIR CHATTELS	60-68
Obi Okoye, A.	PROTECTION OF REGISTERED INDUSTRIAL DESIGNS IN NIGERIA	69-78
Borokini A.A. & Olong M.A.,	FAST-TRACKING THE ADMINISTRATION OF JUSTICE IN NIGERIA	79-89
Oyedepo, O.	THE ROLE OF LEGAL REFORM IN ATTRACTING FOREIGN DIRECT INVESTMENTS BY TRANSNATIONAL CORPORATIONS TO DEVELOPING COUNTRIES	90-99
* Iloh, F.O.	CAPACITY AND PARTIES IN THE LAW OF TORT	100-108
Olong M.A., Longpoe W., & Oyelima P.	STREAMING THE POWERS AND DUTIES OF A RECEIVER / MANAGER AND LIQUIDATOR IN THE ORGANIZATION OF A COMPANY: AN ANTIDOTE FOR CORPORATE GOVERNANCE	109-116
Ujah, M.A.	THE ROLE OF PROPAGANDA IN NATIONAL FOREIGN POLICY AND CONDUCT OF DIPLOMACY: NIGERIA AND GLOBAL PERSPECTIVES	117-123
Oyelami, T.O.	ROLL BACK MALARIA FROM AFRICA: THE LEGAL PERSPECTIVE	124-129
Kabir, D.	CAN THE DONOR OF A POWER OF ATTORNEY EXERCISE THE POWERS DONATED?	130-135
Obasi, M.N.	PROTECTING VARIOUS INTEREST GROUPS IN CORPORATE LEGAL ENVIRONMENT	136-142
Kur, J. J.	FOLKLORE AND INDIGENOUS FORMS OF KNOWLEDGE PROTECTION UNDER AFRICAN CUSTOMARY LAW SYSTEM: A DOCTRINAL AND JURISPRUDENTIAL PERSPECTIVE	143-158
Magai, I.M.	ENFORCEMENT OF ENVIRONMENTAL RIGHTS: EMERGING ISSUE	159-165
CASE NOTES		
* Iloh, F.O.	REVISITED: AMAECHI V. INDEPENDENT NATIONAL ELECTORAL COMMISSION	166-182
Alabo, A.O. & Longpoe W.	NATIONAL UNION OF ELECTRICITY EMPLOYEES AND 1 OR V B P E SC 62/2004 DELIVERED ON 25 TH FEBRUARY, 2010: WHERE THE SUPREME COURT MISSED THE POINT ON THE JURISDICTION OF THE NATIONAL INDUSTRIAL COURT	183-189

CAPACITY AND PARTIES IN THE LAW OF TORT*

1.1 Introduction

Broadly, tort is a civil wrong, other than breach of a contract for which a remedy may be obtained, usually in the form of damages; a breach of a duty that the law imposes on persons who stand in a particular relation to another¹. A tortfeasor is one who commits a tort; a wrongdoer². Joint tortfeasors are two or more tortfeasors who contributed to the claimant's injury and who may be joined as defendants in the same lawsuit³.

In this paper the focus is to examine the capacity of parties to bring and defend actions that border on torts before courts in Nigeria. In a work of this nature, the author considers it a convenient starting point to scrutinize the concept 'capacity':

The power to create or enter into a legal relation under the same circumstances in which a normal person would have the power to create or enter into such a relations; specifically, the satisfaction of a legal mind, that determines one's ability to sue or be sued⁴.

'Standing', another synonym for 'capacity', means a party's right to make a legal claim or seek judicial enforcement of a duty or right⁵. 'Locus standi' – equally another word for capacity denotes legal capacity to institute a case in a court of law. It is the same as 'standing' or 'title to sue'. It is the right of party to appear and be heard on the question before any court or tribunal⁶. The word 'party' means one by or whom a lawsuit is brought⁷.

The central focus of this paper, legal personality, is an important one given the fact that no court would want it jurisdiction to be invoked unless by the proper parties. Only an entity known to law is capable of suing and be sued. A person can sue and be sued before a court of law only if it is recognized as a legal person and known to law. Where, therefore, it is successfully known that a party to an action is not a legal person; the party should be struck out of the suit⁸:

It is settled law and practice that a suit can only be commenced, and proceeded against those who are competent to do so. Generally, a competent person is a person with a juristic existence. This may be a living person or a corporate body. This may be a company limited by shares or a public liability company Plc⁹.

Given the above, it is beyond doubt that the concept of legal personality is indeed very important- only persons to whom the law has accorded legal personality can sue and be used *eo nomine*¹⁰.

1.2 Natural Person (human being)

Human being or individuals are the social units and pre-existed both law and society. Since laws are made by them and for them, and since jural relations are relations between individuals, it is no wonder that jural relation of each individual came to be one of the first and most important unities for legal purposes. The legal concept of a human

* Ifioh, F., O., LL.M (Ibadan) B.L., Legal Practitioner, Lecturer, Faculty of Law, Ebonyi State University, Abakiliki, Ebonyi State. e-mail: ifiohfriday@yahoo.com 08056436125, 08061527156

¹ Black's Law Dictionary 8th Edition P. 1526

² Ibidem

³ Ibidem

⁴ Black's Law Dictionary, 8th edn.

⁵ Ibidem

⁶ Imade vs Military of Edo State (2001) F.W.L.R Pg 1387 (Pt 69)

⁷ Black's Law Dictionary P. 1154

⁸ Ataguba & co. vs Gura Nig. Ltd (2000) F.W.L.R (24) 1526

⁹ Per Omage, J.C.A., Ataguba V. Gura, Supra.

¹⁰ In that name.

being as a person is simply a multitude of claims, duties, liberties, etc treated as a unit; as such, there is no distinction in law between 'natural' and 'legal person'.¹¹

From the jurisprudence of Dias above, it can be contended, and rightly of course, that a human being is capable of bringing and defending an action or actions in tort. Human being- nay natural person can bring actions in their own names, and defend same in the same capacity before the court. Thus if Mr. Fanta recklessly drove his hummer jeep and ran down Mr. Nine -up on the street; Mr. Nine-up (who must have suffered an injury) can bring an action in the tort of negligence in his personal capacity (as Mr. Nine-up) against Mr. Fanta (tortfeasor-defendant). The notion of a human being is more flexible than might be thought¹². Let us examine some instances:

1.3 An Unborn Child

What is the legal status of an unborn child as regards for instance, any deformity happening to the child (foetus) while in the womb or even total destruction, say by abortion? The author, in the course of this research, has not found any Nigerian case on this issue (foetal legal status). However, a voyage into another legal clime is apposite here. The example of the legal personality of a foetus has raised interesting and emotive questions recently¹³. Learned author, Michael Doherty, referred to the case of *CVS*(1987)¹⁴ and submitted thus:

In the case of CVS (1987) one such question arose for consideration. Briefly, in the case a man who claimed to be the father of a foetus attempted to prevent the mother of the foetus from proceeding with an abortion after their relationship broke down. His grounds were to invoke the criminal law against the destruction of a child capable of being born alive (SI Infant Life Preservation act 1929). The rather controversial interpretation given to that phrase by the House of Lords need not detain this text. What is of importance is the observation that it was the father(as an interested person) who brought the action and not the foetus, yet if the foetus had been deemed to be a legal person it could have brought the action itself. Practical problems of instructing solicitors, e.t.c from the womb can in this legal system be over come - there are procedures to enable the incompetent to be party to actions. The implication though is wide. The mother would merely be a walking incubator for another legal person. The mother would owe that person a duty of care that would give rise to that person having a cause of action, where, for example through smoking cigarettes, the mother caused the foetus damage. If the foetus were a legal person, then it would be party to an action to prevent an abortion, e.t.c.

The position, of the foetus not deemed a human being and its father bringing an action on its behalf, as canvassed by the learned author;¹⁵ seems to be in agreement with the opinion of two learned authors in criminal law:

If a child dies in consequence of an act done or omitted to be done by a person before or during its birth, the person who did or omitted to do such act is deemed to have killed the child. It seems, however, that the child must have

¹¹ R.W.M., Dias, Jurisprudence, 5th edn. Butterworths, London, 1985, P-251

¹² Jurisprudence: The philosophy of Law, 3rd edn: Micheal Doherty, Pg.386 .

¹³ Ibidem.

¹⁴ Ibidem .

¹⁵ Ibidem

completely proceeded from its mother's body in a living state and then dies subsequently as a result of the act or omission, for if the child dies in the womb, it was not a human being capable of being killed within the meaning of section 307¹⁶, although an offence under section 328¹⁷ is committed.

1.4 Corporations Sole

The need to continue the official capacity of an individual beyond his lifetime started a long time ago. Dias put it succinctly thus that:

The common lawyers accordingly created a second 'person' who though passing under the same name as the flesh and blood individual, enjoys legal existence, in perpetuity. This is the corporation sole, which is a personification of official capacity¹⁸.

Why did lawyers create this imagination?

The main purpose of the corporation sole is to ensure continuity of an office. Moreover, the occupant can acquire property for the benefit of his successors, he may contract to bind or benefit them, and he can sue for injuries to the property while it was in the hand of his predecessor. Today there are many corporations sole, e.g. a parson, bishop, public trustee, and a great many others. The most spectacular is the crown¹⁹.

1.5 Corporations Aggregate

These are companies or other corporation created by charter, statute or under the companies Acts. They are treated as persons in law unless the contrary is stated (statutes use individuals if they mean human and unincorporated associations but not corporations). Some unincorporated associations are given some of the incidental benefits of corporations but they are still not persons. Partnerships, for example, can issue writs in their own name and can make contract, but the individual partners remain fully liable as individual²⁰.

1.6 The Juristic Nature of Incorporated Organization

It is settled law that only an organisation that has been incorporated can sue and be sued in its corporate name²¹. In *Agbonmagbe Bank vs. General Manager G.B. Ollivant Ltd*²². It was held that since General Manager G.B. Ollivant Ltd. was not a juristic person, that defendant could not be made party to the action and should be struck out. Thus, a company, whether limited by shares or a public liability company Plc. May bring or defend an action in its registered name. However, what is the fundamental difference between corporate and incorporate association? In the *Anyaegebanam's* case, the Nigerian Supreme Court answered the question thus,

The most fundamental difference between a corporate and incorporate association is that the corporation has 'perpetual succession'. It maintains its identity and personality, notwithstanding changes in its membership. But the property of an unincorporated association belongs to its membership from time to time²³.

¹⁶ S. 307, Nigerian Criminal Code: A child becomes capable of being killed when it completely proceeded in a living state it has a completely in a living start from the body of its mother, whether it has breathed or not, and whether it has an independent circulation or not, and whether the navel string is severed or not.

¹⁷ S. 328, Nigeria criminal code provides for the offence of killing an unborn child.

¹⁸ Dias

¹⁹ Dias

²⁰ Jurisprudence; The Philosophy of Law, Micheal Doherty, Pg 388

²¹ *Anyaegebanam V. Osaka* (2000) F.W.L.R. (27) P.1942

²² (1961) All N.L.R.116.

²³ *Anyaegebanam V. Osaka*, Supra

What is the legal status of unincorporated association? An unincorporated association does not legally exist and must necessarily act through its appointed representatives²⁴. On the other hand, a corporate entity, that is an association that has been incorporated, has legal personality. It can sue and be sued in its corporate name²⁵. Despite its unincorporated nature, unincorporated association can own property. But for such property to vest, it must be made through persons who have been appointed trustees²⁶. By virtue of section 2 (1) of the Land (Perpetual Succession) Act²⁷, trustee may be appointed by any community of persons bound together by custom, religion, kinship, or nationality or by any body or association of persons established for any religious, educational, literary, scientific, social or charitable purposes, and such trustees or trustee or may apply to the minister for a certificate of registration of the trustees or trustee of such community, body or association of persons as a corporate body. Thus, the above provision shows that an unincorporated body or association of persons is a factual reality. The association though unregistered, must appoint trustees or a trustee who will apply for registration. The law takes into cognisance the fact that before the application is made, that is while the association is not registered in law, and certain persons may be appointed trustees who must act in that capacity.

1.7 On Legal Personality of a Subsidiary Company

In the world of commerce, some companies do have subsidiaries existing under them. For instance, we may have a company, Feedwell Ltd producing confectionaries; and companies B, C, D, E and F under it, with Feedwell as the parent company. Supposing one of the subsidiaries company, say C, which produced cars, sold one of its products to Mr. Jingo. It happened that the product sold to Jingo was defective and Mr. Jingo suffered injury as a reason thereof. Now, who, between the parent company, Feedwell Ltd, and the subsidiary company C Ltd, should Mr. Jingo proceed against in law? This issue arose in the case of Union Beverage Ltd. Vs, Pepsicola International Ltd²⁸. The Supreme Court answered the question, the legal personality of a subsidiary company, thus:

A subsidiary company has its own separate legal personality. Generally, the act of a subsidiary company cannot be imputed to the parent company nor can the act of the parent company be imputed to the subsidiary company. Each of the four defendants/respondents in this case was a corporate body having its own legal personality separate and different from others. Each of them was capable of suing or being sued in its own name. There was therefore no legal basis for suing the first respondent for what the fourth respondent had done. It would have been otherwise if one of them acts as a servant or an agent of the other but that was not the case in the present circumstances. Consequently, it could be properly said that there was no nexus between the appellant and the first respondent or a nexus between the appellant and the fourth respondent on the basis of the affidavit and the document attached to it²⁹.

1.8 Non-Corporate Statutory Bodies

It is not every statutory body that is a corporate body. A body may be statutory in the sense that it is created by a statute but without it being vested with the distinctive

²⁴ Ibidem

²⁵ Ibidem

²⁶ (1994) 3 NWLR (Pt. 330) 1

²⁷ Ibidem

²⁸ Ibidem

²⁹ (1994) 3 NWLR (Pt. 330) 1

features of a juristic person. It may, however, be conferred with certain specific duties or functions. In the case of Ibrahim. V. Judicial Service Committee, the Supreme Court held that the judicial Service Committee, one of the four statutory bodies established at the state level under section 178 (1) of the 1979 constitution with its membership and official duties spelt out in that Constitution is a corporation aggregate and or/legal personality capable of suing and/ or being sued. In the same vein it held that the Attorney General of a state (and thus of the Federation) created under section 176(1) of the same Constitution is a legal personality capable of suing and/ or being sued. None of these bodies is expressly in the constitution or elsewhere endowed with the attributes of a body corporate

In determining the competence of a statutory body to be sued, it is necessary in every case to look at the instrument by or under which the body is established or acts.

1.9 Unincorporated Non-Statutory Bodies, Associations Members, Clubs etc.

All these are associations of persons with no distinct existence from that of their members. They are not legal persons and non-statutory. They cannot sue or be sued. The Nigerian Bar Association had been held to be such a body and therefore cannot sue or be sued in its name. A case of action lies in favour of or against the particular member or members who did the acts or made the omissions that gave rise to it. Such a member may sue in his name to enforce a contract.

Unincorporated proprietary clubs or institutions belong to the proprietor and he may sue or be sued in his own name in respect of contract affecting the institution.

1.10 Government

The Government of the Federation or of a State is inherently a corporate entity. Rights are vested and duties imposed on each of them by the Constitution. Each can therefore sue and be sued. The constitution itself impliedly acknowledged this (S. 6 (6) (b)). Although a government has corporate capacity, the same does not follow for its various ministries and functionaries through which it operates. Many of these are unincorporated. They cannot therefore sue or be sued except where any of them is conferred with the power to sue and be sued by the instrument creating it.

The Government does not sue and is not sued in its name as such. Rather under the Petition of Rights Act/Law, claims by the Government or any department of the government against any private person are claims against the government or any department of the government are brought by or against the Attorney - General of the government concerned as plaintiff or defendant, respectively. The Attorney General, is statutorily conferred the capacity to sue and be sued for and on behalf of the Government by the Petition of Rights Act/Law. It is also a legal personality.

There are some executive bodies of the government established by the Constitution which are not subject to the direction or control of any other authority or person. Examples are the Federal Civil Service Commission and the Independent Electoral Commission. The Independence of such bodies is thus guaranteed under the Constitution or establishing statute. The Attorney General cannot be properly sued of acts done by such bodies in the course of performing their stipulated function for they are not under the direction or control of the government.

1.11 Representation of Actions

The right to a property may be vested jointly in large number of persons. An example is title under customary law to family or communal land. The right of each member of the family or community to the land is the same. It is a general right among them. No one can claim the right to a specific portion of the land alone. The right extends all over the land. Where such property becomes the subject matter of litigation, obviously every member is entitled to join in the litigation. But the person having the common right may be so many that all of them cannot conveniently sue in the suit involving that right. In such a case the Rules of court permit one or more of them to sue or be sued as representatives of the others. An action which is thus brought by or against one or more

person as representing other persons together with whom the one or more persons have a common interest in the subject matter of the action is called representative action. The few persons by or against whom the action is brought are the representatives of the others and they prosecute or defend not in their personal capacity but in their representative capacity.

1.12 Infants, Persons of Weak or Unsound Mind and Lunatics:

These classes of persons have obvious disabilities as far as being parties to litigation is concerned. An infant for this purpose may be taken as a person under age of twenty-one years. This is the position at common law and under the English Infants Relief Act 1874- a statute of general application, applicable in the country. The other terms are self-explanatory. Because of their disability, the Rules of Court allow them to sue and be sued by normal persons. Where a member of any of these classes sues as a plaintiff he does so by a normal person described as "his next friend". Where he is sued as a defendant, he defends by a normal person described as his "guardian ad litem". An infant, a person of weak or unsound mind or a lunatic cannot properly bring or defend an action by himself. He should do so by another person designated his "next friend" if he is the one suing, i.e. a plaintiff, or where he is sued, i.e. a defendant, by another person designated his "guardian ad litem".

1.13 The Concept of Immunity and Actions in the Law of Torts

The subject 'immunity' is much relevant to the central focus of this paper. This is moreso when one considers the agitations it has generated with regard to the acts (or omissions) of some public officials in recent times. Some people are even clamouring for its removal from our laws. Immunity is any exemption from a duty, liability, or service of process; especially such an exemption granted to a public official³⁰. These concepts shield those who are actions or omissions cause injuries to other from prosecutions.

Immunity is a defence to tort liability which is conferred upon an entire group or class of persons or entities under circumstances where considerations of public policy are thought to require special protection for the person, activity or entity in question at the expense of those injured by its tortious act. Historically, tort litigation against units of government, public officers, and charities, and between spouses, parents and children, has been limited or prohibited on this basis³¹.

1.14 Those Who Are Immunized

Office of the President, Vice-President, Governor, Deputy Governor. The occupants of these offices enjoy absolute immunity. This is constitutionally provided for:

Notwithstanding anything to the contrary in this constitution, but subject to subsection (2) of this section -

- (a) *No civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;*
- (b) *A person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise;*
- (c) *No process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued³².*

³⁰ Union Beverages Ltd (supra). 4/

³¹ Black's Law Dictionary, 8th edn. P.765.

³² Section 308, constitution of the Federal Republic of Nigeria, 1999.

The implication of section 308 of the Constitution was brilliantly illuminated by the Court of Appeal when that court said:

What section 308 of the 1999 constitution provides in favour of the persons enumerated in subsection (3) thereof so long as each of them holds the office stipulated is an immunity from civil or criminal proceedings instituted or continued against him; immunity from arrest or imprisonment during that period either in pursuance of the process of any court or otherwise or the application for or issue of the process of any court requiring or compelling the appearance of a person to whom the section applies³³

Any breach of the provision of section 308 of the 1999 constitution renders such process, proceedings, civil or criminal, null, void and no effect³⁴. Even where a suit had been initiated before the occupants of section 308 (3) came into office, the suit cannot be continued³⁵. This concept of immunity was also provided for under the 1979 constitution of Nigeria³⁶. It is pertinent to note that section 308 does not preclude a public office holder from police investigation, as there is a difference between police investigation and criminal prosecution. The question may be asked if the public official concerned can waive immunity under the section under consideration. The Supreme Court answered the question in *Tinubu V.T.M.B. Securities Plc*³⁷. The court held that the immunity granted to the incumbent of the relevant office under section 308 (1) (a) of the constitution prescribing an absolute prohibition on the courts from entertaining any proceedings, civil or criminal, in respect of any claim or relief against a person to whom that section of the Constitution applies during the period he holds such office. No question of waiver of the relevant immunity by the incumbent of the offices concerned or, indeed, by the court may therefore arise. In other words, the incumbent cannot waive the immunity granted to him under section 308 (1) (a) of the 1999 constitution. Though immunity cannot be waived, but the section 308 does not prohibit the beneficiaries of the immunity clauses from instituting an action.

In my judgment, the whole tenor of section 308 point to a prohibition of proceedings against a person to whom the section applies and not to a prohibition of proceedings by him³⁸.

1.15 Immunity of the State for the Tort Committed by its servants:

Under the common law the State is immuned against liability for the tortuous act of its servants. This immunity of the state came to the fore in the celebrated case of **Ransome Kuti vs. Attorney- General of the Federation**³⁹. Here the appellant /plaintiffs at the trial court brought an action against the Federal Government for the alleged torts committed by some soldiers. One of the issues that arose for determination was whether under the common law of a state, here the Federal Government of Nigeria, was vicariously liable for the alleged torts complained of. At the Court of Appeal in the same case, Nnaemeka-agu, J.C.A (as he then was) said:

"The case the appellant brought to court was based on tort. I agree with the learned Assistant Director for litigation that the crown Proceedings Act of 1947 is not

³³ Chief D.S.P. Alamiyeseigha, chief Saturday Yeiwa (2002) F.W.L.R. (Pt. 96 557).

³⁴ Alamiyeseigha vs. Yeiwa, Supra.

³⁵ Bola Timbu v. T.M.B. Securities Plc. (2001) F.W.L.R (Pt 55) P.580

³⁶ *Aper Aku v. Plateau Publishing Corp. Ltd* (1985) N.C.L.R. 338 and Chief Victor Olabisi Onabanjo v. concord press of Nig. Ltd (1981) 2 N.C.L.R; both decisions of states High courts.

³⁷ Supra

³⁸ *Per Aderemi of Nigeria Ltd* (1981) 2 N.C.L. R both decision of state High courts.

³⁹ (1985) 2 N.W.L.R.

applicable in Nigeria, I also agree that the state cannot, in Nigeria, be sued in tort⁴⁰.

At the Supreme Court, reading the lead judgment, Kayode Eso (J.S.C.) (as he then was) agree with Nnaemeka Agu, (J.C.A.) The Supreme Court, per Eso (J.S.C.) gave an illuminating genesis of the petition of right:

What is left is in regard to the vicarious Liability of the government, but the appellants have been met by that old and almost anachronistic legal phraseology that the King can do no wrong. The state (The king in England) has immunity at common law against being sued. This was based on the ancient principle of non-impeaching the king in his own courts. Petitions of right which could be addressed to the king would not however lie for tort⁴¹.

Having given the historical background of this doctrine on immunity, the learned law Lord cited the law:

"By virtue of the Interpretation Act (Cap. 89) Laws of the Federation of Nigeria and Lagos 1959, section 45 (1) which provides:

"Subject to the provisions of the this section and except insofar as the other provision is made by any Federal law, the common law of England and the doctrine of equity, together with the statute of general application that were in force in England on the 1st day of January, 1900, shall be in force in Lagos and, in so far as they relate to any matter within the exclusive legislative competence of the Federal legislature shall be in force elsewhere in the Federation'" has preserved this ancient and royal doctrine of immunity of the state in our laws⁴²"

Aside from the above, by Ordinance NO. 19 of 1915, the Petitions of Rights Ordinance was passed. In 1947, England, via, section 2 of the Crown Proceedings Act, brought an end to this doctrine of immunity. All said and done, Eso, (J.S.C), dismissed the appeal on the ground that the state was immuned and rather sadly, thus:

I have checked all our constitutions prior to 1979 and regrettably I am not able to find any provision which one could apply, even remotely but rightly, in an annulment of this doctrine. The court is to administer law as it is, not as it ought to be. This Immunity attaching to the state in this country is still⁴³.

1.16 How Does the Law Stand Now?

Happily for the country, section 6 of the 1979 constitution which vests the judicial powers of the country in the court has to my mind removed this anachronism⁴⁴.

The "Anachronism" being referred to in the dictum of Eso (J.S.C.) above is the state immunity for the torts of its servants. He then went on to state, verbatim the provision of the law in the 1979 Constitution that purged our laws of this anachronism. Sub-section (6) of the section provides that:

The judicial powers vested in accordance with the provision of this section

⁴⁰ Ibidem

⁴¹ Ibidem

⁴² Ibidem P. 1685

⁴³ Per Kayode Eso (J.S.C) in Ransome-Kuti vs. Attn-Gen., Supra

⁴⁴ Per Kayode Eso (J.S.C.) IN Ransome-Kuti Vs. A.G (Fed.), Supra.

(b) Shall extend to all matters between persons or between government or authority and any person in Nigerian, and to the actions and proceeding relating thereto, for the determination of any question as to the civil rights and obligation of that person.

In another case⁴⁵, the Supreme Court, per Kayode Eso (J.S.C) (as he then was) held that the provision of the Constitution cited above annulled those part of the Petition of Right Act that was inconsistent with the constitution vide section 1 (3) of the 1979 Constitution.

The status of the Petition of Right Act with respect to the 1979 Consitution of the Federal Republic of Nigeria is the same under the 1999 Constitution for the latter Constitution as the former, contains section 6 (6) (b).

1.17 Diplomatic Immunity

Under Diplomatic and Privileges Act⁴⁶, foreign envoys and foreign consular officers, the members of the families of those persons, the members of their official staff, are accorded immunity from suit and legal process and inviolability of residence and official archives. The issue of diplomatic immunity came up before the Supreme Court in the case of Alhaji A.G Ishola-Noah v. His Excellency the British High Commissioner to Nigeria⁴⁷. In this matter, the plaintiff who had instituted two similar actions against the defendant, the British High Commissioner in Nigeria, wherein the Supreme Court ruled on 2nd of September 1980 that it had no original jurisdiction to entertain the actions against the defendant. Exactly a month later, the same plaintiff took out an originating summons in which he asked for a declaratory judgment against the same British High Commissioner in Nigeria. The court dismissed the action, and held that:

By virtue of section 1 (2) and 3 of the Diplomatic Immunities and privileges Act (No.42 of 1962), any action brought against a foreign envoy in Nigeria is incompetent and it is null and void. Such an action shall accordingly be dismissed⁴⁸.

However, unlike the immunity under section 308 of the C.F.R.N 1999 that cannot be waived, diplomatic immunities are waivable:

A foreign envoy or foreign consular officer, with the consent of his Government, may waive any immunity or inviolability conferred by or under this Act on himself and without the necessity for such consent may waive immunity or inviolability so conferred on a member of his official or domestic staff, or a member of his family or of the family of a member of his official staff⁴⁹.

1.18 Conclusion

This paper has examined the capacity and parties to bring and defend actions in the law of tort.

⁴⁵ Bakare VS. A.G (Fed.) (1990) 5 N.W.L.R. (Pt. 152)

⁴⁶ Diplomatic Immunities And Privileges Act, Chapter D9, Vol. 5, L.F.N. 2004.

⁴⁷ (2002) F.W.L.R. (Pt.86) P.634

⁴⁸ Ibidem

⁴⁹ Diplomatic And Privileges Act, Section 2, Supra