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The Journal of Environmental Sciences (JOES), is devoted to the publication of papers, which advance knowledge on the theoretical and practical aspects of the natural and built environment. The aims of the journal: are to provide an avenue for the dissemination of academic research findings dealing with environmental problems, planning, and development, opportunity for increasing and making available relevant data and information on environmental conditions/problems and advancing effective management solutions to them with special reference to Nigeria; and to provide a forum for meaningful discussions and debates between academics and field practitioners of the natural and built environments.

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The Professional's Duty of Care: A Diagnostic Appraisal of the Quantity Surveyor's Liability of Negligence in Tort.

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ABSTRACT

The legal requirement of duty of care from Professionals is uncompromisable. This paper seeks to examine the level of such duty required by law from professionals that could be said to have satisfied the minimum standard requirement of the law. An attempt will be made to critically appraise the acts that constitute negligence in Tort for a Quantity Surveyor with a view to proffering available defences in such circumstances

INTRODUCTION

Generally, in some categories of job especially those that have direct bearing on the life of human being, that is Medicine, Law and Engineering, the professionals are required by law to take extra care while performing their duty. The degree of efficiency and perfection required of them is of the zenith degree.

In the field of Engineering specifically, civil and building engineering, apt measurement of materials

and labour by Quantity Surveyor is of great importance. A Quantity Surveyor as a professional, is required under the law to exercise adequate care and strive to avoid the incurring of any liability through negligence.

Ordinarily, a professional according to Encarta 2007 is a person that engaged in an occupation as a paid job rather than as a hobby, a professional while performing his duty, must show a high degree of skill of competency.

engineering works and how much it will cost to complete the work (Hornby : 2002)

In other words, a quantity surveyor is a person or measurer whose principal function is to measure and value building work (Robert:1983) Also, a Quantity Surveyor in the Nigerian Institute of Quantity Surveyor's Directory of members (1996) was defined as

WHO IS A QUANTITY SURVEYOR?

Traditionally, a Quantity Surveyor is a person whose job is to estimate the quantities of materials and labour needed for building and civil

...the expert who is concerned with financial probity in the conceptualization, planning and execution of developmental projects both new and refurbishment works. He is the development COST ADVISER in the building, civil and other engineering projects

From the above given definitions, a quantity surveyor therefore can be described as a person whose main duty is to work out the detail needs in terms of quantity of material and labour required for the execution of a particular building and developmental project. A Quantity Surveyor is to

take out in detail the quantities from building plan prepared by an Architects, for the purpose of enabling Builders to know the amount for which they would execute the project

The Quantity Surveyor's major functions according to Ifeanyi (2003) among others include the followings;

- (a) Feasibility Studies of Capital Project
- (b) Cost Modeling

(c) Contract Documentation

(d) Contract Administration

(e) Project Management

Qualification of a Quantity Surveyor

Surveying is classified as a learned profession because the modern practitioner needs a background of technical training and experience, and must exercise independent judgment (Russell: 1969).

Basically, there are two routes to enter the Quantity Surveying profession, in Nigeria. The routes are : (a) a full time three years (for direct entry with HND and four years with OND) or (b), a five years (for UME candidates leading to the award of B.SC or B.Tech. degree in Quantity Surveying. In some advance countries like USA, Canada, and Britain there is a three years technikon diploma advancing to a B-Tech degree after further year of study.

In Nigeria, there are certain well known professional bodies to which all Quantity Surveyors belong. Among such bodies in Nigeria are the Nigerian Institute of Quantity Surveyors and the Quantity Surveyors Registration Board of Nigeria. These bodies serve as the regulatory bodies for the profession.

In Canada, to qualify for registration as either a professional engineer or a surveyor, it is usually necessary to have a college degree ... plus four

years of cognate experience, that is years of practical work, and pass appropriate written examinations. The standard registration law makes it a misdemeanor to practice without licence (Russell: 1969).

Personal Attributes of a Quantity Surveyor

Quantity Surveying is one of the World's dignified professions. Thus, Quantity Surveyors are expected to maintain highest degree of professionalism. His duty of care is of highest standard. He must ensure fairness and accurate finalization of projects.

Quantity Surveyors are one of the few professionals that relate to people at all levels. As they relate to the likes of developers, architects, engineers, land surveyors; so also they relate to lawyers, accountants, contractors and general workers.

CONSTITUTION OF NEGLIGENCE ACT IN LAW

Under the law, it is not all act of carelessness that constitutes a negligent act. Thus, in *Conchelly, Iron & Coal vs MC Mullan* (1934), the court held that,

--- in strict legal analysis negligence means more than heedless or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person, to whom the duty was owed.

According to Roger (1996), negligence as a tort

--- is the breach of a legal duty of care, which results in damage, undesired by the defendant to the plaintiff.

Further more as a tort, negligence is the breach by the defendant of a legal duty to take care, which results in damage to the claimant (Sheila :2001)

In other words, any act which the defendant is fully aware that will result in "actual" damage to the plaintiff and of which he has the power or capacity

- a. The Plaintiff must proof that the defendant was under a duty of care to such plaintiff.
- b. That there had been a beach of that duty
- c. That as a result, the plaintiff has suffered damage.

to prevent and which he fails to prevent same, is a negligent act

Therefore, negligence may signify a state of mind that is either a person's inadvertence to the consequences of his conduct or the deliberate taking of a risk, without necessarily intending the consequences, attendant upon that risk (Sheila:2001). Negligence is one of the most important and common tort in the law, and if plaintiff is suing in negligence according to Colin (1983), he must prove three points to succeed:

In a nutshell, liability in negligence arises when the breach of a duty owed by the defendant to the plaintiff results in damage to the plaintiff. It follows that the first step in establishing such liability is to show that such duty exist (Babara: 1996). Accordingly,

Negligence is the commission to do something which a reasonable man, guided upon those considerations which ordinary regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do (Keith: 1993).

Thus, in law, it is not for every careless act, that a man may be held responsible, but he is under a legal duty to take care (Rogers: 1996).

Therefore, if negligence occurred without ... no attendant physical damage to property or person, that plaintiff could not recover damages in negligence. Thus, if there was only economic loss, they could not sue in negligence (Stephen: 1998). However under certain circumstances, the court held that the plaintiff could recover damages if the principle in *Hedley Byne CO Ltd vs Heller and Partners Ltd* (1964) is applied

Appraisal of the Quantity Surveyors Liability of Negligence in Tort

Liability under the Tort of Negligence is based on the decision in *Donoghue Vs Stevenson*(1932), (it was in this case that the principle of neighborhood was

... Wherever in the circumstances it is foreseeable that if the defendant does not exercise due care, the plaintiff will be harmed.

However, it is pertinent to note that the essential principle governing the surveyors' liability is that a surveyor or valuer must carry out his duties with care and skill of an ordinary competent member of his profession. The Quantity Surveyor is in a quasi – arbitral position.

This standard in law is often referred to as BOLAM STANDARD (This standard was laid down in the case of *Bolam vs Friern Barnet Hospital Management Committee* (1957)). A mere error of professional judgment according to the courts decision in *Whitehouse vs Jordan* (1981) will not amount to negligence unless ... it is so glaring

established) and the circumstances where professional people may be held liable were clearly stated in the Defective Premises Act 1972(Keith: 1993).

Since it is the duty of a quantity surveyor in a building contract to take out in detail the measured quantities from drawings or building plans prepared by an architect, for the purpose of enabling builders to construct or build the project (Donald: 1978); and while quantifying, it is required of him that "he must exercise his judgment fairly and professionally, as was held in *Sutcliffe vs Thackrah* (1974), and failure to do this or if any physical damages occur as a result of this act, such a Quantity Surveyor, will be held liable. He has thus, breach his duty of care. According to *Kodilinye & Aluko*(1999), duty of care will be owed in general:

below proper standard as to make a finding of negligence inevitable.

The simple interpretation of this is that, for such quantity surveyor to be liable, *stricto sensu* (in the real sense of it) under the law, the owner of the building must have.

- a. Suffered physical injury, and
- b. The act of the quantity surveyor must have caused the plaintiff to suffer a latent defect; but in absence of this, Lord Keith in *Murphy vs Brentwood District Council* (1991) held that

... There will be no liability if what the defendant have suffered by the plaintiff's act is purely economic loss...

This position was further stressed in the case of *Dat Estate Vs Church Commissioners of England*

(1988) per Lord Bridge that

...liability can only arise if the ... defective structure causes personal injury or damage to property other than the structure itself. If the defect is discovered before any damage is done, the loss sustained by the owner of the structure, who has to repair or demolish it to avoid a potential source of danger to third parties, would seem to be purely economic.

Going, by the above quotation, if the harm suffered is purely economical, there is no strict liability on the part of the Quantity Surveyor; however the quantity surveyor may still be held liable on the application of the principle of Neighbours Tort. This principle was laid down in *Doroghue vs Steveson* (1932) wherein it was held that a person may still be held liable to a third party even if the damage is not of physical harm per se. Thus, a quantity surveyor in the law of tort will incur liability through negligence if:

- i. He is under legal obligation of taking care
- ii. If in the course of his duty breach such duty of care negligently
- iii. If the plaintiff suffered physical damage from the act of the defendant (*Duncan*: 1986)

In recent time, the following cases of negligent in tort on Nigeria construction sites can be cited:

1 – The court held in *Niger Mills co VS Agube* (2008) 1 ALL FWLR (PT427) page 96 that “when the tort of negligence is established the quantum of damages awarded upon proof of such liability is to be decided according to the severity of each case.

2 - The court listed what plaintiff must prove to succeed in action for negligence in

A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man, he might be hurt himself; and his reckonings he must take into account the possibility of others being careless.

We must note however that, this defence is not all encompassing because according to *Colin* (1983)

Abubakar and another vs Joseph and another (2008) 5-6 S.C (pt11) page 176 that:

a – There exists a duty of care owed to the plaintiff by the defendant.

b – Breach of that duty of care by the defendant.

C – Damages suffered by the plaintiff as a result of the breach by the defendant of that duty of care.

3 – See also *UTB Nig vs Ozoemena* (2007) 1 SC (PT11) page 211.

4 – Court also listed same in *Okweijiminor vs Gbakeji and another* (2008) 1 SC (pt 111) page 263

AVAILABLE DEFENCES TO THE BREACH OF TORTIOUS DUTY OF CARE

There are two major defenses to the tort of negligence under the law. The defences are:

- i. Proof of contributory negligence
- ii. Proof of *violent non fit injuria*

In the first defence, the Quantity surveyor would have to prove that it was basically the negligence of the plaintiff himself which combines with his in bringing about the actual damage. On this *Kodlinye and Aluko* quoting Lord Denning L.J in *Jones vs Livox Quarries Ltd* (1952) said

and as provided in Section 1(1) Law Reform (Contributory Negligence) Act (1945)

Where any person suffers damage as a result of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage but the damages recoverable in respect thereof, shall be reduced to such extent as the court thinks just and equitable, having regard to the claimant share in the responsibility for the damage

Another aspect of contributory negligence is *novus actus interveniens* which means that, the tortious act occurred due to the intervening and distinct act of another person. In this type of case, it is for the court to decide whether the new act ought reasonably to have been foreseen by the defendant (Quantity Surveyor), if it ought to have been foreseen, the defendant remains liable (Collins: 1983)

On the defence of *volenti non fit injuria* (no injury is done to one who consents). Consent itself is a defence to intentional torts, as such, it may also be a defence to an action in negligence. If a defendant is successful in his plea of *volenti*, he will have complete defence, and the plaintiff will be unable to recover any damages (Kodilnhe and Aluko 1999).

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CONCLUSION

From all the aforesaid, it could be gleaned that the duty of care is strictly required from a quantity surveyor in the course of his profession. Failure or breach of this duty will lead to the commission of a tortious liability resulting from negligence.

However for the plaintiff to succeed in claiming damages, it is also required of him to prove duty of care, breach of same by the defendant and physical damage which resulted from the breach of care.

Most importantly however, and couple with all the above essential ingredients of negligence, the breach of duty of care must have occurred without the plaintiffs intentional contribution. If the plaintiff in any way contributes to the negligent act, or consented to its commission, the defendant can rely on same as a good defence