

MODES OF RESOLVING DISPUTES ARISING FROM VICARIOUS LIABILITY

By Bizibrains Okpeh*

Introduction

Conflict has been with mankind since its first inception following man's fallout with God in the Garden of Eden as a result of the conflict of interests.¹ In recent times, litigation has assumed a centre stage in the settlement of disputes/conflicts notwithstanding its inherent contradictions. This work explores these contradictions as well as the need and suitability of the use of Alternative Dispute Resolution mechanisms in the settlement of disputes arising from vicarious liability.

Litigation

According to *Oxford Advanced Learner's Dictionary of Current English*,² to 'litigate is to take a claim or disagreement to court.' Litigation, therefore, is the process of making or defending a claim in court.³ On its part, the *Black's Law Dictionary*⁴ defines litigation as the process of carrying on a lawsuit or the lawsuit itself. In other words, it is the taking of legal action by a litigant.⁵

To the American Bar Association, litigation is an adversarial system where parties to a dispute formally present the proof that will persuade a neutral and objective fact-finder to decide the dispute one way or the other.⁶

Litigation is thus a stage where parties to a suit face off before a third party, usually regarded as an unbiased umpire who listens to the one make his claims and the other defend such claims in

*Okpeh is a lawyer, researcher and analyst. Reach him at bizibrains@gmail.com

¹ Genesis 3:1-24

² Lea, D (ed). *Oxford Advanced Learner's Dictionary of Current English* New 8thedn (New York: Oxford University Press Inc., 2010) p. 869

³ *Ibid*

⁴ Garner, BA (ed). *Black's Law Dictionary* 9th edn (Minnesota: West Publishing Co., 2009) p. 1017

⁵, Martin, EA & Law, J (eds). *Oxford Dictionary of Law* 6thedn (New York: Oxford University Press Inc., 2006) p.319

⁶ See Report on the American Bar Association Working Groups on Civil Justice and Proposals, *Blueprint for Improving the Civil Justice System* cited in Dele, P. *What is Alternative Dispute Resolution?* (Lagos: Dee-Sage Nigeria Limited, 2005) p.18

'acrimonious' circumstances, and makes a pronouncement, one way or the other, to which the parties are bound. Hence, it is often called an adversarial system.

Advantages and Disadvantages of Litigation

Litigation plays a very important role in the settlement of disputes. However, as a mode of settling disputes arising from vicarious liability, it also has its disadvantages. The advantages and disadvantages of litigation shall now be discussed.

One of the advantages of litigation is that it allows for the settlement of disputes.⁷ That is, instead of taking laws into their hands, disputants submit to the jurisdiction of the court, which is regarded as a neutral third party, to settle the dispute one way or the other.

Another advantage of litigation is that it generally offers parties access to justice. This means that both the weak and the strong can approach the court whenever their right is or is likely to be violated⁸ and the court is vested with the power to act on all such questions as to the determination of the civil rights and obligations of any person.⁹

Connected to the above, litigation ensures that victims of torts committed by employees in the course of their employment are compensated by the employer.¹⁰ However, while litigation offers a path to compensation of victims of torts, the promptness of this compensation remains entirely another question.

However, the demerits of litigation are, nevertheless, overwhelming. First, litigation is not cost friendly.¹¹ Stated differently, it is very expensive. This means that the much-acclaimed access to justice usually associated with it is more or less a legal mirage.¹²

Second, litigation is adversarial or confrontational in nature.¹³ As a result of this, it may resolve the matter at hand but does not bring the dispute to an end. This is because it could open up new fronts

⁷Akeredolu, A. 'Court-connected Alternative Dispute Resolution in Nigeria' (2011) 1 No.1 *University of Ibadan Law Journal* p.54

⁸ See the Constitution of the Federal Republic of Nigeria, 1999 (as amended) Section 46

⁹*Ibid* Section 6(6)(b)

¹⁰*Cox v Ministry of Justice* [2016]UKSC 10; *Mohamud v Morrison Supermarkets Plc*[2016] UKSC 11

¹¹ Akeredolu, *Op cit* p.42

¹² Bok, D. Cited in Dele, p.18

¹³ *Ibid*

for acrimonious relationships between parties to a dispute. This usually leads to loss of relationships as parties hardly disputes hardly return to their pre-litigation friendly relations.

Third, litigation occasions undue delay in resolving disputes, including those relating to vicarious liability. Bok put it thus; ‘Access to justice may be open in principle. In practice, however, most people find their legal rights severely compromised by ... the long, frustrating delays involved in bringing proceedings to a conclusion...’¹⁴ It has been reported that the average period within which most civil cases are disposed of in Nigeria is 3 years.¹⁵

Fourth, litigation embraces technicalities.¹⁶ The effect of this is that substantial justice is sacrificed at the altar of technicalities. The ‘law is the law is the law’¹⁷ becomes the order of the day. For although litigation is concerned with justice, it is justice according to the law.¹⁸

Finally, but by no means exhausted, litigation is formal and complex.¹⁹ It has too many complexities often seen as deliberately set up by the Bar and Bench to protect their trade without regard to their clients’ interests, all of which result in inadequate access to justice and an inefficient and ineffective judicial and/or justice system.²⁰

Alternative Dispute Resolution (ADR)

Alternative Dispute Resolution is as old as man.²¹ Its origin may be traced back to more than two thousand years ago as recorded in divine injunctions in the Holy Bible²² and the Holy Quran.²³ ADR is a wholesale of conflict settling mechanisms outside litigation.²⁴ It subsumes a whole range

¹⁴ *Ibid*

¹⁵ *Ibid* p.27

¹⁶ Akeredolu, A. *Op Cit* p.42

¹⁷ Elegido, JM. *Jurisprudence* (Ibadan: Spectrum Law Publishing, 1994) p. 366

¹⁸ Dele, *Op cit* p. 23

¹⁹ Akeredolu, *Op cit* p.42

²⁰ *Ibid*

²¹ Ezike, EO. ‘Developing a Statutory Framework for ADR in Nigeria’ (2011-2012) 10 *The Nigerian Judicial Review* p.249

²² Mathew 5:25

²³ Sura 49, Al-Hujurat Verse 9&10

²⁴ Ezike, *Op cit* p.248

of options or alternatives to courtroom litigation.²⁵ That is, it entails all methods of resolving disputes other than litigation in a court of law.²⁶

It is a name that encapsulates several dispute resolution techniques outside litigation.²⁷ These processes together are usually said to be jural-like forms of dispute settling not in the nature of litigation.²⁸ This work, therefore, conceives ADR as a socio-legal concept that denotes all processes by which conflicts or disputes are settled, although it does not include litigation. It is social in that in its traditional sense, it operated and still operates as a social tool for amicable settlement of disputes, respectively between persons and communities *inter se*, in a manner largely informal and traditionally unsystematic.

In recent times, ADR has been legally institutionalised and integrated into the judicial process as part of the court system, in a manner largely informal but substantially systematic. The latter is usually what is called the Multi-Door Courthouse or Court-connected Alternative Dispute Resolution.²⁹

Forms of Alternative Dispute Resolution

There are various forms of ADR, including but not limited to, negotiation, mediation, conciliation, and arbitration. These shall be discussed seriatim.

Negotiation

According to the Black's Law Dictionary,³⁰ negotiation is a consensual bargaining process in which the parties attempt to reach an agreement on a disputed or potentially disputed matter. It usually involves complete autonomy for the parties involved without the intervention of third parties. It is the process of communication used to get that which is in the possession of another

²⁵Anoke, U. 'Alternative Dispute Resolution Mechanism –The Multi-Door Court house Approach' 1 No.1 *EBSU Journal of Commercial and Industrial Law* p.96

²⁶Akeredolu, A. 'Court-connected Alternative Dispute Resolution in Nigeria' (2011) 1 No.1 *University of Ibadan Law Journal* p.46

²⁷Dele, *Op cit* p.2; Saleh, HS. 'Alternative Dispute Resolution Processes and its Application to Environmental Case in Nigeria' (2012) 5 *Nasarawa State University Law Journal* p.1

²⁸Ofei, S. 'Justice in Dispute Settling' (1988) 2 *The Calabar Law Journal* p.91

²⁹Anoke, *Op cit* p.99

³⁰Black's Law Dictionary, Garner, BA (ed). 9thedn (Minnesota: West Publishing Co., 2009) p.1136

who may exercise control as to when or how one can get it.³¹ It is a private process through which disputants can reach a mutual gentlemanly agreement to resolve any conflict between them.³²

Mediation

Mediation is said to be a nonbinding dispute settling mechanism involving a neutral third party who tries to help the disputing parties reach an amicable solution.³³ It is usually resorted to when negotiation fails.³⁴ Hence, it is a process of assisted negotiation in which a neutral third party helps disputants to resolve their disputes.³⁵ In this way, parties in disputes can resolve their disagreement at a fraction of the cost of the litigation system.³⁶

Conciliation

The Black's Law Dictionary³⁷ defines conciliation as a process in which a neutral person meets with the parties to a dispute and explores how to help them resolve the dispute. Thus, it is a relatively unstructured method of settling disputes in which a third party facilitates communication between parties in an attempt to help them settle their differences.³⁸ Conciliation is one of the ADR mechanisms governed by law in Nigeria.³⁹

Arbitration

Apart from providing that every arbitration agreement shall be in writing and signed by the parties,⁴⁰ the Arbitration and Conciliation Act, does not define arbitration. This is somewhat similar to the situation in England. The (English) Arbitration Act,⁴¹ having defined an 'arbitration agreement' does not define 'arbitration.' The Black's Law Dictionary,⁴² defines arbitration as a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding. The courts have also attempted a definition

³¹ Akeredolu, *Op cit* p.46

³² Dele, *Op cit* p.7

³³ Black's Law Dictionary, Garner, BA (ed). 9thedn (Minnesota: West Publishing Co., 2009) p.1071

³⁴ Akeredolu, *Op cit.* p.47

³⁵ Folberg, J. et al. Cited in Akeredolu, *Ibid*

³⁶ Macforlane, J. Cited in Dele, *Op cit* p.10

³⁷ Garner, BA (ed). 9thedn (Minnesota: West Publishing Co., 2009) p.329

³⁸ *Ibid*

³⁹ See the Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria, 2004 Sections 37 &55

⁴⁰ *Ibid* Section 1(1)(a)

⁴¹ 1996 Section 1

⁴² Garner, BA (ed). 9thedn (Minnesota: West Publishing Co., 2009) p.119

of arbitration.⁴³ Some legal writers regard arbitration as quasi-litigation and not an ADR, properly so called.⁴⁴

Advantages and Disadvantages of Alternative Dispute Resolution over Litigation

One of the advantages of Alternative Dispute Resolution is that it reduces the volume of cases in the court. In other words, it serves as a means of decongesting the court, providing choice and variety to disputants, thereby enhancing the efficiency of the judicial system.⁴⁵

Another advantage of Alternative Dispute Resolution is that it saves the cost of litigation. The expensive nature of litigation means ADR offers a relatively cheaper alternative to dispute resolution.⁴⁶

Yet another advantage of ADR is the preservation and restoration of relationships.⁴⁷ Usually, from the onset of litigation, the battle line is drawn. The result is that it leaves relationships and social lives of disputants in disarray.⁴⁸ However, ADR ensures that the above atmosphere does not exist. Speedy resolution of dispute is also an advantage of ADR. It is relatively fast in terms of the time it takes to settle disputes,⁴⁹ unlike litigation which may take up to 3 to 5 years.⁵⁰ Finally, but not by any means exhausted, ADR offers disputants privacy and confidentiality, with an air of informality in the settlement of disputes.⁵¹ This removes the formality and complexities associated with litigation.

On the other hand, ADR also suffers from certain disadvantages. One of the damning disadvantages of ADR is the problem of enforcement.⁵² Generally, it does not have the force of a court judgment and in cases of default, recourse has to be made again to the courts.⁵³ However, it must be noted that with the emergence of Court-connected ADR, certain measures have been put

⁴³*MISR (Nig) Ltd v Oyedele*(1996)2 ALR (Comm) 157; See also Akeredolu, *Op cit* p.49

⁴⁴Redfern, A. & Hunter, M. Cited in Ezike, *Op cit* pp.250-251

⁴⁵Anoke, *Op cit* p.99

⁴⁶Akeredolu, *Op cit* p.54

⁴⁷*Ibid* p.58

⁴⁸Anoke, *Op cit* pp.105-106

⁴⁹Anoke,*Ibid* p.106

⁵⁰Oniemola, PK. & Olowononi, EO. 'A Critical Appraisal of Mediation as a Dispute Resolution Mechanism in Nigeria' (2013) 8 No.1 *Nigerian Bar Journal* p.178

⁵¹ *Ibid* p.179

⁵²Akeredolu,*Opcit*p.59

⁵³*Ibid*

in place to facilitate the enforcement of ADR. For instance, the terms of settlement may be filed with the court in the form of a consent judgment.⁵⁴

Another disadvantage of ADR is that the process may be undermined by the absence of disputants in hearings.⁵⁵ However, it has been submitted that this problem may be overcome by the issuance of practice directions by the court requiring parties to either be present or adequately represented in hearings.⁵⁶ Of course, this may only be possible or very effective with Court-connected ADR. Again, connected to the above, parties to disputes may refuse to submit to ADR. And since it is largely voluntary, bar court-connected ADR, it is doubtful if they can generally be compelled to submit to it.⁵⁷

Effects of Litigation and Alternative Dispute Resolution on Vicarious Liability

The effects of litigation on vicarious liability cannot be overemphasised. Following from the many disadvantages of litigation, it may have, and does have, adverse effects on vicarious liability, especially in respect of victim's compensation. There is no gainsaying that litigation occasions undue delay in the resolution of disputes. The ultimate effect of this is that litigation presents a real possibility that some victims may never live to be compensated.

For instance, in the case of *Jenyo v Akinreti*⁵⁸ it took over 17 years to finally resolve a fatal accident case. Also, in the English case of *Mohamud v Morrison Supermarkets Plc*,⁵⁹ a case that was instituted in 2013, by the time the United Kingdom Supreme Court delivered its judgment 3 years later in 2016, the victim, Mr. A. Mohamud had already died (although of causes unconnected with the tort in dispute⁶⁰) and had to be substituted by Mr. M. Mohamud. Then, the question may be asked, apart from the obvious fact that the compensation goes to his personal estate, of what use is it to the deceased?

On the other hand, ADR does not only offer an amicable route to the settlement of disputes but also has other positive effect on vicarious liability. Flowing from its many advantages, it may have,

⁵⁴Anoke, *Op cit*

⁵⁵Anoke, *Op cit* p.103

⁵⁶*Ibid*

⁵⁷*Ibid* p.107

⁵⁸ *Jenyo v Akinreti* (1990) NWLR (pt.135) 663

⁵⁹ [2016] UKSC 11

⁶⁰*Ibid* p.2

and does have, the effect of ensuring prompt compensation to the victims of torts or even crimes committed by employees in the course of their employment. The expeditious nature of ADR means that victims will get compensated promptly. This may also help them heal emotionally as the chances of increased emotional hazards exacerbated by elongated trials are largely minimised if not eliminated.

Conclusion

In the final analysis, there are various modes of settling disputes arising from vicarious liability, ranging from litigation to ADR mechanisms. However, it is submitted that, notwithstanding the negligible flip side of ADR, except where it is practically impossible and/or legally inappropriate, cases on vicarious liability should be walked-in or referred to ADR for expedited disposition. Also, parties to disputes turning on vicarious liability should always be amenable or willing to submit to ADR. This will ensure prompt compensation to victims without prejudice to their right of recourse to the court where the terms of settlement are unfavourable to them. In this way, victims of torts (or crimes) committed by employees in the course of their employment would stand a greater chance to live to be compensated.