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PROFESSIONAL MEDICAL NEGLIGENCE AND THE CONSUMER QUESTION IN NIGERIA: THE JOURNEY SO FAR

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ABSTRACT

This work set out to look at the malignant issues of professional medical negligence and the consumer question in Nigeria. The work adopted the doctrinal legal research approach; by engaging the incidence of medical negligence and how it impacts the patients who are usually at the receiving end of the acts of negligence. The work adopts the primary judicial and legal authorities along with common law rules in the discourse of the medical negligence; which are supported, as necessary, with secondary authorities, such as opinions of learned writers, as expounded in texts, articles and other media. The work also looked at the concept of who a consumer is, and proffer reasons why the patient should be treated as a consumer. Using the long-held principles of negligence in the law of torts, the work situated medical negligence as a species of negligence even though all the ingredients needed to prove general negligence are also applicable. The work also looked at the factors that inhibit consumers of medical services from seeking to exercise their rights to redress. Findings from the work include the fact that medical negligence exists and patients who are usually consumers of medical services are usually the victims and the acts are not usually dealt with decisively. The work looked at those factors and made recommendations amongst which is the need for a better protection regime for the consumers of medical services through the amendment of the Consumer Protection Council Law and an aggressive publicity of their activities so that the public should know that they can actually utilize their services to pursue cases of medical negligence.

1. INTRODUCTION

It is a truism that there is a high incidence of fake and substandard products in Nigeria as well as services[1]. The problem which transcends various product fields including drugs is also very noticeable in the supply of services.[2] Regularly, consumers are burdened with inferior services, or at worst, non-performance of services they have paid for. Regrettably, consumers seldom attempt to ask for a remedy due to several factors, notably among such factors is the ignorance about the extent of protection granted by the law.

At a slow pace though, in today's litigious society, a growing number of persons would not just forget about stolen possessions in a hotel or contaminated food and drinks, nor

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1 Felicia Monye, *Law of Consumer Protection* (Spectrum Books Limited, 2005), p.3

2 Jake O. Eyin, Consumer Protection: Medical Services, Hotel Services, Legal Services Financial Services, Public Power Supply, Lecture Notes.

will they forget in a hurry the injury occasioned them or their loved ones by the negligent act or omission of a doctor, or negligent representation or advice by a lawyer. This has led to the consumers of these services feeling abandoned and without any remedy or protection available to them.

Consumer protection can be defined as the act of safeguarding the interests of the consumer in matters relating to the supply of goods and services, fraudulent and hazardous practices as well as environmental degradation.[3] Healthcare providers are supposed to exercise care, diligence, and protection when dealing with their patients. Consumer protection in medical services encompasses a comprehensive framework of laws, regulations, and policies protecting the rights and welfare of individuals seeking medical treatment. It addresses a wide range of crucial elements including the standard of care provided, ensuring patients are fully informed to give consent, promoting transparency in medical procedures, prioritizing patient safety, ensuring fair and transparent billing practices, facilitating access to pertinent information, providing avenues for grievance redress, and upholding privacy and confidentiality of patient information.

In Nigeria, the Consumer Protection Council (CPC) and the National Health Act 2014 (NHA), regulate Consumer protection in medical services. The Nigerian Medical Association (NMA), the Medical and Dental Council of Nigeria (MDCN), regulate medical practice, the National Health Insurance Scheme, (NHIS) Act (1999), the Pharmacy Council of Nigeria (Establishment) Act, 2022 (PCNA), the National Agency for Food and Drug Administration and Control (NAFDAC), and the Nursing and Midwifery Council of Nigeria (NMCN) also ensure quality care and patient safety.

1.1 Conceptual Definition of Consumer

Black's Law Dictionary[4] defines the word consumer *as* "One who consumes, individuals who purchase, use, maintain and dispose of products and services, the term is further defined as a buyer of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty applicable to the product …". The term consumer is also defined as an individual who buys products or services for personal use … a consumer is someone who can be influenced by marketing and advertising.[5]

For this work, we aligned ourselves with the second definition. This is because the moment a person engages the services of a medical Practitioner, he or she automatically acquires the status of a personal consumer of such services which he or she pays for. These persons in many instances are influenced by the marketing and advertising of such service providers. Advertisement is the most potent means of informing the public of the existence of a service.[6]

Although there is no single or adopted definition of who a consumer is, there continues to evolve with many concepts, various definitions, and understanding of the concept that align with our acceptance of the earlier simple but all-encompassing definition[7].

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3 Felicia Monye, op. cit. p. 20.
4 Garner, B.A., *Black's Law Dictionary,* 9th ed. (St. Paul, Minn. West Publishing Co., (2009) p. 358.
5 What is a consumer? Definition.www.investerwards.com. Accessed 26/7/2024.
6 R. G. Lawson: Advertising Law (Macdonald and Evans) 1978 p.2
7 See footnote 5 above.

Some writers limit the definition to contractual relationships while others extend the meaning beyond contractual limits and obligations. In this work, we restricted ourselves to services provided by persons in the medical profession and their patients or purchasers of such services, who are the consumers.[8]

1.2 Consumer of Medical Services

A medical or healthcare consumer is anyone who receives or may receive healthcare services, such as a hospital patient, a client at a community mental health centre, or a member of a prepaid health maintenance organization, while medical services are those that a doctor recommends to diagnose symptoms or treat or monitor a known medical condition, health problem, or disease. Any testing done is considered diagnostic testing and not screening (preventive).[9] The work considers each of these services in depth.

2. MEDICAL PRACTITIONER

A medical Practitioner is defined[10] as an individual accredited by a professional body upon completing a course of study and is usually licensed by a government agency, to practice a health-related profession such as dentistry, medicine, nursing, occupational health, or physical therapy. It also means a qualified doctor including but not limited to anaesthesiologists, radiologists, pathologists, surgeons, cardiologists, general practitioners, and obstetricians. Medical professionals also extend to include student doctors, medical interns, dentists, and midwives.[11] Medical professionals help to identify, prevent or treat illnesses, injuries and diseases. They prescribe medications, therapies, perform surgeries, and conduct medical examinations and tests.

The healthcare industry boasts a wide range of practitioners, notable amongst them are medical doctors, pharmacists, dental technologists, laboratory technologists and technicians, nurses, radiologists, and radiographers.[12] Due to the importance of medical services, it is a profession closely regulated by law. Davies[13] stated to which we agree succinctly that "the medical profession had to be regulated because of the serious harms that could flow from incompetent medical practice." Accordingly, the organisation of health services, the qualification and registration of practitioners and the use of drugs and medicines are all statutorily regulated. Regardless, medico-legal awareness is abysmally poor in Nigeria due to many factors but dominantly, poverty, illiteracy, and traditional beliefs. The effect is that a culture of impunity has been fostered in the healthcare industry. Yet, it is an elementary though fundamental principle of our jurisprudence that ignorance of the law is not an excuse. Members of the healthcare sector need to be knowledgeable about the law relating to the practice of their profession.

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8 There are consumers of medical products such as people who purchase medicines from pharmacies and medicine or patent stores who are not necessarily patients but are merely consumers.

9 < https://medical.dictionary:the-free-dictionary.com> accessed 17 October 2018.

10 Definition/healthprofessional.www.business.dictironary.com. Accessed 28/7/18.

11 https: www.lawinsider.com> Medical Professional definition> Accessed 03/9/2024

12 Jacob Abiodun Dada, Legal Aspects of Medical Practice in Nigeria (University of Calabar Press, University of Calabar, 2013) p1.

13 M. Davies, *Textbook on Medical Law*, 2nd ed. (London: Block Press Ltd, 1996) at p.18.

Alfred Wane[14], noted:

> The doctor or scientist who by his practice holds himself out to be proficient in the field should be well informed, alert to his medico-legal responsibilities, and able to discharge his duties in partnership with the law to the credit of the profession.

Following the above reason, in *Crawford v Chaining Cross Hospital*[15], Lord Denning opined that medical Practitioners must further add to their knowledge by reading the medical press to keep abreast of modern developments. The responsibility to be informed of current developments becomes particularly important because a breach of legal duty may attract grave consequences like imprisonment and prohibition from further practice.

2.1 Consumer Issues Arising in Medical Services

2.1.1 *Negligence*

The tort of negligence, in the generic sense, is the omission to do something that a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or do something that a prudent and reasonable man would do.[16] Generally, negligence is the breach of a legal duty to take care which may result in damage undesired by the defendant to the plaintiff.[17] Applied to the medical situation, it has been defined[18] as the breach of the duty owed by a doctor to his patient to exercise reasonable care and skill, resulting in some bodily, mental, or financial disability.

However, not every act of negligence is actionable under the tort of negligence. It is the complex concept of duty, breach, and damage thereby suffered by the person to whom the duty is owed.[19] One prevalent way consumers of medical services may suffer injury is in the area of medical negligence. In medico-legal parlance, medical negligence has been defined as: "The failure of the health care provider to exercise the ordinary care and skill a reasonable product and qualified person would exercise under the same or similar circumstances".[20] Within the context of the term, "health care providers" are the nurses, physicians, surgeons, anaesthetists, radiographers, dentists, etc.

The principle underlying professional negligence is that anyone who holds himself out as having professional skill is legally expected to demonstrate the amount of competence associated with the proper discharge of the duties of that profession.[21] If he falls short of that expectation and injures anyone as a result, he did not demonstrate the requisite ability and is *ipso facto* liable. This point was buttressed by Tindal C. J. in the case of *Landphier v Phipos*

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14 A Sweme, cited in B.C. Umerah, *Medical Practice and the Law in Nigeria*, (Longman Nigeria Limited, 1989 at iii. as cited by J. A. Dada, op. cit. at p.19.

15 (1953)Times Law Report, 1.

16 F.N Chukwuneke, "Medical Incidents in Developing Countries: A few Case Studies from Nigeria", (2015) 18 (7) Niger J Clin Pract. 20-24

17 Windfiel & Jolowicz on Torts, 12th ed. (W.V.H. Rogers, London: Sweet & Maxwell, 1984) at p.72.

18 Bernard Knight Legal Aspects of medical Practice, New York: Church Hill Livingstone, (1982) at p.48.

19 See *Lochgelly Irwin & Co. v McMullan* (1934) AC at p72.

20 Encyclopedia Britannica, Vol.23, p775.

21 J. A. Dada, op. cit. at p.126.

as follows, “Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill.[22]

Medical negligence refers to the failure of healthcare providers to fulfil their professional obligations, breaching the duty of care and not exercising reasonable degree of skill and The Medical and Dental Council of Nigeria (MDCN), pursuant to the powers conferred on it by the Medical and Dental Practitioners Act 2004 issued a Code of Medical Ethics in Nigeria 2008 ("the Code"). The Code, which codifies the rules of professional conduct for medical practitioners, also regulates the conduct/activities of medical practitioners in Nigeria. For instance, the Code states that all medical practitioners and dental surgeons owe a duty of care to their patients in every professional relationship.

A careful consideration of the provision of the Code clearly shows several malpractices perpetuated by the Defendant in this for instance, the Code requires that a medical practitioner shall not delegate any exclusive professional medical responsibility to any non-medical person. In this case[23], the Trial Court was right when it found that the Defendant was professionally negligent by using a police officer and a basketball coach (non-medical personnel) to reset the patient's leg.

As lives are at stake when providing medical treatment, it is mandatory that a medical practitioner diagnose the situation by carrying out the relevant tests before attempting a line of treatment. A medical practitioner is professionally negligent, when he manifests incompetence in the assessment of a patient, as in the instant case. The findings of the court that the failure of the Defendant to carry out an X-ray to ascertain the nature of the injury sustained by the patient is reckless and negligent are therefore apt and unassailable. To avoid negligence and the liability that comes with it, some policies that can help may include, documentation of all related information with the patient's care, informed consent, open communication, seeking second opinion, if need be, amongst others.

2.2 Ingredients of the Tort of Negligence

Three ingredients must be established by a plaintiff to prove negligence. These are:

1. The defendant (doctor/nurse) owed a duty of care to the plaintiff (patient).
2. That the defendant was in breach of that duty, and
3. That the plaintiff suffered damage as a result of the breach of duty.

In instances where there is a breach of duty owed by a doctor/nurse to his patient to exercise reasonable care and, or skill in treating or attending to his or her patient, resulting in some bodily, mental, or financial disability, the doctor/nurse will be liable in negligence. An action in negligence is civil in nature, although it sometimes may give rise to a criminal action for instance, where the negligent act results in death. The patient urges the Court to recover pecuniary damages from the tortfeasor (doctor/nurse) for not exercising due care in treating him.

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22 (1837) 8c. at p.475.

23 *The State of Lagos v. Dr. Ejike Ferdinand Orji* [Unreported Decision In Suit LD/8963C/2019

2.3 Duty of Care

A duty of care exists whenever a person is connected with another and is expected to take reasonable care to avoid acts or omissions that pose dangers. In the celebrated case of *Donoghue v Stevenson*,[24] in holding the manufacturers liable for negligence, the House of Lords held that the manufacturer owed the plaintiff a duty of care. Lord Atkins, held inter alia:

> The rule that you are to love your neighbour becomes, in Law, you must not injure your neighbour; and the lawyer's question, who is my neighbour… The answer seems to be persons who are closely and directly affected by my act that I ought to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

The law is that in the determination of the existence or otherwise of the duty of care, the Court would ask itself whether there was sufficient proximity between the plaintiff and the defendant. If the answer to this all-important question is in the affirmative, then the Court will find a duty of care situation present unless it is satisfied that there are considerations which ought to negate or reduce, or limit that duty.

For a duty of care to exist in medical negligence, there must be a doctor/patient relationship, which may be formed easily, and is not dependent on any formal acceptance of a patient by a doctor or nurse, for example, by giving a card to the patient. It has been stated that even in an emergency, once a medical practitioner approaches an ill or injured person intending to assist him and takes actions towards treating the patient, a completely valid relationship has been constituted.

In *Doode v Nash*,[25] the defendant a medical Practitioner was held liable for negligence while giving his services gratuitously at a public screening for the detection of glaucoma. Also, in *Gluadwell v Steggai*,[26] the plaintiff, a ten-year-old girl, complained of pain in her knee. Her father summoned the defendant, a clergyman who "also practised as a medical man", to treat her. The treatment proved disastrous. The defendant was held liable for negligence even though there was no contractual relationship between him and the plaintiff. Even when a patient is unconscious and unaware of the presence of a medical Practitioner attending to him, a valid relationship which does not have to be contractual is constituted. The law on this point was articulated by Uzodike[27] as follows:

> A doctor passing by an accident on the road is under no duty to stop and render first aid, but if he undertakes to do so, he has to exercise some degree of care. However, he could be expected to achieve the same standard in an emergency as would be expected of him where the victim is brought to him in a properly equipped hospital.

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[24] (1932) A.C. 562.
[25] (1972) 5.A SR 419.
[26] (1839)5 Bing, 733
[27] E. N. U. Uzodike, "The Doctor and the Law – Professional negligence" in Medical Ethics, ed. E. S. Akpata, Lagos University Press, 1982 p 45.

The basis for the above position was expressed by Tony Weir[28] as follows: "Those who come to help must take care not to make things worse; the kiss of life should not be the kiss of death. But first aid need not be first class and the emergency may justify incompetence."

Even where the Practitioner acted as a "Good Samaritan", a relationship obliging him to demonstrate skill and care has arisen and any breach will result in damages.

3. COMMON ACTS OF NEGLIGENCE OF A MEDICAL PRACTITIONER

Surgical Negligence:

1. *Foreign Objects left in the body*: When a doctor performs surgery, the theatre nurse is responsible for swab counts. Any swabs, packs, tools, or instruments left in the abdomen of the patient after surgery is negligence. Accidentally puncturing an organ is another consumer issue in the medical sector. The case of Sandra David as reported by Premium Times is apt here. It was alleged that her lung was punctured during a procedure to remove accumulated fluid in her abdomen and liver. NMDC is said to be investigating the case. An action for negligence will lie against the surgeon, nurse, and probably the hospital management if they are found culpable. Commendable is the courage of the family of the deceased who instituted an action[29] to get justice for their late daughter Sandra. Filed by Portia Sambo the mother of the deceased, against The Nigerian Government and the Federal Medical Centre for five Million Naira Only, over the death of the 29-year-old woman at the centre due to negligence and also demanded the payment of Eight million Two Hundred Thousand only as cost of treatment of the deceased at the Federal Medical Centre and the Nizamiye hospital Abuja.

   Most victims are wary of legal steps to redress wrongs occasioned by some of these service providers. Debbie's case also reported by Premium Times is a sad reality in Nigeria. The alleged medical negligence led to the death of Debbie a few weeks after complications from a caesarean section (CS) at Asokoro General Hospital. The CS was successful but three days after her discharge from the hospital, her stomach began swelling, and her stitches opened. On her arrival back to the hospital, it was discovered that the doctors who performed the procedure forgot gauze which got her infected. The family did not report to the hospital, nor did they seek legal redress because they wanted the pain of the loss to be forgotten. They did not want to "keep reminding their mother who has not gotten over her daughter's death and believed the best way to handle it is to let go."

   When cases of medical negligence are reported to the MDCN, investigations are conducted; the penalty awarded by the MDCN is the seizure of the medical license of the medical practitioners involved if they are found guilty by the tribunal as enunciated in *Denloye v Medical and Dental Practitioners Disciplinary Committee.*[30] In cases where the practitioner is reported to the Medical and Dental Practitioners Disciplinary Tribunal for the second time on matters of professional negligence and

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28 A case book on Tort. 4th ed, (Winfield).
29 FHC/ABJ/CS/74/2016)
30 (1968) All NLR 306

he is found guilty, he shall be suspended for six months, while a habitually negligent professional could have his name struck out from the relevant register.[31]

1. *Failure to attend and or Give Prompt Attention***:** Failure to provide urgent care for a patient who requires urgent attention may be considered negligent, depending on the circumstances. It is crucial for healthcare professionals to promptly attend to patients who need urgent care to ensure their well-being and health.

2. *Incompetent Assessment of a Patient***:** In most private hospitals run by a single doctor, nurses take it upon themselves to do the job that falls within the description of the duty of a doctor. Where a nurse examines a patient who should not have been examined by her, and does not properly examine before commencing treatment, liability in negligence may lie if the treatment turns out to be the wrong one and the patient suffers injury. Some student doctors are sometimes allowed to handle patients, most time without the requisite medical experience, which may result in fatal injuries. Such doctors will also be held liable.

3. *Improper Administration of Injection***:** Due to negligence or incompetence, medical professionals may administer injections to patients incorrectly, resulting in paralysis. Legal action can be taken in cases of negligence.

4. *Incorrect Diagnosis***:** Incorrect diagnosis may amount to negligence especially where the signs and symptoms are so clear that no reasonably skilful and competent medical Practitioner could fail to observe them. In *University of Ilorin Teaching Hospital v Akilo*[32], it was held that a medical Practitioner in the appellants' employment would be liable for negligence if without due care and skill resulting in an error of treatment, he, for example, describes fractures as dislocations, and dislocations as fractures.

5. *Prescription or Medication Error***:** A nurse just like a doctor may wrongly or mistakenly prescribe the wrong medication for a diagnosed illness; wrong medicine can also be dispensed at the pharmacy. This will amount to negligence. Many people are allergic to certain drugs; it is the duty of the doctor/nurse to inquire from the patient in question, about medications prescribed together that may also be fatal. Also, it would amount to negligence to fail to follow up with a patient after an operation since monitoring, in the circumstances, is of absolute necessity.[33]

6. *Failure of Communication***:** When a doctor or nurse hands over a patient to another colleague, the standard practice is to disclose to the colleague what treatment has been administered to facilitate appropriate treatment. The pertinent thing is for the first doctor to communicate directly with the second one, preferably in writing if this is not done, this might constitute negligence.[34]
7. *Birth Injuries***:** This includes injuries suffered by a mother or her baby. The doctor or nurse can make errors during childbirth that can lead to injury to the mother and baby

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31 Rule 29,30 Code of Medical Ethics in Nigeria
32 (2000) WRN pg 22
33 See Charles Worth & Percy on Negligence, 7th ed.
34 Bernard Knight, Op. cit. at 52-54.

and sometimes result in the death of one or both of them. This involves overlooking or missing signs of birth complications or not responding swiftly to fatal distress. Mrs. Eddy Pious is another unfortunate incident of alleged negligence that was never reported, investigated, or, sought legal redress. Mrs. Pious at 38 weeks pregnant was rushed to the hospital as a result of pains in her abdomen She was checked and sent back home despite the persistent pain. They came back to the hospital again and the verdict was that the baby had died in the womb.[35]

8. *Anaesthesia Administration***:** Mistakes made by anaesthesiologists result in brain damage or death. This occurs when the anaesthesiologist' fails to take into account the patient's medical history, uses faulty equipment, or administrating too much anaesthesia to the patient.

9. *Failure to disclose possible risk to a patient to satisfy the criteria of full disclosure***:** A patient has a right to be informed of potential risks in particular treatment or procedures to enable the patient make informed choices or grant informed consent. Where the doctor fails to make such disclosure and the patient suffers any injury, he shall be liable in the tort of negligence. *Montgomery v. Lanarkshire Health Board*,[36] the claimant was a woman of small stature and a diabetic under the care of a doctor during her pregnancy and labour. The doctor failed to inform her of the high risk of 9-10% risk of shoulder dystocia, where a baby's shoulder is unable to pass through the pelvis of a diabetic woman. The baby suffered severe disabilities after birth as a result of shoulder dystocia. She sued for negligent of the doctor for not informing her of the risk involved. The lower court ruled that there was no negligence but the Supreme Court affirmed the requirement of informed choice or informed consent by patients in medical treatment that rests fundamentally on the duty of disclosure by medical practitioners.

3.2 Breach of Duty

For an action in negligence to be established against a medical Practitioner, the plaintiff must establish a duty of care and must equally show that such duty was breached by the medical Practitioner. If a doctor, while treating a patient, fails to do that which he ought to do and as a result of such failure a patient suffers injury, the doctor will be held liable for professional negligence. *Head Field v Crang*[37] the plaintiff (a consumer of medical service) was admitted as a paying patient to hospital to be confined. She was placed in the same ward with another woman who was at that material time suspected to be suffering from puerperal fever. The plaintiff also got infected with puerperal fever. It was held that an action in negligence against the doctor who was attending to her will lie to recover damages in not isolating her when the other case was suspected and taking steps to prevent her from becoming infected.

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35 Evelyn Okukwu, (Nigeria Premium Times 31 December 2016) Nigerian Hospital Where medical negligence causes death of women, babies https://www.premiumtimesng.com/news/headlines/219289-ivestigation.html accessed 17/10/18

36 (2015) UKSC 11

37 The times, July 31, 1937.

This decision is particularly instructive to medical Practitioners in Nigeria who, quite often, because of inadequate facilities admit patients with diverse ailments in the same ward in spite of the fact that some of them may be suffering from communicable diseases.[38] Doctors who expose other patients to such risks of infection will be liable and inadequate facilities in the hospital will not be an excuse. The hospital management will equally be held liable. Similarly, in *Cooper v Nevill*,[39] a surgeon was held liable. The surgeon operated a patient but left in her abdomen, a swab, Lord Denning stated in his judgment that:

> If the swab were a mopping pack, it was negligent to lose control of it, whilst if it were a restraining pack, then having regard to the small number used, their obvious position, the absence of movement and the lack of any particular need for haste at the end of the operation, it was negligence on the part of the surgeon not to remove it since the responsibility of doing so was admittedly his.

To avoid leaving a swab and other instruments in the patient's body after surgery, the normal practice is to count what is used before and after surgery to confirm that none is left inside the patient.

4. DAMAGES

A patient cannot successfully institute an action for negligence against a negligent doctor unless he can establish that he suffered damage or damages. Damage means loss or injury which can be quantified and compensated in terms of money. Such examples as stated by Bernard Knight,[40] are:

1. Loss of earnings whether due to enforced absence from work or prevention or impairment of his ability to carry on his previous occupation, so that he is forced to take employment at a lower salary or from loss of expectation of life and the consequent shortening of the earning period.
2. Expenses incurred due to the damage caused by the negligence may be hospital or nursing home expenses, nursing attention, special treatment, special food, etc.
3. Reduced enjoyment of life from any physical or mental consequence of the negligent act. Examples would be loss of faculty or limb or sense, which would reduce mobility or appreciation of his surroundings.
4. Especially in the case of women, some physical disability or disfigurement which might reduce the chances of marriage or inability to have further children might be actionable.
5. Pain and suffering whether physical or mental, may also be taken into account, such as psychological or nervous shock.
6. Reduction in expectation of life, apart from the financial aspect.
7. Death may be actionable for the benefit of the defendant's relatives. The main criterion applied to measure such damages is the loss of potential feature earning power, any offsetting by life insurance or pension being taken into account.

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38 J. A. Dada, Op. cit. P.139.
39 The times, July 31, 1937
40 Op. cit. at 19-20.

What would amount to damages will depend on the circumstances of each case, damages can be viewed from various angles. First, it will be viewed from the angle of whether the act is an error or negligence, Medical errors occur when a medical practitioner chooses an inappropriate method of care or improperly executes an appropriate method of care.[41] A medical error can be defined as a commission or an omission with potentially negative consequences to the patient that would have been judged wrong by skilled and knowledgeable peers at the time it occurred, independent of whether there were any negative consequences[42] Flowing from the above, there seems to be a very thin line between acts that constitute medical negligence and medical errors or malpractice. Acts that constitute medical errors may or may not give rise to a claim in medical negligence.

Under the general principles of negligence, not all medical errors and malpractices will qualify as an act of negligence. For instance, a medical error may not have given rise to any injury or damages and thus, a claim of negligence hinged solely on such an act is unlikely to succeed. Such an act may however give rise to disciplinary action against such medical practitioners by professional bodies such as the Medical and Dental Practitioners' Disciplinary Committee hinged on a breach of medical ethics. As such, a breach of medical rules and ethics may not necessarily give rise to a claim of negligence.[43] To lay a claim for damages therefore, a claimant must show that the damage, he has suffered is a direct act of the medical personnel which will of necessity include both the contractual relationship of doctor-patient and the fiduciary relationship to protect patient rights.

In recent times, there has been a rise in cases of medical negligence in Nigeria ranging from failure of medical practitioners to promptly attend to patient in emergency situations to making wrong diagnoses, which often times, leads to the demise of the patient. On 20th January 2023, Honourable Justice A.A Akintoye sitting at the High Court of Lagos State delivered judgment in respect of a criminal charge of medical negligence preferred against one Dr Ejike Ferdinand Orji. The Trial Court, in its well-reasoned judgment, found the Defendant liable for recklessness and negligence in the provision of medical care and services that unfortunately led to the deformity of the left limb/leg of his patient, one Master Somi Ezi-ashi.

The Trial Court analysed the testimony of Mr. Emmanuel (PW1) and Mr. Makinde (PW2) who both testified that the Defendant instructed them to pull Somi's leg so that he can reset it. The Court found that, neither Emmanuel nor Makinde were trained personnel of the hospital. In fact, they were police officer and basketball coach respectively who were present when Somi sustained the injury. The court found that the Defendant was reckless and negligent in using untrained and non-medical personnel in administering treatment. In providing expert opinion, PW8, an orthopaedic surgeon from LASUTH testified that a fracture cannot be manipulated unless there is a diagnosis to ascertain the configuration and

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41 Chukwuneke FN. Medical Incidents in Developing Countries: A few case studies from Nigeria. Niger J Clin Pract. 2015;18(7):20–24. [PubMed]

42 Lokulo-Sodipe JO. An Examination of the Legal Rights of Surgical Patients under the Nigerian Laws. J Law Conflict Resolut. 2009;4(1):79–87.]

43 Oludamilola Adebola Adejumo and Oluseyi Ademola Adejumo; Legal perspectives on liability for medical negligence and malpractices in Nigeria Pan Afr Med J. 2020; 35: 44. Published online 2020 Feb 17. doi: 10.11604/pamj.2020.35.44.16651

amount of displacement. The evidence before the Trial Court according to PW4, PW6, PW7 and PW8 (all orthopaedic surgeons) is that the cast should not have been placed on Somi's leg in the first place before the Defendant had done an X-ray to ascertain the nature of Somi's injury. The Trial Court also referred to the statements of the medical doctors in the panel of Medical and Dental Investigative Panel Report dated 15th March 2021. All the medical doctors, in that investigative report, questioned the urgency that necessitated the Defendant to apply cast without carrying out a scan or x-ray on the injury.

On the question of the tightness of the cast, the Trial Court relied on the uncontroverted testimony of Somi (PW10) who testified that the tightness of the cast caused him excruciating pains, Somi's testimony was confirmed by the testimony of his parents who asked the Defendant to remove the tight cast. The Court also relied on the expert testimony of PW4, PW6, PW7 and PW8 (all orthopaedic surgeons), who testified that the cast should have been removed when Somi complained about the tightness of the cast and of being in pain.[44] What can be deduced from the above case is the fact that the law will do all it can to protect a patient from the negligent acts of the Medical Professional whom the law treats as a consumer of medical goods. This is in consonance with the general duty of care as well as the protection sought to be bestowed upon a consumer by the extant consumer protection laws. The consumer in Nigeria is generally left to his whims and caprices as although there are laws in his favour, they are usually no strong enforcement mechanism.

4.2 The Place of Consumer Protection in Medical Negligence

This work so far has looked at medical negligence and its impact on the society and also explored the theory that medical services and its providers are under an obligation to protect the patients who are the end users and can for all purposes and intent be treated as consumers of the medical services. The question then is; can we with all certainty say the Nigerian consumer of medical services is excluded from the negligence that is very prevalent in the medical sector? The obvious answer is in the negative. We submit that the Nigerian patient who ought to be the beneficiary of all the protections offered by the extant consumer protection laws is often left in the lurch and is often the victim rather than been the beneficiary. There are various factors exacerbating this, which include but not limited to the following;

i. Poverty is perhaps the meta-factor that belies many, if not all, the other factors that facilitate medical malpractice in the institution of interest. Patients in poverty are even less likely to have requisite literacy, education, and financial resources to challenge health care providers. Health service providers exploit those imbalances.

ii. Illiteracy[45]: The prevalence of illiteracy in our society has made it impossible for people to know or become aware of their rights, less seeking to enforce same.

iii. Corruption: This is the cankerworm that has continued to eat deep into almost every fabric of our national life and has had dire consequences on the rights of the patient as a consumer of medical services.

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[44] The State of Lagos V. Dr. Ejike Ferdinand Orji [Unreported Decision In Suit LD/8963C/2019

[45] Patients are less able to access, process and understand information about the medical care they receive.

iv. Poor funding[46]: The budgetary allocation for healthcare and consumer protection is usually very abysmal and where provisions are made, such funds are usually not totally released for the purpose meant.
v. Internal legal regulatory deficits and weak regulatory oversight[47]
vi. Inadequate awareness of patient's rights,
vii. Scarcity of physicians[48]
viii. Bureaucratic bottlenecks,
ix. Lack of administrative will to supervise medical practice quality and in-house legal units
x. Poor consumer protection regime
xi. Poor record keeping,
xii. Slow judicial process and disregard to the rule of law
xiii. The struggle of patients to secure medical experts in adversarial litigation,
xiv. Lack of access to medical records
xv. Conspiracy of silence by medical practitioners[49]
xvi. The underdeveloped medical malpractice jurisprudence
xvii. Regulatory deficits such as lack or inadequacy of remedies and punishment regime in the legislation
xviii. Patients are reluctant to sue medical practitioners for religious and cultural aversions to litigation
xix. Lack of key layered patient surveillance systems.

4.3 Consumer Protection Council

The Consumer Protection Council Act exists to protect the consumers, which includes patients. We will be looking at provisions in the Act that gives the Commission the functions that are akin to an institutional framework. The relevant functions of the council as they affect the protection of patients from medical negligence and redress for patients who have or are victims of medical malpractice are as contained in section 2(a) and (i) of the Act as follows:

(a) Provide speedy redress to consumers'[50] complaints

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46 Nigeria's Health budget since 2011 is less than 5% See, Daily Trust Newspaper of 25th April, 2019, p 1.

47 An underappreciated regulatory deficit is the lack of a robust private health insurance market. in developed climes both private and public insurers often use their contract with health care to pursue regulatory objectives such as patient safety and quality outcomes.

48 This scarcity of physicians creates a monopoly of atmosphere that gives the health care health providers leverage to deter meaningful regulation or accountability. Many patients where were grateful to receive any care at all, even if it were substandard. The ratio of Patient to a Doctor in Nigeria is 5000 to 1 Doctor as against the World Health Organisation benchmark 600 patients per doctor. See, Daily Trust Newspaper of 25th April, 2019, p 1.

49 this situation arises where health care providers are unwilling to testify against other health care providers.

50 It is instructive to note that, section 32 of the Consumer Protection Council Act, Cap, C25 LFN, 2004 interprets "Consumer," to mean an individual ,who purchases, uses, maintains or disposes of products or

through negotiation, mediation and conciliation.

(b) Ensure that consumers' interest receive due consideration at

appropriate forums and provide redress for obnoxious practices or unscrupulous exploitation of consumers by companies, firms, trade association or individuals.

Section 32 of the Act[51] interprets "consumer to mean an individual who purchases, uses, maintains or disposes of products or *services*."[52]A patient can be said to be a consumer of services within the contemplation and context of the Act[53] as such he or she is entitled to the speedy redress of complaints of medical negligence through the instruments of negotiation, mediation and conciliation by the Council.[54] Section 12 (a) of the Act clearly contains remedies and punishment regime that is applicable in punishing erring medical practitioners for medical malpractice. It provides:

That anyone who;

(i) sales or offers for sale any unsafe or hazardous goods

(ii) provides any service or proffers any information or advertisement thereby causing injury or loss to a consumer, is guilty of an offence under this Act and liable on conviction to the fine of fifty thousand or to imprisonment to a term of five years or to both [55]

Flowing from the provision *above,* it is submitted that any sale or mere offer for sale of any unsafe or hazardous medication or medical service that causes injury to a customer or patient is an offence under this Act and liable on conviction to the fine of Fifty Thousand Naira or to imprisonment to a term of five years or to both. The Council is empowered by provisions of section 13 of the Act[56]to make an appropriate compensation order on determination of a compliant.[57] Viewing the redress provision of the Act that puts fine at Fifty Thousand Naira

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services. Accordingly, a patient can be said to be a consumer of services within the contemplation and context of the Act

51 Consumer Protection Council Act, Cap C25, LFN, 2004

52 Emphasis is ours

53 More so that section 31 of the Act enables the Council subject to the approval of the Minister of Commerce to make further regulations as may in its opinion be necessary or expedient for giving full effect to the provisions of the Act for the administration thereof.

54 Section 2 (a) Consumer Protection Council Act, Cap C25, LFN, 2004

55 This section is in tandem with provisions of the Code of Conduct of Pharmacist, as contained in the obligations on the Patient and the Client of the Pharmacist Council of Nigeria Act, Cap P17 LFN, 2004. Which provides *inter alia* that*:*

(a) A pharmacist shall not supply to a patient or client any drug or medicine likely to be abused or which may be detrimental to health, especially when there is a reason to believe that the drug or medicine may be abuse d

(b) A pharmacist should never condone, or assist in, the manufacture, importation, promotion, distribution, stor age, sale or dispensing of drugs, poisons and medical products which are not of good quality, or which do n ot meet with standards specified by law.

56 Ibid.

57 Section 13 (1) Cap, C25 LFN, 2004 … a Court by or before which a person is convicted of an offence may in addition to dealing with such person in any other way make an (in this Act refers to as compensation order) requiring the person to pay compensation for any personal injury, loss or damage resulting from that offence of such amount as it may deem fit or as assessed by a competent professional authority.

compensation can be said to be grossly inadequate as the damages the patients may suffer may be greater than the stated amount. The compensation and focus of the Act is more on goods than on services which has affected the awareness of the public on the powers of the Council to handle cases of medical negligence.

5. FINDINGS AND RECOMMENDATIONS

5.1 Findings:

We have so far established the following facts:

i. There is in existence professional medical negligence which is not usually dealt with effectively to serve as deterrence due to many factors such as corruption, lack of oversight and supervisory roles on medical personnel and a superficial deep deep-seated religious outlook that excuses medical negligence as an act of God.

ii. There is also what can be termed as a conspiracy of silence on the part of the medical personnel who would prefer to be silent over the acts of negligence of fellow medical personnel in the belief that theirs could be the next thereby instituting a *"rub my back and I rub yours"* syndrome.

iii. The various professional disciplinary committees of the health care bodies are usually not known to the public and the consumers of medical services who are patients are left with no options but to report cases of negligence to same people or institutions where the negligence was perpetuated.

iv. There is in existence a consumer protection regime which though not in tandem with current realities, is a bold attempt to protect patients whom we have shown are consumers for all purposes and intents.

5.2 Recommendations:

a. Cases of professional negligence which can either be criminal or civil should always be dealt with expeditiously. This can be achieved through public enlightenment by the professional bodies in the medical sector as well as the relevant government agencies like the National Orientation Agency (NOA) and others.

b. Professional Medical Disciplinary bodies should strive to create awareness through the various associations in the medical profession as this will reduce the distrust that many people have for them.

c. There should be proper supervision from the supervisory bodies as well as managements of health institutions and the medical personnel should understand that as long as their patients who are consumers of their services do not trust them, it would not augur well for their relationship. Medical personnel should realise that it is their solemn duty to purify their professions and by implication, built trust in the public from where their patients come from.

d. It is therefore recommended that all medical professionals comply with the strictest standards of the profession; due process must always be followed to avoid further complicating health situations

e. The Consumer Protection Council Law should be amended, the organisation should aggressively publicise their activities so that the public should know that they can actually utilise their services to pursue cases of medical negligence.

6. CONCLUSION

This work has looked at professional medical negligence and the consumer question and submits that a patient qualifies as a consumer under the extant laws in Nigeria and should be accorded all the protections the laws bestows on him. The state of affairs on professional medical negligence and the consumer question is that there is a prevalence of medical negligence caused mostly by aggravating factors like poverty, corruption and poor consumer protection amongst others and the need to tackle them adequately. The work also made some recommendations that if implemented will no doubt reduce drastically the incidences of professional medical negligence in Nigeria.