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Prevailing Cases of Lawyers' Liability in the Conduct of Cases: A Case for Professional Indemnity

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Abstract

Every profession has peculiar risks and liabilities attaching it. The legal profession and indeed the advocate is not exempt from the prescribed duty of care in his relationship with his clients. This has become so imperative in the face of globalised legal practice in the 21st century that the advocate may bear personal costs in the course of his duty. The objectives of this paper are to explore the concept of professional liability and to re-visit the controversy over liability of legal practitioners, particularly litigation lawyers in Nigeria. The common law, as well as the statutory rationale for lawyers' liability is highlighted. A critical analysis of award of costs by the courts on individual lawyers in most recent times is made. Adopting the doctrinal research methodology, the article evaluates the trend, arguing that while a lawyer might be validly liable in the tort of negligence to his client for 'crass carelessness,' imposing prohibitive costs on advocates for daring to push novel or unpopular positions in court, without more, would not help the development of the rule of law in Nigeria. The findings reveal that the Nigerian lawyer does not have equal statutory protection to defend himself or be heard as in the case of wasted costs orders in England and Wales. It concludes by making a strong case for mandatory professional indemnity for litigation lawyers to cater for unfortunate costs and to ensure that a lawyer does not compromise his professional ethos for fear of intimidating cost liabilities.

Keywords: Legal Practitioner; Lawyer; Counsel; Advocate; Liability.

Introduction

Litigation lawyers have come under heavy attacks in recent times in the cause of practising their profession. The lawyer must seek ways to balance his obligations to clients,¹

¹ General Council of the Bar in Nigeria, Rules of Professional Conduct (RPC) 2007.[14].

the court,² colleagues,³ the society⁴ and personal rights.⁵ To this end, the lawyer needs to exude exceptional courage in order to uphold the best traditions of the bar. The choice of briefs, decision-making process, particularly as regards the preferred approach to achieving maximum results for his clients, has become the lawyer's burden. The situation becomes more complex as refusal of briefs on grounds of race, political differences, religion, sex or fear of authorities is unethical in the legal profession.⁶ The CAB RANK RULE⁷ must be observed by a lawyer in his day-to-day practice. To do otherwise would be a professional misconduct.⁸

Courage and independence are priceless and ageless traditions of the Nigerian bar. It is most challenging when a legal practitioner in Nigeria confronts governmental recklessness in the performance of his duties. The executive and legislative arms of government may wish to avoid the trimmings of the rule of law at which time they see a litigation lawyer as an 'obstructionist'.⁹ The judiciary, on their part, perceives a litigation lawyer as confrontational, a mirror of their conscience, particularly when such a lawyer confronts the judiciary with indefensible judgments. The situation becomes more aggravated when the lawyer is up with a political brief in these times of emergency and national stress. At such times when the lawyer is up against the instruments of state authority or an advocate for an underdog, the lawyer needs some form of protection or indemnity if he must discharge his duties to his clients and the society without fear or favour.

The objectives of this paper are to explore the concept of professional liability and to re-visit the controversy over liability of legal practitioners,

² *Ibid.*[30].

³ *Ibid.*[26].

⁴ Thomas J Rardin, 'Advising a Client as to a Continuing or Future Crime' (2019) 18 Wyoming Law Journal <<https://scholarship.law.uwyo.edu/wlj/vol18/iss1/11>>.[65].

⁵ Sylvester Udemezue, 'An Appraisal of Professional Legal Ethics and Proper Conduct for Lawyers in Nigeria' [2020] SSRN Electronic Journal <<http://dx.doi.org/10.2139/ssrn.3842835>>.[5].

⁶ Ibrahim Abdullahi, 'Ethics, Rules of Professional Conduct and Discipline of Lawyers in Nigeria: An Overview' (2017) 4 International Journal of Public Administration and Management Research.[86-102].

⁷ Andrew Watson, 'The Origins and Development of the Cab Rank Rule for Barristers in England and Wales' (2022) 13 Journal on European History of Law.[12].

⁸ Ibrahim Abdullahi (n 6).[86-102].

⁹ Udemezue (n 5).[5].

particularly litigation lawyers in Nigeria. In this discourse, cases of a lawyer's professional negligence would be in perspective. An aspect of the Rules of Professional Conduct for Legal Practitioners (RPC)¹⁰ and the Legal Practitioners' Act (LPA)¹¹ dealing with a lawyer's duties to the court, the society and most importantly, his client would be evaluated in line with the age-long concept of immunity for legal practitioners in the discharge of their duties. The application of the concept of immunity shall be viewed through the prism of emerging trend of award of costs by the Nigerian courts against individual litigation lawyers. The paper, in the final analysis, suggests the indemnification of legal practice to insulate litigation lawyers from the weight of personal costs imposed on them in the course of their duty.

Research Method

The research method adopted in this article is the doctrinal research method. Accordingly, both primary and secondary source materials are utilised. This includes the statutes, case-law, juristic commentaries, periodicals, journal articles and online materials.

The Legal Profession in Nigeria

The Legal Profession is one of the notable professions in Nigeria. It is a very noble profession entrenched in decorum, ethics and etiquette. The history of the legal profession in Nigeria is traceable to colonial England. Before the advent of British Colonial Rule, disputes were resolved by various local, traditional and religious means across Nigeria.¹² Lagos became a British Colony in 1863 which implicates the direct application of English type of Courts in Nigeria.¹³ These courts require

¹⁰ General Council of the Bar in Nigeria Rules of Professional Conduct (RPC) 2007 (n 1).

¹¹ National Assembly of Nigeria, Legal Practitioners Act CAP L11 LFN 2004.

¹² Omonivi Ademoye, *The Legal Profession in Nigeria, 1865-1962* (Longman Nigeria 1977).[9].

¹³ Akintunde Olusegun Obilade, 'The Nigerian Legal System' (1980) 13 *Verfassung in Recht und Übersee* <<https://doi.org/10.5771/0506-7286-1980-3-273>>.[273].

the services of legal practitioners to function effectively.¹⁴ This necessitated the enactment of the Supreme Court Ordinance of 1876.¹⁵ The Ordinance created a legal profession which was not suited for the Nigerian experience given the myriad of customary and traditional laws prevalent among the indigenous peoples of Nigeria.¹⁶ At independence in 1960, it became exigent to evolve a legal profession with home-grown colouration without losing the prestigious British appeal.¹⁷ Consequently, the Legal Education Act of 1962 was enacted.¹⁸ The Act fortified the Nigerian Legal System by furnishing it with legal practitioners of Nigerian 'content'. Thus, the Council of Legal Education established the Nigerian Law School for the training of 'fit and proper' persons who aspire to the Nigerian Bar.¹⁹ Lawyers trained at the Nigerian Law School are later called to the Nigerian Bar as barristers and solicitors of the Supreme Court of Nigeria as distinct from their counterparts in England who are called either as barristers or solicitors (and never both).²⁰ The dual calling of the Nigerian trained lawyer fixes him with greater responsibility to preserve the high tenets of the profession by abiding by the RPC. The training of a Nigerian lawyer equips him to be the desired instrument for social and constitutional transformation. He majorly fulfils this calling by taking steps to file processes in court to seek far-reaching reliefs as circumstances demand.²¹ In order for a lawyer to achieve the end of social engineering, it is only needful that he be insulated from certain liabilities in the performance of his duties.

¹⁴ JC Anene, *Southern Nigeria in Transition 1885-1906: Theory and Practice in a Colonial Protectorate* (Cambridge University Press 2009).[250].

¹⁵ A Obi-Okoye, *Law in Practice in Nigeria: Professional Responsibilities and Lawyering Skills* (Snaap Press Ltd 2011).[10-11].

¹⁶ Oluwakemi Odeyinde, 'The Legal Practitioners Professional Negligence in Nigeria: Evaluation of The General Liability And Immunity Afforded on Legal Practitioners in The Conduct Of Their Client's Case'' (2021) 1 Scholarly Journal of Advanced Legal Research < www.doi.org/10.46654/SJALR.1541 >.[29].

¹⁷ Committee on the Future of the Nigerian Legal Profession, *Report of the Committee on the Future of the Nigerian Legal Profession* (Federal Government Printer 19959).[5].

¹⁸ Legal Education (Consolidation, etc) Act (Amandement of the Legal Education Act 1962) 2004.

¹⁹ M Slabbert, 'Fit and Proper' Person for the Legal Profession' (2011) 14 Potchefstroom Electronic Law Journal (PELJ).[209].

²⁰ Legal Practitioners Act (LPA) Cap L11 2006.[24].

²¹ *Mr Peter Obi V Independent National Electoral Commission (Inec) & Or.*[565].

The Origin of Lawyer's Immunity

The immunity which lawyers enjoy in court proceedings is of great antiquity. It was originally designed to insulate the lawyer from actions in defamation.²² A lawyer could call a witness, a party or opposing counsel a liar, cheat, swindler and so on without fear of being held liable in defamation. Lawyer's immunity is an age-long common law privilege dating as far back as 1606.²³ In *Minister v Lamb*²⁴, the court ordered immediate discontinuation of allegations against a lawyer in so far as they concern what was said in the course of the administration of law.²⁵ The court held that lawyers' immunity was part of a bundle of privileges that also pertain to the status of judges. Fortifying the foregoing legal principle, in *Henderson v Broomly*, the court held that:

No action will lie for words spoken or written in the course of any judicial proceeding. In spite of all that can be said against it, we find the rule acted upon from the earliest times. The mischief would be immense if the person aggravated, instead of preferring an indictment for perjury, could turn his complaint into a civil action. By universal assent, it appears that in this country no such action lies.²⁶

Similarly, in *Rondel v Worsley*,²⁷ the English House of Lords affirmed the immunity of lawyers. The court, by Lord Reid stated the law rightly *inter alia* that:

As an officer of the court concerned in the administration of justice [a legal practitioner] has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests.

In the foregoing case, the court stressed the basis for the immunity of lawyers as follows:

- i. the immunity is rooted in public policy;
- ii. the immunity is tied to the principle of *res judicata*; and
- iii. the immunity accords with the lawyer's privilege to accept any client who

²² *Ben E Chidoka & Anor V First City Finance Company Limited*. [9343].

²³ T Leigh Anenson, 'Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers' (2004) 31 *Pepperdine Law Review*. [915].

²⁴ *Munster v Lamb*. [588].

²⁵ *Ibid.* [605].

²⁶ *Henderson v Broomhead*.

²⁷ *Rondel v Worsley*.

requests his services.²⁸

Immunity of Lawyers in Nigeria

Lawyers' immunity is part of colonial relics of the Nigerian legal system. In Nigeria, the profession of a barrister and solicitor are fused unlike in England. However, the LPA only creates immunity for a lawyer in his capacity as a barrister and not otherwise. The LPA exempts barristers from liability for act arising in the conduct of their clients' cases in court, tribunal or any other body.²⁹ However, where the barrister has conducted his profession in a very perverse manner, the courts have lifted the immunity to preserve the integrity and nobility of the profession. In such circumstances, the lawyer may be held liable in the tort of negligence at the instance of his clients. Consequently, in *Bello Raji v X Legal Practitioner*,³⁰ a client sued his lawyer in negligence for filing a suit in his behalf which was statute-barred. The lawyer was briefed in good time when the client's good claim still had life. He waited and delayed the filing until the claim was caught up by limitation period. The court observed that the lawyer's conduct showed 'crass carelessness' and so awarded damages against the lawyer in favour of his client.³¹ Also, in *Cocottopoulos v P.Z & Company Limited*,³² a client was allowed to recover against his lawyer who filed a suit against his wrongful dismissal irrespective of the fact that the client's contract of employment expressly gave the employer powers to terminate the employment at will. In the case, the court found that the lawyer showed no professional diligence and so ordered the lawyer to refund every professional fees he was paid in the process.

In England, *Randel v Worsley* is no longer the law.³³ The barristers' and solicitors' immunity in negligence have been lifted. Reversing *Randel v Worsley*, the House of Lords asserts that immunity for lawyers especially in criminal proceedings

²⁸ *Arthur Hall v Simons*.

²⁹ Legal Practitioners Act (LPA) Cap L11 (n 20).

³⁰ *Bello Raji v X Legal Practitioner*.

³¹ *Ibid.*[78].

³² *Cocottopoulos v PZ & Co Limited*.

³³ *Arthur Hall v Simons* (n 28).

would create ‘anomalies. In the view of the law Lords, removing the immunity does not jeopardise the duty of the lawyer to the court.³⁴ The practice in select countries show the yet inability of the legal profession to agree on total removal of lawyers’ immunity from liability. The High Court of Australia followed *Randel v Worsley* in *Giannarelli v Wraith*³⁵ and the recent case of *D’Orta-Ekenaike v Victoria Legal Aid*³⁶ to hold lawyers’ immunity from liabilities as sacrosanct. The position was the same in New Zealand until the decision in *Chamberlains v Lai*.³⁷ In the case, the Supreme Court of New Zealand held that lawyers appearing in court in New Zealand may be held liable in negligence for their conduct of cases both in criminal and civil proceedings. In *Fodwoo v Law Chamber & Co*,³⁸ the Supreme Court of Ghana had earlier held that a lawyer could be held liable in negligence resulting from his conduct of proceedings. Consequently, in Nigeria, there has been debates on the need to totally remove the lawyers’ immunity for negligence.

Nwauche³⁹ argues that sustenance of lawyers’ immunity contravenes the concept of equality before the law which is a cardinal principle of the Nigerian Constitution.⁴⁰ He further posits that lawyers’ immunity was a development resulting from a legal system in transition from colonial heritage and holds nothing unique for Nigeria’s peculiar experience. Oldham on his own part states that it both preposterous and abhorrent that the advocate remains precious and insulated from the same standard of scrutiny set by other professionals in the face of a powerful social ethos rooted on professional accountability.⁴¹ He makes a strong case for uniformity of liability among professions. In the same vein, Oko opines that exposing lawyers to liability arising from incidents of litigation would be a

³⁴ *Ibid.*[191].

³⁵ *Giannarelli v Wraith*.

³⁶ *D’Orta-Ekenaike v Victoria Legal Aid*.

³⁷ *Chamberlains v Lai*.

³⁸ *Fodwoo v Law Chamber & Co*.

³⁹ ES Nwauche, ‘The Need to Review the Immunity of Legal Practitioners for Negligence in Nigeria’ (2004) 44 *Journal of the Indian Law Institute* <<https://www.jstor.org/stable/43951844>>. [574].

⁴⁰ Constitution of the Federal Republic of Nigeria (CFRN) 1999.[7].

⁴¹ Matthew Oldham, ‘The Advocates’ Common Law Immunity’ (1996) 3 *Deakin Law Review*. [55-66].

veritable weapon for addressing poor standards and an inducement for lawyers to engage more in ethical and competent practice.⁴² This researcher observes that the foregoing positions of the learned authors are rather too sweeping. The legal profession is not just any other profession. The privileges of a lawyer in the performance of his duties, which includes the duty of confidentiality,⁴³ are borne out of public policy and not aimed at making a super-human out of the lawyer.⁴⁴ The immunity lasts while the lawyer functions in his office as a barrister and no more. It is doubtful if the removal of lawyers' immunity would suffice to restore public confidence in an already 'battered' legal system such as Nigeria's. Odeyinde, however, posits that arguments for the removal of lawyers' immunity on the grounds that it would strengthen the legal system is a mere excuse for the failure of a system that has refused to work.⁴⁵ Be that as it may, despite the immunity for lawyers against negligence in Nigeria at common law, some Rules of Court have created personal liability for lawyers found negligent in their duties to their clients.⁴⁶ The Nigerian Bar Association, the umbrella body of legal profession in Nigeria, has evolved ways of dealing with negligent lawyers in their professional capacity.⁴⁷ An aggrieved litigant may activate the disciplinary machinery of the Nigerian Bar Association against any lawyer perceived of professional misconduct.⁴⁸ The numerous directions of the Legal Practitioners Disciplinary Committee (LPDC)⁴⁹ against lawyers who are found culpable of professional negligence point to the fact that the Nigerian Bar Association (NBA) has capacity to self-regulate and in the process instill sanity in lawyers' handling of proceedings in court without the

⁴² OC Oko, 'Lawyers's Professional Negligence in Nigeria' 3 *Nigerian Juridical Review*. [22].

⁴³ Muhammed Ndakudu Adam, 'Lawyers' Duty of Professional Confidence to Clients under the Nigerian Legal System: An Overview' (2017) 1 *Unilag Law Review*. [49-51].

⁴⁴ Constitution of the Federal Republic of Nigeria (CFRN) (n 40). [308].

⁴⁵ Oluwakemi Odeyinde (n 16). [39].

⁴⁶ Federal High Court (FHC) Rules (Civil Procedures) 2019. [25].

⁴⁷ Michael Chukwujindu Ogwezzy, 'The Legal Practitioners Act: A Code for Regulating the Conduct of Lawyers in Nigeria' (2013) 7 *Agora International Journal of Juridical Sciences*. [118].

⁴⁸ *Ibid.*

⁴⁹ Sylvester Udemezue, 'Resolving Conundrums Regarding Regulation of the Legal Profession in Nigeria' [2022] *SSRN Electronic Journal* <<http://dx.doi.org/10.2139/ssrn.4313297>>. [6].

intervention of the judiciary.⁵⁰ In *Honeywell Group v Ogunba*,⁵¹ Honeywell Group has submitted a formal complaint against Mr. Kunle Ogunba, a Senior Advocate of Nigeria (SAN), alleging that he has initiated numerous legal actions before various judges of the Federal High Court pertaining to the identical subject matter, with the explicit intention of misusing the court process and exerting undue influence on the administration of justice. The LPDC found Mr. Ogunba liable and stripped him of the rank of SAN.⁵²

Lawyers' Personal Liability to Pay Cost in Conduct of Proceedings

Where a lawyer incurs liability for discharging his duties with gross carelessness, amounting to negligence, he may be liable to the plaintiff, usually his erstwhile client, in the tort of negligence.⁵³ The lawyer may be made to have his day in court or such other administrative tribunal as the case may be. At that point, he is entitled to all legal defences⁵⁴ and constitutional safeguards.⁵⁵

Generally, the law does not impose liabilities on lawyers for a decision which turns out to be an error of judgment, unless such error is of such magnitude that no reasonable member of the profession could have made the error in the circumstances.⁵⁶ Consequently, counsel may be ordered to take responsibility for acts which are for counsel's personal aggrandisement though performed in the name of his client.⁵⁷ Cost has been awarded against counsel where the court had set aside proceedings commenced by counsel upon proof that counsel had no requisite authorisation to commence the proceedings.⁵⁸ The English Legal System has evolved the concept

⁵⁰ *NBA v Eseyin*.

⁵¹ Ayodele Oluwagbemi, 'LPPC Withdraws SAN Rank from Lawyer, Bars Another over Failure to Pay Rent' (*Punch Newspapers*) <<https://punchng.com/lppc-withdraws-san-rank-from-lawyer/>> accessed 20 September 2023.

⁵² A Adesomoju, 'Lawyer Loses SAN Rank over Ondo PDP Crisis' *Punch Newspapers* (*Punch Newspapers*) <<https://punchng.com/lawyer-loses-san-rank-over-ondo-pdp-crisis/>> accessed 20 September 2023.

⁵³ Udemezue (n 49).[30].

⁵⁴ *Orchard v South Eastern Electricity Board*.

⁵⁵ Constitution of the Federal Republic of Nigeria (CFRN) (n 40).[6].

⁵⁶ *Barrister Yusuf Dankofa V Federal Republic Of Nigeria*.

⁵⁷ *USA v Domulest Danzey*.

⁵⁸ *Cart-Zeiss Stiftung v Raymer and Keller Limited*.

of ‘wasted cost’ to justify award of certain costs against a litigation lawyer.⁵⁹ By the wordings of Section 51 (7)(6) of the Senior Courts Act (SCA),⁶⁰ the term “wasted cost” is defined as any costs that are incurred by a party:

- (a) “as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative;⁶¹ or
- (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it as unreasonable to expect that party to pay.”

Wasted cost jurisdiction may be invoked by the courts against counsel upon convincing evidence. The court, however, gives counsel a reasonable opportunity to make written submissions, or at least, to attend a hearing scheduled for that purpose before the court may make any wasted costs orders.⁶² The wasted cost jurisdiction of English courts has not come without knocks from litigation lawyers. In the case of *R v Horsham District Council, ex parte Wenman*,⁶³ the legal representative for the first respondent presented an argument criticizing the courts’ frequent reliance on the jurisdiction of wasting costs orders. It was contended that the potential imposition of such orders could result in three significant and undesired outcomes.⁶⁴ The judge, ignoring these concerns held that “if the law (on wasted costs order) was to lead to those who hold themselves out as competent to practice in a complex field of litigation to decide that they do not in fact have competence to enable them to avoid risks of wasted costs orders against them or to take more active steps to pursue continuing education that is now the norm in order to ensure that they continue to possess standards of the reasonably competent practitioner in the field, then it was a welcome development”.⁶⁵ This researcher agrees with the argument of Mumby, Queen’s Counsel (QC) who was counsel to the first respondent as it

⁵⁹ *Ridehalgh v Horsefield*.

⁶⁰ *Ibid.*

⁶¹ The Civil Procedure Rules (CPR) 1997.[2.3].

⁶² Robin Dunne, *Wasted Costs* (Association of Cost Lawyers Conference 2019).[8].

⁶³ *R v Horsham District Council and Another, ex parte Wenman*.

⁶⁴ *Orchard v South Eastern Electricity Board* (n 54).

⁶⁵ *Ibbs v Holloway Brothers Limited*.

reflects the majority opinion among litigation lawyers in Nigeria.

On Wednesday, 26 February 2022, the legal community was taken aback when the Nigerian Supreme Court awarded costs of thirty million naira (₦30,000,000.00) each against the persons of Chief Afe Babalola and Chief Wole Olanipekun in proceedings they had instituted in behalf of their clients. It may be argued that the application brought by the two senior counsel constituted an abuse of court proceedings, a direct challenge to the ‘well considered reasoning of their Lordships and should be discouraged for the future, with punitive cost of that colossal magnitude against the lawyers in their personal capacities. However, a critical appraisal of the scenario shows that the Supreme Court’s reaction or response to the application by the counsel was rather too harsh and critical.⁶⁶

Ogunbowale posits that the Supreme Court’s order may plummet into a very dangerous precedent to be followed by the lower courts given the principle of *stare decicis*.⁶⁷ Further, the aftermath of the order may be a toxic overstretch of the principle of abuse of court process which the court sets out to expound and so, defeat the course of justice.⁶⁸ Suffice it to say that the suit was brought in line with the extant rules of court and to show that the Supreme Court had no jurisdiction⁶⁹ to grant some of the reliefs it granted in the case sought to be reviewed by the application.⁷⁰ It was not an invitation to the court to sit on appeal over its own decision although the Supreme Court had abundant powers to do so. The offence of the lawyers was their courage to perhaps attempt to do what has not been done before.⁷¹ But the law develops when novel steps are taken to advance the law. In

⁶⁶ Pascal Bekongfe Aboh and Patrick Chukwunonso Aloamaka, ‘COVID-19 Pandemic and Administration of Criminal Justice in Nigeria: A Call for a Better Application’ (2022) 14 Cogito: Multidisciplinary Research Journal.[116].

⁶⁷ Bridget Edokwe, ‘Costs against Trial Lawyers: Setback for Rule of Law by Francis Ogunbowale’ (*BarristerNG.com*7) <<https://barristerng.com/costs-against-trial-lawyers-setback-for-rule-of-law-by-francis-ogunbowale/>> accessed 20 September 2023.

⁶⁸ *Ibid.*

⁶⁹ MA Lateef, *Jurisdiction of Courts in Nigeria: Nigerian Legal System* (Ibadan University Press 2019).[157-209].

⁷⁰ *People’s Democratic Party (PDP) & Ors v Degi-eremienyo & Ors.*

⁷¹ Bamidele Ikusika, ‘The Finality of the Supreme Court: The Bayelsa Election Decision Saga and Its Imminent Considerations’ SSRN Electronic Journal <<http://dx.doi.org/10.2139/ssrn.3546623>>.[5].

Parker v Parker,⁷² Lord Denning, Master of the Rolls (MR) puts the situation most poignantly as follows:

What is the argument on the other side? Only this, that no case has been found which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on and that will be bad for both.

Legal practitioners are encouraged to be bold, fearless but respectful in the discharge of their duties. Thus, in *Adegoke Motors Limited v Adesanya*, Oputa, JSC in encouraging boldness in legal practitioners held that,

It is true that this court can do inestimable good through its wise decisions. Similarly, the court can do incalculable harm through its mistakes. When therefore it appears to learned counsel that any decision of this court has been given per incuriam, such counsel should have the boldness and courage to ask that such a decision be over-ruled. This court has the power to over-rule itself (and has done so in the past) for it gladly accepts that it is far better to admit an error than to preserve in error.

In the light of *Adegoke Motors Limited case*,⁷³ it is difficult to see what counsel did in the case under review which has not been done before. One wonders whether punitive costs should have been awarded against counsel personally; or whether the humongous costs of thirty million naira (₦30,000,000.00) was justified in the circumstances. Again, should not the Supreme Court have explored alternative measures such as strongly worded reprimand or references to the LPDC for appropriate sanctions? Perhaps a stern verbal disapproval of the ‘abuse of court process’ would have obviated the resultant panic to litigation community. Referring counsel to their ‘professional brethren’ at the LPDC for professional misconduct would have afforded a dispassionate approach to the matter and giving counsel opportunity to defend their actions. The Supreme Court missed that opportunity. It is argued that the development may have a cancerous effect on access to justice, the rule of law and the development of public interest litigation in Nigeria.

⁷² *Richard Parker v Steven Parker*.

⁷³ *People’s Democratic Party (PDP) & Ors v Degi-eremienyo & Ors* (n 70).

Barely eighteen (18) months after the Supreme Court awarded cost against the foremost legal practitioners, the Federal High Court sitting in Abuja awarded ten million naira (₦10,000,000.00) against Festus Keyamo, a Senior Advocate of Nigeria with 10% interest on the award per annum until the cost is fully paid.⁷⁴ Counsel had instituted a public interest suit seeking an order of court to compel relevant law enforcement agencies to investigate and try Atiku Abubakar, the Peoples' Democratic Party (PDP) presidential flag bearer, over alleged infringement of some statutes.⁷⁵ The court described the action as “frivolous” and “vexatious” and “an abuse of court process”. Keyamo, on his part, stated that the lawsuit was intended to elicit a response from the agencies who exhibited so much laxity with petitions written to them by the public that the public cannot wait indefinitely for such petitions to be acted upon and dispensed with, one way or the order.

Another Federal High Court on 6 June 2023 visited another counsel, one Chuks Nwachukwu with a crushing cost of twenty million naira (₦20,000,000.00).⁷⁶ The cost was to be paid personally by counsel before any further steps (including appeal) might be taken in the matter. The counsel had filed a public interest action in behalf of the residents of the Federal Capital Territory (FCT) to stop the swearing into office of the current president and vice-president of Nigeria slated for the 29 May 2023. The lawyer had raised the constitutional question of failure of the duo to obtain 25% votes cast in the FCT as prescribed by the CFRN.⁷⁷ Similarly, in a sister case filed by three applicants led by one Praise Ilemona Isaiah, seeking to stop the president's inauguration on 29 May 2023, Justice James Omotosho

⁷⁴ Ajisafe Olayiwola, ‘Keyamo to Appeal as Court Awards Atiku, ICPC N10m in “Frivolous” Lawsuit’ (*Punch Newspapers*) <<https://punchng.com/keyamo-to-appeal-as-court-awards-atiku-icpc-n10m-in-frivolous-lawsuit/>> accessed 20 September 2023.

⁷⁵ Francis Ugwu, ‘2023 Poll: Court Fines Keyamo N10m for Filing Frivolous Suit against Atiku’ (*Daily Post Nigeria*) <<https://dailypost.ng/2023/06/05/2023-poll-court-fines-keyamo-n10m-for-filing-frivolous-suit-against-atiku>> accessed 20 September 2023.

⁷⁶ Sunday Ejike, ‘Again, Court Slams N20m Fine on Lawyer for Filing Suit against Tinubu’ (*Tribune Online*) <<https://tribuneonlineng.com/again-court-slams-n20m-fine-on-lawyer-for-filing-suit-against-tinubu/>> accessed 20 September 2023.

⁷⁷ A Folorunsho-Francis and S Odebiyi., ‘Tinubu's Victory: Atiku, Obi File 86-Ground Appeals at S'Court’ (*Punch Newspapers*) <<https://punchng.com/tinubus-victory-atiku-obi-file-86-ground-appeals-at-scourt/>> accessed 20 September 2023.

awarded a cost of two million naira (₦2,000,000.00) against one Daniel Elombah, the counsel for applicants, in favour of Tinubu and the All Progressives Congress (APC) sued as second and third respondents.⁷⁸ In another development, the Court of Appeal sometime on 25 May 2023 descended on one Ambrose Albert Owuru with a personal cost of forty million naira (₦40,000,000.00).⁷⁹ The attorney had submitted a legal petition with the aim of preventing the scheduled inauguration of Bola Tinubu on May 29, 2023.⁸⁰

In *Commissioner of Police v Ighorihwunu Aghogho*,⁸¹ a foremost activist and coordinator of Take-It-Back-Delta-State-Chapter based in Warri, Delta State had uploaded some stuff on social media against the Chief Justice of Nigeria, the Chief Judge of Delta State, the Delta State Commissioner of Police and other very influential persons alleging their complicity in trafficking of Delta State children. He was charged and arraigned before Asaba Magistrate Court with cyber stalking, a federal offence that falls under the exclusive jurisdiction of the Federal High Court. Counsel applied for the bail of the defendant/applicant who was remanded by the Asaba Magistrate Court on a holding charge.⁸² Okon Efreti Abang, judge of the Federal High Court sitting in Warri had *suo motu* hinted counsel that since there was no proper charge before it, the proper step would be for counsel to explore judicial review at the Delta State High Court which has supervisory powers over the magistrate that made the remand order. However, counsel argued that since the offence of cyber stalking for which applicant was remanded is a federal offence over which the state high court had no jurisdiction, his application was proper before the

⁷⁸ Agency Report, 'Swearing-In: Court Orders Applicants, Lawyer to Pay Tinubu, APC N17m over Frivolous Suit' (*Premium Times Nigeria*) <<https://www.premiumtimesng.com/news/600704-swearing-in-court-orders-applicants-lawyer-to-pay-tinubu-apc-n17m-over-frivolous-suit.html>> accessed 20 September 2023.

⁷⁹ Fadehan Oyeyemi, 'Ex HDP Presidential Candidate, Owuru, Sues Buhari, Asks Court to Declare Villa Vacant' (*Daily Post Nigeria*) <<https://dailypost.ng/2021/06/17/ex-hdp-presidential-candidate-owuru-sues-buhari-asks-court-to-declare-villa-vacant/>> accessed 29 October 2023.

⁸⁰ *Chief Ambrose Albert Owuru & Anor v President Muhammadu Buhari & 3 Ors.*

⁸¹ *Commissioner of Police v Ighorihwunu Aghogho.*

⁸² EA Okojie and Lucky E Enakemere, 'The Legal Status of Holding Charge as a Detention Mechanism under the Nigerian Criminal Justice System' (2014) 20 East African Journal of Peace and Human Rights.[168-183].

court which was a court of competent jurisdiction. The court in its ruling remarked that counsel's refusal to take hints and withdraw the application made the court to write lengthy ruling. He acknowledged the brilliance and industry of counsel but awarded cost of one hundred thousand naira (N100,000.00) to be paid personally by counsel and before counsel may take any further steps in relation to the matter. It was a matter conducted *pro bono* because the liberty of a citizen was at stake. The result is counsel's withdrawal from the matter leaving the defendant to search for another lawyer. What a deterrence! Thus, counsel bore the brunt for daring to stress the law and not because he was negligent.

It is yet to be seen how public interest litigation (PIL) may survive the current regime of punitive costs against daring counsel. Nwadike has pointed out that the implication of these streams of cost is that lawyers will become intimidated even when they have proper right to contest issues in court.⁸³

A Case for Professional Indemnity in Legal Practice⁸⁴

The aggravated costs being awarded personally against legal practitioners, in addition to orders that such costs should be paid before any further steps may be taken in the matter, are capable of sending lawyers out of practice if allowed to fester without mitigation. The combined effect of increasing dependence on legal advice in a dynamic corporate world, the enormity of a lawyer's work and a rising consciousness of legal rights in the current socio-economic milieu may subject the lawyer to undue pressure. Consequently, lawyers must fashion out ways to remain in practice without sacrificing their courage on the altar of intimidation.

⁸³ Wondrous Nnaemeka, 'Lawyers Differ over Courts' N58 Million Fines against Legal Practitioners Challenging Tinubu's Inauguration' (*The Whistler Newspaper*) <<https://thewhistler.ng/lawyers-differ-over-courts-n58-million-fines-against-legal-practitioners-challenging-tinubus-inauguration/>> accessed 29 October 2023.

⁸⁴ Prince Chadak, 'Analysis of Professional Indemnity Insurance in India' (*latestlaws.com*) <<https://www.latestlaws.com/articles/analysis-of-professional-indemnity-insurance-in-india>> accessed 20 September 2023.

This implicates the imperatives of professional indemnity.⁸⁵ Lawyers may take out insurance policies to secure their practice not only for purposes of suits against lawyers in negligence but against personal costs aimed at intimidating the lawyer in his pursuit of justice for his clients.⁸⁶

In the jurisdictions of England and Wales, it is a requirement for solicitors engaged in private practice to get professional indemnity insurance coverage.⁸⁷ The renewal of the annual practice license, which will take effect on October 1, 2013, is a mandatory obligation.

The regulation of professional indemnity (PI) for practitioners in South Africa is governed by the Legal Practice Act 28 of 2014.⁸⁸ The South African model aligns with the IBA International Principles on Professional Indemnity Insurance for Legal Profession. According to the report, the indemnity would ensure that a lawyer's professional commitment in terms of independence, competence, integrity, risk, responsibility, communication, confidentiality and maintenance of public confidence is not eroded by the new challenges of a globalised legal practice.⁸⁹

The Advocates (Professional Indemnity) Regulations in Kenya have mandated that all advocates engaged in private practice must get professional indemnity coverage.⁹⁰ The case of *National Bank of Kenya Limited v E. Muriu Kamau*,⁹¹ has established that an advocate can be held legally responsible for negligence in the

⁸⁵ T Osinowo, 'A Case for Professional Indemnity in Legal Practice' (*This Day Newspaper*) <<https://vitaveritasllp.com/a-case-for-professional-indemnity-in-legal-practice/>> accessed 20 September 2023.

⁸⁶ BusinessDay, 'Why You Need Indemnity Insurance Cover as a Professional' (*Businessday NG*) <<https://businessday.ng/insurance/article/why-you-need-indemnity-insurance-cover-as-a-professional/#>> accessed 20 September 2023.

⁸⁷ The Law Society, 'Professional Indemnity Insurance Overview' (*Law Society UK*) <<https://www.lawsociety.org.uk/topics/professional-indemnity-insurance/pii-overview>> accessed 20 September 2023.

⁸⁸ International Bar Association, 'New Report Published: IBA International Principles on Professional Indemnity Insurance for the Legal Profession' (*International Bar Association*) <<https://www.ibanet.org/New-report-published-IBA-International-Principles-on-Professional-Indemnity-Insurance-for-the-Legal-Profession>> accessed 29 October 2023.

⁸⁹ *Ibid.*

⁹⁰ SM Safiyanu, 'Liability of Legal Practitioners in Nigeria. The True Position of the Law' (2020) 4 International Journal of Social Sciences.[112].

⁹¹ SK Kivuva, 'Addressing Professional Negligence in Intellectual Property Rights Bar in Kenya' (2015).[40-49].

tort of negligence against their client during the course of legal procedures. The Kenya Society of Law (KSK) has made professional indemnity cover a mandatory requirement for annual renewal of licenses by lawyers. In Australia, the Legal Profession Uniform Laws of New South Wales (NSW) requires solicitors to obtain an approved indemnity cover before they may engage or continue to engage in private legal practice.⁹²

In Nigeria, there are no statutory requirements for litigation lawyers to take out professional indemnity insurance despite the fact that it is now the trend that lawyers for errors, omissions and even courage to make novel arguments in court face the threat of being personally damnified with cost or other awards. It is more worrisome that the process of these awards are mainly unilateral at the instance of the court and affords the lawyer no defence. The need for professional indemnity cover for Nigerian litigation lawyers has not been greater than in the present quagmire. It is the duty of a legal practitioner to preserve the confidence of his client without compromising professional ethics. A professional indemnity cover would bolster the clients' confidence and raise public hope that their lawyers' voices may be heard above intimidating liabilities militating against a lawyer's daily practice.

Conclusion

Liability of litigation lawyers in Nigeria is immense and comes in diverse colours. The lawyer faces various liabilities in professional negligence sometimes occasioned by error in judgment. A suit against a lawyer's negligence inures in favour of his client. However, the greatest risk a litigation lawyer faces presently in Nigeria is the risk of bearing costs which the courts may award personally against him, sometimes for daring to bring novel applications to court. This eventuality is most times un-envisaged by counsel as it depends solely on the perception of the judge to counsel's boldness or affront. The finding reveals that the Nigerian lawyer

⁹² 'Professional Indemnity Insurance the Law Society of NSW' (*The Law of Society of New South Wales*, 2023) <<https://www.lawsociety.com.au/practising-law-in-NSW/working-as-a-solicitor-in-NSW/professional-indemnity-insurance>> accessed 29 October 2023.

does not have equal statutory protection to defend himself or be heard as in the case of wasted costs orders in England and Wales. It is posited that where a lawyer must bear liability in the course of his duties, he should be given the privilege to be heard as to why such costs should not be awarded against him personally. Such awards should not be at the pleasure of the judge, without more. Judges' unilateral awards of costs against lawyers without recourse to the lawyers' defences as obtains presently in Nigeria violate such lawyers' rights to defence. Should these costs be enforced to the letter, only a few lawyers would remain in practice and boldness and courage for which Nigerian lawyers are known would have departed forever.

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