

# **ESTABLISHING CONTRACTUAL RESPONSIBILITY BETWEEN THE MEDICAL DOCTOR AND THE PATIENT: THE CAMEROONIAN PERSPECTIVE**

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## **ABSTRACT**

Consent is a prerequisite foundation in which all relationships are established, and there is no exception in the situation of a Doctor-patient relationship where all medical duties and responsibilities must be emphasized. Once it is proven that the patient has fulfilled his medical obligation through the payment of the various dues, it is thus the responsibility of the medical doctor in ensuring that the patient acquires adequate and sufficient treatment as a result of the agreement entered into. This article establishes that there exists a contractual obligation on the parties involved in a medical relationship. Even though with all the agreement entered into by the parties to medical agreement, most of the time we experience grave breaches which always affect the *raison d'être* or rationale of the medical peculiarities and even rights of the parties involved. In order to ascertain and established a platform of medical relationship, it will be necessary or suffice for us in portraying an analytical method of research in this paper by ascertaining whether the agreement accepted by the various parties in the contractual medical agreement are respected by the parties in the course of performing the said obligation. However, the law that governs a contract is the terms of the contract itself and in medicine, there is little guidance to be found in law as to when the contract between the medical doctor and a patient is formed.

**Keywords:** Contract, Responsibility, Medical doctor, Patient

## INTRODUCTION

In law, a contract is any legally binding agreement, written or unwritten.<sup>i</sup> In order to be legally binding, an agreement must satisfy certain requirements which are usually shown by the fact that one person has made an offer and another has accepted it. An intention to be legally bound by that agreement will give rise to what is often called intention to create legal relations.<sup>ii</sup>

The notion of contract is understood differently in Anglophone and Francophone Cameroon giving that the law of Contract applies in the English-speaking part of Cameroon and the Civil Code applies in the French speaking part of Cameroon. A contract is defined under English law applicable in Anglophone Cameroon as an agreement giving rise to obligations which are enforced and recognized by law.<sup>iii</sup> In a contract, the parties must reach an agreement giving rise to obligations which are enforced and recognized by law.

At common law, there are 3 basic essentials to the creation of a contract: agreement, contractual intention and consideration. The first requisite of a contract is that the parties should have reached an agreement. Generally speaking, an agreement is reached when one party makes an offer, which is accepted by another party. In deciding whether the parties have reached an agreement, the courts will apply an objective test.<sup>iv</sup> Secondly, the parties must intend their agreement to be legally binding and lastly, a promise is not, as a general rule, binding as a contract unless it is supported by consideration.

Consideration is "something of value" what is given for a promise and is required in order to make the promise enforceable as a contract. An agreement, even if it is supported by consideration is not binding as a contract if it was made without an intention to create legal relations.

The Civil Code applicable in the Francophone Cameroon, on its part, defines a contract as an agreement by which one or several persons bind themselves towards one or several others, to transfer, to do or not to do something.<sup>v</sup> This definition of contract permits us to distinguish other agreements which do not produce legal obligations. From this definition there are three principal elements for a contract to be valid in Francophone Cameroon. Primarily, a contract is a voluntary agreement between at least two persons. Secondly, a contract is created to bring

out obligations and, thirdly, the obligations are enforceable by law. For a contract to be created Article 1108 of the Civil code applicable in Francophone Cameroon lays down four conditions to wit; consent, capacity, object and cause.

Relating the above definitions to the doctor-patient relationship, a contract will be a voluntary agreement between the medical doctor and the patient which gives rise to obligation which are enforced or recognized by law. For there to be responsibility, the treatment administered to the patient must be valid, and the patient must consent to the treatment provided to him by the medical doctor.<sup>vi</sup> Consent can be verbal, written or by conduct. Consent must not be vitiated by a mistake, misrepresentation or undue influence. The agreement between the medical doctor and the patient must have a legal object and a legal cause for if the judge, on perusal of the object of the contract, realizes that it was to do something illegal, the agreement shall be barred on grounds of illegality.

For any contract to be created under Cameroonian law, be it under the Anglo-Saxon notion of contract law or the French law of contract (*droit des obligations*), a number of requirements must have been satisfied. The first requisite of a contract is that the parties should have reached an agreement. These include, *inter alia*, offer and acceptance. Generally speaking, an agreement is reached when one party makes an offer, which is accepted by another party. However, the law that governs a contract is the terms of the contract itself and in medicine, there is little guidance to be found in law as to when the contract between the medical doctor and a patient is formed.<sup>vii</sup> However, my opinion in this context is that, a contract is formed when the doctor consents to attend to the patient and to give treatment. On the payment of medical dues by the patient to the hospital, the former becomes bound with the latter in a contractual agreement making him a debtor who is obliged to perform the duty expected from a reasonable professional in that circumstance.<sup>viii</sup>

## THE REQUIREMENTS OF A VALID CONTRACT BETWEEN THE MEDICAL DOCTOR AND THE PATIENT

When we read article 1108 of the Civil code applicable in Francophone Cameroon, we easily identify the requirements for the formation of a contract which include consent, capacity, object and cause. Under the law of contract applicable in Anglophone Cameroon, there are three basic essentials to the creation of a contract: (i) agreement; (ii) contractual intention; and (iii) consideration.<sup>ix</sup> Consent refers to the voluntary agreement expressed by at least two persons in relation to a contract. This agreement brings about the birth of an obligation more precisely, an effect of law because it is the volition to be bound that justifies the force of law that the contract has for the parties. This is the essential or most important element in the creation of a contract. If a contract is understood as a binding willful agreement, what then is the object of this agreement and how is it formed? The principle of autonomy signifies that the parties are free to contract or not to accept the contents of the contract. In this light, before a contract is created under both legal systems, there is always offer and acceptance. The person who takes the initiative is called the offeror and the person who receives the offer is the offeree. The offeree makes his or her intention through acceptance which can be given instantly or after some negotiations.

### *1) Offer and Acceptance*

For a contract to be valid, there must be offer and acceptance and this will necessarily be so in a doctor-patient relationship. Under Common Law, an offer is an expression of willingness to contract on specified terms which are accepted by the other party while acceptance is a final and unqualified expression of assent to the terms of an offer.<sup>x</sup> An offer may be addressed to a single person, to a specified group of persons, or to the world at large and may be accepted by anyone who performs an act which may be considered as acceptance. This was ascertained in the case of *Carlill v Carbolic Smoke Ball Company*<sup>xi</sup> which though not grounded on a doctors patient relationship, could be illuminating in that respect.

In the project of reform of the French Civil Code, an offer is defined as a unilateral act that determines the essential elements of the contract that the maker proposes to a determined person or undetermined person which he expresses his desire to be bound by it once accepted.<sup>xii</sup>

**a) Offer- a prerequisite for negotiations towards the formation of a contract**

An offer is an expression of willingness to contract on specified terms, made with the intention that it is to be binding once accepted by the person to whom it is addressed<sup>xiii</sup> and such offer may equally be expressed in a doctor patient relationship. In any case, there must be an objective manifestation of intent by the offeror to be bound by the offer if it is accepted by the other party.<sup>xiv</sup> Therefore, the offeror will be bound if his words or conduct are such as to induce a reasonable third party observer to believe that he intends to be bound, even if in fact he has no such intention.<sup>xv</sup> An offer can be addressed to a single person, to a specified group of persons, or to the world at large.<sup>xvi</sup> An offer may be made expressly by words or by conduct.<sup>xvii</sup>

Under the French law of obligation, an offer is a firm and precise proposition of the contracting party.<sup>xviii</sup> The offeror has to indicate the essential elements which he/she wants to conclude in the contract. By essential elements, we mean those which if absent, we may not know the type of contract contemplated by the offeror. The offeror must therefore define the type of contract as well as the economic conditions under which he/she wishes to conclude the contract. If offer is not precise, the acceptance will not be considered as true but as mere words. In an offer, the offeror must express his firm and definite readiness to enter into the contract. This means that on his own side, he has already given his assent such that a simple acceptance may at once give rise to a valid contract. So, the presence of the essential elements will not suffice to form a contract if the offeror does not declare his intention to be bound by an acceptance.<sup>xix</sup> An offer can be made to an individual or to the public.<sup>xx</sup> An offer seeks to form a contract once it is accepted by anybody. If it is not communicated, then there can be no contract because no one will know of its existence. An offer may be express or implied. The means of communication of offer are varied: it can be by writing, word of mouth or purely material circumstances.<sup>xxi</sup>

The question for determination in a doctor-patient relationship is who is the offeror? Is it the patient who offers to pay if the doctor agrees to treat or the patient who accepts the doctor's offer to treat by agreeing to pay? An offer could be found in the patient's request for treatment and the acceptance in the doctor's commencement of care or an offer can be made expressly by words or by conduct by a hospital, clinic with medical doctors open to the public. That notwithstanding, even though the hospitals are open to receive patients, it is only when the patient comes and ask to consulted by the doctor that an offer is made. This may be explained



on the basis of a standing offer. A standing offer may be described as an offer which remains open either to an individual or to the public and which crystallizes each time the individual or a member of the public performs an act which may be regarded as tantamount to acceptance thereof. So, there will be a contract for as many times as the act is performed. Hospitals or medical centres as a whole remain always open ready to receive patients who show up. Each time they show up, it is for a specific ailment and when the doctor in the said hospital or clinic or medical centre undertakes to consult the patient, the contract crystallizes. Once the patient is cured of that ailment, he/she may come back some months or years later with something else. From the foregoing discussion should the above be interpreted as the formation of a contract altogether?

An offer may sometimes be confused with an invitation to treat and this may be especially so in the doctor patient relationship. An invitation to treat is simply an invitation to negotiate or do business. Thus, we may say that by keeping a hospital, private clinic, or a medical health unit with a medical doctor to attend to patients, the doctor or medical health unit is implicitly professing an invitation to treat. Contrary to an offer, an invitation to treat does not contain definite terms. A distinction between an offer and an invitation to treat was made in the English case of *Pharmaceutical Society of GB v. Boots Cash Chemist (Southern), Ltd.*<sup>xxii</sup> In that case, Boots introduced the then new self-service system into their shop whereby customers would pick up goods from the shelf, put them in a basket and take them to their cash till to pay. The Pharmaceutical Society of Great Britain brought an action to determine the legality of the system with regard to the selling of pharmaceutical products which were required by law to be sold in the presence of a pharmacist. The court thus needed to determine when a contract comes into existence.

The Court of Appeal held that goods on the shelf constitute an invitation to treat and not an offer. A customer takes the good to the till and makes an offer to purchase. The shop assistant then chooses whether or not to accept the offer. The contract is therefore concluded at the till in the presence of a pharmacist. As concerns the doctor patient relationship, the general consensus is that the offer could be found in the patient's request for treatment and the acceptance in the doctor's commencement of care. Thus looking at the above cases on simple and standing offer, we may conclude on one hand that the patient who presents himself or

herself at a clinic or hospital to be treated is the offeror and on the other hand that as concerns hospitals in particular and medical health centres as a whole, these units make the offer which is accepted each time the patient visits them for consultation. The doctor may then accept to receive the patient in either case.

**b) Acceptance as a fundamental requirement for the determination of a contractual relationship**

Under common law applicable in Anglophone Cameroon, an acceptance is a final and unqualified expression of assent to the terms of an offer.<sup>xxiii</sup> Again, there must be an objective manifestation, by the recipient of the offer, of an intention to be bound by its terms. An offer must be accepted in accordance with its precise terms if it is to form an agreement.<sup>xxiv</sup> It must match exactly the offer and ALL terms must be accepted.

The application of the theory of acceptance as propounded by the ordinary law of contract to a doctor patient relationship may not be without difficulty. This is exacerbated by the standing offer concept discussed above. When will a medical doctor or the health unit or establishment under which he/she works or is an employee be held to have accepted an offer made by a patient where it is considered that the patient made the offer? Under what terms should that be? Since in very few cases the contract may only be implied from the conduct of the parties it still presents another problem. However, the Hippocratic Oath may be helpful in the determination of what the medical doctor accepts to do but the reverse may not be exact. In any case since the majority of cases between the medical doctor and the patient are implied, "precise terms or all terms must be accepted" should be interpreted to mean that the doctor accepts to use reasonable care and skill in discharging his obligations to his patient with whom he has contracted to carry out certain treatments. These terms may be implied by fact or implied in law and by statute. In the situation where the latter is considered the offeror, where however the option of a standing offer made by the hospital or medical service unit is retained, acceptance will certainly be construed as soon as the patient enters the hospital for the purpose of being medically attended to.

Acceptance however, has no legal effect until it is communicated to the offeror because it could cause hardship to the offeror to be bound without knowing that his or her offer had been

accepted.<sup>xxv</sup> Communication of acceptance depends on the manner by which the offer was made. Therefore, an offer made orally, may be accepted orally, an offer made via telephone needs to be accepted by telephone, an offer made by fax needs to be accepted by fax and an offer made by internet need to be accepted by internet unless a faster or quicker means of communicating acceptance is used. However, the above means of acceptance will be valid only when the offeror has not prescribed a special means of acceptance. When therefore a patient makes an offer through any one of the above means, the doctor may accept the offer by consulting or administering treatment immediately via the above means but where the patient needs to be examined, he/she must go to the hospital for such examination by the doctor before he or she prescribes any treatment.

Meanwhile under the French law of Obligation, acceptance must be express and total. Total acceptance simply refers to the "yes" given to an offer. This "yes" symbolizes the consent of the parties to the contract. Acceptance leads to the formation of a contract provided that it is pure, simple and certain. Acceptance which is certain is the expression of the definite intention of the offeree to enter into the contract on terms defined by the offeror in his offer. So it must be a non-ambiguous manifestation of the acceptor's readiness to be bound by the terms<sup>xxvi</sup> of the contract. As regards the ways or means of acceptance, it may take any form so long as it expresses the intention to accept. In some cases, the law may prescribe the particular mode of acceptance.<sup>xxvii</sup> Today, the modes are so numerous that we may just have to distinguish electronic from non-electronic means of acceptance.

Acceptance may take a written form bearing a signature. It can also be oral or done by way of gesture as for instance, the performance of an act.<sup>xxviii</sup> Where the offer is made through an electronic means, certain rules will need to be respected for acceptance to be made. For example, the French law of 21st June 2004.<sup>xxix</sup> In Articles 3 and 4, the above law provides for particular modes of acceptance through the internet. An example is the rule of "double click" in sub-section 5 of article 4.

In a doctor-patient relationship, acceptance is done at the moment the doctor agrees to treat the patient. Should a patient take an appointment through the telephone, fax, internet, etc, to be received at a precise time and for one reason or the other the medical doctor is not there on



time and the patient suffers injury as a result, acceptance can only be inferred. Still relating to the first hypothesis, an offer may be accepted by conduct as for example, when the doctor commences to treat the patient, as it will be understood that the medical doctor has accepted the patient's request for treatment. Under Common law applicable in Anglophone Cameroon, acceptance must be supported by consideration which is not the case under the law of obligations applicable in the French speaking part of the country.

## **CONSIDERATION - A CONDITION SINE QUA NON FOR THE EXISTENCE OF A CONTRACT**

The requirement that consideration must be present for a contract to be valid is somehow strange to any one schooled in the civil law tradition. Under this system, the law of obligation governs the formation of contract and the nearest requirement to the English concept of consideration is "cause" which the English Legal scholar is equally unfamiliar with. It is therefore a daunting task to explain the concept of consideration especially in relation to the doctor patient relationship that would give complete satisfaction to Legal scholars in both sides of the legal divide. However, given that its genesis is grounded on the Anglo-Saxon system, it is trite learning that our discussion of consideration will be tilted towards what obtains under this system.

At common law, therefore, a promise is not, as a general rule, binding as a contract unless it is supported by consideration or it is made by deed.<sup>xxx</sup> Consideration is "something of value" which is given for a promise and is required in order to make the promise enforceable as a contract.<sup>xxxi</sup> In England, under the National Health Service (NHS), most patients who go to public hospitals do not enter into a contractual relationship with their doctor or the hospital where they receive treatment. However, it has been suggested that there is a contract between a patient and his general practitioner, (GP) since the addition of the patient's name to the general practitioner's list increases the doctor's remuneration under his contract with the Family Practitioner's Committee and this might constitute consideration by the patient.<sup>xxxii</sup> This argument posited in a Canadian case of *Pitman Estate v. Bain*<sup>xxxiii</sup> in which a hospital claimed that there was no contractual relationship with the patient because there was no consideration and that the payment to the hospital was not coming from the patient but from the government

through universal health care plan. It was held that patients provide indirect contribution through taxes or non-monetary consideration for their hospital care and they also confer the benefit on the hospital by providing the hospital with patients, without which the hospital will not operate. A hospital benefits in terms of government financial compensation and enhancement of its reputation when patients choose it for their care.<sup>xxxiv</sup> Also the courts in the English case *Banbury v. Bank of Montreal*<sup>xxxv</sup> found that the patient's submission to treatment is sufficient consideration for the doctor's services.<sup>xxxvi</sup>

From a meticulous reading of the decision of the courts in these cases, it is evident when they are read in line with our discussion on offer, that they have come to the conclusion that in a doctor patient relationship, it is the patient who makes the offer and acceptance is done by the doctor. The question of whether a medical health unit or hospital in which the doctor is an employee can make a standing offer has not been examined at all. This is unfortunate as the contractual relationship between a doctor and a patient has never been, and will never be the same, as an ordinary contract, or a simple contract, for the purchase of merchandise. In a doctor patient relationship, other factors such as the medical health unit or hospital or manufacturers of certain equipment may be brought into the suit. It is therefore not the ordinary form of contract, and this makes the understanding of the concept of offer, acceptance and consideration rather complicated. But what is the nature of consideration?

**a) *Consideration must be sufficient, but need not be adequate***

Consideration is "something of value" which is given for a promise and is required in order to make the promise enforceable as a contract under English law. In a doctor patient relationship, the fees paid by the patient need not be measured to the value of treatment which he or she will receive from the medical doctor, for the promise has no contractual force unless some value has been given for it, consideration need not be adequate. Courts do not, in general ask whether adequate value has been given in the sense of there being any economic equivalence between the value of the consideration given and the value of any goods or services received.<sup>xxxvii</sup> This is because they do not normally interfere with the bargain made between the parties. Accordingly, nominal consideration is sufficient<sup>xxxviii</sup> in the case of a doctor/patient relationship.

**b) Consideration must move from the promisee**

Consideration must move from the promisee to the promisor. In other words, the promisee must provide the consideration. Traditionally, a person to whom a promise was made can enforce it only if he himself provided the consideration for it. He has no such right if the consideration moved from a third party.<sup>xxxix</sup> The relationship between the doctor and the patient is contractual in origin, the doctor performs services in consideration for fees payable by the patient.<sup>xl</sup> In the doctor-patient relationship, the promisee is the doctor who offers services for consultation either in a public or private hospital and fees is paid by the patient who is the promisor requesting to be treated. Thus, the patient is the offeror in a doctor patient relationship.

We can therefore, say that, the doctor furnishes consideration by way of services he renders to the patient including the treatment he administers to the patient. On the aspect of sufficiency or adequacy of consideration, it should be retained that the obligation required of the medical doctor is to examine the patient, carry out proper diagnosis in line with the conventional or scientifically approved methods and administer treatment accordingly. His obligation is not to heal the patient as such. He is only expected to carry out proper care in the performance of his duties and this exercise is not equated to the illness plus money paid by the patient. Healing is done by God. The doctor merely treats. And if the treatment does not succeed as a result of circumstances independent of the will of the medical doctor, it does not matter the amount the patient must have paid.

**ESTABLISHING CONTRACTUAL RELATIONSHIP BETWEEN THE PATIENT AND THE MEDICAL DOCTOR**

The relationship between the doctor and the patient is mostly contractual, even if the patient does not pay for professional services himself. The duty of the doctor undertaking the treatment of the patient is to advise or act for the betterment of the patient, until the patient terminates the contract by accepting the service of another medical doctor without the consent of the previous one or until further performance of the duty becomes impossible because of the negligent conduct of the patient.<sup>xli</sup> The implied contractual relationship between the doctor and the patient imposes continuing duty on the medical practitioner requiring his advice or action to be reviewed in the light of changed circumstances.<sup>xlii</sup>

### 1) *Liability of the Medical Doctor under Implied Contract*

The law does not usually imply a warranty that the medical doctor will achieve the desired result, but only a term that he will use reasonable care and skill. In the English case of *Independent Broadcasting Authority v E.M.I. Electronics Ltd and BICC Construction Ltd*,<sup>xliii</sup> the House of Lords said that the court would be reluctant to allow implied contracts to be used as a device to extend professional duties beyond express terms or general tortious principles. However, the existence of a contract for medical treatment does not preclude an action for breach of the implied duties of care and skill regarded as tortious in nature.<sup>xliv</sup> The same is obtainable under Cameroon law where the medical doctor does not have the obligation of result but of means. Implied terms that he/she will use reasonable care and skill are Stated in the law.<sup>xlv</sup> Section 22 of Decree No. 83-166 of 12 April 1983 states that, from the moment a medical doctor is called to give attention to a patient and he/she agrees to do so, is bound to give the patient all necessary medical care within his power, either personally or with the help of qualified third party and must always act courteously towards the patient and to show himself sympathetic towards him.

#### a) **Terms implied in law and by statute**

Terms implied in law are terms imported by operation of law, whether the parties intended to include them or not. For certain contracts the law seeks to impose standardized terms as a form of regulation.<sup>xlvi</sup> Many implied terms are contained in statutory instruments. For example, from the moment a doctor is called to attend to a patient and he agrees to do, he is bound to give to the patient all the necessary medical care within his power, either personally or with the help of qualified third parties, to always act correctly and cautiously towards the patient and to be sympathetic towards him.<sup>xlvii</sup>

Some of these terms are equally provided in sections 22 to 24 of Decree no. 83-166 of 12 April 1983 on the Code of Ethics which state that a doctor, from the moment he is called to give attention to a patient and agrees to do this, shall be bound to give the patient all the necessary medical care within his power, either personally or with the help of qualified third parties; to always act correctly and courteously towards the patient and to show himself sympathetic towards him. A doctor must always formulate his diagnosis with the greatest care, regardless of the time that this work may cost him. After having made his diagnosis and prescribed



treatment, the doctor must endeavour to ensure that this treatment is carried out, especially if the patient's life is in danger. A doctor must always prescribe treatment within the limits imposed by the conditions of the patients. He must in good faith not prescribe very costly treatment for a patient until the patient or his family have been informed of the sacrifices which this would entail and the benefit which they may derive from it. A doctor equally has a duty of confidentiality to his patients. In a situation where any of these terms are breached, the doctor may be held liable.

Further significant terms may be implied from the nature of the relationship between the parties. Contracts for professional services require the professional to act with reasonable standards, for example, a lawyer, a driver, a pilot etc. must act in his client's best interests.

#### **b) Implied Warranty of Success**

The question for determination is, does the contract for medical attention between the medical doctor and the patient imply a warranty of success of treatment in the absence of express terms? In the English case of *Eyre v Measday*,<sup>xlviii</sup> *Thanke and Another v Maurice*,<sup>xlix</sup> the defendants performed a sterilization operation on the plaintiff clearly briefing about the nature and effects of procedure and emphasized that the operation was irreversible. The plaintiff and her husband believed that the operation would render the plaintiff completely sterile. Later, the plaintiff became pregnant as a result of which she filed a suit claiming damages on the grounds that, the defendant was in breach of a contractual term that she would be irreversibly sterile and a collateral warranty to that effect which induced her to enter into a contract. In Cameroon, however, section 22 of the Code of Ethics of medical doctors provides in this regard that the implied contract does not imply a warranty that the doctor will achieve a desired result, but only a term that he will use reasonable care and skill.

As stated above, a warranty that the medical doctor will achieve the desired result cannot be implied from a reading of the law in Cameroon but rather from the exercise of his/her duties towards the patient. It is merely that he/she will use reasonable care and skill in the exercise of his/her duty towards the patient. In the English cases of *Eyre v Measday*<sup>1</sup> and *Thanke and Another v Maurice*<sup>ii</sup> the English court dismissed the plaintiff's contention in this regard holding that where a doctor entered into a contract with a patient relating to the performance of any



operation, the law would imply into the contract between the doctor and the patient a term that the operation would be carried out and done with reasonable care and skill and not a warranty of success where the doctor had stated that the procedure would be irreversible, since no responsible medical practitioner intends to give a warranty.<sup>lii</sup>

Thus, in the context of medical negligence under the Code of Ethics in Cameroon, the warranty implied into a contract under section 22 is for medical doctors to exercise reasonable care and skill when diagnosing, treating and advising the patient and that a hospital should provide sufficient facilities and competent staff including medical doctors. The doctor would be held liable only for breach of contract to exercise reasonable care and he/she does not warrant a particular outcome from the treatment.

## **2) *Liability of the Medical Doctor under Express Terms***

Express terms are ones that the parties (in this case the patient and the doctor or the health unit in which the doctor works) have set out in their agreement. The parties may record their agreement, hence the terms of their contract, in more than one document. These terms may be incorporated by reference to the contract; an example is where a contract is made subject to standard terms drawn up by a relevant hospital. This will equally be so with the consent form which hospitals in Cameroon have adopted as a sort of standard form contract in hospitals but unfortunately this form exempts the medical doctor from liability for fault committed in the course of performing his duty. In a standard form contract, the other party takes it or leave it; there is no negotiation as such. But also, the contract may be contained in more than one document even though one does not expressly refer to the other as for example, dealings which take place under a 'master contract' with a separate document being executed every time an individual contract is made. Here, the master contract lays out most of the underlying terms on which the parties are dealing, while certain specific terms – price, times for delivery, etc are covered in individual contracts for each specific trade. Incorporation without express reference depends on the intention of the parties, determined in accordance with the objective test of agreement.<sup>liii</sup> Looking at the doctor patient relationship, the consent form will represent the master contract since it lays out the specific terms to be contracted upon while other expenses

are covered under other specified agreement especially in relation to the price to be paid. This form is usually used in cases where the patient needs to be operated upon.

There are, of course, limits to what the parties in a doctor-patient relationship may purport to agree through express terms. They cannot, for instance, agree to do that which would be regarded as contrary to public policy, for example, the selling of an organ.<sup>liv</sup> But the problem with contracts binding a medical doctor to a patient is that more often than not, the terms may only be implied given that a patient who gets to a hospital will not always be called upon sign a contract before he/she is consulted. But that will be our focus in a subsequent paragraph.

#### **a) Interpretation of express terms of a contract**

Once the express terms have been identified, there is the question of interpretation. The document setting out the parties' agreement must be interpreted objectively: it is not a question of what one party actually intended or what the other party actually understood to have been intended but what a reasonable person in the position of the parties would have understood the words to mean.<sup>lv</sup> The starting point for ascertaining the objective meaning is the words used by the parties. These are interpreted according to their meaning in conventional usage, unless there is something in the background showing that some other meaning would have been conveyed to the reasonable person. Thus, the terms of the contract must be read against the "factual matrix"; that is, the body of facts reasonably available to both parties when they entered the contract.<sup>lvi</sup> Most of the contracts in a doctor-patient relationship are implied thus an express contract may only be evident in the case where a patient wants to be operated upon. In Cameroon, these terms are interpreted to exempt the doctor from liability since the doctor has an obligation of means and not of result.

Also, the "parol evidence" rule provides that evidence cannot be admitted to add to, vary or contradict a written document. Therefore, where a contract has been put in writing, there is a presumption that the writing was intended to include all the terms of the contract, and neither party can rely on extrinsic evidence of terms alleged to have been agreed which are not contained in the document.<sup>lviii</sup> This presumption is rebuttable, as extrinsic evidence is admissible, if the written document was not intended to set out all the terms on which the parties had agreed. The parol evidence rule prevents a party from relying on extrinsic evidence only

about the contents of a contract (and only express terms), and not about its validity such as the presence or absence of consideration or contractual intention, or where a contract is invalid for a reason such as incapacity.<sup>lviii</sup>

To hold a doctor liable for breach of contract, primarily depends on an agreement between the parties and includes express terms of a written contract. Terms as to payment, the provision of facilities, specifying who is to be the treating doctor will depend upon the circumstances. The point of consideration is that the doctor contractually guaranteed the outcome of the treatment. Hence, a patient may be able to bring an action when the treatment does not affect cure or produces the intended result.<sup>lix</sup> The "parol evidence" rule will not really apply to the relationship between the doctor and the patient in Cameroon since the consent form which represents an express document does not contain all the terms related to a standard consent form. The rule can only be applied where the medical doctor guarantees the outcome of the treatment and the treatment does not affect cure or produces the intended result.

#### **b) Liability on express undertaking**

Tortious duties do not impose the extent of personal responsibility and strict liability that may be attached to contractual duties. Strict liability is expected from those medical doctors who give express undertakings in performing his/her duties towards the patient.<sup>lx</sup>

It must be pointed out that, a doctor may enter into a contractual guarantee, but, in order to do so, he must use explicit and unequivocal words such as "I guarantee you will be cured. I will assure 100% success". In the absence of words of this nature forming part of the contract, the courts will not construe actual terms as amounting to a guarantee of success.<sup>lxi</sup> In the Canadian case of *Guilmet v Cambell*,<sup>lxii</sup> a doctor treated the patient for the bleeding of an ulcer. However, prior to the operation, the doctor had told the patient that "once you have an operation it takes care of all your troubles, you can eat as you want, you can drink as you want, you can do as you please... there is nothing to it at all. It is a very simple operation. After the operation you can throw your pill box."<sup>lxiii</sup> But the plaintiff suffered physical injury after the operation. The courts ordered the medical doctor to pay damages for the breach of contractual guarantee by observing that, there must be sufficient evidence that the medical doctor has made a specific, clear and express promise to care or effect a specific result which was relied upon by the

patient.<sup>lxiv</sup> Mindful of the fact that Cameroonian courts are yet to entertain an action with similar facts, it is our suggestion that should this happen, this judgment would be illustrative.

Generally, medical doctors are unlikely to guarantee the success of an operation, but cosmetic surgery, dental surgery and sterilization are exceptional areas where the medical doctors may agree to give a guarantee of success. For example, a dentist who undertakes to remove a tooth by painless process may be strictly liable if pain is caused in the process of extraction of a tooth.<sup>lxv</sup> In the American case of *Bailey v Harman*,<sup>lxvi</sup> a cosmetic surgeon was held liable for failure to achieve the success guaranteed by him. To infer strict liability, there must be clear and cogent evidence of an express undertaking on the part of the medical professional. The plaintiff's allegation that the surgeon guaranteed the permanency of sterilization was negated in the Canadian decision of *Dendaas v Yackel*<sup>lxvii</sup> as there was no evidence of a clear meeting of minds.

The argument that the contracts entered into by medical doctors should contain implied duties guaranteeing success was put forward in the English cases of *Eyre v Measday*<sup>lxviii</sup> and *Thanke and Another v Maurice*<sup>lxix</sup> as an alternative to the claim that an express term warranting success could be found in a contract to perform sterilization. The Court of Appeal could see no scope for an implied term beyond the normal one to perform the operation with reasonable care and skill. The reason behind this dictum of the Court of Appeal is that there cannot be any express undertaking in a matter which depends on the healing of human tissue. Slate, LJ.<sup>lxx</sup> adopted the conventional approach echoed by the words of Lord Denning, "in the absence of any express warranty, the Court should be slow to imply against a medical man an unqualified warranty as to the result of an intended operation, for the very simple reason that, objectively speaking, it was most unlikely that a reasonable medical man will intend to give a warranty of this nature".<sup>lxxi</sup>

In theory, a doctor could give a warranty to his patient, as to the obvious outcome or result of his treatment or administration of his skill. However, in interpreting the doctor-patient relationship under contractual warranty, Cameroonian medical doctors are not only slow to imply a warranty in the absence of an express term that the he/she will achieve a specific result,



but also, case law is virtually absent. This is because medicine being an inexact science, the medical doctor has the obligation of means and not of result.

## CONCLUSION

All doctors owe a duty to exercise reasonable care and skill to their patients in a contractual relationship. For a contract to be held valid under Cameroon law, there must be offer and acceptance together with consideration. An offer on the one hand could be found in the patient's request for treatment and the acceptance in the medical doctor's commencement of care, on the other hand. An offer can be made expressly by conduct by a hospital, clinic with medical doctors open to the public and acceptance by the patient upon receiving treatment. That notwithstanding, even though the hospitals are open to receive patients, it is only when the patient comes and ask to be consulted by the doctor that an offer is made. Thus, in this case, the hospital, private clinic, or medical health unit with a medical doctor to attend to patients, the doctor or medical health unit is implicitly professing an invitation to treat. The offeror in the first definition is the patient who offers money to be treated and in the second definition, the offeror will be the hospital/clinic or medical doctor who offers services. The courts do not generally ask whether adequate value has been given in the sense of there being economic equivalence between the value of consideration and the value of the products or services received. Where there is sufficient consideration, a contract is established.

A contract may include an express or implied term and the basis of these terms is governed by the doctors' performance of his duties with reasonable care and skill.<sup>lxxii</sup> One of the characteristics of the contract is that the contractual duty of care is non-delegable and doctors are equally bound by the duty of confidentiality and secrecy.<sup>lxxiii</sup> The doctor-patient relationship based on contract can be established where there is no express term in the contract. In this case, a term will be implied into the contract that the service will be performed with reasonable care. The standard of care under contract is that of reasonable care, non-delegation of competence and the duty of confidentiality. It is theoretically possible for a doctor to give a contractual warranty. However, the courts refrain from inferring a warranty,<sup>lxxiv</sup> except it is expressly brought out in a statement in the contract or in the course of the doctor/patient communication.<sup>lxxv</sup> Warranties could be express or implied as seen in the cases of contracts for



sale of goods and services. At this level, the point of convergence between contract and tort is based on the duty of care and the point of divergence is seen at the level of contractual warranty which is not found in tort.

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## ENDNOTES

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- <sup>iii</sup> Allen and Overy, *Basic Principles of English Contract Law*, Advocates for International Development, www.a4id.org, p.15.
- <sup>iv</sup> *Ibid*. p. 15.
- <sup>v</sup> Civil Code, Article. 1101.
- <sup>vi</sup> *Ibid*, Articles. 1101, 1108.
- <sup>vii</sup> Osagie, G., *Compendium of Medical law Under the Commonwealth and United States Legal Systems with Treatise on Assisted Conception*, Maiyati Chambers, Lagos, 1<sup>st</sup> Ed., 2006 , p.7.
- <sup>viii</sup> *Ibid*, p. 7.
- <sup>ix</sup> *Supra*, p. 2.
- <sup>x</sup> Allen & Overy, *op.cit*, p. 2.
- <sup>xi</sup> 1893 2 QB 256.
- <sup>xii</sup> Civil Code, Article 1115(1)
- <sup>xiii</sup> *Stover v Manchester City Council* (1974) 1 WLR 1403.
- <sup>xiv</sup> Allen & Overy, *op.cit*, p. 2.
- <sup>xv</sup> *Moran v. University College salford* (no 2), *The Times*, November 23, 1993.
- <sup>xvi</sup> *Carlill v. Carbolic Smoke Ball Company*, 1893 2 QB 256.
- <sup>xvii</sup> *Ibid*.
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- <sup>xix</sup> This was the decision of the French Commercial Cours de Cassation, 6-03-1990, II, 21583, note grosse, Dalloz 199, Commercial Marriage p.317 observed by Aubert.
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- <sup>xxi</sup> Remy Cabrillac, *Supra*.
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- <sup>xxiv</sup> Allen & Overy, *op.cit*, p. 8.
- <sup>xxv</sup> Catherine E., and Frances Q., *ibid*, p. 14.
- <sup>xxvi</sup> Catherine E., and Frances Q., *Ibid*, p. 15.
- <sup>xxvii</sup> Civil Code, Article 32.
- <sup>xxviii</sup> See the case of *Pharmaceutical Society of GB v. Boots Cash Chemist (Southern) Ltd*, (1953) 1 QB 401, (1953) 1 All ER 482, (1953) 2WLR 427.
- <sup>xxix</sup> Law 2004-575 Of 21 June 2004 On freedom of communication.
- <sup>xxx</sup> Allen & Overy, *op.cit*, p. 4.
- <sup>xxxi</sup> Allen & Overy, *op.cit*, p. 5.
- <sup>xxxii</sup> Family Practitioner Committees were replaced by Family Health Service Authorities: National Health Service and Community Care Act 1990, s.2; (S.I. 1990 No.1329). The Health Authorities Act 1995 replaces District Health Authorities and Family Health Service Authorities with Health Authorities.
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- <sup>xxxiv</sup> Michael Jones, *op.cit*, p. 19.
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- <sup>xxxvi</sup> Picard & Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 3<sup>rd</sup> Ed., 1986, pp.1-2.
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