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An Analysis of Medical Negligence in Nigeria: Challenges and Way Forward

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Abstract

The role of the medical practitioner in any society cannot be overemphasized due to the peculiar nature of his job in relation to the general public. The medical practitioner is saddled with lots of responsibilities, which range from providing proper diagnosis, to the treatment and counseling of patients. In the discharge of these duties, he is expected to exercise utmost care and diligence as is expected of all professionals but in the case of the medical practitioner the standard expected of him is very high as he deals with human life, which is so dear and once lost can never be regained. In the light of this, the medical practitioner in Nigeria is faced with several challenges some of which this paper will examine with a view to proffering solutions within the legal framework. The paper will also examine the position of the Nigerian patient vis-a-vis their protection under the law.

Keywords: Medical, negligence, duty, care, diagnosis, diligence

1. Introduction

Medical Law is the branch of law that concerns itself with the rights of patients on one hand and rights and responsibilities of medical professionals on the other hand. Its major branches are negligence, torts and confidentiality. The practice of medico-legal issues is suboptimal in Nigeria unlike in high-income countries where knowledge of patients' rights is high and the healthcare professionals also well indemnified to cover for eventualities. The reason for this may be attributed to a systematic failure of good governance and its attendant corruption, fraud, lack of structure and accountability. There is a dearth of implementation of healthcare laws in Nigeria. Although the legal framework and policies regarding healthcare seem adequate, on the face of it, a lot of work needs to be done regarding its implementation and sanctions on erring medical professionals.

The National Health Act 2014 is the prescribed law relating to healthcare delivery in Nigeria. It is broad in terms of its application, yet not robust enough to cover all health-related fields. In most instances, patients are not aware of its provisions and therefore have no use for them.[1] In recent times, however, practicing physicians in Nigeria and elsewhere frequently express the opinion that the medical profession is being subjected to increasing criticism by the public. Medical negligence has now become a topical issue in the Nigerian Legal System so one may then ask the question "what is medical negligence?"

2. Negligence

It is important to first understand what negligence means, in general. Negligence in legal parlance can be defined as the breach of an existing duty of care and such breach has resulted in an injury to the person to whom the duty of care was owed. Akpata JSC in *Odinaka v. Moghalu*[2]summed up negligence as "*…the omission to do something which a reasonable man undersimilar circumstances would do or, doing of something which areasonable and prudent*

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[1] M I Ezeuko 'The Laws Guiding Emergency Treatment in Nigeria in Cases of Gunshot Victims', (2019) 87 (1) *Medico-Legal Journal*, 47–48 .

[2](1992) NWLR (Pt. 233) 1

man would not do". In the case of *Ojo v Gharoro*[3], negligence was said to have been described as a fluid principle which has to be applied to the most diverse conditions and problems of human life. In other words, it denotes a failure to meet acceptable levels of conduct expected of a reasonable person of same status, social standing or qualification, in that same situation.[4]

2.1 Medical Negligence

Medical negligence constitutes an act or omission by a medical practitioner which falls below the accepted standard of care resulting to injury or death of the patient.[5] Medical negligence then means the failure, on the part of a medical practitioner to exercise a reasonable degree of skill and care in the treatment of a patient, such that if a doctor treats a patient in a negligent manner causing harm or worsening the existing health condition, the patient can bring an action on negligence against the doctor claiming damages for the harm suffered.[6]In legal sense medical negligence is a subset of professional negligence which is a branch of the general concept of negligence that applies to the situation in which physician who represented himself or herself having special knowledge and art, breaches his or her duty to take care about his or her patient. The general rules apply in establishing that the physician who owed the duty of care is in breach of that duty. [7]An action in medical negligence must be able to prove the following elements:

a) The existence of a duty of care;

b) Failure to exercise such duty of care by the medical practitioner;

c) Resultant injury to the patient as a result of the breach of duty; and

d) causation, a causal link between the acts complained and damages suffered.

In practical terms, medical negligence can result from a misdiagnosis or even a delayed diagnosis; incorrect treatment; surgical mistakes among others.

Medical negligence is hinged on the tortious principle of negligence as propounded by Lord Atkin in the 1932 case of *Donoghue v Stevenson*.[8] The case established a general duty to take reasonable care to avoid foreseeable injury to another. Therefore, to establish a case in negligence, it must be shown that a duty of care was owed; there had been a breach of that duty; and that damage or injury was suffered as a direct result of a breach of the duty owed. In medical negligence and going by the definition above, medical practitioners who undertake the care and treatment of patients owe a duty of care to such patients. A duty of care is necessarily implied when a patient is registered and being treated in a hospital. The view has been expressed that, care of medical practitioners ought not to be limited only to the patients under their direct management but to be extended to any patient whom they come across in their professional environment and as such, a medical practitioner owes the duty to care for every patient found within the hospital premises whether or not he is on the management team of such patient.

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[3] (2006) LPELR 2383 (SC)

[4]*Ighreriniovo v S C C Nigeria Ltd & Ors* (2013) LPELR – 20336 (SC) *Kabo Air Ltd. v Mohammed* (2015) 5 NWLR (Pt. 1451) 38.

[5]F N Chukwuneke, 'Medical Incidents in Developing Countries: A Few Case Studies from Nigeria', (2015) 18 (7) *Niger J Clin Pract.* 20–24.

[6] F Emiri, *Medical Law and Ethics in Nigeria* (Lagos: Malthouse Press Ltd, 2012) p 273.

[7] B K Dey,' Medical Negligence: An Overview', <file:///C:/Users/COMM%20&%20PPTY%20LAW%20DEPT/Downloads/Medical_Negligence_An_Overview.pdf> accessed 27 May 2024.

[8]*Donoghue v Stevenson* (1932) AC 562

2.1.1 Common Types of Medical Negligence

A wide variety of situations can lead to a medical negligence claim – from a doctor leaving a sponge in a patient's body during an operation to failing to tell a patient that a prescribed drug might cause heart failure. However, it may fall into one of these categories:

(a) ***Failure to diagnose***: If a competent doctor would have discovered the patient's illness or made a different diagnosis, which in turn would have led to a better outcome than the one actually achieved.

(b) ***Improper treatment***: If a doctor treats the patient in a way that no other competent doctor would, the patient could have a medical negligence claim. In a similar vein, it may also be negligence if the doctor selects the appropriate treatment but administers it incompetently.

c. ***Failure to warn a patient of known risks***: Doctors have a duty to warn patients of known risks of a procedure or course of treatment- this is known as the duty of informed consent. If a patient, was not properly informed of the possible risks and elects to go through with a procedure, the doctor may be liable for medical negligence if the patient is injured by the procedure (in a way that the doctor should have warned could happen).[9]

3. What Law Governs Medical Negligence in Nigeria?

An empirical work by a researcher shows that 61.69% of Nigerian patients feel that medical practitioners in Nigeria are arrogant and careless about their conditions and plights. Also, 33.3% of Nigerian patients indicated that their doctor's treatment had caused them extra injury beyond the ones that took them to the hospital.[10] In spite of this large number of victims, the number of cases recorded or filed as lawsuits are low. The reason for low-level of claims includes a cultural notion of adverse medical events, poverty, illiteracy, limited option of treatment, reluctance to seek redress against the medical practitioner and most of all ignorance.[11]

Against this background, patients must be properly informed of their rights to claim and the possibility of instituting a suit against negligent health providers. Certainly, the quality of care may improve in Nigeria if health care providers are liable for their careless acts. It becomes apposite to closely examine the legal rights and remedies available to a patient who has been a victim of medical negligence.

In Nigeria, medical practice is governed by the provisions of:

1. The Medical and Dental Practitioners Act CAP M8, LFN 2004;
2. The Nursing and Midwifery (Registration, etc.) Act 1979;
3. The National Health Act 2014:
4. The Code of Medical Ethics in Nigeria (pursuant to section 1(2) (c) of CAP M8;
5. The Constitution of the Federal Republic of Nigeria 1999 (As Amended);

[9] ibid (n4).

[10] <https://threshold-attorneys.com/a-contextual-analysis-of-medical-negligence-duties-and-responsibilities-liabilities-medical-ethics-and-defenses-available-to-a-medical-practitioner-a-legal-perspective-part-1/>

[11] Ogundare, Bisola, Medical Negligence in Nigeria: A Quick Guide on Liabilities and Remedies (October 28, 2019). < https://ssrn.com/abstract=3476524 or http://dx.doi.org/10.2139/ssrn.3476524> accessed 20 May 2024.

6. The Medical Oath/Vow;
7. The Compulsory Treatment and Care for Victims of Gunshot Act 2017;
8. The Patients' Bill of Rights

4. Proof of Negligence

As earlier discussed, Negligence is the omission of doing something which a reasonable man would do under the same circumstances or doing something that a prudent or reasonable man would not. As a tort, it is the breach of a legal duty to take care which results in damage, undesired by the defendant to the plaintiff. In general, when it comes to negligence, it is important to note that while one must take care not to cause injury to others, there is no duty to act for the benefit of others. However, the medical profession places a responsibility on everyone involved in healthcare to attend to and act in the best interest of any sick or injured person. It has been established earlier, that there is a duty of care owed by medical personnel to a patient. Medical negligence is, therefore, a breach of a duty of care by a person in the medical profession, to a patient, which results in damage to the patient.

To prove negligence, one must show that a required standard of care was violated, and that the violation was the legal cause of the injury. In the case of *First Bank Nigeria Plc. v Banjo*,[12] the court inferred certain elements of negligence which must be proved as follows:

1. That the defendant owed the plaintiff a duty to exercise due care;
2. That the defendant failed to exercise the due care, and;
3. That the defendant's failure was the cause of the injury of the plaintiff;

In order to determine professional misconduct, the court will decide if the act or omission of the doctor falls short of the standard expected of other medical practitioners.

In law generally, the burden of proving negligence (i.e that the defendant was in breach of the duty of care he owed to the plaintiff) always lies on the plaintiff.[13] In *Abubakar & Anor v Joseph & Anor*,[14] the court held that: "*The burden of proof of negligence falls on the plaintiff who alleges negligence*". This is because negligence is a question of fact, and it is the duty of he who asserts to prove it. However, this might pose an issue for the victim because across various countries and jurisdictions around the world, it is possible that the action fails because of the inability to prove that negligence occurred or show how it happened; in other words, lack of direct evidence. In the aforementioned case, Niki Tobi, JSC further stated that failure to prove particulars of negligence pleaded will be fatal to the case of the plaintiff.

5. Medical Negligence in Legal Perspective

The tort of Negligence, in the generic sense, is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do.[15] It is not for every careless act that a man may be held liable in negligence as the tort relates to a breach of legal duty of care to the person to whom the defendant holds the duty and which results in legal injury.

[12] (2015) 5 NWLR (PT 1452) 253
[13] Kodilinye & Aluko, The Nigerian Law of Torts (Spectrum Books Ltd. 2007) 147
[14] (2008) LPER 48 (SC)
[15] *Blyth v Birmingham Waterworks* (1856) 11 Ex Ch 781, or 156 ER 1047.

Thus, for a claimant to make a case of negligence in law, the following elements must be established:

1) That the defendant owes the claimant a legal duty of care in the context in question.
2) That the defendant has been in breach of that duty.
3) That consequential to the defendant's breach of the duty of care, the claimant has suffered harm or loss which flow from, or are caused by the breach of duty of care and not too remote from the causation/breach of duty of care.[16]

It is trite that failure to appropriately establish any of these basic legal elements would be fatal in establishing liability for negligence against the defendant.

Contextually, medical negligence is an offshoot or genre of the generic tort of negligence with the basic elements being applicable. Thus, medical negligence occurs in a situation where a doctor, owing a duty of care to the patient breaches that duty and the patient suffers injury. A central component is that the doctor acts in a negligent and injurious manner, in which a reasonable doctor in the affected doctor's professional standing and circumstances, would not have acted or expected to have acted.

Various acts or omissions can amount to grounds for medical negligence and causes of action. These include[17]:

A) Failure to attend promptly to a patient requiring urgent attention when the doctor was in a position to do so.
B) Improper or incompetent assessment of a patient, or incorrect diagnosis, particularly when the clinical features were so glaring that no reasonable and competent doctor could have failed to notice them.
C) Failure to advise, or proffering wrong advice, to a patient on the risk involved in a particular operation or course of treatment, especially if such an operation or course of treatment is likely to result in serious side effects or harms.
D) Failure to obtain the consent of the patient (informed or otherwise) before proceeding on any surgical procedure or course of treatment, when such consent was necessary.
E) Unjustifiable error in treatment e.g., amputation of the wrong limb, inadvertent termination of a pregnancy, prescribing the wrong drug in error for a correctly diagnosed ailment, and so on.
F) Failure to refer or transfer a patient in good time when such a referral or transfer was necessary.
G) Failure to do anything that ought reasonably to have been done under any circumstance for the good of the patient.
H) Failure to see a patient as often as his medical condition warrants or to make proper notes of the practitioner's observations and prescribed treatment during such visits or to

[16]See (*n*8).
[17]See *n*8

communicate with the patient or his relation as may be necessary with regards to any developments, progress or prognosis in the patient's condition.

I) Failure to admit into hospital a patient whose condition requires hospitalization.

J) Leaving a surgical instrument or swab in the body of a patient after operation.

K) Failure to cross match blood before transfusion.

L) Using a patient for experimental purposes without his consent.

M) Use of unsterilized tools.

N) Where swab is left in operation site or patient wakes up in the course of surgical operation despite general anesthetic.

O) Unjustifiable infringement on any of the rights of the patient in the course of treatment, e.g., undertaking a line of treatment that is against the religion of a patient and the will of the patient.

5.1 Legal Actions on Medical Negligence

Generally, as in other areas of law, it is a patient who is aggrieved by medical negligence that can initiate legal processes for redress or sanctioning of offending doctor. However, where the patient is a minor, the proxy or surrogate of the child, such as parent or legal guardian, can initiate complaint processes on the minor's behalf as next friend[18] ; same would operate where the patient lacks competence on the basis of any mental incapacitations. Where the negligent act results in death, any competent survivor or successor of the deceased can initiate action in respect of the "wrongful death" of the victim.[19] The processes initiated can be against the doctor individually, or by vicariously joining the master or employer of the doctor in appropriate situations.[20]

Whether directly by an aggrieved patient, or any of the qualified proxies, legal processes that can be initiated against a doctor can either be civil or criminal in nature. Criminal action would arise where the negligent act complained of amounts to a gross or criminal negligence as operative under pertinent laws.[21] In essence, an act of medical negligence can generate both civil and criminal actions. In initiating civil and criminal actions for medical negligence, an aggrieved patient or proxy may write a letter of complaint and demand for redress to the doctor or his employer on the incident of medical negligence[22] A formal complaint can be filed with the Medical and Dental Council of Nigeria for appropriate redress.[23]Report may also be made at a Police Station with an ultimate desire of criminal prosecution where the negligent act in question is perceived to be criminal. This is more likely to occur in situations of death or grievous bodily injuries to the patient through the doctor's act.[24]

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[18]SUIT NO: SC.97/2009. 3PLR/2019; LER [2019] SC.97/2009

[19]*Tarassoff v Regents of the University of California:* 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (decided on July 1st, 1976); *Raimi Jenyo and F. A. Aderemi (Administrators of the Estate of Basiratu Raimi (Deceased)) v Akinsanmi Akinreti and Anor* (1990) NWLR (Pt. 135) 663, (1990); *Aderinola Adeyemi and Ors. v Shittu Bamidele and Anor.* (1968) LCN/1615 (SC), [1968] 1 All N.L.R. 31 at p. 37; Fatal Accidents Law of Lagos State, 1961

[20]See (*n*8).

[21]Criminal Code, ss 303 & 305

[22]Whether or not the medical doctor was in the position to promptly attend to the patient but failed to do so.

[23]Medical and Dental Practitioners Act-sections 1, 3, 15 & 16

[24]See (n8).

Moreover, civil action may be instituted for redress in a court of appropriate jurisdiction on the ground of the act or conduct constituting medical negligence. Such civil actions can proceed from the court of primary jurisdiction to the final Court of Appeal, as in civil actions on other subjects other than medical negligence.[25]

Perhaps, in case of writing a letter of complaint and demand for redress or filing a formal complaint with the Medical and Dental Council of Nigeria for appropriate redress, the trial is between the Council, and the Prosecutor at appropriate courts, respectively with the affected doctor as defendant. The aggrieved patient essentially stands as witness and complainant on whose behalf the Council or government prosecutor pursue sanctions. While in the case of instituting a civil action in a court of appropriate jurisdiction, the battle is directly between the aggrieved patient and the doctor in the conventional setting of Plaintiff/Claimant versus Defendant, with each side striving to prove his case as prescribed by law. In any situation of contest, the culpability of the doctor for the alleged negligent act must be established by the prosecutors or claimants; otherwise, there would be no basis for sanctions or redress. Perhaps, it bears adding too, that all the necessary principles for fair-hearing and due process must be adhered to; if not a doctor sanctioned at a lower forum may walk free at an appellate forum.[26]

5.2 Liability and Punishment for Medical Negligence

Liability is the quality, state or condition of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment.[27] Thus, negligence could be civil or criminal and as such, injured parties can seek both civil reliefs as well as press for punishment under criminal law.

5.2.1 Civil Liability

The degree of negligence, which gives rise to civil action, must be that of ordinary tortious negligence. This can be proved where all elements of the three tests exist, which are: That the medical practitioner owed a duty of care to the patient; the duty of care was breached; and as a direct consequence of the breach, the patient suffered damages. Also, the onus of proof lies with the claimant who must call evidence to show negligence on the part of the medical practitioner.

Commencing a civil action for negligence may give rise to vicarious liability. In circumstances where hospital staff is negligent in the performance of their duties, the hospital may be held to be vicariously liable.[28] This is based on the general principle that an employer is liable for the act of its employee in the course of his employment. This principle was recognized in the case of *Igbokwe v. UCH Board of Management*[29], where Irwin J held that "…*hospital authority is responsible for the acts or omission of the whole of its staff, whether theywere physicians, doctors, nurses or other employees*."

In medical negligence actions under tort or contract, the patient has a legal duty, or burden of proof, to establish his allegation of negligence and entitlement to redress against the doctor. This burden of proof is to be discharged on the balance of probabilities or preponderance of

[25]See (n8).
[26]*Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo* (2001) 3 S.C.N.J 1 or (2001) 7 N.W.L.R. (Pt 711) 206
[27] B A Garner, *Black's Law Dictionary* (10th edn, Thomson Reuters, 2014).
[28] 'Liability and Proof Of Medical Negligence In Nigeria', <https://www.mondaq.com/nigeria/professional-negligence/1004164/liability-and-proof-of-medical-negligence-in-nigeria> accessed 27 May 2024
[29](1961) WNLR

evidence.[30] Put differently, it is up to the plaintiff to prove the allegations of negligence and his entitlement to redress.

The mode of proving or establishing a medical negligence case is set in some definite legal framework; this, essentially, entails the contending parties calling witnesses to adduce relevant evidence in respect of their positions. The need for medical expert witness is particularly crucial in medical negligence cases. Absence of required expert evidence can be fatal to the case of any of the parties that fails to invoke such evidence where necessary.

5.2.2 Criminal Liability

A medical practitioners' action may also result in commission of a crime giving rise to criminal liability. Hence, where in the course of treatment, and due to some form of negligence on the part of the medical practitioner, a patient suffers some gross or extreme harm or death, showing disregard for life and safety, liability will arise under criminal negligence.[31]

When a person does an act or makes an omission and death results from negligence on his part, the question whether he is guilty of manslaughter depends on the degree of negligence. The Criminal Code is silent as to the requisite degree of negligence, but Nigerian courts have held that the degree is the same as in English law. The negligence must be above the ordinary tortuous, negligence. Accordingly, simple lack of care or more inadvertence such as would create civil liability is not sufficient. There must be gross negligence or recklessness.[32] No act or omission which is unintentional can be criminal, unless it is one of those relatively few acts or omissions which are criminal under the code, when committed unintentionally but negligently.[33]

Generally, except in cases of willful acts of homicide[34] or assisted suicide services rendered to a patient, is unlikely that a doctor would be charged for murder or culpable homicide where a medical negligence results in death of the patient. This can be attributed to the absence of *mens rea* for culpable homicide in the circumstances. Moreover, section 24 of the Criminal Code exculpates an individual from criminal guilt where an alleged crime is due to accident. However, a doctor can face criminal sanction for manslaughter or culpable homicide not punishable with death if his conduct is found to translate to gross or criminal negligence. Along this axis, section 303 of the Criminal Code provides:

> *It is the duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any other person, to do any other lawful act which is or may be dangerous to human life or health, to have reasonable skill and to use reasonable care in doing such act; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to observe or perform that duty*.

Where a doctor faces criminal trial for manslaughter due to gross medical negligence the trial follows all pertinent processes, procedures and rules of criminal trials. The doctor-defendant, in

[30]Evidence Act 2011, s 134.

[31] O A Adejumo and O A Adejumo, 'Legal Perspectives on Liability for Medical Negligence and Malpractices in Nigeria, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7245980/>accessed27 May 2024.

[32] Ehigiator & Ucheagwu Okoye, 'Medical Negligence & Criminal Liability: An evaluation of the Nigerian Position' (2021) 2 *MUNFOLLJ*

[33] Okonkwo and Naish, *Criminal Law in Nigeria(*Spectrum Books Ltd ,2009)

[34]Criminal Code s 326.

addition to all possible basic defences, such as prosecutor's failure to establish guilt beyond reasonable doubt, can invoke sections 297 and 313 of the Criminal Code.

A victim can seek redress for medical negligence under criminal law in the gravest of circumstances. Where the extent of the negligence had been such that it resulted in permanent disability or death of the patient, then the practitioner will be guilty of gross negligence which can amount to a crime against the State. And where such breach of duty of care results in the death of a patient, a medical practitioner can be liable for manslaughter.

Furthermore, there are other offences a medical practitioner can also be liable for during his course of duty depending on the nature of his/her actions. Section 343 (1) (e) of the criminal code provides that:

> *Any person who in the manner so rash or negligent as to endanger human life or to be likely to cause harm to any other person giving medical or surgical treatment to any person whom he has undertaken to treat is guilty of misdemeanor and is liable to imprisonment for one year*.

Thus, under section 343(1) of the Criminal Code, liability for medical negligence will arise even where life has not been lost but endangered, in the course of treatment. As such, liability will arise in criminal negligence for acts other than manslaughter.

6. Conclusion

Medical Negligence is not a new term or concept, neither are the remedies and punitive measures attached to it. All Healthcare Workers have a special burden or responsibility to take special care in the course of their duties. For one to be sworn in as healthcare practitioner, it is assumed that such a person is well skilled in the field, meticulous, intelligent and proactive. While it is not the responsibility of any medical practitioner to go around looking for people to save, they have the responsibility to exercise utmost care when they come in contact with the sick or injured, failure of which could lead to serious legal issues. Medical professionals in Nigeria should be abreast with the laws guiding medical practice as ignorance of the law is not an excuse.