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## AN EVALUATION OF THE RIGHTS OF VICTIMS OF MEDICAL NEGLIGENCE UNDER THE NIGERIAN LAW

By

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### Abstract

This work examined the current Nigerian laws and practices on the Rights of Victims of Medical Negligence. With Nigeria's debilitating healthcare system, cases of medical negligence are on a surge, while litigation for damages in medical negligence are inhibited because the plaintiffs/victims are usually laden with a heavy burden of proving negligence against the erring medical practitioners. The objectives of this study, amongst others, were to examine the development of Medical Practice in Nigeria, examine the forms and causes of medical negligence, regulatory frameworks on the rights of victims of medical negligence under the various ambits of law. It was recommended, amongst others, that non-governmental organizations and Human Rights groups should sensitize and enlighten the public on the rights of victims of medical negligence.

### 1.1 INTRODUCTION

Litigation against professionals such as Lawyers, medical doctors, engineers, surveyors, architects, accountants, among others, for professional negligence, unethical practice or incompetence are not common in this country. This is so,

notwithstanding the fact that very grave consequences may result from the act of these professionals<sup>848</sup>.

Medical profession is one of the most indispensable professions in today's civilized world. It is one profession whose activities touch on the lives of virtually all members of the society and one profession that literally holds in its hands, the power of life and death<sup>849</sup>. Very instructive on the relevance of the medical profession with respect to their relationship with their patients, is the dictum of the Court in the case of *Abatan v Awudu*<sup>850</sup> Per Aderemi JCA, where the Court of Appeal held that the "relationship between a Doctor and his patient is one of trust and confidence; a relationship where one has the power and duty to treat and restore the other to mental and physical well-being". With the enormous power that Medical Practitioners wield comes also the enormous responsibilities on their part to exercise such powers diligently so as not to cause injury to patients in their care. It is apt to consider a few practical instances of medical negligence. One incidence was captioned "Nigeria: Baby Kehinde Slams N500,000,000.00 on UCH"<sup>851</sup> involving a baby who had her hand amputated three months after her birth in what the hospital's Chief Medical Director described as "a regrettable mistake".

In 2010, there was the news of a Doctor who slashed a baby's head during a cesarean session on the baby's mother which went viral on air and social media. The victim in this case suffered brain damage for which the Doctor apologized and called the negligence an accident inadvertently done<sup>852</sup>.

Despite all the above excesses of Medical Practitioners in Nigeria and several others that are not public knowledge, patients are still reluctant to institute actions in Court for the injuries they sustained from their Doctor's negligence. This reluctance and near total failure of victims of medical negligence to pursue the award of damages against their Doctors or even have other forms of actions to be taken against these Doctors have been attributed to a lot of factors, primary of which is the ignorance of

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J. A Dada, Legal Aspects of Medical Practice in Nigeria, (2nd Ed. Calabar, University of Calabar Press) p.8

<sup>849</sup> Ibid

<sup>850</sup> (2003) 10 NWLR (pt. 829) 451

<sup>851</sup> M. Chinazor, "Nigeria: "Baby Kehinde Slams N5000, 000,000.00 Suit on UCH" (2008) available at <http://allafrica.com/stories>. Accessed on 22nd Mach 2019.

<sup>852</sup> Kobojunkie "Careless Doctors Slashes Babies Head During CS, Mother Begs Fashola for Justice" (2010) available at <https://www.nairaland.com/447/691/careless-Doctors-slashes-babies-head/6057002>. Accessed on 28th March 2019.

their rights as victims. Additionally, the majority of the Nigerian population is poor and most people are unable to contemplate litigation in the courts, even if aware of their rights. Also, there is no developed system of civil legal aid and judgments are not easy to enforce. Corruption also affects many aspects of public life, including the judicial system. Far from there being a "compensation culture" there is a reluctance to litigate for compensation for torts. Injuries, even when caused by negligence, tend to be regarded as part of the vicissitudes of life, possibly divinely ordained. Accordingly, the idea of seeking compensation may be regarded as a violation of the natural and supernatural order rather than as vindicating one's rights.

More so, there are major shortages in medical resources in hospitals. There has been a "brain drain" of doctors and nurses from Nigeria to greener countries. The cultural and religious attitudes in parts of Nigeria tend to weaken the assertion by patients of their rights. A further difficulty is the absence of reported case law and the very limited academic analysis of the subject.

Furthermore, the avenues for recovery of compensation for medical negligence in Nigeria are essentially those of the common law. The Nigerian tort law system is largely the same as that operating in Britain, Ireland, North America and Australia and consequently Nigerian Courts are conservative in their application of tort principles<sup>853</sup>.

Therefore, the need to examine the current law and practice in Nigeria, in relation to medical negligence litigation and make proposals for reform is imminent.

## **1.2 CONCEPTUAL CLARIFICATION OF KEY TERMS**

### **(i) Rights**

A right is defined by the Merriam Webster Dictionary<sup>854</sup> as something to which one has a just claim: such as the power or privilege to which one is justly entitled. Right is also defined as that which is proper under law and morality or ethics, something that is due to a person by just claim, legal guarantee or moral principle<sup>855</sup>

### **(ii) Victim**

A victim is a person harmed by a crime, tort or other wrong. A victim is also defined as a person harmed, injured or killed as a result of a crime, accident or other event or action<sup>856</sup>.

### **(iii) Negligence**

Negligence is defined as the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls

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<sup>853</sup> Ibid

<sup>854</sup> Merriam-Webster Online Dictionary, <https://www.merriam-Webster.com/dictionary/Rights>

<sup>855</sup> B. A. Garner, Black's Law Dictionary, (9th Edition, West Publishing Co. USA 1891) 1436

<sup>856</sup> Ibid

below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregarding of others rights<sup>857</sup>. Negligence is defined as a Breach of duty of care which results in loss or injury to the person or entity the duty is owed. Negligence usually includes doing something that an ordinary, reasonable, and prudent person would not do, or not doing something such a person would do considering the circumstances, situation and the knowledge of Parties involved.

#### **(iv) Law**

Law is defined as the aggregate of legislation, judicial precedents, and acceptable legal principles; the body of authoritative grounds of judicial and administrative action, especially, the body of rules, standards and principles that the Courts of a particular jurisdiction apply in deciding controversies brought before them<sup>858</sup>. Law is also defined as a system of rules that a society or government develops in order to deal with crime, business agreements, and social relationships.<sup>859</sup>

### **1.3 RIGHTS OF VICTIMS OF MEDICAL NEGLIGENCE**

The rights of victims of Medical negligence will be considered under the various aspects of Law as follows;

#### **1.3.1 Rights of Victims of Medical Negligence under Law of contract**

A victim of medical negligence has the right to sue the medical practitioner in contract for the award of damages. This right arises from the fact that the relationship of a patient and his medical practitioner is primarily contractual in nature.

A contract is a binding agreement between two or more persons. In a contract, duties and liabilities are usually fixed by the parties subject to the law. The parties may be connected by pre-contractual negotiations. Privity of contract is a necessity; Contract is concerned with supporting and enforcing promises. Strict liability is usual. Contract compensates defects in the quality of contractual works and supplies. In contract, liability is based on proximity or the remoteness of damage. The purpose of the damages is to put the plaintiff in the position he would have been if the contract was performed. Limitation of time runs from the date the breach of contract occurred.

Thus, in a contract, the parties usually agree and determine what should be the contract, and other such details as they wish, while other rights and duties as may be necessary, are implied into the contract by law. Therefore, as a general rule, it is the parties that usually specify the terms of a contract including conditions, warranties, exemption clauses and provisions for discharge. They may even impose penalties for

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<sup>857</sup> Ibid

<sup>858</sup> Garner, OP. Cit

<sup>859</sup> Collins Online dictionary, <https://www.collinsdictionary.com/dictionary/english/law>

breach. All these the contracting parties can do within the freedom of contract allowed by the law of the given state or country. In the law of contract, the rights and duties are owed by a specific person, towards another specific person or persons.

If parties to an agreement are allowed to freely renege on their avowed commitments, then the human society will become entrapped in incessant strife, anarchy and chaos<sup>860</sup>. An unending rift would be the order of the day, and so when people freely engage themselves in the exchange of certain categories of promises, the law seeks to maintain a level of balance, to ensure that those involved keep to their words or pay some compensation if they failed.<sup>861</sup>

The function of the law in enforcing contracts is therefore, to regulate certain transactions

between parties to ensure that those involved kept or fulfilled their promises for a smooth and orderly conduct in the affairs of the society. In order to plan properly, businessmen usually need to be assured that promises made to them by others would be fulfilled, and in default certain defined consequences would follow. Essentially, the function of the law in regulating and enforcing contracts is to ensure that reasonable expectations of honest men (arising from their bargains) are not disappointed.<sup>862</sup>

Thus, when a patient meets a private medical practitioner for medical treatment, a contractual relationship arises between them, even though there is no formal written contract. The essential elements of a valid simple contract could be identified in that situation. Thus, there is an offer and an acceptance of the offer. The consideration will consist of the professional fees paid by the patient to the medical practitioner.

Essentially the medical practitioner undertakes to exercise care and skill in rendering the medical treatment. Where he fails to render the medical service as agreed upon or performs it in such a careless and reckless manner that the desired result is not achieved, then he will be deemed to have breached the contract. The private patient is entitled to sue his medical practitioner concurrently in contract, although there was no strictly defined contract with expressly written terms governing the agreement for medical care<sup>863</sup>. It has been suggested that there is a contract between a patient and

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<sup>860</sup>V.N. Okpara, *Contract Law: A New Approach* (Enugu: Fourth Dimension Publishing Co. Ltd. 2013)

p. 7.

<sup>861</sup> Catherine Elliot & Frances Quinn, *Contract Law*, 2nd edn. (1999) pp. 1 - 2.

<sup>862</sup> *Ibid*

<sup>863</sup> Rodney Nelson-Jones and F. Burton, *Medical Negligence, Case Law* (2nd edn. Butterworth, 1995) p. 26.

his medical practitioner even when the medical care is given in a state-run hospital. The existence of such contract was canvassed in the Canadian case of *Pittman Estate v Bain*<sup>864</sup> in which a hospital claimed that there was no contractual relationship with a patient because there was no consideration, the payment for the medical care not having been made by the patient. It was held that patients provide indirect consideration for their hospital care. They contributed indirectly through taxes and they also conferred a benefit on a hospital by providing the hospital with patients without which the hospital would not operate. A hospital benefited in terms of government financial assistance and enhancement of its reputation when patients choose it for their care. This aspect was sufficient consideration to support a contract between the hospital and the patient. In theory, this rationale should apply to patients receiving treatment in the state hospitals, but was rejected in U.K.<sup>865</sup> and India<sup>866</sup>.

No legal formalities are required for the conclusion of the contract between doctor or hospital and patient. The contract comes into being by mere consensus between the parties," but, in practice, both private and state hospitals usually require their patients to sign an admission form and require written consent for surgery. The contract may be concluded expressly or tacitly, and may be written or oral<sup>867</sup>. Doctors in private practice normally enter into tacit agreements with their patients<sup>868</sup>.

Express agreements between doctor or hospital and patient are not unusual, especially in cases of specialized procedures. Where no express agreement has been reached, the implied terms of the contract between the parties will depend upon the specific circumstances of the case. Usually, the implied agreement between doctor and patient entails that the doctor undertakes to examine the patient, to diagnose his or her ailment, and to treat the patient with such professional skill, competence, and judgment as the average or ordinary medical practitioner in the particular branch of the profession possesses, and with the amount of care that may reasonably be expected from such a practitioner. The doctor ordinarily undertakes to act in accordance with the recognised, accepted, customary, or usual practices of medicine<sup>869</sup>. Any unusual procedures contemplated by the medical practitioner should first be discussed with the patient.

Ordinarily, by taking on a case, a doctor or hospital does not guarantee that the patient will be cured or that the intervention will be a success; of course, the

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<sup>864</sup> 1994) 112 D.C.R. (4th) 257 (Out. Ct., Gen. Div.)

<sup>865</sup> *Reynolds v. The Health First Medical Group* (2000) Llyod's Rep. Med.240.

<sup>866</sup> *Consumer Unity Trust Society v State of Rajasthan* CPR 241 1991 (NCDRC).

<sup>867</sup> *Classes & Verschoor*, 43, at 115

<sup>868</sup> *Strauss*, at 60

<sup>869</sup> *Van Wyk v. Lewis* 1924 AD 438 at 448, 469-70; *Allor v. Paterson & Jackson* 1936 SR 221 at 224; cf *Collins v. Adm'r, Cape* 1995 (4) SA 73 (C) at 81-82; *Coppen v. Impey* 1916 CPD 309 at 314; *Kovalsky v. Krige*.

possibility of an express or implied warranty to that effect does exist<sup>870</sup>. In the normal course of events, the doctor undertakes no more than to treat or operate upon the patient with due competence, care, and skill namely, that which may be expected from a medical practitioner in the particular branch of the profession<sup>871</sup>.

A doctor or hospital that fails to perform in accordance with, or that departs or deviates from the express or implied terms of the contract, commits a breach of contract<sup>872</sup>. Since medical practitioners are expected to exercise reasonable skill and care, it will amount to breach of contract for a medical practitioner to perform his or her duties in a negligent manner<sup>873</sup>.

Breach of contract may result in the doctor or hospital being held liable for patrimonial loss, or in the doctor or hospital being unable to recover a fee for services rendered<sup>874</sup>. However, non-pecuniary (no patrimonial) damages cannot be recovered in contract<sup>875</sup>. Specific performance is not a likely remedy, since the doctor renders a personal service to the patient.<sup>876</sup>

The medical practitioner cannot unilaterally withdraw from the agreement once treatment has commenced<sup>877</sup>. Once the treatment has been completed, the agreement comes to an end and the doctor can no longer be expected to attend to the patient<sup>878</sup>. An undertaking on the part of a doctor to examine a patient and to diagnose his or her condition does not amount to an undertaking on the part of the doctor to personally treat the patient<sup>879</sup>. A doctor may refer the patient to another doctor for treatment without fear of being held liable for breach of contract<sup>880</sup>. In fact, a failure to refer a

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<sup>871</sup> Introduction to Medico-legal Practice, supra note 43, at 5, 22; Strauss, supra note 51, at 41.

<sup>872</sup> Strauss, supra note 1, at 62. Examples of such conduct would include where a doctor other than the one agreed upon performs the medical intervention, or where the medical intervention differs from the one agreed upon. Id at 62 n.2 (citing Strauss & Strydom, (n.43), at 107; Burger v Adm'r, Kaap 1990 (1) SA 483 (C), Recsei's Estate v. Meine 1943 EDL 277).

<sup>873</sup> Classen & Verschoor (n. 43) at 116

<sup>874</sup> Strauss, supra note 1, at 62 (citing Recsei's Estate 1943 EDL 277; McCallum v. Hallen 1916 EDL 74; Sutherland. White 1911 EDL 407; Hewatt v. Rendel 1925 TPD 679; cf Oates v. Niland 1914 CPD 976; Kruger v. Boltman 1933 (1) PH A 3 (E); Shiels v. Minister of Health 1974 (3) SA 276 (RA).

<sup>875</sup> Ibid

<sup>876</sup> *Myers v. Abramson* 1952 (3) SA 121 (C) at 124.

<sup>877</sup> Claassen & Verschoor, 117. Note, however, that in terms of section 20 of the National Health Act, a "health care provider may refuse to treat a [patient or client] who is physically or verbally abusive or who sexually harasses him or her." National Health Act 61 of 2003 s. 20(4).

<sup>878</sup> Strauss (n.63)

<sup>879</sup> Classen & Verschoor (n. 43)

<sup>880</sup> Ibid

patient to a specialist when the doctor lacks the necessary knowledge or skill to treat the patient may amount to negligence<sup>881</sup>.

### **1.3.2 Rights of Victims under Law of Torts**

A patient, as a victim of medical negligence, also has the right to maintain a civil action, in tort for damages against the defaulting medical practitioner. The action for the tort of negligence is based on the medical practitioner's breach of a legal duty to take care which he owed to the patient and which resulted in damage to the patient.

Tort is a breach of a duty imposed by law. In many instances, the parties in a tort are previously unconnected. There is often no privity of contract. Tort is concerned with protecting interests and compensating wrongs, injuries or damage<sup>882</sup>. Liability in tort is often based on fault or occurrence of damage. Liability is determined by the remoteness of the damage based on foresight of the type of harm. Tort aims to restore a plaintiff to his pre-accident or pre-wrong position. Limitation of time runs from the date the wrong or damage occurred.

In other words, a tort does not arise by the agreement of the parties concerned in a tortious act. In the law of tort, the duty is imposed by law, and generally such duty is owed to all persons. A tortfeasor does not by agreement voluntarily undertake the liabilities which the law imposes on him. Therefore if the law imposes a duty on a person to take care, so that his conduct does not injure his neighbor, then if the person fails to exercise reasonable care, the wrong that may result is often a tort, even though it may also be a crime, or other civil wrong.

### **1.3.3 Right of Victims under Criminal Law**

The victim of medical negligence has the right to maintain a criminal prosecution against the defaulting medical practitioner. In practice, he is expected to lodge the formal report with the police and will act as the complainant in the criminal proceeding.

The main purpose of criminal law is to sanction and reform the offender by way of fine, imprisonment, or imposition of other appropriate sanction such as binding over, community service or work, committal to an institution, suspended sentence, supervision under a probation order, or such other penalty as the court may deem fit to impose according to law<sup>883</sup>. The victim's injury affords reason and occasion for the State to sanction and possibly reform a convict. The complainant's compensatory and restitutionary rights are not the primary objectives of criminal action, though stolen goods when recovered are usually restored. However compensatory orders may also

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<sup>881</sup> Ibid

<sup>882</sup> E. Malemi, *Law of Tort* (Lagos: Princeton Publishing Co. 2008) p. 6.

<sup>883</sup> Malami (n. 8)

be made in favour of a complainant in appropriate circumstances, Compensatory orders are more common in Western societies, for instance, in England. If a wrong gives rise exclusively to punishment by the state, it is a crime only and not a tort. However, reformation may only be possible where the relevant sanction permits. A death sentence that is carried out may obviously not make room for reformation, but may only be deterrence to other would-be offenders.

The police are the principal agency of the State for the enforcement of criminal law. The Ministry of Justice which prosecutes crimes in the High Court, works hand in hand with the police. In other circumstances, other specific agencies invested with the enabling statutory powers may bring criminal proceedings against breaches of the criminal law which they are empowered to enforce. Apart from the police, other agencies which may enforce criminal laws, include NAFDAC, NDLEA, Board of Customs and Excise, EFCC, FBIR and so forth. A private citizen may also prosecute a crime, where the state does not do so upon a complaint, provided, he meets the relevant requirements of law which will pave way for him to exercise the right to private prosecution against the alleged offender<sup>884</sup> and where he fails to secure a conviction, he may be ordered to pay damages for wrongful arrest, false imprisonment, malicious prosecution, and so forth to the accused person he unsuccessfully prosecuted.

A plaintiff may waive his civil rights in tort and forgo legal action against a tortfeasor, but he may not waive the prosecution of a crime without the consent of the relevant law enforcement agency, for the reason that once the prosecution of a matter has begun in court, only the State can, and may pardon, or enter a nolle prosequi<sup>885</sup>.

#### **1.3.4 Right to Report to Professional Body for Disciplinary Action**

The victim of medical negligence also has the right to report the negligent medical practitioner to the relevant professional body for appropriate disciplinary action. It should be noted that members of various professions, from their own expertise and experience, have practice standards or guidelines by which their disciplinary authorities determine and measure the competence and standards by which providers have performed their various tasks. The consequence of having such practice

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<sup>884</sup>If the law enforcement agencies refuse to prosecute at public instance, a private citizen may prosecute the suspect on information. Ss.342 – 343, Criminal Code Act, 2004 and *Fawehinmi v Akilu* (1987) 4 NWLR (Pt. 67) p. 799 SC.

<sup>885</sup> Malemi (n.9)

standards is that providers who fail to comply with them, may be held to be in breach of their duty. In Nigeria, for example, the Medical and Dental Practitioners Act regulates the medical and dental professions. This Act sets up the Medical and Dental Council of Nigeria. The Council has listed acts constituting professional negligence to include, making mistake in treatment, failure to advise or proffering wrong advice to a patient, making incorrect diagnosis, failure to attend to a patient, etc<sup>886</sup>

#### **1.4 Conclusion**

Nigerian Laws have provided for the rights of victims of medical negligence under the law of contract, torts, criminal law and constitutional/human law. Victims are also disposed to initiating disciplinary proceedings against erring medical officers before the Medical and Dental Disciplinary Committee. It is clear that the problem is not the adequacy of the rights but the difficulties in proving negligence against the medical practitioners. Other problems include the poor healthcare system in Nigeria, illiteracy of the citizens and lack of awareness of the existence of their legal and constitutional rights. Urgent actions should be taken to address these problems and ensure an improved healthcare system in the country, awareness of the citizens' rights as victims of medical negligence and the strong desire to enforce these rights. This will correspondingly make the medical practitioners to sit-up and be more diligent in the discharge of their professional duties, thereby minimizing the incidence of medical negligence in Nigeria.

(i) It is recommended that government at all levels should provide more budgetary allocation to the health sector to address the current problems of lack of infrastructure, equipment, drugs and personnel.

(ii) There is an urgent need for the government to show more commitment in educating the citizens<sup>887</sup>. Non-governmental organizations (NGOS), particularly human rights groups, also have a duty to enlighten the public and create awareness on their rights to proper healthcare and remedies for medical negligence. An enlightened society will certainly impact positively on the standard of medical practice in Nigeria.

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<sup>886</sup> Rule 28, Code of Medical Ethics in Nigeria, Revised ed., (Medical and Dental Council of Nigeria 2004) p.41

<sup>887</sup> Right to Education is guaranteed under the Universal Declaration of Human Rights (Art 26). International Covenant on Economic, Social and Cultural Rights (Art 13), African Charter on Human and Peoples' Rights Act 17(1). However, under the Constitution of the Federal Republic of Nigeria 1999, the Right is provided for in section 18 under Fundamental Objectives and Directive Principles of State Policy, which are generally non-justiciable.

(iii) Most victims of medical negligence in Nigeria are often unable to seek legal redress due to the prevailing high cost of litigation which is completely beyond the reach of the ordinary citizens. Under this situation, the constitutionally recognized right of access to court<sup>888</sup> becomes irrelevant and victims of medical negligence continue to endure and suffer in silence. Government should introduce policies aimed at making the cost of litigation affordable to the ordinary citizens.

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<sup>888</sup> Section 6(6) b) of the Constitution of the Federal Republic of Nigeria 1999.