AN APPRAISAL OF THE LIABILITY REGIME FOR MEDICAL MALPRACTICES IN NIGERIA

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Abstract

Medical practice is bedeviled with medical practitioner's practices that are contrary to the ethics of the profession, which consist of inability to effectively exercise the duty of care and skill on a pat ent. Judgments or actions of a medical practitioner require more than is expected of the practitioner that is why a medical practitioner should exhibit the due care and skill in the discharge of his profession. This duty of a medical practitioner must conform to the ethics of his profession so that he is not found wanting for professional misconduct. For example negligence and ethical misconduct which most times result to tortious liability, contractual liability, criminal liability, corporate liability and professional liability. Problems do arise when a medical practitioner is treating a patient. The legal implications that do arise due to the medical practitioner's act that contravenes the ethics of his profession is known as liability for medical malpractice., Medical practitioners do not advice the patient concerning the type of treatment that will be carried out nor diagnose the illness properly before treatment. Most times the medical practitioner do not seek the consent of the patient before treatment, they carry out surgical errors, medication errors. All these dereliction of professional duties results to professional negligence. The aim of this research is the appraisal of the Liability Regime for Medical Malpractice in Nigeria, with a view to examining the nature of the duty of care on medical practitioners in Nigeria and examines how they have effectively been exercising this duty of care and skill on patients and so forth.

In this research work, doctrinal research and empirical research was used. Doctrinal research entails going to libraries to get information from various relevant enactments of primary sources, that is statutes, law reports, bye laws. Also, books of secondary sources that is a written by notable authors that are versed in that field of legal study. Empirical research, entails that the researcher must go out to conduct interviews and collect information from people of that are ve4rsed in that area of study. It is found that in correct diagnosis do occur due to inadequate medical history that is inability to interpret or identify the patient's symptoms or failure to conduct texts. Also, most male medical practitioners examine patients alone. Also some medical practitioners conduct surgery on patients alone when the procedure of the surgery is incredibly complex from a practical stand point. Therefore, it is recommended and expected of the medical practitioner to possess adequate medical experience and to examine a patient in the presence of a chaperone while they are also expected to be with another colleague of the same specialty and a senior nursing officer while conducting surgery in an operating theatre because as the saying goes, two heads are better than one.

1.1 Introduction

Medical and Dental Practitioners Disciplinary Tribunal have the power to carryout disciplinary measure if the code of medical ethics is violated and the punishment that follows on a medical, practitioner, but where the professional negligence of a medical practitioner amounts to a crime, it is a matter for the courts to deal with and it is only after the courts have found him guilty, that the Medical and Dental Practitioners Disciplinary Tribunal can then proceed to deal with him in a professional respect[1].

The Tribunal function is closely related to that of a High court, both of them have the same jurisdiction as court of first instance in medical cases. Also, witnesses are subpoenaed and evidence is given on oath. The Medical Practitioner who appears before the Tribunal may be legally represented.

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[1] *R. vs. Akerele* (1942)8 W.A.C.A 5,, see also Chukkol, K.S. (2010) The Law of Crimes in Nigeria, Ahmadu Bello University Press, Zaria, Nigeria p.309

The Tribunal is empowered to try any medical practitioner that is found wanting in his professional respect. There exist five types of liability cases. These consist of tortuous, contractual, criminal, professional and corporate liabilities that the Medical and Dental Practitioners Disciplinary Tribunal and the law courts do try on a medical practitioner who have contravened the medical ethics of his profession that is an infamous conduct in a Professional respect. A conduct that his fellow colleagues would say, "He did made a mistake there, he ought not to have done it".

The positive effect of medical liability by the Medical and Dental Practitioners Disciplinary Tribunal and the Law Courts on medical practitioner's negligent acts to patients is that, it assists the patients to realize their rights to sue the medical practitioner. Also the medical practitioner have realized their limits in the treatment of patients so as to avoid any malpractice suit by the patient.

Regrettably, in spite of the positive effects, medical practice is bedeviled with a medical practitioner practices that are contrary to the ethics of the profession.

This medical malpractice that is being committed is due to the fact that medical practitioner have failed to exercise the duty of care and skill that a practitioner of the same medical specialty would exercise under similar circumstances. Such unethical conducts include incorrect diagnosis, surgical errors, medication errors, poor post surgical and medication management, uniformed consent and breach of consent to the contractual agreement between the medical practitioner and the patient.

The aim of this paper is to appraise the liability regime for medical malpractice in Nigeria with a view to highlighting the various basis of liabilities for medical malpractice that may be enforced against the Medical and Dental Practitioners in Nigeria.

1.2 Criminal Liability

In criminal liability case, it must be established that the facts must be such that the negligence of the accused went beyond a matter of compensation between the medical practitioner and patient and this showed such disregard for the life and safety of the patient as to amount to a crime against the state or populace and conduct deserving punishment[2].

Apart from ethical and civil liabilities for negligence, a medical practitioner may also be criminally liable for negligence, this can arise by administering the

[2]White, M.J. (1994) Liability and Medical Malpractice. Retrieved from http://doi.Org/101377/hlthhaff.14.1.321, on 30/10/2020, 10: 54am

wrong treatment, also from a negligent omission such as failing to prescribe at all[3]. In *Okonkwovs Medical and Dental Practitioners Disciplinary Tribunal*[4], The medical and dental practitioners disciplinary tribunal found Okonkwo, the medical practitioner guilty of the commission of crime by negligently holding on to the patient, knowing fully well that the correct treatment cannot be given to the patient, when he is supposed to refer the patient immediately to another hospital.

A classical case of criminal negligence is *A.G. Western Nigeria vs. Oyelade*[5]. In this case, the accused, a native herbalist, who deals only on herbs, which is equivalent to a medical pharmacist and who is not a medical practitioner was invited to treat the deceased of his swollen scrotum. The accused began by pricking the swollen scrotum with a needle and squeezing out some liquid. He then gave the deceased patient some medicine to drink. The deceased patient died of the injuries to his testicles and scrotum. Delivering his judgment, Fakayode, J. remarked:

> Certainly, it is not an offence for an alternative medical practitioner to treat a sick patient, but it is an offence to operate on him or give him injections in a manner that is rash and careless and thus causing his death. Anybody who gives medicine or injections to a sick patient rashly and carelessly and thereby causes the sick patient's death shall be guilty of an offence which may amount to manslaughter or even murder having regard to the circumstances of the case.

His Lordship thereby convicted the accused for manslaughter

In *R. vs Akerele*[6] a registered medical practitioner was charged with manslaughter following the death of a child he had given an injection of sobita to treat an infection of yaws. At the trial, the prosecution contended that the medical practitioner was grossly negligent in that he concocted too strong a solution of sobita. He was alleged to have administered on that patient an overdose of the medicine. Evidence was adduced to show that some other

[3] Dada, J.A. (2002) Legal and Medical Practice in Nigeria. University of Calabar Press, Nigeria, Ppl06-107.
[4](2001) FWLR (pt 44) p.542.
[5] (1996) NMLR 407
[6](1942)8 W.A.C.A 5 , see also Chukkol, K.S. (2010). The Law of Crimes in Nigeria, Ahmadu Bello University Press Zaria, Nigeria Pp309

children that were given the injection had died. The court of first instance sentenced the accused for manslaughter and three years imprisonment.

1.3 Professional Liability

There are professional liabilities which include:

1. Censure: The medical practitioner is criticized severely because he has failed to carry out the rules and regulations guiding the medical ethics of his profession.
2. Revocation of License: This occurs when a medical practitioner has exhibited gross negligence in the management of a patient.
3. Suspension: Any medical practitioner that carries out any negligent act by failing to observe the duty of care and skill to his patient which results to harm to the patient, will be liable for breach of duty of care and skill.
4. Probation: A medical practitioner is not allowed to carry out private medical service if he is a full time staff of federal, state or local government.

It is shown that, if a medical practitioner performs an act which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute, then it is said that the medical or dental practitioner has been guilty of infamous conduct in a professional respect. In *Olaoye vs Chairman Medical and Dental Practitioners Investigating Panel*[7] The Medical and Dental Practitioners Investigating Panel found Olaoye guilty for "failing to respond to an emergency call at 1:30am for operation of the deceased patient but rather postponed the said operation to 8:00am". Also in *Bolitho vs. City & Hackney Health Authority.* The defendant (Medical Practitioner) admitted negligence for not attended to Patrick (the deceased patient) claiming that she has afternoon duty in the clinic to attend.

Self-promotion, advertising and canvassing any grave dereliction of professional duty or serious breach of medical ethics, can give rise to a charge of serious professional misconduct.[8]

There may be some acts which, although not infamous if done by any other person, yet if done by a medical or dental practitioner in relation to his profession, that is with regard to patients or to his professional brethren, may be considered an infamous conduct in a professional respect.

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[7](1997)5 NWLR (pt506) 550.

[8]Umerah, B.C. op.cit p.4-15

In *Akintade vs. Medical and Dental Practitioners Disciplinary Tribunal'* one Olusola Abe (deceased) was admitted at the Christian Health Centre Ilesha on 27th October 1997 for appendectomy, an operation which was carried out by Robert .0. Akintade, a registered medical practitioner, the only resident medical practitioner at the centre. On 28th October 1997, the deceased was noted to be quite obsessed, whom on her history that was taken, was not found to be diabetic and the medical practitioner did not order investigation on urinalysis in order to exclude diabetes before operating on her. After the operation, complications set in and patient's condition deteriorated from 31st October 1997 until 4th November 1997 when the medical practitioner then referred the patient to Obafemi Awolowo University Teaching Hospital on 6th November, 1997. The Obafemi Awolowo University Teaching Hospital certificate of death gave the primary cause of death as septicaemia and the secondary cause as faecal peritonitis fistula. The medical report also indicated that ...death in this instance could be attributed to a combination of septicaemia following faecal peritonitis fistula that followed the appendectomy she had in a private hospital. The uncontrolled diabetes and obesity probably also contributed.

Consequently, the medical practitioner was arraigned before the Medical and Dental Practitioners Disciplinary Tribunal on a two count charge. The first charge consists of the following offences:

7 Failure to attend to the patient promptly

8 Incompetence in the assessment of the patient by failing to diagnose her as a diabetic patient and failing to realize that the patient had post operations complication of faecal peritonitis fistula.

9 Deficient treatment arising from inadequate pre-operative investigations, deficient operative procedure and poor and faulty post operative management.

The second charge consist of:

9.1 Admission of the patient in the medical practitioner's private hospital when he knows or ought to know that the facilities therein were inadequate for the required treatment;

9.2 Failure to refer the patient early to a better facility, especially when post operative complication set in.

The Medical and Dental Practitioners Disciplinary Tribunal struck his name out of the register of the Medical and Dental Council of Nigeria.

The medical practitioner appealed to the Court of Appeal which set aside the 2nd charge and convicted the medical practitioner for the offences listed in the 1st

charge. He was therefore sentenced to suspension from practice for three months.

In *Adebayo vs. Chairman,* Medical and Dental Practitioners Investigating Panel & Ors a patient under the care of the medical practitioner who refused blood transfusion he suggested was bleeding to death. The medical tribunal was of the view that the medical practitioner took no effective steps to arrest the bleeding or push fluids into the patient in severe shock. The steps taken by the medical practitioner were below standard considering the fact that the deceased had already lost 800 millilitres of blood during Bilateral Tubal Ligation and Caesarean Section operation earned, out on her. The medical tribunal was also of the view that every consultant should know that much can be done to save the life of patients who refused blood transfusion and was still losing blood. In fact, the court added that it is very difficult to believe that a Consultant Obstetrician and Gynaecologist would not know what to do when a post-operative patient was bleeding to death. The finding of the Medical Tribunal for inadequacy of the steps taken by the consultant in question is summarized by the court below:

> Adebayo's reaction to the emergency he was called to see was inadequate and incompetent. He failed to take the appropriate resuscitative measures to save the patient's life when he appeared on the scene where she lay dying. The patient was given oxygen, which the doctor ought to have known would be of no or little use to her because she had neither the red cells nor the circulation to carry it. Even if they could not increase her red cells because of the refusal of blood transfusion, they ought to have boosted her circulation by rapid fluid infusion in order to stop her heart failing and to make it possible for the little red cells still left in her to move and transport oxygen to her brain and tissues. Adebayo's approval of administration of oxygen in the absence of blood means they were just waiting for her to die.

The medical practitioner was found liable for negligence and the Tribunal struck out his name from the register. He appealed to the Court of Appeal, his appeal was struck out on appeal to the Supreme Court, he was accordingly suspended from practice for six months by the Supreme Court.

The first instance of medical professional negligence is failure to attend to a patient promptly and as often as his/her condition requires. In the case of *Olowu*

vs. *The Nigerian Navy* a consultant obstetrician and gynecologist was deployed to the Nigerian Navy Medical Centre Apapa as part of his military assignment as a military medical officer and was there as the commander of the medical centre. One Joy Bassey was one of his obstetric patients for antenatal care. Previously the patient had still birth and caesarean section for failed induction of labour, thus making her a high risk patient. On the 21st day of April, 1999 the said patient went into labour and she was rushed to the medical centre where she was previously registered. She was received by the nurses on duty while the medical officer was absent on the particular date. The nurses while conducting preliminary test on the patient discovered some signs indicating complication and the doctor was immediately notified of the observation on the patient. The doctor arrived the medical centre and asked the nurses questions without personally examining the patient and thereafter left. He did not return until the next day when the patient's condition had deteriorated despite the fact that he was aware of the medical history of the patient. At 11.00am on the following day, the medical practitioner came back and merely wrote a letter of referral for the patient to be taken to the Military Hospital Yaba, when the situation had already deteriorated as she was already bleeding profusely from her vagina. She was later operated upon where it was discovered that the body had died about 24 hours ago and already outside the womb and her uterus was ruptured. It was also found that the said patient would not be able to bear children again as a result of the extensive damage to her womb following the prolonged labour. Consequently, the womb had to be removed. The medical practitioner was arraigned before the General Court Martial and found guilty of negligence. He was demoted from the rank of Navy Captain to Commander of four years seniority from the date of confirmation of the sentence.

Another form of professional negligence which received judicial interpretation is manifestation of incompetence in the assessment of a patient; making an incorrect diagnosis particularly when the clinical features were so glaring that no reasonable skillful practitioner could have failed to notice them and failure to do anything that ought reasonably to have been done under any circumstance for the good of the patient. Thus, in the case of *Godit Milam vs. Medical and Dental Practitioners Investigating Panel & Anor,*[9] the medical practitioner performed caesarean section and Bilateral Tubal Ligation (BTL) operations on a patient when evidence shows that the BTL operation was not justified. In fact, it was argued against him that there was no basis for the BTL he performed on the

[9] (2018) LPELR-CA/L/66A/2008

deceased having discovered that the deceased's ovaries and tubes were normal following the delivery of the baby. Worst still, the doctor embarked on the operation when he knew and/or ought reasonably to know that it will result in loss of blood yet he failed to make any or adequate provision for blood transfusion which caused the death of the patient. As a Registered Medical Practitioner of fifteen years' experience, he claimed to have diagnosed the patient with anaemic heart failure and acute renal (or kidney) failure with background of anaemia whereas the reasonable conclusion according to the medical tribunal is that anaemia was the result of severe haemorrhage resulting from the operation performed by the medical practitioner. The medical practitioner was found negligent in the treatment of the patient and was suspended from practice for six months by the Medical and Dental Practitioners Disciplinary Tribunal.

It is submitted that some members of staff often maliciously commit deliberate negligence in order to run down the business or name of their employer.

It is noteworthy that punitive sanctions can be meted out to a medical practitioner that fails to carry out the duty of care and skill to a patient such sanctions are;

1. **Censure** This is a way of criticizing the medical practitioner severely because he has failed to carryout the rules and regulations the medical ethics of his profession.

   Some medical practitioners never seek the consent of patients to drug administration except in rare cases of a dangerous drug. In fact most times, the medical practitioner, do not seek the content of the patient for drug administration.

   Most times, error in treatment of a patient do occur, which results to negligence from the medical practitioner.

2. **Revocation of license** This takes place when the medical practitioner has exhibited gross negligence in the management of a patient. In the case of *Conrad Murrays vs California,* the medical practitioner (Murray) was found guilty of involuntary manslaughter, i.e. criminal negligence. It was established during the trial that Murray administered a lethal dose of anesthetic proposal on Michael Jackson in his house and left him without medical supervision. The court described Murray's conduct as reckless and he was sentenced to four years imprisonment and the medical council thereafter, revoked his license to practice.

The criminal code[10] states that, if death is caused by administering any stupefying or over-powering things for either of the purposes aforesaid.

Also, a medical practitioner is mandated after registering his hospital to pay his practicing fee to the council. The practicing fee is yearly and renewable after it has expired.

Conviction for default will be serious if a medical practitioner defaults in payment of the practicing fee[11], his hospital will be closed down and his license to practice will be revoked until the practicing fee is paid.

3. **Suspension** Any medical practitioner that carries out any negligent act by failing to observe the duty of care and skill to his patient and this resulted to a harm to his patient, will be liable for breach of duty of care and skill to the patient and if the harm to the patient is serious but not gross misconduct, the medical practitioner will be held, liable and suspended from carrying out his medical duties for three months or six months, depending on the severity of the harm caused to the patient. In the case of *Akinlade vs Medical and Dental Practitioners Disciplinary Tribunal*[12], the Court of Appeal sentenced the medical practitioner to suspension from practice for three months for his negligent act to his patient Olusola Abe, which led to her death.
4. **Probation** A medical practitioner who is under the full-time employment of the Federal, State or Local Government Public Service is excluded from carrying out private medical service.

But if the private practice is of the medical practitioner himself, he is not prohibited to practice under the Act.

Private practice of a public servant medical practitioner is allowed by the government if such practice is rendered free of charge.

It is worthy to note that the President of the Federal Republic of Nigeria exercised his power under Section 1 (5) of the Act and issued the Regulated and other Professions (Private Practice Prohibition) Medical and Dental Profession (exemption) Order, 1992,

which exempted Medical and Dental Practitioners from the Application of the Act and legalized private practice among Medical and Dental Practitioners in Nigeria. In 1993, the purpose of legalizing private practice among legal practitioners in public service was also effected.

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[10] Section 316 (5) of the Criminal Code of Nigeria

[11] Rule 6 of Code of Medical Ethics in Nigeria

[12] (2005)9 NWLR (pt 930) 338 CA

1.4 Tortious Liability

Malpractice is an aspect of negligence but the degree of negligence whether it is criminal or civil is determined by the dereliction of professional duty of the medical practitioner. This means that criminal negligence is higher than the civil liabilities. Although in civil liabilities, a minor offence will attract only warning by the Medical and Dental Practitioners Disciplinary Tribunal while the higher civil liabilities will attract damages that is monetary compensation. Tortious means wrongful,[13] tortious acts means a negligent act or wrongful act which results to tortious liability on the medical practitioner. Tortious liability entails that an incorrect diagnosis may amount to negligence, which results to tortuous liability, if the signs and symptoms are clear that a competent medical practitioner could fail to observe them[14]. Worthy to note is that, if a medical practitioner falls short of his duty of care and skill and injures a patient, the medical practitioner is *ipso facto* liable. But the medical practitioner will be held liable, if he is under a legal duty to take care of his patient. But notwithstanding, if the court finds out that there was no proximity between the medical practitioner and the patient, this will negate the duty of care and skill from the medical practitioner[15].

A breach of duty occurs in medical negligence which results to tortuous liability, when a medical practitioner fails to demonstrate the standard of care and skill... the standard therefore is objective and impersonal.

Code of Medical Ethics[16] states that Medical Practitioners owe a duty of care to their patients in every professional relationship it is required that a practitioner upgrades his skill as best as possible in the light of advancing knowledge in the profession.

What the medical practitioner owe to the patient is:

1. That there must be a duty of care and skill to the patient
2. That he breached this duty of care and skill to the patient
3. That the breach has resulted to a damage on the patient

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[13] Blacks Law Dictionary, 9th Edition p. 1627

[14] Dada, J.A. (2002), Legal Aspect of Medical Practice in Nigeria, 2nd Edition, University of Calabar, p.94

[15] Ibid, Pp 95-98

[16] Rule 28 of the Code of Medical Ethics in Nigeria, 2004

A medical practitioner should exhibit the degree of care and skill that an average medical practitioner of the same circumstance would show, though this will vary according to the skill expected of the medical practitioner.

According to Emiri[17], in determining whether a medical practitioner's conduct amount to negligence, the court will test his conduct on the basis of the skill and care of an average medical practitioner, not the skill and care expected to be exhibited by the most experienced medical practitioner. The reason is that some may be more well educated than others. The degree of care and skill required, also take into account the availability of medical materials and practice location of the medical practitioner. Emiri[18], farther stated that a law court can still consider a mistake which is excusable and the one that is not excusable, while considering causes of action in medical negligence.

Damages constitute an important ingredient which must be established before a Plaintiff can succeed in a claim of Negligence. This means that the patient must have suffered loss or injury as a result of the negligent act of the medical practitioner which can be measured and compensated for in terms of money.[19]

Compensation takes place when it has been proved to the court that the medical practitioner was negligent towards carrying out the duty of care and skill to the patient. The court can award compensation to the patient, if the following special damages are strictly proved by the patient, in the case of *Julius Berger Nigeria Pic* vs *Ogundehin*[20], the Court of Appeal held that:

> special damages are quantifiable pecuniary losses up to the dare of trial. They are assessed separately from the awards since they must be pleaded and proved. The exact amount to be claimed is known as the time of trial. Special damages include medical expenses, nursing fees, drugs, taxi fares to and from hospital and loss of earning during the period.

The court can award only general damages (monetary compensation) if the patient cannot strictly prove the special damages.[21]

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[17]Emiri, F.O. (2012), Medical Law and Ethics in Nigeria.Malthouse Press Limited, Lagos. p283, See also Olopade, 0. (2008) Law and Medical Practice in Nigeria. College Press and Publisher, Ibadan, Nigeria.pl09

[18] Ibid p281, see also Abugu, U. (2001) Another Look at the Reasonable Man's Test in Negligence Unilorin Journal of Private and Property Law, vol. 2(UJPPL).

[19] Dada op. cit. p. 99

[20] (2013) LPELR-20421 (CA)

[21] Ilanseatic International Ltd vs Usang (2002)13 NWLR pt 784

The criteria for assessment of general damages in personal injury cases includes;

1. The bodily pain and suffering that the Plaintiff underwent and that which may occur in future.
2. Whether or not such Plaintiff sustained permanent disability or disfigurement.
3. The loss of earning caused by any such disability or disfigurement.
4. The length of time the Plaintiff spent in the hospital receiving treatment.
5. The age, status and expectation of life of the Plaintiff

In tortious liability, the 'But for Test' is used to prove factual causation in tort adjudication. This is a standard used for judging the negligent act of a medical practitioner that resulted to an injury on the patient. In this test, on act or omission would be a cause of injury if and only if, but for the act, the injury would not have occurred. This means that the act must have been a necessary condition for the occurrence of the injury[22]. The advantage that, this have is that if the plaintiff fails to prove causation, then the plaintiff gets nothing in term of damages. In tortious liability cases, it is a problem for the plaintiff to establish causation by using the But for Test as the plaintiff will usually be suffering from other symptom or disease apart from the disease complained of before receiving the treatment. Other contributory factors may exist, which can equally contribute to the damage and make it impossible for the plaintiff to overcome the evidential burden of this test[23]. In *K.S. Sivanathan vs. The Government of Malaysia*[24], *Gill J,* stated that:

> A plaintiff may claim that the defendant's negligent failure to give him proper treatment has deprived him of an improvement in his medical condition or has allowed him to deteriorate further. The 'But for Test' of causation produces an all or nothing result, unless he can show that proper treatment was more likely than not to have produced an improvement or arrested the deterioration, the plaintiff will be unable to show that the defendant's negligence caused his damage and will recover nothing.

Sometimes, it is impossible to attribute a plaintiff's disease to one specific cause. That is why dispute do occur over technical evidence as to what is the outcome of a particular treatment.

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[22]Abugu, U. (2018) Principles and Practice of Medical Law and Ethic, Pagelink Nig. Ltd, Abuja p310
23 Barnet vs. Chelsea and Kensington Hospital Management Committee (1969)1 QB 428
[24] (2001)3 MU725

In the case of Hotson vs East Berkeshire Area Health Authority, [25] the Plaintiff was negligently treated following traumatic avulsion of the head of the femur and developed a vascular necrosis.
The trial judge concluded that the matter was simply one of quantification of damages and the Court of Appeal upheld the view that the mistreatment had denied the Plaintiff a 25% chance of good recovery. Damages were awarded to the Plaintiff and reduced accordingly. In Nigeria, it is noteworthy that most cases are settled between the patient and medical practitioner before it goes to court. The cases that are already in court are mostly settled out of court.
In tortious liability, the onus is on the patient to prove both the existence of the damage and that it resulted from the medical practitioner's act or omission.

1.5 Contractual Liability

In a contractual obligation, which is well known as principle of confidentiality, a medical practitioner is under this obligation not to reveal any contract between him and his patient and abide by the medical ethics, unless demanded by law due to some reasons. The Hippocratic oath states that whatever, in connection with my professional practice, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret.
A contract takes place where the offeror consents to offer and the offeree consents to accept, together with a consideration, which is money.
Medically, a contractual agreement takes place when a patient goes to a medical practitioner for treatment and consents to the medical practitioner's consent to treat which can be in express or implied terms. The patient accepts to pay the medical practitioner, the payment becomes the consideration. In this case, the medical practitioner becomes liable towards the treatment of the patient. A specific performance is expected from the medical practitioner and failure of the medical practitioner to carry out the specific performance which is duty of care and skill on the patient, will attract breach of contract and contractual liability will lie.
In the contractual obligation of which consent of the patient is paramount[26], failure to obtain consent of the patient by the medical practitioner may lead to recovery of damages in a civil action. A medical practitioner who has

[25] (1987) A.C. 750, (1987)2 All E.R 909
[26] Olapade, O. (2003) Consent and Informed Consent to Medical Treatment and their Effect, Vol. 1, Igbenedion University Law Journal p.2

negligently treated his patient may have broken an express or implied terms in his contract to take reasonable care and skill.

Most Nigerian Laws are received English Laws. Under English Law, [27] the law can imply terms into a contract with the effect that a medical practitioner may be held to have contracted with a patient to achieve a specific result.

In the case of *Tanko* vs. *Okekaru*[28], *Danjuma Tanko,* 14 years old (suing by his next friend K. Ibrahim) had in the course of removing some zinc sheets from his mother's residence, injured his left centre finger. He alleged that Rom Okekaru, without due care and skill negligently amputated the injured finger, an exercise that permanently disfigured and incapacitated him in handling objects. Consequently, Tanko instituted an action against Okekaru claiming for battery resulting from the amputation of his left centre finger. Okekaru denied negligence and further stated in evidence that he sought and obtained the consent of Tanko's aunt, who was the closest relative present at the material time before he amputated Tanko's finger. The Nigerian Supreme Court found that effort was not made to obtain directly the consent of the patient, a rational human being who was 14 years of age at the material time before his finger was amputated. Rather, the defendant medical practitioner claimed to have obtained the consent of the patient's aunt who had given him the go ahead to "carry on with whatsoever treatment necessary. The Supreme Court decided that this did not amount to a valid consent to amputate the patient's left centre finger and awarded the patient the sum of fifty thousand naira (N50,000.00) as general damages for battery only.

It is noteworthy that a contractual negligence of uninformed consent was held against the medical practitioner. In the wider conception of the law of contract, it has been posited that... an action for damages exists for breach of contract, where also the amount claimed is deemed as compensation for harm which the defendant has caused wrongfully.

It is submitted that the medical practitioner owe the patient a contractual obligation (Right in personam) of which a breach of this attracts judicial intervention by way of awarding damages.

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[27]Dieter, G. (1988). International Medical Practice. Law: A Comparative Study of Civil Liability arising from Medical Care (Dordrecht, Tubingen Publisher, p18 – 24).

[28] (2002)15 NWLR (pt. 791) 657 SC

1.6 Vicarious Liability

In corporate liability cases, the hospital authority is vicariously liable for the negligent act or omission of the whole staff due to improper delegation of duties to its members of staff.

In the case of *Abi vs. CBN,*[29] the patient sued the medical practitioner and the hospital for negligently diagnosing, prescribing and administering a drug on him that made him to become deaf. Although, his appeal failed because he could not produce an expert witness (A medical Practitioner) during the court litigation, the patient only pleaded *res ipsa loquitur.*

On 26th day of February 2001, the plaintiff Mr. Abi fell sick and was admitted in the hospital of the 2nd defendant, Abuja clinic, one of the retainer hospitals of the 1st defendant, Central Bank of Nigeria, where the plaintiff was a staff. The plaintiff was examined, interviewed and attended to by Udom, a medical practitioner who is the third defendant. The plaintiffs claim is that Udom, the medical practitioner negligently diagnosed, prescribed and administered on him drugs that made him to become deaf. The plaintiff maintained that he was suffering from Cerebrospinal Meningitis (CSM) and the 2nd and 3rd defendants administered him with a variety of drugs including gentamycin which made him to become permanently deaf. Prior to this development of CSM, the Applicant's file in Abuja Clinic shows that the Applicant had a three day history of fever, neck pain, waist pain and difficulty in hearing and passing of urine and during the cause of treatment, the Applicant developed CSM complications including sight, loss of hearing, incoherent speech and loss of balance. The plaintiff thereafter commenced a suit by writ of summons and statement of claim on 29/07/04 at Federal High Court Abuja, where he claimed

that the 1st defendant is vicariously liable for negligent act of its employed agent Abuja clinic coupled with a plea of *Res Ipsa Loquitur*, an order directed to the defendant to pay the plaintiff five hundred million naira ($4500,000,000.00) as special damages and five hundred million naira ($4500,000,000.00) as general damages. The trial court in a reserved judgment held that "The plaintiff has failed to prove his case and his claims therefore failed and cannot then be entitled to any of these damages claimed. The case is therefore dismissed. I so order" The plaintiff being dissatisfied, appealed to the court of Appeal, stating vicarious liability and *Res Ipsa Loquitur,* while the respondent also cross appealed, stating that Abuja clinic is an independent contractor.

[29] (2012)3 NWLR (pt 1286)1 CA

According to the judge, "in the judgment of the trial court, no statement about *Res Ipsa Loquitur* from the plaintiff nor independent contractor from the defendant was mentioned". The court of Appeal thereby dismissed the two Appeals that is, the Appeal from the Appellant and the cross Appeal from the Respondents.

In the case of *Igbokwe vs. University College Health Management Board*[30] the deceased was admitted into a fourth floor maternity ward of the defendant hospital, where she gave birth to a baby on the 23rd December, 1958, after the birth, she was suspected of being mentally deranged and was put on sedative drugs. A nurse was instructed to keep an eye on her. One two sides of the ward where she was admitted, there was an open veranda about seventy feet from the ground protected by railings four and half feet high. In the morning of the 29th December 1958, the deceased was missing from her bed and was found dead from injuries she received when she fell from the fourth floor. Her dependants claimed damage for her death, contending that the circumstances pointed to negligence on the part of the hospital authority and they relied on Res Ipsa Loquitur. The hospital authority agreed under cross examination that if someone had been specially assigned to watch the deceased, the incident would probably not have occurred. The court held that the plaintiffs action succeeded because the hospital authority had failed to rebut the inference of negligence which arose from the facts. The court hereby, awarded the sum of 250 pounds as general damages. In this case, the doctrine of Res Ipsa Loquitur exists that is, the facts speak for itself which shifts the burden of proof to the defendant, who is the medical practitioner. Unlike in the tortious liability, the plaintiff must prove the three ingredients namely, duty of care and skill to the patient, breach of duty of care and skill and resultant damage in order to succeed in a claim founded in negligence. This means that the burden of proof shifts to the defendants to prove the facts which are within his knowledge. The facts proved must point to the defendant as being the negligent party and there must be the absence of explanation.

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[30] (1961)WRNLR 173. See also *Selfe vs. Ilford and District Hospital Management Committee* (1970) CLY 1852

In Albert Gonzale's case, [31] Abbott Goldberg J. stated that;

> The hospital has a duty to protect its patients from malpractice suits on members of its medical staff when it knows or should have known that malpractice was likely to be committed upon them. Mercy hospital had no actual knowledge of Dr. Nork's propensity to commit malpractice, but it was negligent in not knowing, because it did not have a system of acquiring knowledge... I have reached the conclusion that the hospital is liable... they like every hospital governing board, are corporately responsible for the conduct of their medical staff.

1.7 Conclusion

Liability regime for medical malpractices is a period when a medical practitioner is held liable by the Medical and Dental Practitioners Disciplinary Tribunal and the law courts for any (2011) LPELR SC. 182/2007 malpractices committed. Malpractice such as negligence and professional misconduct and the doctor will be held liable under tortious, contractual, professional, criminal and corporate liabilities.

The law courts on most occasions do not uphold the disciplinary actions carried out by the Medical and Dental Practitioners Disciplinary Tribunal on medical practitioners. It is noteworthy that a case is neither a negligent act nor is it absolutely criminal in nature. It is known as quasi criminal act, it is an unintentional criminal act of a medical practitioner. Note that damages awarded to a patient in contractual liability significantly differ from tortious liability. High courts and medical tribunal have the same jurisdiction as court of first instance in medical cases. Worthy to note that the 'But for Test' which states that an act or omission would be a cause of injury, if and only if but for the act, the injury would not have occurred is a yard stick in determining issues in negligence although other contributory factors may exist which can equally contribute to the damages, thereby making it impossible for the plaintiff to overcome the evidential burden of this test. Corporate liability exist where, the owner of a hospital is vicariously held liable for the Negligent act of its staff. The six As which consist of Alcohol, addition, Association, Abortion, Adultery and

[31] Albert Gonzales, vs John G. Nork and Mercy Hospitals, Superior Court, Sacramento, California, Case No. 228566.

Advertising are some of the serious professional misconducts of a medical practitioner. Nurses and midwives have added important value to medical practice in Nigeria.

From the above analysis, the following findings are made:

i. The basic rationale for medical malpractice suits is not compensation but rather to improve incentives for safety in the presence of asymmetric information between patients and physicians.
ii. There are areas of legislative gap in the area of medical malpractice (e.g. insurance coverage).
iii. There ought to be an elaboration on other risky areas of health such as human cloning, reproductive health, surrogacy, and transplant of human organs.
iv. The Medical and Dental Practitioners Tribunal's composition, operations and methodology requires statutory and institutional overhaul. It is apparent that reported cases of lack of fair hearing and instances of members who did not participate in all sittings of the Tribunal are leading to situations where decisions of the Tribunal are set aside on appeal.

Incorrect diagnosis do occur due to inadequate medical history of the patient by the medical practitioner for example, inability to interpret or identify the patient's symptoms or failure to conduct tests.

Based on the above findings, it is recommended that:

i. Patients should be sensitized to be aware of their rights to sue the medical practitioner in the law court.
ii. The government should enact a law to ensure that people get insurance coverage, in case of event of sickness and treatments in hospitals.
iii. The federal government should extensively enact laws to cover human cloning, reproductive health, surrogacy and transplant of human organs for effective service to patients.
iv. It is expected of the medical practitioner to possess adequate medical experience and apply his medical skills with diligence. This mean that he should know his limits in terms of skill, and should not take on cases which he cannot effectively handle. He should also ensure that the tests must be thorough and careful to the fact stated to enable him to correctly treat the patient.
v. Every medical practitioner is expected to be with another colleague of the same specialty while conducting surgery in an operating theatre that is a

consultant, general practitioner and the senior nursing officer because, as the saying goes, two heads are better than one, also, to examine patients in the consulting room in the presence of a chaperone so as to avoid accusation of rape or indecent assault by the patient.