AN EXAMINATION OF WHETHER DISCHARGING PATIENTS AGAINST MEDICAL ADVICE CONFER LEGAL PROTECTION ON MEDICAL PRACTITIONERS

By

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1.1 INTRODUCTION

The responsibility of a doctor to his patient commences as soon as the doctor undertakes to medically evaluate the patient. And once a doctor undertakes to treat a patient, whether or not there is an agreement a duty of care arises.[1]

Patients are people with medical problems who seek a solution from the health team. The medical evaluation is a process of clinical decision making which follows a logical sequencing pattern of information obtained from the patient's history and physical examination (algorithmic paradigm).

What is regarded as a medical consent is anything from a simple willful nod of the head, verbal or written expression of this. The patient by this, has given to the physician [whom he expects to be knowledgeable (but knows his limits), competent and safe, compassionate and confidential] the permission to reach a diagnosis of his ailment using relevant techniques and administration of remedial measures. This consent is usually given in respect of a minor, mentally retarded and unconscious patient by a responsible adult relative.[2]

Consent is an important feature in modern medical practice and a doctor must never presume the consent of the patient.[3]

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[1] Okoje, E., Lecture on Medical Professional Negligence in Nigeriawww.nigerianlawguru.com accessed on 17.07.2010.

[2] Nwokediuko, S C. & Arodiwe, E.B. Clinical discharge against medical advice in a developing country. Journal of College of Medicine Vol.13(1) 2008 pp 34-38.

[3] Umerah, B.C. (ed) Medical Practice and the Law in Nigeria, Longman Nig. Ltd. Ikeja 1989, p 12

Similarly, the responsibilities of a doctor towards a patient may cease when a patient decides to discontinue with a particular practitioner.
However, in situation of "Discharge Against Medical Advice" (DAMA), the patients or their relations seek hospital discharge when it is not medically indicated. This is an ethical dilemma.

This paper seeks to examine whether use of the term "against medical advice" by medical practitioners confer some form of legal protection should consequences occur to the patient who decides to leave against the advice of his attending physician.

The paper shall study case law in an attempt to discover clear criteria for when "against medical advice" may be protective, partially protective or offer non protection at all. However the paper is limited by dearth of decided cases on "discharge against medical advice" in Nigeria (to the best of our knowledge) which is especially common in paediatric practice.[4]

As a result, our references shall only be in relation to cases decided at other comparative jurisdictions, even though the decisions of courts in one country are not binding for another but are often of persuasive authority.[5]

1.2 REASONS FOR DISCHARGE AGAINST MEDICAL ADVICE

In one of the series of proceedings of the Hospital clinical meetings in ABUTH, Zaria in 2009, the following have been identified as some of the reasons why patients (or their relations) decide to leave against medical advice.

i. Economic reasons - poverty leading to inability to cope with medical expenses;
ii. Illiteracy and preference for alternative therapies. This is especially common in orthopaedic practice;
iii. Terminal illness;
iv. Lack of appropriate facilities for diagnosis and therapy.

[4] Adesuyi, et. al. Diaspora Medicine, OAU, Press Ltd., Ile-Ife, Nigeria, 2003, p.93.
[5] By virtue of the Independence Act 1960 for example, decisions of British Courts are no longer binding on Nigerian Courts as from 1st October, 1960.

This agrees with a study in Ilorin[6] where the clinical condition warranting DAMA are Trauma 97.2% (51% being long bone trauma), alternative care 43.6% and financial constraints accounting for 29% of the discharges.
Be that as it may, we shall now proceed to examine the legal implications of negligence in the practice of the medical profession.

1.3 MEDICAL NEGLIGENCE

The criminal and penal codes which apply in the southern and Northern states of Nigeria respectively, contain elaborate provisions under which cases of medical negligence can be prosecuted in relation to the culpability of offenders. Responsibility for medical negligence can also arise civilly. While the main purpose of criminal prosecution is to punish offenders through imprisonment or fine that of civil suit is to pay monetary compensation to the person harmed.[7]

This segment of the paper shall examine the civil and criminal aspect of medical negligence and the implications arising there from. However, it is pertinent at this juncture to ask the question – what is negligence? A person is said to be negligent when he omits to do something which a reasonable man would do when he is guided by the factors which ordinarily regulate human conduct or when he does something which a prudent and reasonable man would not do.[8] Negligence can also be defined as the breach of a legal duty to take care which leads to damage.[9] Medical Negligence is therefore the failure on the part of the medical practitioner to exercise reasonable degree of skills and care in the treatment of a patient.

1.3.1 Civil Liability

Liability for medical negligence may arise in contract or in tort, while the duty in contract arises from the agreement between the parties that in tort is independent of agreement and imposed upon the parties by law.[10]

The relationship which exists between physicians and their patients can be said to be contractual even though the agreement is not usually expressed in

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[6] Nasir, A. and Babalola, O. "Clinical Spectrum of Discharge Against Medical Advice in a Developing Country" Indian Journal of Surgery Vol.70, No.2, April, 2001, pp.68-72.
[7] Olopade, O., Law and Medical Practice in Nigeria College Press and Publication Ltd., Ibadan, 2008, p 106.
[8] Aliyu v. Aturu (1999) 7 NWLR pt 612, p.536.
[9] See Okin Biscuit Ltd v. Oshe (2004) FWLR p.188.
[10] Olopade, O. op cit. p 107.

contract term, but is implied from the behavioral attitude of the parties. Thus, if a doctor administers medical treatment to a patient in a negligent manner and causes the patient harm, the patient may bring an action of negligence against the doctor claiming damages for the harm suffered. Thus, a plaintiff must prove the following three conditions in order to succeed in an action of negligence against a doctor:

(i) That the doctor owed the plaintiff a duty to use reasonable care in treating the plaintiff.
(ii) That the doctor failed to exercise such care that is, was in breach of that duty;
(iii) That the plaintiff suffered damage as a result of the breach.[11]

It should be pointed out however, that although the act of the defendant may have caused the harm complained of, nevertheless the law does not hold a person responsible for all the direct consequences of that person's negligent act. The person is liable only for such consequences as a reasonable man would foresee as the natural and probable consequences of the act.

1.3.2 Criminal Liability

The basis of criminal liability of a doctor for the negligent treatment of patient rests on a breach of duty which the doctor owes to the patient. This duty is imposed by law irrespective of any contractual relationship between a doctor and the patient. Section 303 of the criminal code,[12] provides that it is the duty of every person who except in a case of necessity, undertake to administer surgical or medical treatment to any person, or 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 such a person 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.

From the above provisions of Section 303, it is apparent that not only must a doctor who undertakes treatment of some one possess reasonable skill; the doctor must use that skill in the particular case. Conversely, if the doctor is

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[11] Umerah, B.C. op Cit P.123.
[12] Cap C38 Laws of the Federation of Nigeria, 2004.

unskilled, it is no excuse that the best was done if the doctor's best falls short of the required standard of care.[13]

The Penal Code[14] also makes provision on the same issue. Thus, section 49(1) of the penal code states that:
Nothing is an offence by reason of any injury which it may cause or be intended by the doer to cause or is known by the doer to be likely to cause, if it be done without any criminal intention to cause injury and in good faith for the purpose of preventing or avoiding other injury to person or property or of benefiting the person to whom injury is or may be caused provided:

(i) that having regard to all the circumstances of the case, the doing of the thing was reasonable; and
(ii) that where the circumstances so require, the thing is done with reasonable care and skill.

The above provision may be explained thus, if Y a surgeon knowing that a particular operation is likely to cause the death of Z, who suffers from a painful complaint but not intend to cause Z's death and intending in good faith Z' benefit, performs that operation and Z dies in consequence of the operation. If the operation is one which in all the circumstances it was reasonable for Y to perform and it is performed with reasonable care and skill, Y has committed no offence.

Although section 303 of the criminal code appears to be similar to section 49(1) of the penal code yet, the two provisions differ. While Section 303 of the criminal code specifically confers criminal liability on defaulting medical doctors on the one hand however section 49(1) of the penal code on the other is expressed in general terms and exempts persons from liability as long as the thing done resulting to injury was reasonable or that the thing was done with reasonable care and skill. Nevertheless, both provisions of the two codes essentially relate to the basis of criminal liability for negligence.

[13] Umerah, B C op. cit p 122
[14] Cap 83 Laws of Northern Nigeria, 1963.

1.4 CONTRIBUTORY NEGLIGENCE

Contributory negligence is basically negligence of the plaintiff himself which combines with the defendant's negligence in bringing about the injury to the plaintiff.[15] In many cases the plaintiff's negligence will have been a contributing cause of the injury.

The essence of contributory negligence in law is not that the plaintiff's carelessness was necessarily a cause of the injury but rather it contributed to it. Accordingly, for example, it has been held that a motor cyclist who was knocked down by a negligent car driver was contributory negligent in not wearing a crash helmet at the time,[16] since his carelessness is not wearing helmet contributed to his injury or damage, though it could not in any sense be said to have been a cause of the accident. In the words of Denning, L.J.[17] (as he then was)

> *"A person is guilty of contributory negligence if he sought reasonably to have foreseen that, if he did not act as a reasonable prudent man, he might be hurt himself and in his reckonings he must take into account the possibility of others being careless."*

It follows there from that contributory negligence does not involve any breach of duty owed by the plaintiff to the defendant, for it does not necessarily connote activity fraught with undue risk to others, but rather failure on the part of the person injured to take reasonable care of himself in his own interest. The standard of care for his own safety expected of the plaintiff is that of a reasonable prudent man.

1.5 DISCHARGE AGAINST MEDICAL ADVICE

Implicit in the use of the term "against medical advice" is physician's notion that it is some form of disclaimer that automatically exonerates the physicians in the event of an adverse consequence. And since patients are admitted voluntarily to hospitals then 'DAMA' is seen merely as

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[15] Kodilinye, G., and Aluko, O Nigerian Law of Torts Spectrum Books Ltd., Ibadan 1999, pp.84-85.
[16] O'Connel v. Jackson (1973), 1 QB 270
[17] Jones v Livox Quarries Ltd (1952) 2 QB 608, at p.615

withdrawal of the original consent.[18] Thus, does use of the term "against medical advice" by physicians confer some form of legal protection?

It has been noted from the onset that there has not been any reported case decided by Nigerian Courts on the basis of "discharge against medical advice". More so, available statistics on the number of patients discharged against "medical advice in Nigerian Public Hospitals are scanty to the best of our knowledge. Accordingly, it may be justifiable and logical to examine the case laws and the statistics of patients "discharged against medical advice" from other jurisdictions. This is with a view to determine the correct legal position and making a case for its adoption and application in Nigeria.

Available statistics have shown that anywhere from 1 in 65[19] and 1 in 120[20] discharges from General Hospitals in America and Britain are against medical advice. The findings identify the characteristics of patients discharging themselves against medical advice. They are generally younger, male and have emergency admissions, have been more frequently hospitalized, live alone, and have more severe symptoms at discharge than those released in the usual way. O'Hara and colleagues have identified a higher rate of discharge against medical advice in the elderly. Schlauch and his co-workers have suggested that there may be collusion between the patients and medical staff with the agreement that this is an appropriate method of discharge, especially in non critical cases.

The findings further revealed that psychosocial factors involved in the decision of a patient to leave against medical advice include anger overwhelming fear and psychosis. The threat to leave maybe a last effort to communicate feelings.[21] Thus, patients discharged against medical advice might be expected to have more adverse consequences (i.e. exacerbation of illness, death, injury to self or others, although information on this aspect is yet to be established scientifically. Even in the absence of negligence,

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[18] Devitt, P.J. et al "Does Identifying a discharge against medical advice" confer a legal protection?" Journal of Family Practice March 2000, pp.224-227.

[19] O'Hara D., Hart, W. and McDonald I. "Leaving Hospital Against Medical Advice" Journal of Quality Clinical Practice, 1996, Vol.16 pp.157-164.

[20] Schlauch R., Reich, P. and Kelly, M "Leaving Hospital Against Medical Advice" National English Journal of Medicine 1979, Vol.300, pp.322-323.

[21] Albert, H.D. and Kornfeld D.S. "The Threat to Sign out against Medical Advice." Annual International Journal of Medicine 1973, Vol.79, pp.888-889.

adverse medical consequences occur and often lead to medical malpractice litigation. The likelihood of legal action is increased by intense emotion and general fear.

Having considered the characteristics of patients discharging themselves against medical advice and the likely factors which usually lead patients taking such decisions, we shall next consider cases in which issue of against medical advice arose.

1.5.1 Cases on Harm or Injury Occasioned by Contributory Negligence After Discharge

In Weinstock v. Ott,[22] the estate of Nora Ott successfully sued for medical malpractice claiming Dr. Weinstock had breach a duty to refer Ms Ott for diagnostic consultation when he was unable to discover the cause of her disorder. Dr. Weinstock had referred her to a hospital for test, at which time the cause of her 4 years of abdominal problems was determined to be Ischemic bowel disease. After 4 weeks of test her condition deteriorated and she discharged herself against medical advice and return to the care of Dr. Weinstock before a definite diagnosis had been made. Because of her husband's dissatisfaction with her condition, she returned to the hospital, had further surgery in October, and died shortly thereafter. It was Dr. Weinstocck's (the outpatient referring physician) defence that Ms Ott had contributed to her problems by discharging herself from the hospital against medical advice. However, she was found not to have been contributory negligent. The general rule on a patient's contributory negligence states that the patient must exercise that degree of care that an ordinary reasonable person under the same disabilities and infirmities in like circumstance, would exercise.

Whether she acted unreasonably in discharging herself against medical advice was a question of fact for the jury. On appeal, the court held that since she had been ill for 4 years, had been in and out of hospitals, had a plethora of test, and was frustrated from years of unsuccessful test coupled with her extremely poor health, the jury found that Ms Ott did not act unreasonably when she discharged herself from the hospital.

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[22] Weinstock v Ott 44 NE 2d 1227 (1998).

In Suria v. Shiffman[23] the court held that the patients actions in laving the hospital against medical advice did not afford a complete defence in a malpractice case (brought in connection with the administration of Silicone injections to a transsexual male) but would warrant a reduction in damages to the degree that the patients actions increased the extent of the injury.

In Pollicina v. Miseri Cordia Hospital Medical Center and Hospital of the Albert Einstein college of medicine[24] the patient discharged herself against medical advice from the Miseri Cordia Hospital but was immediately admitted to Einstein Hospital. The patient died one week later of pulmonary thrombosis. In this medical malpractice case, the trial court granted motions to dismiss the complaint against Miseri Cordia on the basis that the actions of the Hospital did not lead directly to the damage to the patient. The protective factor was that following her discharge against medical advice, she was admitted to another hospital.

Lastly, in Hawkins v. Brooklyn Caledonian Hospital[25] the patient brought an action against the hospital claiming that the failure of a physician to obtain assistance in inserting a subclarian catheter and to properly insert the catheter, the tip of which broke off inside the patient's body during the procedure, was a departure from good and accepted medical practice. The patient was warned that physical activity could cause the tip of the catheter to migrate, causing his death. He also suffered the painful effect of thrombophlebities and its continued consequences including the use of illicit drugs after a period of sobriety in an attempt at self medication. Mr. Hawkins left the hospital against medical advice, missed 2 scheduled appointments, failed to take his medications and was later readmitted with another bout of phlebitis. He was discharged 2 days later but failed to keep his next clinic appointment.

In this case, although some of the damages claimed were the result of the patient's failure to comply with recommended medical treatment, the court of appeal ruled that the trial court's verdict against the hospital and damages should stand.

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[23] Suria v. Shiffman 486 NYS 2 al, 724 (AD 1st Dept 1985).
[24] Pollicina v Miseri Cordia Hospital Medical Centre 557 NYS 20 902, 158 (AD2d 194 1990).
[25] Hawkins v. Brooklyn Caledonian Hospital, 658 NYS 2d 375, 239 (AD 2d 249 1997).

One common feature of all the cases examined reveals that medical doctors were sued by the plaintiffs in consequences brought about by DAMA while discharging their duties in good faith. These are circumstances which the average Nigerian medical practitioner equally risks being confronted with.

1.5.2 Cases on Psychiatric Discharges

In Kelly v. United States of America and John Shoe[26] the decision of a veterans Affairs Medical centre to release Arnold Schokley against medical advice was challenged. After Schokley was released he stabbed officer Kelly. The court held that there was no reasonable grounds for the treating psychiatrist to seek involuntary commitment of Schokley, and judgment was made in favor of the medical centre.

In Solbrig v. United States of America,[27] the Solbrig family brought an action alleging that the veterans hospital in Milwaukee, Wisconsin, and 2 of its nonpsychiatric physicians should not have released Mr. Solbrig because he was a clear suicidal risk. He died by suicide within hours of his discharge against medical advice. The court found that although Mr. Solbrig had expressed suicidal tendencies in the past, he showed no sign of being a genuine suicidal risk on the morning of his discharge, and the physicians were not found negligent in their treatment of the patient.

1.6 THE USE OF A WAIVER TO EXEMPT LIABILITY

A hospital may not as a condition of allowing a patient to leave against medical advice require the patient to sign a form releasing the hospital from liability for malpractice claims by the patient. In Dedely v. Kings Highway Hospital center,[28] a mother requesting the release of her infant son was required to sign a form by which she assumed "all risks, responsibilities and liabilities, whatsoever" and released "Kings Highway Hospital centre Inc, its physicians, surgeons authorities and employees from all risks, claims, re4sponsibilities whatsoever". The court found this type of form to be contrary to public policy and therefore worthless. It also observed that a hospital's failure to release a patient unless it sought judicial relief, would undoubtedly subject the hospital to actionable act.

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[26] Kelly v. United States of America and John Shoe Civil Action86 – 2864 (U.S Dist Lexis 2201 1987).

[27] Solbrig v. United States of America 92 C8249 14-18 (US Dist Lexis 2201, 1995)

[28] Dedely v. Kings Highway Hospital center 617 NYS 29 445 supp (1994).

1.7 CONCLUSION

Most medical practitioners stand to rely on the defences of the consent where there are allegations against them for medical negligence. However, in the event of an adverse consequence after discharge against medical advice, legal action is possible. The cases cited above illustrate that medical authorities who comply with patients' request to leave by discharging them against medical advice may not be sufficiently protecting themselves from legal action. Liability may still exist for malpractice and also for failure to provide the patient with sufficient information to ensure an informed withholding of consent to hospitalization. The hospital and the doctor have a clear duty to evaluate whether the patient meets involuntary commitment criteria.

On the basis of the cases examined, the following guidelines are hereby recommended for Nigerian Medical doctors faced with a decision to discharge a patient against medical advice;

i. A careful, thorough and well documented examination is the best defence;
ii. The severity of the illness should be assessed as well as the severity of the risk if the patient is discharged.
iii. When a high degree of risk is involved, the medical doctor should engage in a constructive dialogue with the patient about grievances, often this opportunity for communication will be sufficient and the patient can be persuaded to remain in the hospital.
iv. In a lower risk case, it is still good practice for the medical doctor to explore the patients thinking about the discharge.
v. Before discharging a patient against medical advice, the medical doctor should ensure that the patients withholding of consent for the hospitalization is informed with respect to risks, benefits and alternatives
vi. Where the patient meets criteria for involuntary hospitalization under the relevant laws, the patient should be committed.

Accordingly, if the above guidelines are adhered to by our medical practitioners, it is most likely that the risk of adverse consequences and subsequent litigation by aggrieved parties may be reduced or even be avoided in cases of DAMA.