THRESHOLD
ATTORNEYS & SOLICITORS

A CONTEXTUAL ANALYSIS OF MEDICAL NEGLIGENCE: DUTIES AND RESPONSIBILITIES, LIABILITIES, MEDICAL ETHICS AND DEFENSES AVAILABLE TO A MEDICAL PRACTITIONER - A LEGAL PERSPECTIVE (PART 1)

Introduction

In Nigeria, there is an alarming increase of medical negligence, and this is due to lack of available work force and infrastructure in the health sector. Most Nigerians have experienced a terrible state of care by health care providers. These health care providers are generally called medical practitioners and they are qualified and appropriately registered to practice. Currently, there are many reports of harms experienced by patients because of the negligent act of the medical practitioners. An empirical work by a researcher shows that 61.69% of Nigerian patients feel that medical practitioners in Nigeria are arrogant and careless about their conditions and plights. In addition, 33.3% of Nigerian patients indicated that their doctors' treatment had caused them extra injury beyond the ones that took them to the hospital. In spite of this large number of victims, the number of cases recorded or filed, as lawsuits are low. The reasons for low-level of claims include a cultural notion of adverse medical events, poverty, illiteracy, limited option of treatment, reluctant to seek redress against the medical practitioner and most of all ignorance. Against this background, patients must be properly informed of their rights to claim and the possibility of instituting a suit against negligent health providers. Certainly, the quality of care may improve in Nigeria if health care providers are liable for their careless acts.

Medical negligence constitutes an act or omission by a medical practitioner, which falls below the accepted standard of care resulting to injury or death of the patient. Medical negligence is hinged on the tortious principle of negligence as propounded by Lord Atkin in the case of **Donoghue V. Stevenson (1932) AC 562**. The above case established a general duty to take reasonable care to avoid foreseeable injury to another. Therefore, to establish a case of medical negligence, it must be shown that a duty of care was owed; there had been a breach of that duty; and that damage or injury was suffered as a direct result of a breach of the duty owed. In medical negligence and going by the definition above, medical practitioners who undertake the care and treatment of patients owe a duty of care to such patients.

info@threshold-attorneys.com
www.threshold-attorneys.com
Threshold Attorneys & Solicitors

In medical practice, the standard of care required is usually contained in the rules of professional ethics for medical practitioners. In Nigeria, the Medical and Dental Council of Nigeria set the standard of care. Other medical bodies including the Nigerian Medical Association, the Medical and Dental Consultants Association of Nigeria also have principles or ethics guiding their members with disciplinary measures in place to ensure compliance.

The purpose of this article is to present a review of legal basics as they affect medical practice.

Concept of Medical Negligence

Medical negligence may be defined as- "breach of duty by a health care provider to his patient to exercise reasonable care or skill resulting in some bodily, mental or financial disability". These health care providers include doctors, nurses, physicians, dentist, pharmacists, surgeons, pediatricians, radiologists, ophthalmologists and a host of others.

Medical Negligence occurs when a medical practitioner chooses an inappropriate method of care or improperly executes an appropriate method of care. The Rules of Professional Conduct for Medical and Dental Practitioners also known as the code of Medical Ethics have provided instances that would amount to professional negligence. These include failure to attend promptly to a patient requiring urgent attention when the practitioner was in a position to do so; manifestation of incompetence in the assessment of a patient; making an incorrect diagnosis particularly when the clinical features were so glaring that no reasonable skilful practitioner could have failed to notice them; failure to advise, or proffering wrong advice to, a patient on the risk involved in a particular operation or course of treatment, especially if such an operation or course of treatment is likely to result in serious side effects like deformity or loss of organ; failure to obtain the consent of the patient (informed or otherwise) before proceeding on any surgical procedure or course of treatment, when such a consent was necessary; making a mistake in treatment e.g. amputation of the wrong limb, inadvertent termination of a pregnancy, prescribing the wrong drug in error for a correctly diagnosed ailment.

Other instances include failure to refer or transfer a patient in good time when such a referral or transfer was necessary; failure to do anything that ought reasonably to have been done under any circumstance for the good of the patient; failure to see a patient as often as his medical condition warrants or to make proper notes of the practitioner's observations and prescribed treatment during such visits or to communicate with the patient or his relation as may be necessary with regards to any developments, progress or prognosis in the patient's condition.

info@threshold-attorneys.com
www.threshold-attorneys.com
Threshold Attorneys & Solicitors

Medical Errors V. Medical Negligence

There seems to be a very thin line between acts that constitute medical negligence and medical errors. A medical error is a commission or an omission with potentially negative consequences to the patient that would have been judged wrong by skilled and knowledgeable peers at the time it occurred, independent of whether there were any negative consequences. Acts that constitute medical errors may or may not give rise to a claim in medical negligence. Under the extant principles of negligence, not all medical errors and malpractices will qualify as an act of negligence. For instance, a medical error may not give rise to any injury or damages and thus, a claim of negligence hinged solely on such an act is unlikely to succeed. Such an act may however give rise to a disciplinary action against such medical practitioner by the Medical and Dental practitioners' Disciplinary Committee hinged on a breach of medical ethics.

Options available to a patient who is unable to establish negligence

It is thus important to discuss the alternative options available to a patient who is unable to establish negligence or a patient who is a victim of medical wrong or error. These options includes;

Breach of Contract: A patient who has suffered some form of damage or injury in the course of treatment may bring an action for breach of contract. This may be a viable option especially in cases where negligence cannot be proved.

There is an implied existence of a contract in cases where a patient submits himself for treatment. This contract requires the doctor to exercise reasonable skill and care in the treatment of patients. The rationale for this as seen in most breach of contract cases is that the medical practitioner is made to put the patient in the position he would have been if treatment were properly performed.

In other words, a claim for damages will lie where the breach of the medical practitioners' contract has caused the patient to incur some extra costs. To succeed in an action for breach of contract unlike in negligence cases, the patient must prove the existence of a doctor-patient relationship, breach of the implied /express term of the contract, and injury arising from or in the course of treatment.

Fiduciary relationship: Under the rules of equity, a claim may also be hinged on the recognition of a doctor-patient relationship as one, which imposes a fiduciary duty on the medical practitioner. A fiduciary duty to protect the patients' interest may be imposed on the medical practitioner in favour of the patient. This was successfully done in **Norbery V. Wynrib (1992) 2 SCR 226** where the court upheld this view to uphold and defend the patient's fundamental and personal interest. There are also cases where the patient suffers damages or injury but has no valid claim against the medical practitioner.

info@threshold-attorneys.com
www.threshold-attorneys.com
Threshold Attorneys & Solicitors

The fiducial relationship between the patient and medical practional will arise where the patient has given informed consent or where the medical practitioner acted based on compulsion to save the life of the patient. An apt example will be the removal of a patient's uterus, which refuses to contract during a caesarean section operation. The medical practitioner's action is unlikely to amount to negligence especially in circumstances where his actions were in good faith and in the best interest of the patient.

Option to sue for breach of human rights: Liability for medical error or malpractice may also validly arise as a breach of a patient's human right. The relevant basic human rights of a patient must be borne in mind and safely guarded, in the course of their treatment by medical practitioners. The patient's autonomy should also not be disregarded by attending physicians. The right of the patient to make final and conclusive decision about his medical care is well recognized under the principle of patient's autonomy, and also well enshrined in the human rights of persons. The right to personal liberty and self-determination may also be implied in some medical cases to buttress autonomy. The use of a right-based approach to deal with issues in medical practice is not to "play the blame game" or to punish erring individuals but primarily to form a basis for practical accountability on the part of government and health care providers in the provision of health care services to citizens. This will result in safe, functional and effective health care systems.

The right to health has been widely interpreted to include the right to freely make decisions on issues pertaining to one's health and to have access to information on one's health issues and available treatment options. Failure to provide information on all available treatment options may thus give rise to liability for negligence and breach of the patients' right to health. A duty is owed by the medical practitioner to inform a patient for instance of the new knowledge of risks of products. The 2014 National Health Act in Nigeria contains provisions that emphasize the right of a patient to be informed of his health status, treatment options available, the benefits, risks, costs and consequences of such options. The right to privacy has been held by the courts to include the right of a mature adult to refuse treatment that may prolong his life even though such refusal may seem unwise, foolish or ridiculous to others.

Standard of Care and Breach of Duty of Care

Usually, the standard used in cases of Negligence is that of the 'reasonable man'- that is, that of an ordinary person placed in the same circumstances. In terms of medical negligence however, the focus is on the standard of professional duty expected of a comparable medical practitioner. The argument has been raised that the standard expected of a young medical officer should not be the same standard expected of a Consultant. The standard expected of a learner for instance is different from that required of a professional driver.

info@threshold-attorneys.com
www.threshold-attorneys.com
Threshold Attorneys & Solicitors

As such, the Consultant ought to be a specialist in a chosen field and hence, the degree of care expected of him should thus, be higher than that of a non-specialist and this should not be overlooked in determining liability. An exception may however arise in cases where a junior doctor is undertaking provision of specialist services; the standard that will be required in such circumstances may be that of a specialist whilst also not overlooking the liability of the hospital to employ the services of qualified specialists to provide specialist care and needed supervision, when necessary. In any event, the court will be in the position to consider the peculiar circumstances of each case.

Mistake in diagnosis will also not amount to negligence if the required standard of care has been duly observed. In cases where there is some form of doubt on the part of the medical practitioner as to specific diagnosis to make, such a person ought to make a referral to a specialist, failure to do so may however amount to negligence. The standard of care required from alternative medical practitioners appears to be lenient especially where the act is not such that will give rise to liability for criminal negligence. In **Shakoor V. Situ, (2000) 4 ER 181**, the court held that an alternative medical practitioner could not be judged by standard of an orthodox medical practitioner. The rationale for this is that the alternative medical practitioner has not by his practice held out himself as professing the art of medicine in the orthodox sense and as such, the standard required of him is that which is prevalent in the art of alternative medical practice.

A breach of duty is established where a medical practitioner's actions has failed to meet an appropriate professional standard. The determination of appropriate standard is not fixed; it may be subject to certain facts. The burden is on the claimant to show that no reasonable doctor acting in the same circumstances would have acted in the way the defendant acted. The fact that the culpability of a medical practitioner is largely dependent on the expert evidence of a colleague has been largely criticised on the grounds that the approach seems to be in favour of the medical profession over and above the patient and hence, support from colleagues arguably makes it easy to escape liability for negligence. While this seems like a possibility, the fact that judges have the prerogative to determine the weight to attach to evidence adduced in a suit cannot be overlooked. In essence, where evidence given appears tainted, the judge has a responsibility to disregard such evidence.

This was evident in the court's decision in **Hucks V Cole (1993) 4 MED LR 393** where it rightly held that 'the court must be vigilant to see whether the reasons given for putting a patient at risk are valid or whether they stem from a residual adherence to out of date ideas'. In the same vein, the court in **Bolitho V. City and Hackney Health Authority (1997) 4 ALL ER 771** held the view that negligence can be successfully proved even in cases where medical opinion suggests otherwise. The court emphasized the need for the judge to consider evidence adduced and decide whether the action unnecessarily puts patients at risk.

info@threshold-attorneys.com
www.threshold-attorneys.com
Threshold Attorneys & Solicitors

In establishing whether a breach has occurred, the courts can also rely on written guidelines and rules of medical ethics to ascertain standard practices.

Issues in Causation

The fact that the patient's injury was caused by the medical practitioner is crucial to establish negligence. Not only should the injury be caused by the medical practitioner, the injury must be a direct and not a remote consequence of the medical practitional's action. Hence, Lord Denning in **MIV & Ors V. London Borough of Newham (2018) EWHC 3298** rightly noted that causation is a question of fact and not law. This is especially relevant in circumstances where the patient would have died or inevitably sustained injury irrespective of the medical practitioner's negligence. Causation cannot be based on assumptions especially in cases of medical negligence and hence, must be proved or at the minimum, show that the patient's injury was caused substantially by the medical practitioner's actions.

In **Barnett V. Chelsea and Kessington Hospital Management Committee (1968) 2 WLR 422** a medical practitioner failed to attend to some patients who presented themselves at his clinic which resulted in the death of one of the patients before morning, the court held that the medical practitioner did not cause the death of the said patient. This was particularly because there was no known cure for the patient's ailment and the patient would in any event had died even if he was attended to. The issue of causation will also be required to be settled in cases where there are alternative possible causes of death or injury. Proof that the medical practitioner's negligence caused the injury or death cannot be dispensed with in such cases.

The medical practitioner's ability to reasonably foresee damage or injury is also crucial in proving causation and establishing negligence.

The Principle of Res Ipsa Loquitur

A patient in a civil case of negligence can make a plea of res ipsa loquitur- meaning 'the fact speaks for itself'. This is an exception to the requirement of proof in certain cases. The plea of res ipsa is to the effect that the patient's situation is deemed to indicate that it was clearly a consequence of the medical practitioner's negligence. As such, the burden shifts to the medical practitioner to rebut the presumption of negligence against him by showing that the patient's situation could have been or was caused by other factors. The court is usually reluctant to extend res ipsa loquitur doctrine to cases of medical negligence. This is particularly because of the nature of the human system and medical practice. It may be easier to make such a plea in cases where things are purely 'physical' and can be glaring enough to see. However, by the nature of medical cases, it is not usually very easy to conclusively plea res ipsa loquitur. In **O'Malley-Williams V. Board of Governors of National Hospital for Nervous Diseases, (1975) 1 BMJ 635**

info@threshold-attorneys.com
www.threshold-attorneys.com
Threshold Attorneys & Solicitors

the plea of res ipsa failed because the injury being complained of was a well-recognised consequence of the procedure that was carried out. Be that as it may, the doctrine of res ipsa may suffice in some exceptional medical negligence cases, to shift the burden of proof from the patient, to the medical practitioner.

Hospital Management Liability

Apart from the liability of medical practitioners in their individual capacities, a hospital may also be liable for negligence. This is especially because hospitals are no longer being regarded solely as 'venues for treatment' but as 'providers of treatment'. This development has given rise to the liability of hospitals either directly or vicariously for acts of negligence. Direct liability for negligence will arise where a hospital has failed to provide an environment and facilities that will facilitate safe treatment of patients. For example, this will arise where equipment, which are expected to be available are not available or are not functional leading to harm, injury or death of patients. Examples include: a non-functional ambulance, unhygienic conditions, non-maintenance of medical records, and transmission of infections, amongst others. Vicarious liability on the other hand will arise where the hospital is being held liable for acts, omissions and failure of its staff, in the discharge of their responsibilities in the hospital. This view was well expounded by Lord Denning in the 1951 case of **Cassidy V. Minister of Health (1951) 2 KB 343.**

A senior medical practitioner may also be held vicariously liable for the actions or omissions of a junior or any member of the medical team that he leads or who is under his supervision and control.

Discharge against medical advice (DAMA)

The basis for legally administering treatment on a patient is hinged on the fact that the patient whether expressly or impliedly gives his consent. In law, treatment is not to be administered without consent and it is not sufficient excuse that it was done for the benefit of the patient. Discharge against medical advice (DAMA) is a recognized phenomenon in hospitals with potential medico-legal implications on the hospital authority and medical staff. Both the Professionalism Charter and the law recognize that patients are mature individuals who have the right to take a DAMA, for which the attending physician may incur liabilities where he opposes without reasonable justification. In the exercise of such rights however, medical staff must be wary of avoiding deficiencies and must put in place proper procedures and documentation of cases where the patients insist on DAMA. Lawsuits related to discharges seem more common among those discharged against medical advice. Well-executed DAMA forms have been found to protect physicians against litigation and indeed, will be a useful and compelling piece of evidence to help establish a defence for the physician from any liability in any civil suit, which may be instituted against him. Prescribed procedure is that the attending physician should administer DAMA.

info@threshold-attorneys.com
www.threshold-attorneys.com
Threshold Attorneys & Solicitors

Indeed, if possible, because of the sensitive nature of the process, the most senior doctor should administer the document. In some cases, where the patient or the family feel the closeness and empathy of the experienced physician, the decision to DAMA may be reversed.

The physician is expected to assess the DAMA form for adequacy and proper filling and failure to do so may be fatal where defence in an action on negligence is hinged on DAMA. In situations where the patient refuses to sign the DAMA form, the content should be read out aloud and patient's refusal to sign documented; the fact that the patient was made aware of the risks of leaving should also be documented. Inability to properly administer the DAMA form as part of the discharge process is equivalent to an act of negligence with legal consequences. Indeed, the need for the patient to be well informed prior to signing the form cannot be over-emphasized and thus, the signing of the DAMA form should only be a confirmation that a detailed conversation, which had helped the patient come to the decision to seek DAMA has taken place between the patient and the physician. Until that is done, the patient cannot be said to have enjoyed his full autonomy and the medical personnel may be culpable in a law court for infringement of the patient's fundamental human rights and more specifically, liability for negligence.

Criminal Negligence

Apart from civil liabilities, which have been our focus, so far, a medical practitioners' action may also result in commission of a crime giving rise to criminal liability. Liability may arise for instance for criminal assault or for causing grievous bodily harm. Hence, where in the course of treatment, and due to some form of negligence on the part of the medical practitioner, a patient suffers some gross or extreme harm or death, showing disregard for life and safety, liability will arise under criminal negligence. This view was given expression by the Privy Council in the Nigerian case of **R. V. Akerele (1941) 8 WACA 56** where the court held that the degree of negligence required in criminal cases must go beyond that for civil liability and it must be shown that there has been 'such disregard for life and safety of others' to amount to manslaughter. This is in tandem with the rule of evidence relating to standard of 'proof beyond reasonable doubt' for criminal cases.

The view has been expressed that liability for criminal negligence is limited to prosecution for manslaughter. In Nigeria however, it appears based on the provision of Section 343 of the Nigerian Criminal code, that liability will arise in criminal negligence for acts other than manslaughter. Section 343 is to the effect that any person who gives medicine or medical or surgical treatment in a rash or negligent manner as to endanger life or likely to cause harm to a person shall be guilty of a misdemeanor. As such, under Nigerian criminal law system, liability will arise even where life has not been lost but endangered, in the course of treatment. Also, Section 303 of the Nigerian Criminal Code requires that persons who undertake to administer surgical

info@threshold-attorneys.com
www.threshold-attorneys.com
Threshold Attorneys & Solicitors

or medical treatment should possess reasonable skill and use reasonable care in acting except in cases of necessity. This can on the face of it be interpreted to accommodate or recognize persons other than qualified medical practitioners for instance, quacks, to carry out surgical and medical treatment provided they use reasonable skill and care. A second look at the provision will however reveal that the requirement for possession of reasonable skill and use of reasonable care is to be read conjunctively and not in the alternative. Thus, the view has been expressed by some that the test for judging responsibility is not a person's qualification or skill but a person's conduct considered negligent. Thus, the decision reached by the court in the case of **R V. Lawanta (1961) WNLR 133. 45** where the defendant was acquitted on a charge of manslaughter because the court found that although unqualified, he exhibited the proper degree of skill by sterilizing equipment used is considered questionable, in view of the express provision of Section 303. Sterilizing of equipment does not suffice to establish requisite skill in handling treatment involving human life. The fact that the accused was not qualified immediately suggests that he could not have possessed the reasonable skill required under section 303.

It must be noted however that skills do not only involve possession of qualifications; it may be a product of years of experience which ought not to be assumed or dispensed with or substituted with use of reasonable care. A locally trained mid-wife who has taken multiple deliveries may be able to exhibit reasonable skill in taking delivery.

However, it is our submission that the issue of possession of reasonable skill especially for informally trained persons should be one to be proved sufficiently and undoubtedly by careful consideration of the facts and circumstances of each case, before a decision is reached. This will be in recognition of the sanctity of human life and the need to protect same. Happily, the court in **R V. Ozegbe** was stricter in construing the provision of section 303 and the defendant was convicted for manslaughter, as he had no proper knowledge of the surgery, which he carried out. The view has been expressed that a clear distinction should be made between cases of recklessness and cases of criminal negligence arising from sheer ignorance or incompetence.

Duty of the Medical Practitioner to the Patient

In the absence of medical emergencies and any incapacity on the part of the patient, a medical practitioner is duty bound to do the following;

To Carry out a Proper Diagnosis: A doctor must do proper diagnosis before undertaking any form of medical treatment so as to ascertain the true status of his patient and to help him determine the nature of the sickness. In order to achieve this, the medical practitioner may need to carry out some preliminary tests, e.g. Blood or Urine Tests, Scan and X-rays where the need arises. This exercise will enable the medical practitioner to take informed decisions so as to avoid situations such as that in **De Freville v. Dill** where the medical practitioner carelessly certified a man as being of unsound mind.

info@threshold-attorneys.com
www.threshold-attorneys.com
Threshold Attorneys & Solicitors

To give Proper Treatment/Counselling: In accordance with best practices, the medical practitioner is expected to treat his patient with diligence and to counsel him as to the side effects of such treatment. He is not to hold back any information from the patient in relation to the said treatment. Where the patient was informed of the type of treatment but the medical practitioner failed to give sufficient details of the risks or side effects involved, the patient would only have a remedy in Negligence. The death of Mrs. Stella Obasanjo, former 1st Lady of the Federal Republic of Nigeria (1998 - 2005) is a case in point. She went for liposuction in a Spanish Clinic and died from post-surgery complications. A tribunal in Spain suspended the doctor from Medical Practice for three (3) years and was told to pay the sum of £120,000 as damages to the son of the deceased. It is in the discharge of these duties that medical practitioners have faced major challenges, which brings one to the issue of ethics in the practice of Medicine.

The duty to treat patients include the duty to prescribe the right medication, tell patients about the advantages, disadvantages, risks and alternatives regarding a proposed treatment or operation, and provide adequate follow-up to the patient within a reasonable amount of time.

Informing the Patient: The extent of the duty to provide information depends on the circumstances and the patient in question. However, doctors must give their patients all the information they need to make free and informed decisions. For example, doctors must tell their patients about the diagnosis, nature, goal and seriousness of the treatment, risks of the treatment, amongst others. The doctor's duty to provide information also includes answering patients' questions.

The doctor must explain the chances of success and the risk of failure of the suggested treatment, keeping in mind the patient's specific condition. The doctor must also inform their patients about the possible negative effects of a treatment. However, it is impossible for a doctor to talk about all the possible risks; doctors must tell their patients about the foreseeable risks, in other words, the risks that are most likely to occur.

Obtaining the Patient's Free and Informed Consent: The reason behind the duty of doctors to provide information to patients is to give patients all the information they need to make free and informed decisions with full knowledge of the facts about the treatment and care offered. When a patient agrees to treatment or care, this is called consent. The duty to get the consent of patients is a continuous process. This is why patients must be kept informed about any new information about their states of health and the treatments they are receiving.

Respecting Confidentiality: Doctors have a duty to respect their patients' confidentiality. This duty covers both the information patients tell their doctors and any facts doctors discover about their patients as part of the doctor-patient relationship. Confidentiality belongs to the patient, not the doctor. Doctors cannot reveal what their patients tell them, unless their patients waive the confidentiality of the information or consent to it.

info@threshold-attorneys.com
www.threshold-attorneys.com

THRESHOLD
ATTORNEYS & SOLICITORS

Author

Miracle Akusobi, Esq
Managing Partner
miracle.akusobi@threshold-attorneys.com

Contributor

Chioma Ugwu
Partner
c.ugwu@threshold-attorneys.com

Contributor

Imaobong Jackson
Senior Associate
I.jackson@threshold-attorneys.com

Contributor

Gift Eze
Associate
g.eze@threshold-attorneys.com