Medical Negligence in Nigeria: A Critical Analysis

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Abstract

Medical practice encompasses a variety of healthcare practice evolved to maintain and restore health by prevention and treatment of illness in human beings. The basic understanding of prehistoric medical practice is from the study of ancient pictograms that show medical practice procedure, as well as the surgical tools uncovered from anthropological sites of ancient societies while giving answers to whether doctors work within the existing framework guarding their medical practice and the ways of proving negligence against such erring medical practitioners, the difficulty in proving it and the need highlight whether the Fundamental Rights (Enforcement Procedure) Rules 2009 is reliable in securing a redress in cases of medical negligence other than under tortuous liability, likewise the challenges or difficulties encountered in proving same through tortuous liability. The aim of this study is to establish the origin of medical negligence and to outline the frameworks within which the medical doctors operate and negligence generally as regards medical practice and ways of proving negligence against medical doctors. It goes further to examine the involvement of medical practitioner in medical negligence and the scope of this work is limited to Doctors in Nigeria. This work recommends that proving medical negligence by way of enforcement of fundamental rights is a way forward through the Fundamental Rights (Enforcement Procedure) Rules 2009 and adopted the doctrinal, descriptive and analytical form of research because the study describes and analyses the state of the law in Nigeria as it relates to the area of focus in this work. In conclusion, a combination of punitive measures and infrastructural improvement of our country's healthcare system will provide a holistic response to the prevalence of medical malpractice in Nigeria.

Keywords: medicine, negligence, medical practice, duty of care

1. Introduction

Negligence is part of the common law tradition. It first showed up as a tort in its own right in a case from 1850 called Brown v. Kendall[1]. In that case the defendant accidentally hit the Plaintiff with a stick when he was using the stick

to try to break up a fight between he and the Plaintiff's dog. The court held that when a defendant injures another unintentionally while doing something lawful, the plaintiff must prove that the defendant was acting without due care in order to recover for his injuries. A century ago Oliver Wendell Holmes, Jr., examined the history of negligence in search of a general theory of tort. He concluded that from the earliest times in England, the basis of tort liability was fault, or the failure to exercise due care[2]. Liability for an injury to another arose whenever the defendant failed to use such care as a prudent man would use under the circumstances[3]. A decade ago Morton J. Horwitz re-examined the history of negligence for same purpose and concluded that negligence was not originally understood as carelessness or fault[4]. Rather, negligence meant neglect or failure fully to perform a pre-existing duty, whether imposed by contract, statute or common law status[5]. Because the defendant was liable for the breach of this duty regardless of the reason for his nonfeasance, Horwitz argues, the original standard of tort liability was not fault but strict liability. He maintains that the fault theory of negligence was not established in tort law until the nineteenth century by judges who sought to create immunities from legal liability and thereby to provide substantial subsidies for those who undertook schemes of economic development[6]. The modern notion of negligence, then, was incorporated into tort law by economically motivated judges for the benefit of businessmen and business enterprises.

1.1 History of Medical Practice

The practice of medicine dates back to time immemorial which is why medical practice is often regarded as a profession of great antiquity. Thus, Ackerknecht[7] notes that the progress of medicine could be traced from grasping attempts of primitive man to fight diseases with magic and stone knives, then to the accomplishments of the great authorities of classical antiquity from Hippocrates to Galen, then to the stagnation of the middle ages and the progress that followed the renaissance of medicine in the sixteenth century in the USA and other developed countries of the world like Germany, France, USSR, Canada etc.

Medical practice has attained sufficient status to the extent that principles of law that are relevant to medical practice can now be examined under the concept of Medical Law. Medical Law can therefore be described as the branch of law dealing with medical practice or medical profession[8]. The functions of medical law therefore relates to identification of issues relating to or regulating the practice of medicine. The essence of medical law or the kind of conduct required of a medical doctor can be traced as far back as the sixth or fifth century B.C. Hippocrates of Kos also known as Hippocrates II, was a Greek Physician of the age of Pericles (Classical Greece) and is considered one of the most outstanding figures in the history of medicine; he is referred to as the

'father of modern medicine'. Hippocrates is commonly portrayed and credited with coining the Hippocratic Oath, still relevant and in use today.[9] While the development of medicine is not a mono-cultural affair, the Greeks are generally credited with the origin of modern medicine. This is because in the Modern Greek era, diseases were no longer regarded as a supernatural phenomenon. Rather, it was approached from a rational, naturalistic and scientific point of view.[10]

Hippocrates recognized the need for a code of conduct for doctors of the act of healing and laid down the statement of code of medical ethics known as the oath of Hippocrates. This is a simple and modern declaration which a medical doctor makes and which he must adhere to in practice. It is meant to enable Medical and Dental Practitioners maintain a universally acceptable professional standard of practice as well as meet the demands of the Medical and Dental Council of Nigeria with regards to ethics of professional practice.[11] Ever since, medical practice has witnessed systematic and considerable growth and it has, for a very long time, been carefully regulated by statutes. To ensure professional competence, formal training in approved institutions is now a sine qua non for persons seeking to be admitted into the medical profession. Thus, before the advent of a science oriented and regulated medical practice, the field of medicine was covered by a medicine-man[12] who is said to be a practitioner of healing art and cognate mysteries in a primitive culture, dealing with multifarious and multi dimensional and medical conditions.[13]

The predominant statute regulating medical practice in Nigeria is the Medical and Dental Practitioners Act[14] which provides all the necessary framework for the establishment of the Medical and Dental Council of Nigeria for the purpose of registration of medical doctors and dental surgeons and to provide for a disciplinary tribunal for the discipline of members. Apart from the Medical and Dental Practitioners Act, a medical doctor may be liable criminally and may be asked to pay damages by way of civil remedy where it is discovered that the act or omission of the medical doctor falls below expectation. Indeed in Denloye v Medical Practitioners Disciplinary Committee[15], the court in this case pointed out the fact that where the nature of the act or omission of a medical doctor amount to a crime, the regular law court must determine the criminal aspect of it before liability is determined under the Medical and Dental Practitioners Act with respect to misconduct or infamous conduct. It must be noted that it is the act of registration and not the medical qualification which confers on the practitioner the legal right to practice medicine.

2. What is Negligence?

In *Blythe v. Birmingham Waterworks Co*[16] Anderson, B said:

> *"Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and dreasonable man would not do. It is not for every careless act that a man may be held liable in law."*

It is important to examine what a plaintiff who alleges negligence would have to prove. In *Hazel v. British Transport Commission*,[17] Pearce J said:

> *"The basic rule is that negligence consist in doing something which a reasonable man would not have done in that situation or omitting to do something which a reasonable man would have done in that situation."*

2.1 Medical Negligence

Medical Negligence as a tort is the breach of a legal duty to take care which results in damage undesired by the doctor to the patient. Like every tort, there are certain critical elements that must be established in order to succeed in an action against a negligent doctor.

The ingredients of the tort of medical negligence are not any different from the elements of the tort of negligence generally. Medical negligence also means the failure, on the part of a medical practitioner, to exercise a reasonable degree of skill and care in the treatment of a patient, such that if a doctor treats a patient in a negligent manner causing harm or worsening the existing health condition, the patient can bring an action on negligence against the doctor claiming damages for the harm suffered. In the case of *Dr. Laxman Balkrishna Joshi vs. Dr. Trimbark Babu Godbole and Anr*.[18] and *A.S. Mittal v. State of U. P*[19], it was laid down that when a doctor is consulted by a patient, the doctor owes to his patient certain duties which are: (a) duty of care in deciding whether to undertake the case, (b) duty of care in deciding what treatment to give, and (c) duty of care in the administration of that treatment; see also *First Bank Nigeria Plc. V. Banjo*[20]. A breach of any of the above duties may give a cause of action for negligence and the patient may on that basis recover damages from his doctor. The principle of "duty of care" was first raised in 1883; in the case of *Heaven v. Pender*[21], Brett M. R stated thus,

> *"Whenever one person is placed by circumstances in such a position in regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."*

The principle of duty of care would be half baked with the popular care of *Donoghue v. Stevenson*[22] where Lord Atkin found the general rule of duty of care. In the case, a lady had a drink of ginger beer from a bottle in which was a decomposing snail at the bottom owing to which she took ill. She sued the ginger beer manufacturer for negligence. The court held that the company owed a general duty of care to the woman even though the ginger beer was not directly purchased by the woman but by her friend.

The issue of medical negligence is found on the absence of duty of care owed to a patient. As commented by Michael Jones[23],

> *"Normally, there will be no difficulty in finding a duty of care owed by the doctor to his patent, at least where the claim is in respect of personal injuries, and this is true even where there is a contractual relationship. The practitioner may also owe a duty of care to the patent in respect of pure financial loss. In addition, there are a number of circumstances where a doctor may also owe a duty of care to a third party arising out of the treatment given to the patient, but the incident and extent of such duties is more problematic."*

In *Cassidy v Ministry of Health*[24], Denning LJ stated thus;

> *"In my opinion, authorities who run a hospital, be they local authorities, government boards, or any other corporation, are in law under the self-same duty as the humblest doctor. Whenever they accept a patient for treatment, they must use reasonable care and skill to cure him of the ailment. The hospital authorities cannot, of course, do it by themselves. They must do it by themselves. They have no ears to listen through the stethoscope, and no hand the knife. They must do it by the staff are negligent in giving the treatment they are just as liable for that negligence as is anyone else who employs others to do his duties for him. Is there any possible difference in law, I ask, can there be, between hospital authorities who accept a patient for treatment and railway or shipping authorities who accept a passenger for carriage? None whatever. Once they undertake the task, they come under a duty to use in the doing of it, and that is so whatever they do it for reward or not."*

A duty of care owned to a patent can be described as a legal obligation levied on an individual requiring adherence to a standard of reasonable care while performing any act that will possibly or foreseeable occasion harm to another. Where an injury is suffered owing to a failure to observe the duty of care, there is said to be a breach. Injury could be physical, fiscal or emotional and they are remediable through various remedial alternatives as prescribed by law. Every medical practitioner is expected to take the appropriate steps available to make the right diagnosis, provide treatment and follow-up on their patient's progress. In the case of *Chin Keow V. Government of the Federation of Malaysia &*

Anor[25], a doctor failed to make any inquiry about the medical history of a patient, which led to her death within one hour of being injected with penicillin. The lords of the judicial committee of the Privy Council overturned the decision of the federal high court of Malaysia and noted that the doctor failed in his duty to make an appropriate inquiry before causing the penicillin injection to be given which was the cause of the death of the deceased. Had any inquiry been made, he would have been aware that the deceased had previously suffered an adverse reaction due to an injection, which led to an endorsement of her out-patient card of the warning 'Allergic to Penicillin'. The doctor was held liable for negligence.

Furthermore, in the case of *Ojo v. Gharoro & Ors*,[26] a needle got broken in the abdomen of a patient during a surgery. In that case the appellant had fertility problems which made her approach the University of Benin Teaching Hospital (UBTH), Benin City. The 1st Respondent, a lecturer at the UBTH examined the appellant. The appellant was diagnosed of uterine fibroid, secondary infertility and menorrhagia. She was informed that she had a growth in her uterus and that she needed a surgical operation to enable her become pregnant to which she consented. After the operation the appellant felt pains and it was confirmed through x-ray that there was a broken needle in her abdomen. This necessitated a second operation which succeeded in removing the broken needle. The appellant sued claiming the sum of ₦2,000,000.00 as special and general damages for negligence. The court dismissed the appellant's claim on the ground that the respondents rebutted the presumption of negligence raised by the appellant. The Supreme Court agreed that the surgeons exercised their best surgical skills and as such not negligent.

Dada[27] put it more aptly when he posited that medical negligence, as well as any kind of negligence to be proved, three ingredients must be established by the plaintiff. These are:

i. that the doctor owed a duty of care to the patient

ii. that the doctor was in a breach of that duty; and

iii. that the patient suffered damage as a result of the breach of duty.

The three elements above will be examined. However, that the separation of the three elements is only for convenience of writing. The three elements are however inseparable as will be seen in the course of this work. Also other concepts that are closely knit or are necessary parts of the three elements will be discussed.

3. The Duty and Standard of Care

According to the Black's Law Dictionary,[28] duty of care is a legal relationship arising from a standard of care, the violation of which subjects the actor to liability. This duty of care determines as a matter of policy in all cases of negligence, whether the type of loss incurred/suffered by the plaintiff in the particular manner in which it occurred can ever be actionable. It must be stressed that it is not every careless act that a man may be held responsible in law, nor for every careless act that cause damage. He will only be liable in negligence if he is under a "legal duty" to take care and duty of care as a concept connotes a relationship between two persons because a duty of care concept cannot exist between strangers. A man is said to be entitled to be as negligent as he pleases towards the whole world if he owes no duty to anybody.[29] One cannot judiciously deal with the issue of duty of care without mentioning the case the primacy of the *locus classicus* case of *Donoghue v Stevenson*[30] in the case, the plaintiff's friends bought her a ginger beer in a café, she drank some of it and as she was helping herself to a second glass, the remains of a decomposed snail floated to the top of the glass. The nauseating sight of this and the impurities she already drank resulted in shock and severe gastroenteritis. The case went all the way to the House of Lords on the preliminary issues as to whether a duty of care existed. The question for the House of Lords to decide was: if a company produced a drink and sold it to a distributor, was it under any legal duty to the ultimate purchaser or consumer to ensure reasonable care that article was free from defect likely to cause injury to health?

The question to ask on the "neighbour" and "duty of care" principle is whether between the wrongdoer and the person who has suffered damage there is sufficient relationship of proximity or neighbourhood such that in the reasonable contemplation of the former, carelessness on his part may likely cause damage to the latter in which case a prima facie arises.[31] This principle was also followed in the recent case of *Owigs and Obigs Nig Ltd v Zenith Bank*[32].

3.1 Breach of Duty of Care

The second element of the tort of negligence is the misconduct itself, the defendant's improper act or omission normally referred to as the defendant's breach of duty, this element implies the pre-existence of a standard of proper care to avoid exposing other persons and their property to undue risks or harm, which revert back to duty.[33]

To succeed in action for negligence, the plaintiff must show that the defendant owes him duty of care[34] and that he has suffered damage in consequence of the defendant's breach of duty of care towards him and in law, the proximate and not the remote cause, is what should be considered.[35]

The test for deciding whether there has been a breach of duty of care was laid down by Alderson Baron in *Blyth v Birmingham Water Works & Co*.[36] where he stated that:

Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.[37]

Many examples of duty of care abound. Situations where the required duties have been breached are but are not limited to the following: Failure to Take Medical History, Retention of Objects in Operation Site, Failure to Attend and or Give Prompt Attention, Causing an Injury to a Patient in the Course of Treatment, Error in Treatment, Improper Examination of Patient, Failure to Obtain Consent of the Patient, Incorrect Diagnosis, Failure of Communication, Incompetent Assessment of a Patient, Errors in Treating Patients, Improper Administration of Injection etc.

3.2 Damages Arising from the Breach

The third ingredient of the tort of negligence is that the plaintiff's injury or damages must have been caused by the defendant's breach of duty and must not be too remote a consequence of it.[38] It is not enough that a medical doctor owes a duty of care to the plaintiff and that he breached that duty of care, it is also important to show that there is consequential damage as a result of the breach, otherwise, the claim of the patient will fail. The burden is on the plaintiff. One case that illustrates this principle is the case of *Barnett v Kensington Hospital Management Committee*,[39] where although the doctor was held to have breached his duty of care to the patient, the deceased's widow's action was dismissed because she failed to prove that the death was caused by the doctor's negligence and evidence showed that the deceased would have died in any event, even if he was treated with care.

3.3 Causation and Remoteness of Damages

The need to show causation constitutes the link between the defendant's fault – the breach of duty – and the harm suffered by the plaintiff.[40] Causation is concerned with the physical connection between the defendant's negligence and the plaintiff's damage. This is also known as factual causation. As Jones[41] rightly noted, no matter how gross the defendant's negligence, he is liable if, as a question of fact, his conduct did not cause the damage. Thus, there must be a causal link between the defendant's breach of duty and the damage sustained by the plaintiff.

4. Criminal Negligence

It should be noted that apart from civil liability for negligence, a medical doctor may also be criminally liable for negligence. This legal position was well articulated in the case of *R v Bateman*[42] where it was held that a medical doctor may be criminally liable if his negligence passed beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment. Therefore 'criminal negligence' refers to a gross deviation from the standard of care expected of a reasonable person that is manifest in a failure to protect others from a risk deriving from one's conduct and renders one criminally liable.[43]

The degree of negligence required to establish criminal responsibility is higher than that required for establishing civil liability because gross negligence or recklessness must be proved. Both the Penal Code[44] and Criminal Code[45] provides sanctions for criminal negligence especially on the part of doctors and other health practitioners.

5. Proof of Medical Negligence

The issue of proof is always the key to the success of every action before a court of law. A particular cause of action will fail to be regarded as a cause of action properly so called, if the action is not capable of being proved. Every contested case, civil or criminal, must give rise to at least one contested issue of fact, but many cases of both kinds – civil or criminal – give rise to several issues of fact to be decided between the parties.[46] These issues or disputes of fact can only be resolved by credible evidence from each party seeking to establish a particular fact or claim before the court. The issue of evidence is therefore at the heart of litigation.

5.1 Burden and Standard of Proof

According to Allen,[47] the 'burden of proof' is the obligation which rests on a party in relation to a particular issue of fact in a civil or criminal case, and which must be 'discharged' or 'satisfied', if that party is to win on the issue in question.

Burden of proof is of two-folds, viz:

a) The first is the liability of a plaintiff to establish and prove the entire or reasonable portion of his case before a court of law that can give judgment in his favour. This is always constantly on the plaintiff.

b) The other type is related to particular facts or issues which a party claims exist. It is this burden of proof that oscillates from one party to the other.

While the first type of burden of proof is called legal burden of establishing a case, the second one is called evidential burden.[48]

Generally, the Evidence Act 2011 makes copious provisions on the burden of proof in cases. It provides in Section 132 that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The Act further provides that whoever desires any court to give judgment as to legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist,[49] and that when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Also, Section 134 of the Evidence Act further provides that the standard of proof in civil cases shall be discharged on the balance of probabilities in all civil proceedings. It follows from the above, that in a medical negligence suit, it is for the patient-complainant to establish his claim against the medical doctor and not for the doctor to prove that he acted with sufficient care and skill. If the initial burden of negligence is discharged by the claimant, it would be for the hospital and the doctor concerned to substantiate their defence that there was no negligence.[50] Oho, J.C.A aptly puts it in the case of *Julius Berger Nig. Plc v. Ugo*,[51] that "in an action for negligence, it is the duty of the plaintiff to prove that which he asserts and not the defendant to disprove it". This was further corroborated by the decision in the case of *Julius Berger Nig. Plc v. Ogendehin.*[52]

5.2 Expert Evidence

The plaintiff in a medical action is ordinarily required to produce, in support of his claim, the testimony of qualified medical experts. This is because the technical aspect of his claim will ordinarily be far beyond competence of the court, whose duty it is to assess the defendant doctor's conduct.[53] The plaintiff must hence, by expert witness, establish the ingredient of breach of duty of care among other ingredients. An expert does this by giving his professional opinion as to the standard expected of a doctor in the circumstance of the defendant and whether the defendant had met this standard. Opinion evidence refers to a witness's belief, thought, inference, or conclusion concerning a fact or facts.[54]

Finally, where a party in a medical negligence action intends to rely on the presumption of *res ipsa loquitur*, the party must specifically plead the doctrine either by specific reference to that maxim or by pleading facts which justify the application of it. This was the holding of the Supreme Court in the case of *Adebisi v, Oke*,[55] where it was held that the trial court did not travel out of the pleading when it relied on the doctrine of *res ipsa loquitur* in holding the

defendant liable despite that the maxim was not specifically mentioned in the plaintiff's statement of claim. The court held that it was sufficient that the said pleading contains facts that support reliance on the doctrine.

Under the provision Section 63 of the Evidence Act, the fact that a person has been convicted of a criminal offence is admissible evidence in civil proceedings of the offence having been committed. The application of this provision has a long history of controversy from its application under the Common Law, the English Civil Evidence Act and under the Nigerian Law of Evidence.

6. Defences to Medical Negligence

Apart from a denial of the actual occurrence of negligence, even when the fact of damage is proved, there are defences which a defendant may raise in negligence action and they are as follows:

a) Negligence:

Often, medical professionals aren't the only ones responsible for an injury. A medical professional who can demonstrate that the injury would not have occurred if the patient had not acted negligently may have a valid defense against a malpractice claim. For instance, suppose a patient fails to disclose key details of their medical history or mixes prescriptions against the doctor's orders. In that case, the doctor is not responsible for any injuries that result. There was an argument about whether the standard of care owed by the defendant and the plaintiff should be the same or a different standard. The common law has treated the standard differently because the failure by a defendant puts others at risk, whereas the failure by the plaintiff impacts on only them. However, the civil liability legislation states that they are the same. This idea has also found support from *Callinan and Heydon JJ* in *Vairy v Wyong Shire Council*, where it was stated that the plaintiff's contributory negligence involves a breach of one's duty to society not to become a burden on it by exposing oneself to risk where, at 483, their Honours said:[56]

"The 'duty' to take reasonable care for his own safety that a plaintiff has is not simply a nakedly self-interested one, but one of enlightened self-interest which should not disregard the burden, by way of social security and other obligations that a civilised and democratic society will assume towards him if he is injured. In short, the duty that he owes is not just to look out for himself, but not to act in a way which may put him at risk, in the knowledge that society may come under obligations of various kinds to him if the risk is realised."

In *Adams by her next friend O'Grady v State of New South Wales*,[57] the Court held that it was entitled to come to a view that the contributory negligence

should be assessed at 100 per cent of the cause of the injury.[58] But this has not happened in medical negligence cases and, considering the expert knowledge involved, it is difficult to imagine such a case.

b) The Good Samaritan Law:

"Good Samaritan" laws protect people who come to the aid of those in medical distress. Physicians, nurses, and other medical experts are often specifically covered by such laws. If a doctor assists someone in an emergency situation, they will be protected from civil liability if anything goes wrong during the rescue. The general rule is that a medical professional who voluntarily helps someone owes that individual the same duty of care and treatment as that of a reasonably competent doctor under similar or the same circumstances.

Legal Framework for Medical Practice

Law exists for the common good of the society. There are many regulatory agencies in Nigeria for the protection of end users of medical products and for the enhancement and preservation of standards. The objectives can be achieved by means of rules and regulations made pursuant to enabling legislation. These existing agencies have the rules of professional ethics guiding practice and discipline of practitioners but only these regulations/rules will be examined namely:

(a) The Constitution of the Federal Republic of Nigeria, 1999 as amended.

(b) The Medical and Dental Practitioners Act, Cap. M8 Laws of the Federation of Nigeria 2004.

(c) The National Health Act 2014

(d) The Criminal Code Act, CAP. C38 Laws of the Federation of Nigeria 2004.

(e) Federal Competition and Consumer Protection Commission Act

(f) Torts Law cap 140, Revised Laws of Anambra State 1991

(g) The Code of Medical Ethics in Nigeria 2004

(h) The Nigeria Medical Association 1960

7.1 The Constitution of the Federal Republic of Nigeria (C.F.R.N.) 1999 as amended.

The Nigerian Constitution is the supreme law of the country and its provisions is binding on every authority and persons.[59] It is the mother law from which all other and legislations flow. It is the grund norm. This position of it makes it imperative that it should be the first to be discussed.

To this end, chapter IV of the constitution recognises absolutely the fundamental rights of all citizens in Nigeria**.** Section 33 of the 1999 Constitution as amended guarantees the right to life. The law is that every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of a sentence of Court in respect of a criminal offence for which he has been found guilty in Nigeria.[60]

7.2 The Medical and Dental Practitioners Act

Medical and Dental Practitioners in Nigeria are regulated by the Medical and Dental Practitioners Act[61] which set up the Medical and Dental Council of Nigeria for the registration of medical and dental practitioners to review and prepare a code of conduct for the regulation of both professions.[62]

The Medical and Dental Practitioners Act has 22 Sections in Succession, which is important to the medical practice in Nigeria

7.3 Federal Competition and Consumer Protection Act 2018

Federal Competition and Consumer Protection Act repealed the Consumer Protection Act, Cap C25, Laws of the Federation of Nigeria 2004. This Act established the Federal Competition and Consumer Protection Commission and Consumer Protection Tribunal for the development and promotion of fair, efficient and competitive markets in the Nigerian economy to facilitate access by all citizens to safe products and secure the protection of rights for all consumers in Nigeria, penalise other restrictive trade and business practices which prevent competition and contribute to the sustainable development of the Nigerian economy.[63]

Federal Competition and Consumer Protection Act have 18 Parts in Succession.

7.4 National Health Act 2014 (NHA)

The National Health Act is the first comprehensive legislation on health in Nigeria which was passed by the Nigerian National Assembly in 2014, and was signed into law by the President Ebele Goodluck Jonathan on 9th December, 2014 which provides a framework for the regulation and provision of national health with the purpose of providing the people living in Nigeria with the best health services within the limits of available resources.[64] The link between the right to health and core components of a health system is dependent on the fact that the right to health does not exist in vacuum but relies on a functional health system for its realization.[65]

The NHA is committed to ensuring availability in sufficient number of functioning public health facilities in Nigeria, as well as complementary goods

and services.[66]

7.5 Criminal Code Act (C.C.A.)

The practice of medicine is also regulated by criminal law system particularly the Penal Code which is Penal Code[67] (Northern States) applicable in the Northern States and the Criminal Code[68] applicable in the Southern States which provides as follows:

a. Section 343 (1) (e) (f) (g):

b. Section 344

c. Section 300

d. Section 305

e. Section 228

f. Section 230

g. Section 303

However, Section 297 of the Criminal Code Act protects from criminal liability, the medical doctor who reasonably performs for the benefit of another, a surgical operation in good faith with reasonable care and skill, having regard to the patient's state at the time and all circumstances of the case.

7.6 Torts Law of Anambra State

Negligence as civil wrong shall consist of breach of a legal duty to take care which results in damage, which may not have been desired or even contemplated by the person committing the breach, to the person to whom the duty is owed.[69] Going by this provision, every person shall have a duty to take reasonable care to avoid any act or omission which he is reasonably expected to foresee as likely to injure persons who are so closely and directly affected by his acts or omissions that he ought reasonably to have them in contemplation as being so affected when he is directing his mind to any such act or omission.[70]

Finally, where a person possesses special skill or holds himself out as possessing such skill, it shall be his duty to exercise such care as a normal skilful member of his trade or profession is reasonably expected to exercise, and where he is alleged to have been negligent in so exercising it, his performance shall be judged in the light of the normal standard reasonably expected of an ordinary person with the requisite skill in a similar profession or business.[71]

7.7 Code of Medical Ethics

The word, ethics is derived from the Greek work ethos which means custom and habits. The word relates to the precepts which should control moral behavior. Ethics is that science of knowledge which deals with the nature and grounds of moral obligations, distinguishing what is right from what is wrong. Just like all professions in Nigeria, medical practitioners and practice are regulated and guided by the Hippocratic Oath and Code of Ethics and no medical practitioner could practice medicine without subscribing to the Hippocratic Oath although the efficacy, status and usefulness of the Hippocratic Oath are suspicious in that it is not subscribed to before a recognized Commissioner for Oaths and contains no sanctions or provisions for enforcement, it is at best a love letter containing so much pious declarations[72].

We also take the liberty to reproduce in extensor the Declaration which is now known as the Physician Oath at the time of being admitted as a member of the medical profession:

"I solemnly pledge myself to consecrate my life to the service of humanity; I will practice my profession with conscience and dignity; the health of my patient will be my consideration; I will respect the secrets which are confided in me; even after the patient had died; I will maintain by all the means in my power, the honour and the noble traditions of the medical profession; my colleagues will be my brothers; I will not permit considerations of religion, nationality, race, party politics or social standing to intervene between my duty and my patient; I will maintain the utmost respect for human life from the time of conception; even under threat. I will not use my medical knowledge contrary to the laws of humanity. I make these promises solemnly, freely and upon my honour."[73]

7.8 The Nigerian Medical Association Constitution 1960

Just like all professions in Nigeria, medical practitioners and practice are equally regulated and guided by the Nigerian Medical Association Constitution of 1960. The said constitution has 28 Articles in succession which is important to the medical practice in Nigeria.

8. Challenges / Impediments to Enforcing of Medical Rights

Litigations against medical doctors for negligence are not common in this country. This is so notwithstanding the fact that very grave consequences may result from the act of the doctor. Why then do we have few cases bordering on medical negligence, unethical practice or incompetence in Nigeria? This question is not only relevant but important in relation to medical practice where a patient may not only lose a limb, tooth or an eye but his life. The reasons for

the paucity of cases against medical doctors are not far-fetched. These reasons which are cultural, social and legal in character can be briefly examined as follows:

a. Cultural Factor,

b. Social Factors,

c. Legal Factors

9. Recommendations

Medical negligence which could be in form of wrong diagnosis, defective treatment and dereliction of required duty of care from medical doctors has continued to increase in Nigeria. It is unfortunate that cases on medical negligence are rare in Nigeria and in a way has contributed to very few judicial pronouncements on the liabilities of medical doctors.[74] One of the major reasons for this situation is the loss of confidence in obtaining justice considering the rigorous procedure of proving medical negligence. This advocacy stems from the fact that there is an existing right to health. Since this is not in doubt, cases of medical negligence should come by way of a special procedure considering its delicate nature. We therefore recommend that proving medical negligence by way of enforcement of fundamental rights is a way forward through the Fundamental Rights (Enforcement Procedure) Rules 2009.

We will briefly discuss the salient procedural innovation in the Fundamental Rights (Enforcement Procedure) Rules 2009 which made it endearing to lawyers. These innovations which ensure the expeditious disposal of fundamental right cases, and medical negligence is one of them, are as follows:

i. One of the notable innovations is that it expanded the scope of legal instruments (which recognize the right to health) that can be relied on or cited in the enforcement of fundamental rights. It is expected that patients whose rights have been violated by medical doctors can seek redress through fundamental rights enforcement under the Rules, as an alternative to civil claims under tort.

ii. The Rule has also dispensed with the burdensome requirement of locus standi which denotes a legal capacity of a person to institute an action. The Rule has expressly mandated the court to proactively pursue enhanced access to justice for all classes of litigants especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated and the unrepresented who appears to the court to be a proper party to be heard will be heard whether or

not the party have been served with any relevant processes and whether or not the party has an interest in the matter.

iii. The Rule has abolished leave as a precondition for enforcement hence an application for the enforcement of right may be made by way of originating and there is no need to serve leave of the court before filing the application for enforcement of fundamental rights in Nigeria.

iv. One of the primary aims of the Fundamental Rights (Enforcement Procedure) Rules 2009 is to expedite the hearing of an application for enforcement of fundamental rights and failure of any proceeding to comply with the requirements as to time, place or form shall be treated as irregularity and not a nullity.

v. In this Rule, limitation of period of time has been dispensed with like an action for negligence must be instituted within 3 years of occurrence of breach of such right or be statute barred but in application for enforcement of fundamental rights shall not be affected by any limitation statute whatsoever.

Therefore, patients who suffer any of the categories of injuries may apply to enforce their rights through the Fundamental Rights (Enforcement Procedure) Rules 2009 instead of tortuous actions in negligence. The advantage of doing this is that it will remove the need to search for medical experts as witnesses which in most cases is difficult to get. It will also ensure that the matter is quickly heard and resolved since it will be battled strictly on evidence and there will be no room for technicalities. Other recommendations include but not limited to the following:

a. Incorporate Medical Law and Ethics in the Curriculum of Prospective Medical Practitioners

b. The Establishment of Health Courts or Medical Malpractice Expert Determination Tribunals

c. Increase Legislative Backing for Healthcare Rights

d. Establish Institutional Checks

e. Nigeria to Adopt A No Fault System

f. Problem of Experts Evidence

g. Documentation of Treatment Given by a Doctor

h. Compulsory Insurance Policy

i. Medical Law as a Course of Study for Lawyers

j. Creating Awareness

k. Amendment of Rules of Professional Conduct

l. Improvement of Healthcare System

10. Conclusion

The aforementioned recommended reform efforts are proffered with the overall aim that Nigeria's healthcare system would be made more efficient. A combination of punitive measures and infrastructural improvement of our country's healthcare system will provide a holistic response to the prevalence of medical malpractice in Nigeria. Indeed medical practitioners are not perfect and the law does not require them to be infallible. It would be absurd and idealistic to impose on them such a herculean standard. Mistakes and some undesirable outcomes are bound to occur. Nonetheless, in order to limit draconian judicial and legislative oversight, the medical profession should endeavour to recognize and accommodate patients' expectations and demands in order for its social contract to function well for quality of healthcare.

It is the responsibility of health regulatory bodies to show more diligence in the delivery of their services and to continue to educate their members on their responsibility in practice. The profession should not be cavalier and lenient in policing itself. Doctors and other healthcare providers must endeavour not to sacrifice ethics and care on the altar of financial gain. The era of greater accountability in medical practice and patient rights has come to stay. It is expected that our courts and legislators will adapt to this shift from protectionism. Medical doctors and healthcare providers will do well to align their practice to suit this emerging trend.

Endnotes

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