



LIABILITY OF INSTITUTIONAL HEALTH CARE PROVIDERS IN NIGERIA AND MEDICAL NEGLIGENCE

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Abstract

Health care system in Nigeria has recorded unimaginable and unsatisfactory performance in quality health care delivery. The desire to promote awareness of medical negligence due to the fact that at some point in life one has fallen victim of medical negligence, but due to ignorance it was swept under the carpet. This work looked at medical negligence as it relates to health care providers which is not only limited to doctors, but also extends to nurses, laboratory scientist, laboratory technicians and other paramedics. It identified the duties of health care providers to patients as well as the duties of patients towards health care providers, the liabilities of health care providers in medical negligence and to raise awareness on the remedy available to victims of medical negligence. The methodology used is the doctrinal research method. In the course of this work, it was discovered that many Nigerians are not aware of the fact that health care providers could be held liable for medical negligence. Medical malpractice is not only committed by doctors, but also by staff and members of a health care providing institution. Also this research reveals that relationship between patient and health care provider is central in providing health care services. This research came up with recommendations, especially in awareness to health care providers on their legal responsibilities towards their patients and having strict regard for patients which, if adhered to, will go a long way to ameliorate the challenges faced by Nigerians when trying to access health care services.

Introduction

Many patients in Nigeria do not know their rights and many have limited knowledge. If those patients become better informed of their rights and the reality of their taking out successful law suits against negligent health care providers, the quality of health care may improve in Nigeria. The provision of medical services brings together the doctor, patient and at least the relatives or the friends or both of the patients concerned with the relief of his illness. We believe life is God-given. Thus, a doctor figures in the scheme of God as he stands to carry out his command. A patient generally approaches a hospital/doctor based on its/his reputation. Therefore, it is expected that a doctor carries out necessary investigation or seeks a report from the patient.

The health care system in Nigeria has recorded unimaginable and unsatisfactory performance in quality delivery for a very long time. Medical services are still not accessible to many people, especially the poor. When accessed, patients receive sub-standard care in many cases due to

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the negligence on the part of one health care provider or another. On the other hand, when services are unaffordable, the patients go to quacks that may provide cheaper services, while causing greater harm or damage to the injured patients and their families. Generally, negligence is a breach of a legal duty to take care, which results in damage to the claimant.² Professional medical negligence or malpractice, as it is often called, has been on the increase and there is an urgent need to address the issue in terms of attitude of law towards medical practice so as to protect the patient, as well as make liable to punishment any medical personnel who negligently cause harm or injury to a patient. These health care providers need to be brought to order, especially since many helpless victims have been sent to an early grave as a result of medical negligence and to also revive the confidence of patient in the once highly revered medical profession. Today, most people who go to the hospital for treatment or medical advice tend to do so with some level of pessimism in the face of rising cases of medical negligence in our dear country Nigeria. There exist laws to regulate human conduct which includes medical practice. The law is formulated to protect people's rights and to make sure that certain basic rules of social conduct are complied with. For instance, the National Health Act³ was formulated to provide a framework for the regulation, development and management of a national health system and set standards for rendering health services in the federation. It is in the light of this that the medical profession, like any other profession, has become more open to legal scrutiny.⁴⁵

As a result of the poor level of awareness or enlightenment in Nigeria as to the rights of victims in the event of medical negligence and other professional misconducts and, sometimes for some other reasons, most victims of medical negligence do not go to court to seek redress which has contributed to the rise in cases of medical negligence. Applying the neighbourhood test, there is no gainsaying the fact that the doctor or any other health professional in a health facility is a very close neighbour of the patient who represents himself to the health facility to whom the doctor and other health personnel owes a duty of care.⁶

The Code of Medical Ethics in Nigeria⁷ provides instances where a medical practitioner can be said to be guilty of medical negligence and such instances could be through an act or an omission. The majority of medical negligence or malpractice cases are not intended, but due to circumstances, things can go wrong. Once it is established that another health worker of the same qualification would not have made such a mistake in the same situation, then a breach of duty has taken place. Since some of these mistakes can have devastating consequences on the victims, the practitioner needs to be checked by both his professional disciplinary body and the courts. A medical doctor who performed a surgery and negligently left scissors in the patient's

² W.V.H Rogers, *Winfield and Jolowicz on Tort* (11thedn, Sweet & Maxwell 2006) p.132

³ National Health Act, LFN 2014

⁴ Ogiamen T.B.E, „Medical Practice and the Law“ *Nigerian Observer* in February 20,

⁵ “ in Eric Okojie, Professional Medical Negligence in Nigeria” <www.nigerianlawguru.com> accessed 2/03/2021.

⁶ Ahmed Adetola-Kazeem „Legal Options Available to Victims of Medical Negligence in Nigeria“ <www.nigerianlawguru.com> accessed 2/03/2021.

⁷ Issued at Lagos by the Medical and Dental Council of Nigeria in consonance with the provisions of the Medical and Dental Practitioners Act Cap 221 LFN.

abdomen, thereby causing the death of the patient, maybe sued in a civil action for damages and he may also be prosecuted, if found guilty, be convicted for committing the crime of manslaughter. In view of the above, and using the doctrinal research method, this research shall seek to answer whether health care providers can be liable for negligence, and if patients who suffer injury from Health care providers do institute legal action against health care providers.

Concept Of Medical Negligence

Medical negligence is a process where a medical practitioner commits an act of negligence. If a patient is not treated with proper care expected from a medical personnel and it results in an injury or death of the patient, it is negligence. In the ordinary sense, negligence is an important and dynamic part of all torts; it is a species of law which regulates the interaction of humans. Therefore, it is an aspect of tort that is not peculiar to medical doctors'/patients relationship, but to other fields like teachers, legal practitioner and so on, which stands in a relationship to take care of their negligence, failure to do so will warrant action in negligence. The doctor/patient relationship is one of the most unique and privileged relation based on the mutual trust and faith.

Negligence may be either a mental element required in the proof of other torts or it may connote an independent tort.⁸ According to Winfield and Jollowicz⁹ negligence has been defined as “a tort which consists of the breach of a legal duty to take care which results in damage undesired by the defendant to the plaintiff”. Negligence is the failure to exercise the appropriate and or ethical rule or care expected to be exercised amongst specified circumstances.¹⁰ It means failure to take proper care over something, carelessness, dereliction of duty and nonperformance of duty. The Black’s Law Dictionary¹¹ defines negligence per se as conduct, whether of action or omission which may be declared and treated as negligence without argument or proof as to the particular surrounding circumstances, either because it is in violation of statute or valid municipal ordinance or because it is probably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it. Negligence is a breach of a legal duty to take care which results in damage to the client.¹⁰ Negligence is therefore the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs will do, or doing something which a prudent and reasonable man will not do.

Medical negligence is all about medical errors or negligence, an issue which invariably turns on an analysis of the reasonable doctor. There is no one single acceptable definition of medical negligence. In the medico-legal parlance, medical negligence has been defined as the failure of the health care provider to exercise the ordinary care and skill a reasonable prudent and qualified person would exercise under the same or similar circumstances.¹² According to Black’s Law Dictionary, Medical Negligence is “A doctor’s failure to exercise the degree of care and skill that a physician or surgeon of the same medical specialty would use under similar circumstances¹². In terms of medical malpractice, medical negligence is usually the basis for a

⁸ F.C Nwoke, *Law of Torts in Nigeria* (Mono Expressions 2003)

⁹ W.H.R Rogers, (n1)

¹⁰ Medical Malpractice <<https://en.m.wikipedia.org>> accessed 12/05/2021.

¹¹ Garner B.A, *Black’s Law Dictionary* (7thedn, West Publishing Company 1990) ¹⁰Nwoke, (n6)

¹² Encyclopedia Britannica <<https://www.britannica.com/>> accessed 12/05/2021. ¹² Garner, (n9)

lawsuit demanding compensation for an injury caused by a doctor or other medical professional¹³. While negligence on its own does not merit a medical malpractice claim, when the negligence results in undue injury to a patient, a lawsuit may be brought demanding compensation for all associated damages. It should be noted that medical negligence is professional carelessness committed by not only a medical doctor but healthcare institution as a whole and by any relating staff member that does not conform to the accepted standards of medical practice and causes injury or even death to the patient. Most cases involve registered medical practitioners but similar principles are applied to relating staff members such as dentists, midwives, nurses, physiotherapists, psychologists, psychiatrists and laboratory scientists and so on.

Medical negligence occurs when a doctor or any other medical professional performs their job in a way that deviates from the accepted medical standard of care. While medical negligence does not always result in injury to the patient, it is still an act of negligence¹⁴. A doctor who is negligent exposes himself to disciplinary action from the Nigerian Medical and Dental Council for civil and criminal negligence. The legal basis for doctor's civil liability is founded on the ground that the public entrust itself to their care and so entitled them (the public) to demand and expect a reasonable degree of skill and care. The question whether or not a doctor is negligent will, therefore, depend on the facts of each case. Whatever the facts, the following three requirements must be established: (i) the doctor owe a duty of care to the patient, (ii) that the duty is breached and (iii) that the patient suffered damage as a result of such breach.¹⁵

A doctor in the hospital owes a duty of care to patients in the ward in which the doctor is employed to work. A private physician who has contracted to provide medical services for the employees owes a duty of care to such employees who are on the clinic's list. Institutional health care providers also owe the same duty of care to patients accepted for treatment in their facilities, whereby they must provide proper medical services for them. This is particularly relevant in the case of a doctor, for example an obstetrician who undertakes a complicated cardiac surgery, that obstetrician must conform to the standard of a cardiac surgeon. If the obstetrician does not possess the special skills and facilities required for cardiac surgery, then it is negligent on his part to undertake the treatment at all knowing that as an obstetrician he does not possess the special skills and facilities required for a cardiac surgery. However, in an emergency, an obstetrician who comes to assist a cardiac patient by performing a simple procedure to ease pain would not be held liable for failing to achieve results that one would expect from a cardiac surgeon¹⁶. A house officer is not expected to show the same standard of skill and care as a consultant working in a special area. A doctor, except in emergency, cannot excuse himself on the grounds that he was unwell or he had a long spell of duty and was, therefore, very tired, the law would hold that a doctor has no business to undertake the care of patient unless he is fit to do so.

The court balances all the relevant circumstances in order to decide whether the medical practitioner's conduct has fallen below what constitutes a reasonable standard of care. He is judged according to what a person in a particular circumstance ought to have done and person's foresight is similarly assessed according to circumstances and risks which ought to have been

¹³ <www.medicalmalpractice.com/resources/medical-malpractice> accessed 12/05/2021.

¹⁴ Ibid.

¹⁵ Festus O. Emiri, *Medical Law and Ethics in Nigeria* (Malthouse Press 2012).

¹⁶ <<http://www.Robinsongill.com.avi/medicalnegligence.aspx>>accessed on 12th April, 2022.

foreseen¹⁷. An example is the “surgeon swab” type of case, where a surgeon in the course of an operation uses swabs and fails to remove one of them from the cavity before closing the incision. Following the customary practice of nurses to count swabs before and after an operation, the surgeon relying upon this would not relieve himself of liability, since he owes the patient the duty of care and it is his duty to supervise the nurses. Confusion persists as to whether the standard of care is assessed according to the doctor’s qualifications, the post within the health care institution that he holds or the task that he is engaged in performing. It is submitted that the correct measure is the task the individual undertakes that fixes the standard irrespective of his qualification. It is only natural that no doctor will like to be cut within the web of a malpractice suit. The position was clearly stated by Lord Denning in this direction to the jury in *Hatcher v Black*.¹⁸ In that case, the plaintiff a singer underwent a thyroidectomy after being assured that she would not suffer any voice impairment. Unfortunately, the surgery did not prove quite successful as she suffered nerve injury resulting in her voice being damaged. The doctor knew there was slight risk to the plaintiff’s voice but had, nonetheless assured her that there was no risk in order to prevent her from worrying. In an action against the doctor for negligence, Lord Denning, in his characteristic lucid language, directed the jury thus: It would be wrong and indeed bad law to say that simply because a misadventure or mishap occurred, the hospital and the doctors are thereby liable. It would be disastrous to the community if it were so it would mean that a doctor examining a patient as a surgeon operating at a table, instead of getting on with his work, would be forever be looking over his shoulders to see if someone was coming up with a dagger for an action for negligence against a doctor is for him like unto a dagger. His professional reputation is as dear to him as his body. You must not, therefore, find him negligent simply because something happen to go wrong; if for instance, one of the risks inherent in an operation actually takes place of some complication ensures which lessens or takes away the benefits that were hoped for, or if in a matter of opinion he makes an error of judgement, you should only find him guilty of negligence when he falls short of the standard of a reasonable skilful medical man, in short, when he is deserving of censure for negligence in a medical man is deserving of censure.¹⁹

It appears that the courts are more willing to grant damages against the hospital than a medical personnel, probably because of the huge amount of compensation demanded by claimants, the hospital is more buoyant and therefore in a better position to be a defendant in such claims. In Nigeria, there was a case of a certain Mr. Ude Oche who lost his wife on the 23rd day of December, 1997 at the Ahmadu Bello University Teaching Hospital, as a result of negligence and breach of duty in blood transfusion. After the doctor’s prescription for surgery, a blood grouping and cross-match was carried out by a 400 level student of laboratory technology and the result came out as ‘AB positive’ after which Mr Oche informed the hospital that the correct blood group of his wife was ‘O positive’. The doctor relied on the laboratory test and transfused the AB positive blood to which the wife reacted badly. Another test was carried out and it came out as ‘O positive’ and the correct blood type was subsequently transfused, although the wife never got over the reaction and she later died. Although a settlement out of court was eventually

¹⁷ Ibid.

¹⁸ The Times, 2nd July 1954.

<www.academia.edu/6017060/Tort_of_Medical_Negligence_in_the_UK> accessed on 23rd December 2023.

¹⁹ Ibid.

reached, the hospital paid a certain amount of money to the complainants and various disciplinary measures were meted out against the hospital staff responsible for the injury²⁰²¹.

Where medical practitioners abandon their patient in the course of treatment, they may be liable in negligence. In the case of *Dickson Igbokwe v UCH Board Management*²², the deceased was admitted on the 4th floor of the hospital where she gave birth in December 1958 and was suspected of being mentally deranged and placed on sedatives. The following day, she was missing from her bed and was found dead on the ground, 70 feet below. The husband sued and the defendant admitted that if the deceased had been properly monitored, she would have been alive. Two hundred and fifty pounds was awarded as damages to the woman's children, and the husband was excluded because he was not properly married to the deceased under native law and custom or any law at all. It must be noted that quacks and other unqualified or unlicensed persons, who undertake medical treatment are required by law to exercise the same degree of skill and diligence as a person qualified to practice the profession is required to exercise.²³

When a doctor or nurse is handing over a patient to another colleague, the standard practice is to disclose to that colleague the treatment that had already been administered to the patient, in order to assist the continuous treatment. Failure to do so which subsequently results in damage or injury will be seen as negligence²⁴.

Hospitals Liability For Medical Negligence

In the context of medical malpractice actions, hospitals can be held directly liable for their own negligence and can also be held "vicariously" liable for the negligence of their employees. Vicarious liability means a party is held responsible not for its own negligence, but rather for the negligence of another. Many serious claims for medical malpractice arise from procedures and treatment given to patients in hospitals. The hospital itself is generally liable for any action of its employees that are undertaken within the scope of their employment with the hospital. A hospital is responsible for the actions of its employees, be that a doctor, nurse or the person involved in the provision of healthcare services as long as that person is acting within the scope of his or her employment, providing health care services to patients for the hospital²⁵.

Not all doctors working in a hospital facility are employees of the hospital. He or she may have privileges to use the hospital facilities to provide medical care and treatment for patients. These types of doctors often bill patients for services directly rather than through the hospital, but that may not always be the case. Some doctors are independent contractors rather than employees of the hospital and in that type of situation the hospital may not be liable for negligence of those doctors. There are however a number of exceptions to that general rule and it is important to consult with an attorney for a careful analysis on a case by case basis before concluding that

²⁰ Ref. A.B.U.T.H./PLG/62, Minutes of the Meeting of the Ethical Committee held on

²¹ /9/98 to deliberate on the report submitted on the death of one Mrs. Ama Oche (unpublished)

²² (1961) W.R.N.L.R. 173

²³ Umerah, E.D, *Medical Practice & the Law in Nigeria* (Longman Nigeria Limited 1989).

²⁴ *Akerele v R* [1942] 8 WACA 5

²⁵ Rupert M. Jackson and John L. Powell, *Professional Negligence* (Sweet and Powell 2006) 6-61

the hospital is not liable for an injury that occurred in a hospital or medical facility. The main point that most consumers need to understand about hospital liability for the negligent actions of its employees providing medical treatment and assistance to the public is that, it would be best to consult with an attorney to determine if the facility has any liability for an injury that may have happened on or its facility. It might be difficult to access the kind of employment agreement or privilege contract information that would evidence the employment or independent contractor status of that individual necessary to properly assess the liability of the hospital facility for any given injury situation. If someone is an employee of a hospital, the hospital is responsible, if that employee hurts a patient by acting incompetently. In other words, if the employee is negligent in carrying out his duties, the hospital is on the hook for any resulting injuries to the patient. It is also pertinent to state that not every mistake or unfortunate event that happens in a hospital rises to the level of negligence. Whether a doctor is a hospital employee depends on the nature of his or her relationship with the hospital. Though some doctors are hospital employee, some doctors are not. Non-employee doctors are independent contractors which means that the hospital cannot be held liable responsible for the doctor's medical malpractice, even if the malpractice happened in the hospital²⁶. In the case of *Collins v Herts County Council*²⁷ Hilbery J. held that a hospital authority is liable for the act of a resident junior house surgeon, but not for those of a visiting surgeon.

In *Cassidy v Ministry of Health*,²⁸ court of appeal held that the hospital authority were responsible for all medical staff who had treated the plaintiff during his operation and afterwards, accordingly the plaintiff could rely upon the doctrine of *res ipsa loquitur*. A doctor is more likely to be an employee rather than an independent contractor, if the hospital controls the doctor's working hours and vacation time or the hospital sets the fees the doctor can charge. A hospital can be held primarily liable for an injury on other grounds. For example, a hospital is obliged to provide and maintain equipment necessary to provide proper surgical procedures to patients undergoing surgery. This equipment should be functioning in safe, good working order at all times and should be inspected to document that it is in a safe condition for patient use. Hospital personnel must have been adequately trained in the correct operation of the facility medical equipment and all equipment malfunctions should be reported to the correct authority. If hospital personnel are aware that a piece of equipment is being improperly used by a doctor during a surgery, they are obliged to object and report the problem in order to prevent any patient injury from happening. A hospital is also required to have an adequate amount of operating rooms and enough staff to handle the number of planned procedures each day. A hospital would be liable for an injury that happened where it did not cancel a procedure that it knew it could not provide a proper operating room in which to conduct the procedure and a doctor was allowed to begin the procedure anyway causing patient injury as a result. In *Collins v Herts County Council*, it was held that the hospital authorities were liable by reason of a negligent system in the provision of dangerous drugs. Broadly speaking, a person is liable for negligence of employees when acting in the course of their employment, but not for the negligence of independent contractors.

²⁶ Ibid.

²⁷ (1947) 1 K.B 598 ²⁸
(1951) 2 KB 343 at 360.

The modern theory of vicarious liability is thus predicated exclusively on consideration of social policy and not on fault based. In *C.I Ltd v Shatwel*²⁸. A person who employs another to advance his own economic interest should be held responsible for any harm caused by the activities of such employees. This way, the innocent victim of the employee's tort would be able to sue a financially responsible defendant. There is an important qualification in the concept of vicarious liability which must be well noted. An employer is only vicariously liable for the tort of his servant committed in the course of his employment, that is, while the servant was doing the job he was employed to do. Therefore, if the servant was on a frolic of his own, his employer will not be vicariously liable. According to Winfield and Jolowicz²⁹, a tort comes within the course of the servant's employment if: It is expressly or impliedly authorized by his master; It is an unauthorized manner of doing something authorized by his master or it is necessarily incidental to something which the servant is employed to do.

Hospitals Liability For Negligence Of Staff

Ordinarily, a person who commits a tort is held liable for it. However, there are situations where a person is held responsible for the act of another person in which he did not participate, as a result of a special relationship between him and the actor.³¹ Vicarious liability is a term used in describing situations in which a person is held liable for the damage caused either by the negligence or other act of another. There is no requirement that the person being held liable should have participated in the act or that he should owe a duty in law to the person suffering damage. This mostly occurs in master and servant relationships. The form therefore, means the case of one person taking the place of another in so far as liability is concerned.

An employer stands in the position of authority vis-à-vis the employees; this makes him vicariously liable for the wrong of his employee.³⁰ In the context of medical negligence, vicarious liability can arise from situations where the employees of the doctor are negligent and where the employees, including the doctor of a hospital are negligent. The rationale for liability is said to be rooted in economic strength. It is believed that it helps spread cost, placing it on the shoulders of the party who has the economic muscle to pay. It is desirable in assuaging compensation claim to an injured plaintiff in the era of industrialization where accidents usually occur without clear identification of the wrongdoer.³¹ In the past, one of the arguments for denying liability of hospitals authorities was that in the actual execution of his work, the doctor or nurse is not under the control and direction of the authorities and therefore not a servant in the sense that would attract vicarious liability. This approach was particularly unhelpful, disadvantageous and highly detrimental to the plaintiff (patient) because such a medical practitioner would hardly be able to cope with the amount of damages awarded, particularly if they were substantial. The general theory in vicarious liability *qui facit per alium, facitperse* (He who acts through another is deemed to act in person and so, let the principal answer) now applies in medical negligence³². In *Hillver v St Batholomew*, the English Court of Appeal held the view that a hospital is not responsible for the negligence of its staff in the

²⁸ (1965) A.C 656.

²⁹ Rogers, (n1)

³¹ Nwoke (n6)

³⁰ David Berg „Medical Negligence in Hospitals“ *All Law Journal* [2016] (4)

(1).<www.alllaw.com/articles/nolo/medical-malpractice/hospital-liability-errors-bystaff> Accessed 09/04/2021.

³¹ Emiri (n15) p.295.

³² J.A Dada, *Legal Aspects of Medical Practice* (2nd edn, University of Calabar Press 2013). 145.

performance of their professional duties, as distinct from purely administrative duties. The rationale for this limitation is that the hospital neither dictates nor controls the exercise of professional judgment. According to the English Court of Appeal, the governors of a public hospital, by their admission of the patient to enjoy in the hospital the gratuitous benefit of its care do, I think undertake that the patient while there shall be treated only by experts, whether surgeons, physicians or nurses of whose professional competence the governors have taken reasonable care to ensure themselves and further that those experts shall have at their disposal for the care and treatment of the patient, fit and proper apparatus and appliances.³³

Going by this, a patient could sue a hospital for breach of contract or tort if the hospital does not employ competent staff or if it fails to supply to its staff proper medical equipment or is vicariously liable for breach for purely administrative matters. The early hospitals were essentially charitable, meant for the poor. The rich could then afford medical treatment in their homes. Commencing with *Gold v Essex County Council*³⁵, the position changed. From 1942, there has been a progression in the elimination of hospitals immunity. Consequently hospitals became liable for the negligence of doctors, nurses and even part-time anesthetists.³⁴ In this respect the courts have shifted the focus from the control criterion to one that emphasizes whether the servant is a part of the master's organization, thereby placing emphasis not on how the servant works, but rather where and when he so works. It thus, makes it difficult as escape route for a hospital to plea that their professional staffs are free from control and supervision. As long as they are within the organization, their negligence can be thrown on the hospital.

Lord Denning in *Cassidy v Ministry of Health* summarized the law thus:

In my opinion, authorities who run a hospital, be they local authorities, government boards whenever they accept a patient for treatment, they must use reasonable care and skill to cure him or her of his or her ailment. The hospital authority cannot of course do it by themselves, they have no ears to listen through the stethoscope and no hands to hold the surgeon's knife. They must do it by the staff they employ and if their staff are negligent in giving the treatment they are just as liable for that negligence as is anyone who employs others to do duties for him or any other corporation are in law under the selfsame duty as the humblest doctor.³⁵

To hold a hospital vicariously liable either via contract or tort, the plaintiff will need to prove that the person who commits the negligent act is an employee of the hospital and the act is performed in the course and scope of his employment.

Courts And Medical Negligence

A cursory look on grounds and reasons health care providers are found wanting for the act of medical negligence can be seen in some decisions taken by the disciplinary tribunal and courts. In *Dickson Igbokwe v University College Hospital Board of Management*³⁶, the deceased was admitted into a fourth floor maternity ward of the defendant Hospital Board where she gave

³³ *Hillyver v The Governors of St. Bartholomew's Hospital* (1909) 2 KB 820. ³⁵ (1942) 2 KB 293.

³⁴ *Cassidy v Ministry of Health*, (n27).

³⁵ (1951) 2 KB 343 at 360

³⁶ (1961) WNLR 173

³⁹ (1962) 6 ENLR. 196.

birth to a baby on the 23rd December 1958. After the birth, she was suspected of being mentally deranged and was put on sedative drugs. A nurse was instructed to keep an eye on her. On two sides of the ward where she was admitted, there was an open verandah about seventy feet from the ground protected by railings four and a half feet high. In the morning of the 29th December, 1958, the deceased was missing from her bed and was found dead from injuries she received when she fell from the fourth floor.

Her dependents claimed damages for her death contending that the circumstances pointed to negligence on the part of the hospital authority and they relied on *res ipsa loquitur*. The hospital authority agreed under cross examination that someone had been specially assigned to watch the deceased; the incident would probably not have occurred. No medical expert was called to show that given the case history, all reasonable precautions had been taken to prevent the occurrence.

The court held that the plaintiff's action succeeded because the hospital authority had failed to rebut the inference of negligence which arose from the facts. On the question of damages, the court did not believe that the deceased who was a petty trader contributed as much as €3 in a month towards the maintenance of her children. It awarded a sum of €250 as damages and shared it among the six children of the deceased. Her husband who was also a claimant was left out in the award because he failed to prove satisfactorily that he was married to the deceased under native law and custom.

In *Kanu Okoro Ajegbu v Dr. E. S Etuk*,³⁹ the deceased was admitted into the Onitsha General Hospital on the 16th of August 1961 by the defendant doctor who diagnosed a ruptured appendix. He treated the deceased with antibiotics to localize the infection and performed an appendectomy on the 17th August. Only one incision was made but it had to be extended to expose the appendix properly. On the 20th August, the deceased was given an enema because his stomach was slightly distended. As it did not work, the nurse who gave it reported this fact to the defendant who instructed that a little more enema be given and if it failed, a flatus tube should be used. After the second enema which also proved unsuccessful, a flatus tube was inserted and all the enema and air were discharged. The deceased died on the 21st August. There was some evidence that the death might have been due to delayed chloroform poisoning. No post-mortem examination was performed to ascertain the cause of death.

A dependent of the deceased sued the defendant under the Fatal Accidents Law claiming damages for the death which the dependent attributed to negligence on the part of the defendant. The particulars of negligence were as follows:

1. That there was gross negligence in the actual performance of the operation which was alleged to have lasted for about three and half hours and that there were two incisions.
2. That the defendant refused to attend to the deceased after the operation because he did not come into the hospital as the defendant's private patient. (A witness for the plaintiff had stated that the defendant told him that if a patient stumbled upon him officially, he would treat him officially).
3. That the deceased was overdosed with chloroform thereby setting on chloroform poisoning.

The court found that the operation lasted for about fifty-five minutes only and that only one incision was made. Even if there were two, that, according to expert testimony, would merely amount to an error of judgment. Although the administration of the first enema was a negligent act, it was not the defendant who ordered it. In any event, the enema and gas were later discharged. On the question of neglect, the court found that the evidence rather pointed the other way and there was the fact also that there were only two doctors attached to such a big General Hospital. While there was medical evidence that the symptoms before death (jaundice, restlessness and coma) were consistent with delayed chloroform poisoning, the witness was not categorical on this because as there was no post-mortem examination, it could not be ascertained whether the liver was actually poisoned. The same witness agreed that the symptoms could as well be those of paralytic *ileus* due to peritonitis arising from the ruptured appendix. This was the view put forward by the defendant and which the court accepted. In the result, the plaintiff's claim failed because the plaintiff had failed to prove the allegations of negligence.

In *Chin Keow v Government of Malaysia*,³⁷ a doctor administered an injection of procaine penicillin to a woman from which she died within an hour. Her mother sued in negligence alleging that the doctor had failed to inquire or conduct any tests to ascertain whether the woman was allergic to penicillin. Had the doctor conducted the inquiry, he would have discovered that the woman had previously reacted adversely to penicillin as a result of which her out-patient card was endorsed with the warning "Allergic to Penicillin". The trial judge held that the defendant was negligent in failing to make the inquiry. The Federal High Court of Malaysia, on appeal, rejected the finding of negligence. The Privy Council restored the judgment of the trial court. The Federal Court had taken the view that evidence should have been forthcoming from a medical witness of the highest professional standing or that such evidence as there was should have been supported by references to the writings of distinguished medical men. Their lordships of the Privy Council disagreed with this view. "The test is the standard of the ordinary competent practitioner exercising ordinary professional skill and on this the evidence was all one way".

In *Ojo v Gharoro*,³⁸ Miss Felicia Ojo, the plaintiff in this matter needed fruit of the womb. That took her to the University of Benin Teaching Hospital. Dr Gharoro (1st defendant), a lecturer at the University of Benin and an Honorary Consultant in the Obstetrics and Gynecology Department of the University of Benin Teaching Hospital, Benin City, examined her. Ojo was diagnosed as one having secondary infertility (uterine fibroid and menorrhagia). In other words, she was told that she had growth in her fallopian tube and that she needed a surgical operation to remove the growth to enable her become pregnant. The plaintiff needed to be pregnant and so she consented to the operation. On 17th December 1993, Dr Ejide (3rd defendant) performed the operation in the theatre of the University of Benin Teaching Hospital Management Board (2nd defendant), it is the claim of the defendants that the operation was successful. But the plaintiff thought differently. She submitted that in the course of the operation, the 1st and 3rd defendants negligently left in her womb a broken needle as a result of which she experienced great pains. She reported to the 1st defendant, who asked her to do an X-Ray. The X-Ray confirmed that there was a broken needle in her abdomen. This resulted in

³⁷ (1967) 1 WLR. 813.

³⁸ (2006) 10 NWLR (Pt.987) 175 SC.

a second operation in January 1994, which could not totally or completely remove the broken needle.

The plaintiff sued claiming the sum of Two Million Naira (₦2, 000,000) as special and general damages for negligence. At the conclusion of hearing the trial judge found that on the evidence before the court, the defendant had successfully rebutted the presumption of negligence raised by the plaintiff. The plaintiff's appeal to the Court of Appeal and the Supreme Court was dismissed. The courts held that the trial judge was correct to rule as he did.

In another recent decision of the court on medical negligence, where an FCT High Court in Maitama ordered Kings Care Hospital, Abuja to pay ₦1,000,000 (One Million Naira) as damages to couple for negligence and breach of care. The claimants, Bamikole Owolabi and wife, Mercy had told the court that two ultra-scan reports by the defendant hospital showed that Mercy was pregnant with twins but gave birth to only a baby. Owolabi asked the Court to compel the private hospital to produce the second baby which the scan report showed. However, in its counteraffidavit to the suit, the hospital contended that Mercy gave birth to one the baby girl who weighed 3.3kg, adding that it was medically impossible for a pair of babies to weigh 3.3kg.

Justice Jude Okeke, however, said the hospital was negligent and liable for breach of care by issuing the claimants with scan results which did not reflect the true status of the pregnancy. Delivering judgment, the Judge held that the hospital should have conducted an independent scan to later discover that the earlier scan was wrong. Since they did not do that, the claimants still had in mind that they were going to have twins according to scan of November 21st, 2012 and March 13th, 2013 but their hopes were dashed. In the circumstances, the defendants are ordered to pay a sum of ₦1,000,000 (One Million Naira) to the claimants being negligent in the scan reports issued to them and ₦50,000 (Fifty Thousand Naira) for emerging successful in the suit.³⁹

Our discourse reveals that the remedy for medical malpractice suit is pecuniary in nature; it is the healthcare institution (employer) who bears the economic muscle to pay for damages that might arise due to negligence of its employee. However, there are defences which a health care institution or provider could raise in action for medical negligence, which if he succeeds will avail the healthcare provider of the medical malpractice suit.

Conclusion

The essence of medical malpractice suit is to ensure that health care providers are diligent when handling patients. Professional medical negligence or malpractice has been on the increase and there is an urgent need to address the issue in terms of attitude of law towards medical practice as to protect the patient as well as vulnerable ones.

Most people who go to healthcare providers are scared due to the financial challenge, the cost to procure such health service. As a result of poor awareness and illiteracy in the society today, most people are reluctant to pursue their legal claims arising from medical malpractice. In the

³⁹ Kings Care Hospital, Abuja To Pay N1m Damages for Wrong Scan.

<<http://nigerianmedicals.com/abujahospital-to-pay-n1m-damages-f..>>accessed 13/10/2021.

light of growing cases of negligence in hospitals today, it is very important that the issue is addressed timeously.

Professional medics tend to work for long hours and have a very stressful working line. With hospital resources stretched to the maximum, it is not surprising that these professionals make occasional mistakes because of the pressure they are under. That is not to say that these mistakes should be ignored. It is very important that medical malpractices are reported and claim brought against the party at fault. There are very few medical malpractice suit today due to misinformation, believe, financial constrain and the fear of the unknown. With the help of this research, many Nigerians will be aware of their right over medical malpractice issues. Based on the outcome of this research, the following recommendations are made:

1. Urgent attention should be given to victims of medical negligence in the course of pursuing justice in the courts.
2. Healthcare providers should be cautious in carrying out their duties; they should act with strict regard for patients.
3. Hospital managements should organize, host training courses on the law of torts or on law and medicine to educate medical practitioners on their legal responsibility towards their patients. Awareness on medical negligence should be a regular issue for discussion by the Medical and Dental Council of Nigeria and other regulatory bodies in the medical profession, because majority of healthcare providers in Nigeria feels they have the right to do anything at their whims and caprice when handling a patient. This will minimize malpractice suits and their accompanying huge financial cost and also redeem the image of the medical practitioner.
4. Hospital management should also ensure that only qualified and professionally inclined practitioners are employed to work in their hospitals, the equipment needed for effective performance of duty should also be procured and routine checks carried out from time to time to prevent cases of mishaps which could have been avoided.