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Healthcare Litigation:

An Angel in Disguise?

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> 68 Percent
>
> Of Nigerian 2018 Health Budget Allocated To Primary Healthcare

Health, as they say, is wealth and the need for a functioning health industry cannot be overstated. The Nigerian government allocated 68% of its 2018 health budget to primary healthcare for wider impact coverage. It is undeniable that improved health is a mainstay of a society.

It no longer makes news where a person's health deteriorates as a result of negligence of health professionals. Whilst many a hospital exhibits the sign: *"We Care, God Heals"*, some medical professionals have arguably abandoned the former part of the quote, leaving the patient entirely in God's hands.

There have been cases of equipment being forgotten in the body of patients after surgery, incompetence in operating medical equipment, wrongful diagnosis, mistake in treatment etc. There was the recent case of one Kingsley Kalu, in Abuja, whose left leg had to be amputated while awaiting medical treatment for an inordinate amount of time. This would undoubtedly have caused him a loss or a reduction in his source of livelihood.

What is worrisome is that even reputable hospitals are not spared some of these avoidable incidents. This article discusses the legal issues around medical negligence in Nigeria.

Regulatory Overview

In Nigeria, medical practice is governed by the provisions of the ***Medical and Dental Practitioners Act, (MDPA)***.[1] ***Sections 1(2)(a), 9*** and ***10 MDPA*** empowers the *Medical and Dental Council of Nigeria* (MDCN) to determine the standards of knowledge and skill to be attained by persons seeking to become members of the medical profession.

There is also the ***Code of Medical Ethics in Nigeria 2008 (the Code)*** which seeks to guide the professional conduct of medical practitioners in Nigeria. ***Rule 24, the Code***, provides that the *Medical and Dental Practitioners Investigation Panel* is the court of first hearing for panels brought before the *MDCN*. ***Rule 28, the Code*** makes provisions for actions which would constitute medical negligence such as failure to attend promptly to a patient requiring urgent attention when the practitioner was in a position to do so; manifesting 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

[1] ***Cap. M8, Laws of the Federation of Nigeria (LFN) 2004***

or loss of organ, or function, etc.

Fiduciary Relationship: Dimensions

A patient-physician relationship exists when a physician serves a patient's medical needs, generally by mutual consent between physician and patient. In some instances, the agreement is implied, such as in emergency care. In order for the physician to make accurate diagnosis and provide optimal treatment recommendations, the patient must be able to communicate all relevant information about an illness or injury. Physicians are obliged to refrain from divulging confidential information. In 2011, a nurse was dismissed from his employment after it was discovered that Tiger Woods' confidential information had been leaked while he was a patient in the hospital.

The doctor-patient relationship is central and essential for the delivery of high quality healthcare in the diagnosis and treatment of disease. This relationship involves, maintaining a professional rapport with patients, uphold patients' dignity, and respect their privacy.

A doctor or any health professional is required by law to exercise the care and skill of a reasonable professional; this is further reinforced by their holding themselves out as possessing a special skill. Negligence is simply a failure to reach that standard. This was the decision of the UK's Court of Criminal Appeal in ***R v. Bateman***.[2] It should be noted that loss of life arising from medical procedure or displaying 'less' knowledge than another medical professional does not automatically imply negligence. Medical negligence makes it possible for patients to recover compensation from any harms that result

from sub-standard treatment.

Using Litigation as a Tool

Deterrence is a key objective of the tort system. According to classic deterrence theory, by imposing economic penalties and reputational costs on health care providers who cause negligent harm, litigation creates incentives to be more careful, thereby improving the quality of care. The responsibility of a medical practitioner towards a patient commences as soon the medical practitioner consents to undertake a medical examination of the patient. What is regarded as consent is anything from simple nod of the head or expression of this in words.

The burden of proving negligence always lies on the claimant - must prove that the defendant owed him a duty of care, there was a breach of the duty and the breach caused the claimant injury. It cannot be enough that treatment was not a success, or did not work out as initially planned. It is also not possible to claim damages just because the medical practitioner did something wrong - it must have caused the patient harm. The harm must have come about as a result of negligence and not any underlying condition: ***Abubakar v. Joseph***.[3] Herein lies the difficulty faced by patients in proving medical negligence over the years. There are many cases where, although the plaintiff can prove that an accident happened, he is unable to show how it happened.

[2] *[1925] 19 Cr App R 8*
[3] *[2011] 13 NWLR (Pt. 570), 441*

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One of the ways through which a claimant can successfully bring an action for medical negligence is through the doctrine of *res ipsa loquitur*, meaning the facts speak for themselves. This doctrine, if successfully established, is able to shift the onus on the defendant to show either that the accident was due to a specific cause which did not involve negligence on his part, or that he had used reasonable care in the matter: ***Ejisun v. Ajao.***[4] It is also important to prove that damages and other losses (such as loss of earnings) have resulted from the harm caused by the breach of care.

There are instances where hospitals try to avoid liability by claiming that the negligent doctor or consultant was an independent contractor. In ***Unilorin Teaching Hospital v. Abegunde***,[5] the Court of Appeal (CA) held that a hospital authority is vicariously liable for the negligent acts or omissions of the whole of its staff.

> "StartUps In Nigeria Have Begun Revamping The Health Industry"

An action for medical negligence must be brought within three years from the cause action as required under ***Section 9 Limitation Law of Lagos State 2003***. An action brought after the expiration of this period becomes statute barred: ***Sifax (Nig.) Limited v. MIGFO (Nig.) Limited.***[6]

Medical negligence can also expand into criminal prosecution for manslaughter especially where the patient dies as a result of the negligence. ***Section 303 Criminal Code***[7] provides that every person, except in case of necessity, who undertakes to administer surgical or medical treatment has a duty to have reasonable skill and to use reasonable care in administering the treatment and if any negative consequence results to the life or health of the patient as a result of his breach of this duty, he is held to have caused such consequence.

A recent example was the November 2015 conviction of Nigerian doctor Mrs. Hadiza Bawa-Garba, for manslaughter by gross negligence over 2011 death of Jack Adcock in the United Kingdom. She received a 24-month suspended sentence and the Medical Practitioners' Tribunal decided she should be allowed to continue her training and practise again as a doctor after a one-year suspension.[8] There is also the notorious case of Dr. Conrad Murray who was found guilty of manslaughter for gross negligence leading to the death of music icon, Michael Jackson.

Medical negligence is not dependent on payment of fees. There have been cases where

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[4] *[1975] NMLR 4, at 6*
[5] *[2015] 3 NWLR (Pt. 1447), 421*
[6] *[2016] 7 NWLR (Pt. 1510), 10*
[7] *Cap. C39 LFN 2004*
[8] The decision of the tribunal was appealed by the family of Jack Adcock but the appeal was dismissed.

medical personnel, due to their patients not having paid the requisite fees, perform their duties nonchalantly. The fact that no payment or other reward is offered or expected, makes no difference to the duty of care.

The Right to Self-Determination

In determining whether a medical practitioner is negligent, it is important to consider whether it is in all cases that a doctor is expected to use his 'professional best' in treating his patient. At times, a doctor's right to treat a patient is restricted by the lack of consent from the patient. Fundamental elements of the patient-physician relationship includes the patient having the right to receive information from physicians and to discuss the benefits, risks and costs of appropriate treatment alternatives, the patient having the right to make decisions regarding the health care that is recommended by or her physician. Accordingly, patients may accept or refuse any recommended medical treatment.

In the Canadian case of ***Malette v. Shulman***,[9] *the Ontario High Court* held a doctor liable for trespass for administering blood to a patient who was a member of *Jehovah's Witness*. The court held that the patient had declined the transfusion based on her religious beliefs; although the doctor was not negligent, he was liable for trespass.

> A DOCTOR OR ANY HEALTH PROFESSIONAL IS REQUIRED BY LAW TO EXERCISE THE CARE AND SKILL OF A REASONABLE PROFESSIONAL

In ***Medical and Dental Practitioner Disciplinary Tribunal v. Okonkwo***,[10] a patient who required blood transfusion rejected the offer based on her beliefs as a *Jehovah's Witness*. She later died and her relatives proceeded against the doctor for negligence. He was suspended by the Appellant but the Supreme Court overturned the suspension on the ground that the patient had declined to give her consent on the treatment. This establishes the principle of self-determination, the right of a patient to determine what happens to his or her body.

It should be noted that although every adult has a right of self-determination, the choice of an individual can be overruled by the overriding interest of the state as decided in ***Fosmire v. Nicoleau.***[11]

Conclusion

Drastic steps need to be taken to curb the excesses of some negligent healthcare providers which act in flagrant disregard for human life. It is not the absence of laws, that is the issue but more of lack of awareness of patients' rights and corruption which has eaten deep into our national fabric. Hopefully, the recently launched ***Patients' Bill of Rights (PBoR),***[12] an initiative of the Consumer Protection Council (CPC) – if zealously deployed - should be helpful in this regard.

Negligence is usually borne out of (or an expression of) lawlessness. Instituting an action against negligent medical practitioners may just be the action needed to revitalise the health sector. Without a doubt, litigation can only do so much. There is still need to re-educate medical practitioners, create awareness, promote more openness from hospitals as to dealings with patients and their relatives, advancement of general medical practice by using digital approach to providing solutions, etc. Some start-ups in Nigeria such as Helium Healthcare, *Ubenwa* etc. have begun revamping the health industry. For instance, Helium operates an app which is a smart all-in-one electronic health

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[9] *1988 47 DLR (4) 18*
[10] *[2001] 7 NWLR (Pt. 711) 206*
[11] *551 NY.S. 2d 876 N.Y 1990 (Court of Appeal of New York).*
[12] The ***PBoR*** was passed on 31 July, 2018 is essentially a list of guarantees for those receiving medical care. It may take the form of a law or a non-binding declaration. Typically a patient's bill of rights guarantees patients information, fair treatment, and autonomy over medical decisions, among other rights.

> What Is Worrisome Is That Even Reputable Hospitals Are Not Spared Some Of These Avoidable Incidents.

record for hospitals across Africa. It handles doctor's visits, prescriptions, and medical billing. It also runs offline and syncs to the cloud when connection is available. *Ubenwa* seeks to reduce infant mortality by enabling quick and cost-effective diagnosis of birth asphyxia from infant cry.

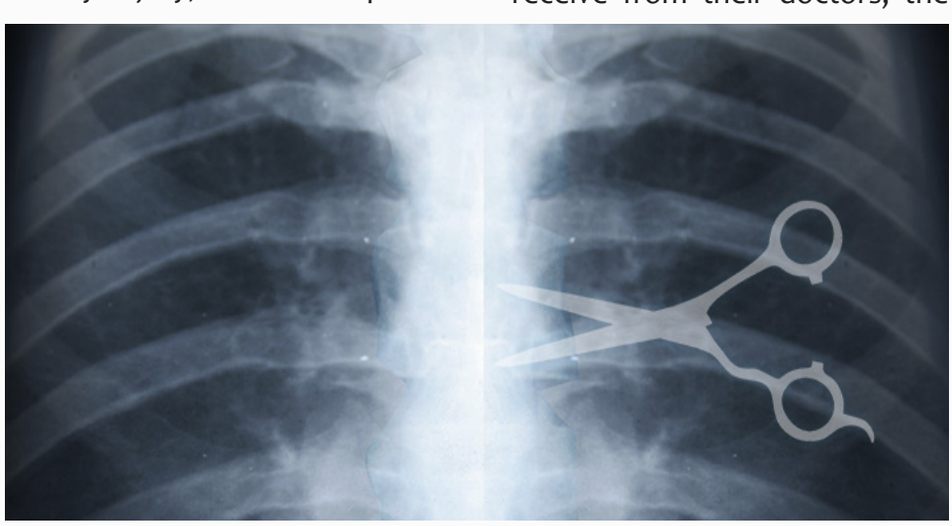
Furthermore, the ***MDPA*** should make provision for compensation without necessarily involving the courts. ***Section 16(2) MDPA*** only provides that the l MDP Disciplinary Tribunal is able to suspend or revoke the license of a medical practitioner found guilty of malpractice. Recently, there was a report of how the family of a certain 29 year old Sandra David was yet to obtain 'justice' and compensation for the alleged medical negligence from the Federal Medical Centre, Abuja resulting in her death.[13] As at the time the report was made in December 2017, the MDP Disciplinary Tribunal was yet to even to reach a decision on an incident that occurred in 2016.

The MDCN has a role to play to play in improving medical care in Nigeria through the speedy resolutions of disputes either in favour of the healthcare professional or the complainant.

In all this, it must be stated that medical practitioners must be protected from unwarranted negligence allegations. To better secure practitioners, more regard must be taken to medical professional liability insurance to protect physicians and other licensed health care professionals from liability associated with wrongful practices resulting in bodily injury, medical expenses and property damage, as well as the cost of defending lawsuits related to such claims.

The ***PBoR***, for instance, spells out the patient's right to information, urgent medical intervention, secure healthcare environment, to be treated with respect and timely access to medical records which must be treated with confidentiality. It further guarantees fair treatment, drives quality service, provides transparency in billing etc.

Although there is no incontrovertible data on the actual number of medical negligence cases in Nigerian hospitals, patients and medical practitioners alike acknowledge the number to be high compared with patients who actually receive 'compensation'. An empirical work by a researcher was devoted to finding out the impression of Nigerians about the care and treatment they receive from their doctors, the



Medical Negligence: An X-Ray of a forgotten surgical scissors inside a patient

[13] Evelyn Okakwu, ***"Court, Medical Council Yet To Act a Year After 'Negligence' Caused Woman's Death"***, *Premium Times, 12.12.2017*; https://www.premiumtimesng.com/health/health-news/252223-court-medical-council-yet-act-year-negligence-caused-womans-death.html (Last visited on 9/10/2018

degree of medical malpractice claims by patients in Nigeria and the reasons for identified very low level of claims against doctors by patients.[14]

It was discovered that 61.69% of Nigerian patients feel that Nigerian doctors are arrogant and care less about their patients' conditions and plights.[15] Also 33.3% of Nigerian patients indicated that their doctors' treatment had caused them extra injury beyond the ones that took them to the hospital.[16]

The doctor's malpractices which may lead to such extra or aggravated injury or pain include: wrong drug prescription, impatience of doctors in taking and understanding the patients' medical history before prescription, etc. This is evident in some doctors who have concluded their prescription even before the patients settle down to describe their ailments or how they are feeling.

Other areas of malpractice where patients gave damning response of high prevalence in Nigeria include late or none detection of ailments or diseases, mistaken identity of patients, lack of, or improper consent to treatment, poor administration of consent forms, etc. In spite of the non-contestable high prevalence of malpractice as indicated by the responses, the level of claims remains abysmally low. To start with only, 40% of the respondents in the survey indicated that they were aware of their right to make claims against their doctors for negligence or carelessness. And only 1.1% of the whole respondents ever made a claim against their doctors in courts.

The reasons offered by those interviewed for such low level of claims against doctors include poverty, illiteracy/ignorance, undue delay by courts, cultural inhibitions, religious beliefs, fear of the court and the enmity created between friends after court cases. Whilst no amount can compensate for a human life or substantial damage to health, compensation provides a minor relief to the family left behind especially where the patient was the bread winner of the family. Medical-malpractice lawsuits do not have the harmful effects that they are imagined to have, in fact they can do some good. Litigation cannot solve the entire problem of the health industry (and it is not intended to) but it can curb negligence and that is a start.

LeLaw Disclaimer

33 Percent

Of Nigerian Patients Indicated That Their Doctors' Treatment Had Caused Them Extra Injury Beyond The Ones That Took Them To The Hospital

[14] ***Abugu, U: "A Critical Appraisal of the Legal Regime for Medical Malpractice Claims in Nigeria" (Ph.D. Thesis, Faculty of Law, University of Abuja (2015), pp. 6-11,*** and ***414-441.***

[15] *Ibid at p. 424*

[16] *Ibid at p.427*