Medical Liability in the Eritrean Context

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Abstract

Medical negligence lawsuits are relatively rare in Eritrea, when compared to other countries. Nonetheless, this does not mean that there are no medical faults, but rather society's knowledge and attitude towards suing a Hospital is very low, except for a few cases. The fatalistic attitude engendered by tradition plays a pivotal role. Victims of negligence accept it as fate. In most cases, patients lack the awareness that they can sue and claim damages from health care providers for negligence. However, this is not true in all cases. Nowadays, there is a growing tendency in Eritrea of lodging lawsuits against medical professionals. This reality must attract our attention and trigger some actions since it is also one way of checking and evaluating ourselves against quality care.

This paper is largely based on the articles quoted from the Eritrean Transitional Codes, which might be subject to different interpretations.

THE BASIS OF MEDICAL LIABILITY

A) CONTRACT AND TORT

Most claims in respect to medical injury are brought in tort, that is, on the basis of a non-contractual civil wrong. The reason for this is that within the governmental institutions patients are not in a contractual relationship with the doctor treating them. In the private sector, by contrast, there will be a contractual relationship and it is, therefore, possible to bring an action for damages in contract.

Most civil cases are determined using theories contained in the law of torts. Personal injury lawsuits are usually based *on the tort law premise that when someone does something that harms another person physically, mentally, or financially, the person who suffers the harm ought to be compensated for the loss and the person who caused the loss should pay*. Whether a civil lawsuit based on tort law will succeed or not depends on the type of tort committed.

Read article 2028, page 2

B) CRIME

Criminal liability for negligence is effectively limited to prosecutions for manslaughter . The level of negligence that the doctor must have manifested is considerably above that at which civil liability may be incurred. Traditionally it has been defined as 'gross' or 'extreme' negligence and sometimes, somewhat tautologically, as 'criminal negligence'; the essential concern is that it surpasses the civil test. In order to establish criminal liability, the facts must be such that the negligence of the accused went 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.

LITIGATION IN MEDICAL PRACTICE

The most common examples of the interjection of the law into medicine occur when patients sue their physicians or health professionals for malpractice. A malpractice suit is usually a tort action. A tort is a civil wrong—a non-criminal or non-contract related (extra-contractual) wrong, committed by one individual (defendant) who has caused some injury to a second individual (plaintiff). A lawsuit or action in tort is a request for compensation for damages that have occurred.

Article 2028 of the Eritrean Transitional Civil Code (hereinafter called ETCC) has a similar definition, which reads:

"Whosoever causes damage to another by an offence shall make it good."

What constitutes an offence?

According to Article 2029:

(1) An offence may consist in an intentional act or in mere negligence.
(2) An offence may consist in an act or failure to act.

It would be noteworthy here to mention that tort is not the only lawsuit against health professionals. Criminal and contractual litigations are also probable lawsuits. In fact, many health professionals have been subject to both criminal and extra-contractual liabilities. This means if they are found to be liable, they will be penalized criminally and obliged to pay damages.

MALPRACTICE LITIGATIONS: -

The three types of torts, i.e., negligence, intentional misconduct, and strict liability will be discussed with more emphasis on negligence.

[7]As principle, in criminal negligence the degree of negligence must be so grave as to go beyond a matter of compensation. However, this is not always true in the real world. For example: a) gross carelessness during treatment, anesthesia, operation, or postoperative period; b) not doing sensitivity testing when indicated c) injecting basal anesthetics in a fatal dosage or in the wrong tissues; d) leaving instruments or sponges in the abdomen or any other part of the body; e) leaving tourniquets too long; f) giving wrong or infected blood; g) gangrene after too tight plastering or paralysis after splints; h) performing a criminal abortion, and i) mismanagement of delivery under the influence of alcohol/drugs.

1) NEGLIGENCE

Negligence is defined as a conduct that falls below the standard established by law for protection against unreasonable risk of harm.

A) COMMON ARTICLES

The most common cause for action (lawsuit) for medical malpractice is negligence. Negligence may be resulted from either commission or omission (refer article 2029(2) above. The former refers to doing something that the health professional should not have done. The latter refers to omitting or failing to do something that the health professional should have done. For example, treating patients without their consent, save some exceptions. When does a patient consent to treatment? Should the consent be in writing, implicit or should oral agreement suffice? Consent differs from case to case. In all cases, every procedure should be informed to the patient and the patient should give informed decision. Failure to obtain such consent may entail liability if the patient suffers some injury out of the professional's actions.

All health professionals are under legal duty and ethics to perform in a prescribed form (commission) and to strain from performing predetermined acts (omissions). In fact, medical professionals as other professionals in other fields are supposed to behave ethically which is more than what the law requires them to do.

Article 2029(1) and 2031(1), (2) (read footnote below) of the ETCC and articles 59 and 526 of the Penal Code, target all health professionals. These articles remind us that negligence is not only a cause for administrative penalties, but also a cause for litigation before a court of law.

B) WHAT Constitutes Negligence and WHEN

Negligence, intentional misconduct, and strict liability—have their own degree of fault that a plaintiff must prove in order to collect from a defendant.

There are four major elements required for a negligence action: (1) that an actor owes a duty of care to another; (2) that the applicable standard for carrying out the duty be breached; (3) that as a proximate cause of the breach of duty a compensable injury results; and (4) that there be compensable damages or injury to plaintiff.

The key factors in determining negligence are: the

- Standard of Care – what is the accepted method of care for doctors in this particular circumstance tempered by what is common within the geographic area;
- Whether that standard was followed; and
- If the standard of care was not followed, whether or not following that standard caused the injury.

WHEN

Negligence can occur at various stages. A health care provider may misdiagnose a problem , fail to treat the injury or illness properly , administer the wrong medication, and fail to adequately inform a patient about the risks of a procedure or about alternative treatments .

1.1 Professional Negligence (ARTICLE 2031)

Professional negligence occurs whenever a professional performs his or her duties improperly out of ignorance or carelessness. It is important to note that professional negligence is only one way in which professionals can incur liability for their job-related actions. A doctor can be sued for breach of contract if he or she backs out of an agreement to work for a hospital. A nurse might be sued for assault and battery if he or she intentionally harms another person with an improper injection.

1.1.1 Medical Negligence and its Elements

Medical negligence comprises the majority of professional negligence lawsuits. This is not to say that medical professionals are more prone to committing negligence, but that they are the target of more professional negligence lawsuits. A person establishes a basic case of medical negligence by establishing four elements— the FOUR D'S:

A. Duty owed to the patient, B. breach of the standard of care (Deviation), C. causation (Direct cause), and D. Damage to the patient.

A party accused of medical negligence defends itself either by showing that one of these elements is missing or by establishing an affirmative defense. An affirmative defense is a legal argument in which the defendant admits the existence of all required elements, but argues that his or her actions should be excused nonetheless.

A. Duty toward the Patient

Article 2031: Professional Fault

Article 2031 (2) states: He/she shall be liable where due regard being had to scientific facts or the accepted rules of the practice of his/her profession; he/she is guilty of imprudence or of negligence constituting definite ignorance of his/her duties.

"Standard" in hospitals or other health facilities includes procedures, guidelines, accepted usages and principles …etc.

Article 2031

(1) A person practicing a profession or a specific activity shall, in the practice of such profession or activity, observe the rules governing that practice. (2) He shall be liable where, due regard being had to scientific facts or the accepted rules of the practice of his profession; he is guilty of imprudence or of negligence constituting definite ignorance of his duties.The following is an Indian case in which a doctor failed to diagnose a chronic subdural haematoma with fatal result. The practitioner did not look for evidence of raised intracranial pressure with an ophthalmoscope and this fact weighed heavily with the Council in deciding to settle the case. Though it is

The first element in any medical negligence lawsuit is that of a duty owed to the patient. Medical practitioners have both compulsory and voluntary duties. The former relates to compulsory notification and responsibilities to the state. The latter relates to

1) responsibility to patients 2) medical examinations 3) operations 4) issuing of certificates 5) prisons and reformatories 6) medico legal examination and certificates 7) postmortem examination 8) sending pathological material by post, and 9) attending to accidents.

The first voluntary duty, "Responsibility towards a patient" is undertaken as soon as a doctor agrees to examine the case, which implies the establishment of doctor-patient relationship. Responsibility to patients—implied contract includes: a) to continue to treat b) reasonable care, c) reasonable skill, d) keep professional secrets inviolate except under privileged circumstances, d) not undertaking procedures beyond skill, f) special precautions to be taken in cases of children and adults not capable of taking care of themselves, g) special precautions in respect of dangerous drugs and poisons, h) consultation with another colleague under certain circumstances, and I) keeping abreast of recent advances in the field.

If there is no legal duty to act, a medical professional can stand by doing nothing while a person suffers, and still not be negligent. Thus, the first question to address in a medical negligence lawsuit is whether the medical professional owed any duty to the plaintiff or not. However, note that in Eritrea any professional is under legal duty to assist people in danger. Refer to article 520 of the Transitional Penal Code.

B. Breach of the Standard of Care (DEVIATION)

ARTICLE 2031: Professional Fault

(1) A person practicing a profession or a specific activity shall, in the practice of such profession or activity, observe the rules governing that practice.

(2) He/she shall be liable where, due regard being had to scientific facts or the accepted rules of the practice of his/her profession, he/she is guilty of imprudence or of negligence constituting definite ignorance of his/her duties.

Proving that someone else was negligent hinges on the following question: Was the party who allegedly caused the injury behaving as carefully and as a reasonable person would have behaved under the same circumstances? If not, then that party was negligent and committed the tort of negligence.

The outcome of a lawsuit in which negligence is alleged can be difficult to predict because determining how much care a reasonable person would have exercised in the same situation is difficult.

Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. The degree of skill that a practitioner undertakes to bring to the treatment of his/her patient is the average degree of the same standing as himself/herself. He does not undertake, if he is an attorney, that at all events he shall gain a case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill.

The doctor is thus not expected to be a miracle-worker guaranteeing a cure or a man of the very highest skill in his calling. What standard then is he expected to meet? The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is a well-established law that it is sufficient if he exercises the ordinary skill of an ordinary man exercising that particular art.

The circumstances in which a doctor treats his patient will also be taken into account. A doctor working in an emergency, with inadequate facilities and under great pressure, will not be expected by the courts to achieve the same results as a doctor who is working with ideal conditions. In Eritrea, when one looks at the available physicians and patients ratio per hospitals it would be very easy to understand the burden facing the physicians. Working under such tedious circumstance would give room for mistakes and errors.

To establish liability by a doctor where deviation from normal practice is alleged, three facts must be met: First, it must be proved that there is a usual and normal practice; this is particularly so if there are guidelines covering a procedure, secondly it must be proved that the defender has not adopted that practice; and thirdly (and this is of crucial importance) it must be established that the course the doctor adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care.

In order to avoid liability for medical negligence, a physician must,-at a minimum,-use the same level of care that any reasonably competent doctor would use under the same circumstances. In most cases, a plaintiff must present expert testimony on what the standard of care should have been. Medical negligence lawsuits often become battles in which each side has expert witnesses declaring different levels of acceptable medical standards. Therefore, at least we must have a body in the Ministry of Health to assume this responsibility whenever is asked by any side, be it prosecutor, court or plaintiff/defendant.

13 This article was invoked against nurses in one of our hospital for allegedly not providing assistance in cases of serious need. It was decided in favor of the nurses in Zoba Makel court. Note that it has been a legal battle for several months and yet appeal is possible.

doubtful if the doctor could have made the diagnosis of raised intracranial pressure, had he looked but there can be no doubt that, in view of the presenting symptoms and signs, he should have known that some competent person should undertake such an investigation.

Failure to suggest consultation with a specialist under certain circumstances may be regarded as negligence.

Some general guidelines must be remembered. For example, every care should be exercised while using dangerous drugs, and excessive exposure of the patient to radiation should be avoided.

Illustrative case, following a course of chloramphenicol for cystitis with a total dose of 45 grams, the patient developed aplastic anaemia. In view of the dosage and the circumstances in which it was given, the claim by the widow and her children was settled.

12 The practitioner must warn the patient of any known or probable side effects of a drug or device. Failure to do so renders the practitioner liable for the harm suffered by the patient and the injuries caused to third parties (eg, while driving under the effect of a narcotic analgesic or while operating machinery). Discuss whether administering these drugs is the direct cause of the damage incurred.

C. Causation

Article 2028 : General Principle

"Whosoever causes damage to another by an offence shall make it good."

The third element of a medical negligence lawsuit is causation. Causation frequently is divided into two separate inquiries: 1) whether the professional's actions in fact caused the harm to the patient, and 2) whether the professional's actions were the proximate cause of the patient's harm. Courts are finding it difficult to decide a case, which involves medical negligence. The most important factor in deciding medical negligence is the proximate cause and the same can be identified by medical expert only. A lot of times, medical staff tends to support each other and don't state or explain the possible faults that might have been committed by his/her colleague. Therefore, the best solution would be for the institution (Ministry of Health) to develop a certain body to entertain patient's complaints and try to resolve them within the Institution itself.

D. Damage

Article 2028 : General Principle

"Whosoever causes damage to another by an offence shall make it good."

To determine if someone is liable — that is, legally responsible for a patient's injuries, the patient or injured person need to determine if a health care provider was negligent and if so, whether that negligence caused the injury. Just because a case turned out poorly doesn't necessarily imply that a doctor was negligent.

A person who is the victim of medical negligence can sue for the injuries and all direct consequences of those injuries. "Direct consequences" include any mental or physical pain and suffering caused by a careless doctor, and any lost wages resulting from the injury.

2. Intentional Misconduct

Article 2027: Sources of extra-contractual liability

(1) Irrespective of any undertaking on his/her part, a person shall be liable for the damage he/she causes to another by an offence, and

ARTICLE 2029: Types of offences

(1) An offence may consist in an intentional act or in mere negligence

Articles 2027(1) and 2029(1) together read:

Intentional misconduct is a deliberate action resulting in an injury to another person or damages another person's property. A plaintiff alleging intentional misconduct need not compare the defendant's actions to those of a reasonable person; he or she only must show that the defendant intended his or her actions. In a civil lawsuit in which the plaintiff alleges intentional misconduct, the plaintiff can recover punitive damages in addition to awards for injuries, pain, and suffering. Punitive damages, designed to punish people or organizations for unlawful acts, are often very large sums of money.

14 Refer also article 2027(1), "… he causes…"
15 Refer also article 2027(1) in page 12 below, "...for the damage…"

3) Strict Liability (liability with out fault)

ARTICLE 2027: Sources of extra-contractual liability

(2) A person shall be liable, where the law so provides, for the damage he/she causes to another by an activity in which he/she engages or by an object he/she possesses.

The final theory of tort liability, strict liability, applies to very dangerous activities. If someone does something extremely dangerous, and someone gets hurt as a result, the injured person can sue for damages without having to prove the defendant acted negligently or with intent to cause harm. The principle behind strict liability lawsuits is that some activities are so dangerous that, in exchange for permission to engage in the activity, the actor must assume total responsibility for any resulting damage.

Liability

According to article 2028 of the Transitional Civil Code of Eritrea, whosoever cause damage to another by an offence shall make it good. And pursuant to articles 2027(3) and 2031 of the same code a person shall be liable where a third party for whom he is answerable in law incurs a liability (vicarious liability), and a person practicing being a doctor, a nurse, a health assistant or any medical personnel shall observe the governing practices of his/her profession, respectively.

In medical malpractices litigation, the existence of a duty generally refers to an obligation of the defendant whether it is an organization, physician or other health professional to another individual who is generally, but not always, a patient. Therefore, if a wrong is done the tort-feasor/doer should make it good pursuant to article 2028 of the Transitional Civil Code of Eritrea.

Articles 2098 (2), 2105 and 2150 (1) of the Transitional Civil Code of Eritrea, are also relevant articles for determining damages.

SUMMONS, DOCUMENTARY EVIDENCE and the duty to testify

SUMMONS

A subpoena (sub=under, poena=penalty) or a summons is a document compelling the attendance of a witness, on a specified day and at a specified time, in a court of law under a penalty. When a summons is served on a witness, he must attend the court punctually, give evidence, and produce such documents or other articles as required by the court. Failure to obey a summons without a just cause renders the witness liable to an action for damages in a civil case and a fine, imprisonment or warrant of arrest and compulsory attendance in a criminal case.

Article 442 of the Penal Code: Refusal to aid justice

"Who so ever having been lawfully summoned to appear in judicial or quasi judicial proceedings as a witness or accused person, interpreter, assessor or juror: a) fails or refuses to appear without lawful excuse is punishable with fine and in the event of persistent and repeated refusal, with simple imprisonment…"

Moreover, Article 111 of the Criminal Procedure

Code empowers the court to issue summons to any person whose attendance is required either to give evidence or to produce documents.

Article 118 of the same code states that the court may make such order, including the issue of a warrant with or without bail for the arrest of such person, Sub (3) of the same article states that, "nothing in this Article shall affect the provisions of Art. 442 of the penal code, meaning the court can take measures specified in 442 in addition to arrest warrant.

DOCUMENTARY EVIDENCE

This means and includes all documents produced for the information of the court. Such evidence may consist of: a) medical certificates b) medico legal reports

Medical certificate: This is the simplest form of documentary evidence and may pertain to such facts as sickness, compensation, death etc. It is accepted by a court of law only when issued by a registered medical practitioner. The court may require the attendance of the certifying doctor to testify on oath the facts mentioned in the certificate and to be cross-examined on it if necessary.

Medico legal report: This is a report prepared by a doctor, usually in criminal cases, such as assault, rape, murder, poisoning, etc, in response to a requisition from a law enforcement authority. It is meant for the guidance of the investigating officer. It will be produced in court and is subject to cross-examination by the opposing counsel.

Examples of such report are: a) injury report, b) postmortem report, c) age certificate, d) dying declaration, e) certificate of mental illness, and f) certificate in connection with sexual offenses, etc.

Professionals' role and duty in providing evidence

In the majority of medical malpractice cases, the element of causation must be proved by expert testimony. Since most medical occurrences are not within the common knowledge of the judges, expert testimony enables the judges to understand the standard of care, any departures from that standard along with causation and damages. Of course, it requires the judge to make some judgments about the credibility of the expert witnesses and the evidence that they rely upon, but without their assistance, the judges could do no more than speculate about matters far beyond their possible comprehension.

Because of the difficulty in making a definitive determination about whether a certain act proximately caused the plaintiff's injury, experts are usually asked to give their opinion about the probability that a certain medical event caused a certain outcome. Therefore, medical professionals are expected and have a legal obligation/duty to testify whenever asked to do so in their respective assignment. This is the area where medical professionals contribute towards justice and fairness. It is also equally important to know that once a professional gives expert testimony he/she is part of the case and is subject to cross-examination from either party until the closure of the case.

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