

AN ANALYSIS OF TELEMEDICAL LIABILITIES UNDER THE NIGERIAN LAWS*

ABSTRACT

Telemedicine which essentially is the provision of healthcare services, clinical information and education over a distance using telecommunications technology; is different from conventional medical practice, in that the former happens mostly in the cyberspace involving internet service providers, practitioners and patients in sometimes, different nations and jurisdictions. This multi-disciplinary and cross-functional nature of telemedicine creates various liability risks otherwise known as telemedical liabilities which could either be civil or criminal. This paper analyses the various telemedical liabilities under the Nigerian laws, arising from the actions or inactions of service providers, medical practitioners and patients. Unlike in conventional medical practice where issues of liability are easily ascertained, it is not always clear-cut in telemedical liabilities. In such cases, there is need for clarity in the relationship between the tele-patient and the practitioner.

Keywords: Healthcare, Technology, Telemedical Liabilities, Telemedicine.

1.1 INTRODUCTION

In today's world, things that would hitherto require the physical presence of parties or participants, like learning, meetings, court trials, et cetera, could be achieved remotely, irrespective of any part of the world a party or participant is,¹ provided he or she is connected to the internet and equipped with the skill and access. That is the impact of technology, which has also been felt in the health sector, where health issues of patients are taken care of remotely, with the aid of telemedicine.

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¹Greg Kaplan, Benjamin Moll and Giovanni L. Violante, *The Great Lockdown and the Big Stimulus: Tracing the Pandemic Possibility Frontier for the U.S.*, (National Bureau of Economic Research, New York, 2020) 11

Telemedicine refers to the provision of healthcare services, clinical information, and education over a distance using telecommunication technology.² Telemedicine requires clear communication in real-time between the doctor and the patients.³ Low-grade equipment can cause miscommunication or even misdiagnosis, resulting in poor patient outcomes and dangerous liability risks arising.⁴ Apart from telemedicine gadgets, the use of telemedicine apps portends similar risks, particularly where the health professionals relies on mobile health products for patient care; or where the health professional recommends the use of a certain mobile health product. One area of particular importance for the use of health apps is patients' monitoring of their own health. The demand for such apps has grown substantially in recent years, particularly for chronic conditions including high blood pressure and diabetes.⁵

Unlike conventional medical practice, telemedicine happens in the cyberspace involving internet service providers, practitioners, and patients in sometimes, different nations and jurisdictions. The successful implementation of telemedicine requires concurrent response and information sharing among all these parties.⁶ Given that telemedicine is a multidisciplinary and cross-

functional platform, which involves service providers, practitioners, and patients⁷; the aim of this paper is to analyse the liabilities arising from the practice of telemedicine (or telemedical liabilities) under the Nigerian laws by

²Danielle Chaet, Ron Clearfield, James E Sabin and Kathryn Skimming, 'Ethical practice in Telehealth and Telemedicine,'(2017) 32*Journal of General Internal Medicine*,1136, 1137

³Joel Rodrigues, Sandra SendraCompte, and Isabel Díez, *e-Health Systems: Theory and Technical Applications*, (Elsevier Science, Amsterdam, 2016) 1

⁴ Catherine Flick, 'Informed Consent in Information Technology: Improving End User License Agreement' in John Weckert J. (ed) *Professionalism in the Information and Communication Technology Industry*, (Australian National University Press, Canberra, 2013) 127, 143

⁵Vikram Puri, Jolanda G Tromp, Noell C.L. Leroy, Chung Le Van, and Nhu Gia Nguyen, 'Analysis of Telemedicine Technologies' in Dac-Nhuong Le, Chung Van Le, Jolanda G. Tromp and Gia Nhu Nguyen (eds)*Emerging Technologies for Health and Medicine*(Scrivener Publishing LLC, Hoboken, 2018)153,154

⁶Anthony Jnr Bokolo 'Application of Telemedicine and eHealth Technology for Clinical Services in Response to COVID-19 Pandemic'(2021)11 *Health Technology*,359, 360

⁷James Wall and Jacques Marescaux, 'History of Telesurgery' in Philippe A. Liverneaux, Stacey H. Berner, Michael S. Bednar, Sijo J. Parekattil, Gustavo Mantovani Ruggiero and Jesse C. Selber(eds) *Telemicrosurgery* (Springer, Paris, 2013)5, 16

examining it in relation to the actions or inactions of service providers, medical practitioners and patients.

1.2 MEANING OF TELEMEDICINE

The word “telemedicine” was formed by combining the Greek word “*τελε*” (tele which means “distance”) and the Latin word *mederi* (which means “healing”) to form the term “telemedicine” that literally translates into the phrase “distance healing”.⁸As stated earlier, telemedicine refers to the provision of healthcare services, clinical information, and education over a distance using telecommunication technology. It is the use of telecommunications to provide medical information.⁹ It is also the technology that permits delivery of care anytime anywhere to anyone irrespective of the physical location of the parties involved.¹⁰Under the Code of Medical Ethics, telemedicine was described as follows:

*Telemedicine is the employment of telecommunication technology to give clinical attention to patients in locations remote from the doctor. It also enables clinicians from different parts of the globe to simultaneously exchange clinical views as if they were at the same location. It may involve audio, visual or audio-visual broadcast.*¹¹

The above provision takes into cognizance the fact that telemedicine is the practice of medicine enabled by technology. Technology, particularly, information communication technology (ICT), has metaphorically shrunk the world.¹² ICT has lessened physical barriers to communication and allowed humans to interact freely on a global scale via the use of computers and the

⁸S B Bhattacharyya, *A DIY Guide to Telemedicine for Clinicians* (Springer Nature Pte Ltd, Singapore, 2017) 48

⁹A C Norris, *Essentials of Telemedicine and Telecare* (John Wiley and Sons Ltd, West Sussex, 2002)2

¹⁰Toyeeb Olamilekan Abolade and Adekunle Durosinmi, ‘Telemedicine in Nigeria: A Paradigm Shift in Healthcare Delivery, Proceedings of the 21st iSTEAMS Multidisciplinary Going Global Conference,’ (2019) *CSIR-INSTI* <(PDF) Telemedicine in Nigeria: A Paradigm Shift in Healthcare Delivery (researchgate.net)> assessed 14 May 2023

¹¹ Appendix 5 *Code of Medical Ethics*, 2008. See also Rule 22 *Code of Medical Ethics*, 2004 with similar but slightly modified provision.

¹² S S Khanka, *Business Ethics and Corporate Governance* (S. Chand and Company Limited, New Delhi, 2014) 362

internet.¹³ The expression that the world is a global village is now a cliché. For, societies have long embraced the internet and use of computers in various ways, including but not limited to, education, communication, job creation, entertainment and commerce. The integration of ICT into the health sector as a means of delivering healthcare at a distance resulted in telemedicine.

Telemedicine encompasses the whole range of medical activities including diagnosis, treatment, and prevention of disease, continuing education of healthcare providers and consumers, and research and evaluation.¹⁴

Some authors tend to refer the term “telemedicine” in different ways: “telehealth”,¹⁵ “mhealth”,¹⁶ “digital health”,¹⁷ “telecare”,¹⁸ “ehealth”, etc. Among these terms, mostly used are ehealth and telemedicine. Generally, e-health, is understood to mean the application of the Internet and other related technologies in the health sector for improving access, efficiency, efficacy, and quality of clinical and corporate processes used by health organizations, physicians, patients, and consumers in an effort to improve the health status of patients.¹⁹ While telemedicine focuses on the use of internet and other technologies to deliver healthcare services remotely.²⁰ Consequently, some

¹³Christian Fuchs, *Internet and Society: Social Theory in the Information Age* (Routledge, New York, 2008) 137

¹⁴Kgomotso Moahi, Kelvin Joseph Bwalya and Peter Sebina, *Health Information Systems and the Advancement of Medical Practice in Developing Countries* (IGI Global, Hershey, 2017) 130

¹⁵Tracy A Lusting, *The Role of Telehealth in an Evolving Health Care Environment* (National Academies Press, Washington DC, 2012) 1

¹⁶Akaninyene Otu, Ido Ukpeh, Okey Okuzu and Sanni Yaya, ‘Leveraging Mobile Health Applications to Improve Sexual and Reproductive Health Services in Nigeria: Implications for Practice and Policy’ (2021) 18 (21) *Reproductive Health*, <<https://doi.org/10.1186/s12978-021-01069-z>> 27 May 2023

¹⁷ Federal Ministry of Health, National Health ICT Framework, 2015-2020, <<https://www.health.gov.ng/doc/HealthICTStrategicFramework.pdf>> 27 May 2023

¹⁸Ajala F A, Adetunji A and Akande N ‘Telemedicine Acceptability in South Western Nigeria: Its Prospects and Challenges,’ (2015) 9 *An International Journal of Advanced Computer Technology*, 1970, 1971

¹⁹Jamie Ross, Fiona Stevenson, Rosa Lau and Elizabeth Murray, ‘Factors that Influence the Implementation of e-Health: A Systematic Review of Systematic Reviews (an update)’ (2016) 1 *Implementation Science*, 146

²⁰James K Godstime, Odimayomi P. Kayode, and Shaba A. Halilu, ‘Telemedicine Development in Nigeria’, National Space Research and Development Agency (NASRDA), Abuja-Nigeria,

authors consider e-health broader than telemedicine²¹ or telemedicine as a component of e-health. However, for the purposes of this paper, the various terms mentioned above would be used interchangeably in analyzing telemedical liabilities under Nigerian laws.

It may be argued that Nigeria embraced telemedicine in 2007, when National Space Research and Development Agency (NASRDA) and the Federal Ministry of Health inaugurated its pilot project in two teaching hospitals and six federal medical centres in the six geopolitical zones of the country. The teaching hospitals were the University College Hospital, Ibadan and the University Teaching Hospital, Maiduguri. The Federal Medical Centres included those in Owo, Gombe, Makurdi, Yenagoa, Birnin Kebbi and Owerri. Apart from the public institutions, private organisations such as the Lagoon Hospital, Lagos and the Igbinedion University Teaching Hospital, Benin also embraced the use of the technology.²² In addition, a pilot project implementation that involved mobile-units or vehicles equipped with satellite receivers was unveiled.²³

On April 13, 2020, NASRDA rolled out telemedicine project to combat COVID-19 in Nigeria. The acting Director General of NASRDA, Mr. Jonathan Angulu explained that the idea of the mobile telemedicine project is aimed at bringing medical services to the doorsteps of the people. According to him, the project is decked with modern facilities which are capable of penetrating remote areas in providing the best medical services to the people, pointing out that the mobile hospital has the facility to connect to several hospitals and medical records which allows for efficiency in health care delivery. The NASRDA boss said with necessary support of the federal government, the space agency is capable and determined to make the facility available in the 774 local government areas in the country in no distant time.

<https://www.unspider.org/sites/default/files/james_3rd_ws-bonn_23_10_09.pdf>assessed 17 May, 2023

²¹Hind Bitar and Sarah Alismail, 'The Role of eHealth, Telehealth, and Telemedicine for Chronic Disease Patients During COVID-19 Pandemic: A Rapid Systematic Review,' (2021)7*Digital health*, <<https://doi.org/10.1177/20552076211009396>>assessed 17 May, 2023

²²Kingsley ChiwuikeUkaoha and Francisca Egbokhare, 'Prospects and Challenges of telemedicine in Nigeria' (2012)JMBS,<https://www.researchgate.net/publication/272877000_Prospects_and_challenges_of_telemedicine_in_Nigeria>assessed 18May, 2023

²³ Ibid

Most recently, on December 13, 2022, the Department of Pediatrics, BarauDiko Teaching Hospital Kaduna, launched its first Telemedicine Center, named Professor Tabari Telemedicine Center, designed to save lives right from home via telecommunication technology.

1.3 TYPES OF TELEMEDICINE

Telepsychiatry, teleradiology, tele-dermatology, tele-neurology are all various forms of telemedicine or rather, a reflection of the various areas of medical practice to which telemedicine has been deployed.²⁴ Irrespective of the form in which telemedicine is practiced, or the area of medicine to which it is deployed, telemedicine can be, and has been broadly classified into four types. They are teleconsultation, tele-education, telemonitoring and telesurgery.

1.3.1 TELECONSULTATION

Medical consultation is at the heart of clinical practice.²⁵ Not surprisingly, therefore, teleconsultation to support clinical decision making is the most frequent example of telemedical procedures.²⁶ A teleconsultation can take place between one or more care-givers and a patient.²⁷ The simplest example is a telephone conversation between two physicians to obtain a second opinion.

The physicians may be in different rooms in the same building or in different countries over a satellite link. The most frequent image of a teleconsultation, however, is of a patient and his or her doctor communicating via a videoconferencing link.²⁸ This type of link usually takes place in real time to generate the interactive feedback (i.e. consultation) that acts upon information as it is received. The alternative store-and-forward technology is frequently used in teleradiology for the transmission of large X-ray files at periods of low

²⁴Kimberly Rockwell and Alexis Gilroy, 'Legal and Regulatory Issues with Telemedicine Practice in the ICU' in Matthew A. Koenig (ed.) *Telemedicine in the ICU* (Springer, Cham, 2019) 63, 64

²⁵A C Norris, *Essentials of Telemedicine and Telecare* (John Wiley and Sons Ltd, West Sussex, 2002) 2

²⁶ Ibid

²⁷ Ibid

²⁸Thierry Moulin, Jacques Joubert, Jean-Luc Chopard, Lynette B. Joubert and Elisabeth Medeiros de Bustos, 'Telemedicine in Stroke: Potentials, limitations and Ongoing Issues' in Georgi Graschew and Theo A. Roelofs (eds.) *Advances in Telemedicine: Application in Various Medical Disciplines and Geographical Regions*, (Intech, Croatia, 2011) 3, 24

network traffic. In these situations, the delay between receipt of information and advice is planned and causes no disruption to treatment.²⁹ Often another healthcare worker is present with the patient during the consultation, and the involvement of two healthcare professionals modifies the one-to-one patient-physician relationship found in conventional consultation.³⁰

Teleconsultation refer to synchronous or asynchronous consultation using information and communication technology to omit geographical and functional distance. Its goals are for diagnostics or treatment between two or more geographically separated health providers (for example physicians or nurses) or between health providers and patients.³¹

1.3.2 TELE-EDUCATION

Telemedicine technology can excellently be used for distance training where live lectures, including surgeries, are broadcasted through to remote locations like medical colleges and medical conferences.³² A highly experienced surgeon at the remote end can help instruct a less experienced surgeon at the patient's end to perform a demanding procedure proficiently with high levels of satisfactory outcome as a sort of hands-on training in procedures conducted from a distance.³³

1.3.3 TELEMONTORING

Telemonitoring is the use of a telecommunications link to gather routine or repeated data on a patient's condition.³⁴ Telemedicine technology enables the required information to be available on a variety of platforms like home

²⁹Sajeesh Kumar, 'Introduction to Teleradiology' in Sajeesh Kumar and Elizabeth A. Krupinski (eds.) *Teleradiology*, (Springer, Switzerland, 2008) 1, 3

³⁰A C Norris, *Essentials of Telemedicine and Telecare* (John Wiley and Sons Ltd, West Sussex, 2002) 20

³¹Kolsoum Deldar, Kambiz Bahaadinbeigy and Seyed Mahmood, 'Teleconsultation and Clinical Decision Making: A Systematic Review,' (2016) 24 *Acta Informatica Medica (AIM): Journal of the Society for Medical Informatics of Bosnia & Herzegovina*, 286

³²S B Bhattacharyya, *A DIY Guide to Telemedicine for Clinicians* (Springer Nature Pte Ltd, Singapore, 2017) 3

³³A C Norris, *Essentials of Telemedicine and Telecare* (John Wiley and Sons Ltd, West Sussex, 2002) 3

³⁴Ibid 24

computers, tablets, smartphones or other mobile devices.³⁵ The patient may be in a hospital, at home, on an aircraft or wearing an ambulatory device such as a blood pressure monitor, and data can be transmitted across the world. In almost every case, the purpose of monitoring is to decide if and when an adjustment is needed to the patient's treatment.³⁶

1.3.4 TELESURGERY

Telesurgery, sometimes referred to as telerobotic surgery, is a specialized form of telemedicine, featuring robotic surgical devices that enable surgeons to operate on patients remotely.³⁷ Telesurgery has refined surgery in some disease conditions.³⁸ Remote telesurgery is the same as normal surgery, except that the surgeon and the patient are separated by significant distances.³⁹

In 2001, Dr. Jacques Marescaux was able to perform a gall bladder surgery while he was in New York and the patient was in France:

On 7 September 2001, Operation Lindbergh culminated in the first complete remote surgery on a human patient (a 68-year-old female), performed over a distance of 4,300 miles (7,000 km). The patient and surgical system were located in an operating room in Strasbourg, while the surgeon and remote console were situated in a high-rise building in downtown New York. A team of surgeons remained at the patient's side to step in, in case they were needed. The procedure performed was a laparoscopic cholecystectomy (gallbladder removal), considered the standard of care in minimally invasive surgery. The established time delay during the surgery was 135ms, remarkable considering that the data travelled a distance of more than 8,600 miles (14,000 km) from the surgeon's console to the surgical system and back to the console. The patient left the hospital within 48 h—a typical stay after laparoscopic cholecystectomy—and had an uneventful recovery.⁴⁰

³⁵ Ibid70

³⁶ Ibid 147

³⁷ Dylan J Cahill, 'Telesurgery: Surgery in the Digital Age,' (2017)19 *Dartmouth Undergraduate Journal of Science*, 12

³⁸ Richard M Satava 'Future Directions in Robotic Surgery' in Jacob Rosen, Blake Hannaford and Richard Satava (eds.) *Surgical Robotics* (Springer, Boston, 2011)3, 4

³⁹ Sajeesh Kumar, 'Introduction to Teleradiology' in Sajeesh Kumar and Elizabeth A. krupinski (eds.) *Teleradiology*, (Springer, Switzerland, 2008) 1, 3

⁴⁰ Ibid 4

Dr. Mehran Anvari has since performed many remote telesurgical cases in Canada.⁴¹ Most tele-surgical devices consist of two main components common to all robotic surgical systems: a “master” control unit where the surgeon operates using hand and foot controls while watching the surgery on a high-quality 3D monitor, and a “slave” unit containing robotic arms that operate on the patient.⁴² In the case of telesurgery, the master control unit may be located hundreds to thousands of kilometers away from the patient in the operating room. Though the concept of telesurgery may appear novel or risky, the basic idea of using robots to carry out complex tasks from great distances is nothing new; it has been nearly two decades since NASA began operating its first Mars rover, Pathfinder, over 225 million km from Earth.⁴³ The concept of telesurgery originated with NASA in the 1970s as the space program began considering the possibility of operating on astronauts remotely.⁴⁴ At the time, the military was also keenly interested in the development of a platform that could be used to provide surgeries to soldiers in battlefield clinics. In the following decade, the field of telesurgery became a rich area of research along with initiatives promoting the development of minimally invasive surgery techniques and robotic surgical devices. The first “master-slave system” was developed in the 1990s, and various robotic surgery devices were tested before the da Vinci® Surgical System gained Food and Drug Administration (FDA) approval in 2000. The da Vinci Robot, build by Intuitive Surgical, is the most widely used robotic surgery system, with nearly 4,000 units installed worldwide. It has two parts: the control console and the patient side. Most telesurgeries performed to date have used robotic surgical systems that operate using principles similar to da Vinci, such as ZEUS®, RAVEN, and M7.⁴⁵ Compared with the other ‘tele’ applications discussed so far, telesurgery is in its infancy.⁴⁶ The main advantages of telemonitoring over telesurgery are that

⁴¹Charles R Doarn and Gerald Moses, ‘Overcoming Barriers to Wider Adoption of Mobile Telerobotic Surgery: Engineering, Clinical and Business Challenges’ in Jacob Rosen, Blake Hannaford and Richard Satava (eds.) *Surgical Robotics* (Springer, Boston, 2011)69, 72

⁴²Sajeesh Kumar, ‘Introduction to Teleradiology’ in Sajeesh Kumar and Elizabeth A. krupinski (eds.) *Teleradiology*, (Springer, Switzerland, 2008) 4

⁴³ Ibid

⁴⁴James Wall and Jacques Marescaux, ‘History of Telesurgery’ in Philippe A. Liverneaux, Stacey H. Berner, Michael S. Bednar, Sijo J. Parekattil, Gustavo Mantovani Ruggiero and Jesse C. Selber(eds) *Telemicrosurgery* (Springer, Paris, 2013)5, 16

⁴⁵ Ibid

⁴⁶ Ibid

the former can be performed at a much-reduced cost and that it puts patients at less risk in the case of network outages.⁴⁷

1.4 TELEMEDICAL LIABILITIES

Telemedical liabilities refer to liabilities arising from the practice of telemedicine.⁴⁸Liabilities can either be civil or criminal or both.⁴⁹Criminal liability refers to responsibility for a crime and the penalty society imposes for the crime. Civil liability, on the other hand, is a legal obligation that requires a party to pay for damages or to follow other court-enforcements in a lawsuit. Different from criminal liability, which is often brought by the State to redress a public wrong, civil liability is usually brought by a private party to sue for damages, injunctions or other remedy.⁵⁰

1.5 CIVIL LIABILITIES IN TELEMEDICINE

Oftentimes, the concept of liability with respect to doctor-patient relationships, is usually considered in relation to the negligent actions or omissions of the medical practitioner. A person is said to be negligent, if he omits or fails to do something which a reasonable man under similar circumstances would do or the doing of something which a reasonable and prudent man would not do.⁵¹Thus, in an action for negligence, the plaintiff must prove the following elements: (a) the existence of duty of care owed to the plaintiff by the defendant. (b) breach of that duty of care by the defendant. (c) damages suffered by the plaintiff as a result of the breach by the defendant of that duty of care.⁵²

Similarly, in telemedicine, an action for telemedical negligence requires the plaintiff to establish that: the defendant (e.g., the teleconsultant) owes him or

⁴⁷TamásHaidegger and ZoltánBenyó, 'ExtremeTelesurgery' <<https://www.intechop.en.com/chapters/6511>> assessed 19 May, 2023

⁴⁸Haydon M. Pitchford, Marcus C. Divers, Sherita N. Chapman, and Andrew M. Southerland, 'Prehospital Telemedicine and EMS Integration' in: Matthew A Koenig (ed.) *Telemedicine in the ICU*, Springer, Switzerland, 281, 289

⁴⁹ Ibid

⁵⁰A C Norris, *Essentials of Telemedicine and Telecare* (John Wiley and Sons Ltd, West Sussex, 2002)5

⁵¹*Federal Ministry of Health & Anor v Comet Shipping Agencies* (2009) 4 - 5 SC (PT. II) 110

⁵²*Hamza v Kure* (2010) 10 NWLR (pt. 1203) 630; *Reynolds Construction Company v Odigie* (2018) LPELR 44776 (CA).

her a duty of care (established via the patient-doctor relationship); and that the duty has been breached, i.e., the teleconsultant was negligent; and that he or she suffered harm as a consequence of the negligence.⁵³

It is safe to say that the first question to be determined in any action for negligence, is whether the defendant owed a duty of care to the plaintiff. There are a number of common situations on which it is well established that a duty of care exists, and the list is not exhaustive. In general, a duty of care will be owed wherever in the circumstances it is foreseeable that if the defendant does not exercise due care, the plaintiff will be harmed.⁵⁴ This foreseeability test was laid down by Lord Atkin in the celebrated case of *Donoghue v Stevenson*⁵⁵ and it is known as “the neighbour principle.” Specifically speaking however, it remains the duty of the plaintiff who alleges that a defendant owes him a duty of care to establish facts upon which the duty is founded. The Supreme Court, in *ABC Transport Co Ltd. v Omotoye*⁵⁶ puts it this way “in an action for negligence, for a plaintiff to succeed he must, in addition to pleading and establishing the particulars of negligence relied on, also state and establish the duty of care owed to him by the defendant, the facts upon which that duty is founded and the breach of that duty by the defendant.”

The fact upon which the duty of care is founded in medical negligence is ascertained from the doctor-patient relationship. In other words, for a medical malpractice case to be successful, a doctor-patient relationship must be established in order for the doctor to hold a duty of care toward the patient.⁵⁷ This relationship is widely viewed as contractual in nature, either being established expressly by a written contract, or implied through the conduct of the doctor and patient.⁵⁸ While not necessarily problematic for malpractice

⁵³Oludamilola Adebola Adejumo and Oluseyi Ademola Adejumo, ‘Legal Perspectives on Liability for Medical Negligence and Malpractices in Nigeria’ (2020)35 *The Pan African Medical Journal*, <<https://doi.org/10.11604/pamj.2020.35.44.16651>> assessed on 23 May, 2023

⁵⁴Gilbert Kodilinye and Oluwole Aluko, *The Nigerian Law of Torts* (Spectrum Books Limited, Ibadan, 1999)39

⁵⁵ [1932] AC562

⁵⁶ (2019) LPELR -47829 (SC).

⁵⁷William W Longpoe and E IbuOtor, ‘Doctor-Patient Relationship: A Basis for Liability and Burden of Proof’, (2020)17(1) *A Journal of Contemporary Research*, 85, 88

⁵⁸ Ibid.

cases involving traditional care, uncertainty remains as to when this relationship is established in telemedical care.⁵⁹

Without legislation determining the formation of the physician-patient relationship, the existence of the relationship is determined on a factual basis and will vary from case-to-case. In *Wheeler v Yettie Mem'l Hosp.*,⁶⁰ Dr. Rodriguez, a general practitioner with staff privileges at a hospital who was on call approved the transfer of an eight-month pregnant patient to another hospital based only on a recitation of the circumstances on the phone with two nurses. When Mrs. Wheeler arrived at Yettie Kersting at approximately 3:10 p.m., Nurses Davison and Colvin ("the Nurses") assessed her condition as "dilated 4 cm., 70% effaced with bulging membranes, and the fetus at -2 station." This assessment was communicated by telephone to Dr. Sergio Rodriguez, a general practitioner with staff privileges, who was on call that day. Nurse Colvin also called John Sealy and gave the same information to an unidentified doctor there. The John Sealy doctor instructed the nurse to send the patient to Galveston on her left side. Dr. Rodriguez also approved the transfer. The patient died during the trip, and the court found that "in evaluating the status of Mrs. Wheeler's labour and giving his approval, he established a doctor-patient relationship with Mrs. Wheeler and accepted the duties which flow from such a relationship." In *Biens v Cent. Suffolk Hosp.*,⁶¹ it was held that a telephone call to a doctor's office regarding the beginning of treatment may be sufficient to create a physician-patient relationship. On the other hand, in *Hord v United States*,⁶² it was held that the physician must offer some benefit to the patient in order for the relationship to be formed, and that even an examination does not establish the relationship unless there was an agreement to benefit the patient.

Despite these variations, it is relatively clear that physicians will not be able to escape malpractice liability by claiming that the lack of an in-person meeting or examination precludes the physician-patient relationship.⁶³ The relationship is likely formed when the patient has sought medical care from a

⁵⁹Tyler D. Wolf, 'Telemedicine and Malpractice: Creating Uniformity at the National Level,' (2020) 61 *William & Mary Law Review*, 1505, 1515

⁶⁰ 866 SW2d 32, 35 (Tex. App. 1993)

⁶¹ 557 N Y S 2d 139 (NY App Div 1990)

⁶² No. CA-96-3401-7-13, 1999 WL 249061, 4 (4th Cir. Apr. 28, 1999)

⁶³Tyler D. Wolf, 'Telemedicine and Malpractice: Creating Uniformity at the National Level,' (2020) 61 *William & Mary Law Review*, 1505, 1515

physician and both the physician and patient agree to that care.⁶⁴ The relationship is most likely established without the need for an in-person meeting.⁶⁵ With current telemedicine technologies, the consulting physician may have the opportunity to be “virtually present” in the patient’s room, as opposed to simply speaking with the treating physician over the telephone.⁶⁶

A potential issue arises when a physician-to-physician consultation occurs through telemedicine. In that scenario, the physician does not actually interact with the patients, and such consultations generally do not form the physician-patient relationship.⁶⁷ Despite this, it appears that doctors who provide anything more than a mere consultation may expose themselves to malpractice liability by establishing the relationship, even if they never spoke with the patient. In *McKinney v Schlatter*,⁶⁸ a patient was admitted to the emergency room and examined by the emergency room physician who telephoned the cardiologist on call. After the cardiologist was briefed on the patient's condition, he told the emergency room physician that the patient's problem was not cardiac. Relying upon the cardiologist's diagnosis, the patient was released and died soon thereafter. In the subsequent malpractice case against the cardiologist, the Ohio appellate court found that:

a physician-patient relationship can exist by implication between an emergency room patient and an on call physician who is consulted by the patient's physician but who has never met, spoken with, or consulted the patient when the on call physician (1) participates in the diagnosis of the patient's condition, (2) participates in or prescribes a course of treatment for the patient, and (3) owes a duty to the hospital, staff or patient for whose benefit he is on call.

⁶⁴William W Longpoe and E Ibu Otor, ‘Doctor-Patient Relationship: A Basis for Liability and Burden of Proof’, (2020)17(1) *A Journal of Contemporary Research*, 85, 88

⁶⁵ Ibid.

⁶⁶Charles R Doarn and Gerald Moses, ‘Overcoming Barriers to Wider Adoption of Mobile Telerobotic Surgery: Engineering, Clinical and Business Challenges’ in Jacob Rosen, Blake Hannaford and Richard Satava (eds.) *Surgical Robotics* (Springer, Boston, 2011)69, 72

⁶⁷Tamilore Labisi, ‘The legal Framework of Telemedicine in Nigeria,’ <<http://dx.doi.org/10.13140/RG.2.2.30223.10401>>assessed 19May, 2023

⁶⁸ No. CA96-05-100, 1997 WL 67702, 1 (Ohio App 12 Dist. Feb 18, 1997), appeal dismissed, 78 Ohio St.3d 1471, appeal dismissed, 79 Ohio St.3d 1421 (1997)

In *Cogswell v Chapman*⁶⁹, an infant arrived at the emergency room with an eye injury from a fishing accident. The defendant, William Eichner, was a "courtesy/consulting physician at the hospital" and only provided a recommended treatment via a phone call to the emergency room physician. The court acknowledged that "exposure to liability of a consulting physician is limited," but nevertheless affirmed that an issue of fact existed regarding Eichner's potential physician-patient relationship.

Once physician-patient relationship exists, a party would have established the duty of care against the medical practitioner. In addition, a party seeking to sue a physician for malpractice resulting from a telemedicine consultation must prove that the physician breached the duty of care by demonstrating that the actions of the medical practitioner fall below the requisite standard of care. What amounts to the requisite standard of care depends on the facts of the case, provided a physician or surgeon is held only to that degree of skill possessed by physicians and surgeons of his standing. In *Bolam v Friern Hospital Management Committee*,⁷⁰ the court said that "a man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular act."

In addition, the plaintiff is required to show that he has suffered damage for which the defendant is liable in law. It is only when it can be shown that the action of the defendant caused the damage suffered by the Plaintiff, that the action of the Plaintiff can succeed. In *Barnett v Chelsea and Kensington Hospital Management Committee*,⁷¹ the Claimant's husband and two of his fellow night watchmen went to the hospital and complained that they had been vomiting for three hours after drinking tea. The nurse called the casualty doctor by telephone and told him of the complaint. Instead of going to see them, the doctor instructed the nurse to tell them to go home and consult their doctors later. The men left and later that day the claimant's husband died of arsenic poisoning and the coroner's verdict was that of murder by persons unknown because the arsenic poison was introduced into the tea. The court found that even if the deceased had been examined and treated with proper care by the doctor, it would probably not have been possible to save his life. Thus, there was no causal link between the negligent act of the doctor and the

⁶⁹ 672 NYS.2d 460, 461 (NY App Div. 1998)

⁷⁰ [1957] 1 WLR 582 at 586

⁷¹ [1969] 1 Q B 428.

injury eventually suffered by the claimant's husband. The claimant's case failed.

In telemedicine, liability may arise from patients' self-monitoring gadgets, particularly where health professionals recommend that the patient use a certain mobile health product or where the health professional contributed in the development.⁷² Health professionals who use mobile health technologies directly in the context of patient care could be held liable for malpractice if a patient is harmed. Conversely, a health professional who declines to make use of data provided by a patient via mobile health technology (which is likely to be overwhelming in its volume) could be held liable if he or she misses important information, delaying diagnosis and harming the patient. But in either case, the physician will only be held liable if he or she fails to exercise sound professional judgement in the use of mobile health technologies.⁷³

Defects in computer equipment and software can cause all manner of damage.⁷⁴ There has been occasion when defects in software have had very serious consequences. For example, in 1992 it was discovered that around 1000 patients at a North Staffordshire hospital had received incorrect dosage of radiation therapy because of an alleged fault in a computer program. Later that same year the London Ambulance's new computer system failed dramatically throwing the ambulance service into chaos and resulting in a number of deaths caused by consequential delays in getting ambulances to the call-out destinations.⁷⁵

If a person suffers loss or damage as a result of defective hardware or software in the use of telemedicine, he or she is entitled to seek remedy either in contract, law of negligence, or product liability. However, the natural inclination of service providers (responsible for creating the telemedicine software and telemedicine platforms which connects patient with doctors) is to prevent, with the aid of contracts or click wraps, any liability that might be attributable to them. So, they tend to exempt themselves from liability over

⁷²Joel Rodrigues, Sandra SendraCompte, and Isabel Díez, *e-Health Systems: Theory and Technical Applications*, (Elsevier Science, Amsterdam, 2016) 5

⁷³ Ibid

⁷⁴David I Bainbridge, *Introduction to Information Technology Law*, (Pearson Education Limited, England,2008) 241

⁷⁵ Ibid

issues arising from consultations that take place on the platform or other issues arising from the use of their software.⁷⁶

However, given that a telepatient is a consumer⁷⁷ of the services of the service providers, the consumer protection law prevents the exclusion or restriction of liability or making the liability so onerous. Even an arbitration clause is not to be treated as a restriction.⁷⁸ Under the relevant law⁷⁹ a telepatient can claim against the producer of a defective product regardless of the lack of a contractual relationship between the telepatient and the producer and without having to show basic requirement for an action in negligence. As a matter of fact, the law puts the onus of proof on the service provider to show that the services are not defective in case of allegation of defective service.⁸⁰ This position, it may be argued, goes against established principle of the evidence law which to the effect that he who alleges must prove; but this consumer protection law seeks to protect the interest of the consumers against service providers who put mechanisms in place to evade liabilities.

However, the extent to which service providers or intermediaries would be held liable, depends on whether they are functioning as a content provider, host provider or access provider. A Content provider makes content of whatever nature (information, picture, videos, etc.) available to the public. So, the liability of a content provider depends on whether there is a contract between the patient and the content provider.⁸¹ Sometimes, the liability of the content provider may reduce if the content was provided to the patient for free or as it would usually be the case, the contracts have disclaimer clauses.⁸²

⁷⁶Anil Upadhyay, 'The Liability Conundrum for Telemedicine Platforms in India: Striking a Balance between Vicarious and Intermediary Liability,' <<https://www.lexology.com/library/detail.aspx?g=2d0e3883-a211-4cf9-99be-1f426f25420b>>assessed on 20 May 2023

⁷⁷ In *Indian Medical Association v VP Shanta and Ors III (1995) CPJ 1 (SC)*, the Supreme Court of India held that all patients are consumers even if treatment is given free of charge.

⁷⁸ Section 141 *Federal Competition and Consumer Protections Act*, 2018.

⁷⁹*Federal Competition and Consumer Protections Act*, Ibid

⁸⁰ Section 154 Ibid

⁸¹Schwemer Sebastian Felix, MahlerTobias and Styri, Håko, 'Legal Analysis of the Intermediary Service Providers of Non-hosting Nature', *Final Report prepared for European Commission*, <<https://op.europa.eu/en/publication-detail/-/publication/3931eed8-3e88-11eb-b27b-01aa75ed71a1/language-en>>assessed 20 May, 2023

⁸²*State of Punjab v Shiv Ram and Ors., IV (2005) CPJ 14 (SC)*

Host provider, on the other hand, creates the platform where the patients and the doctors are registered.⁸³ Its liability in the circumstance lies in the failure or otherwise of doing due diligence.⁸⁴ In *Airtel Networks ltd v Imerh*⁸⁵ where the Appellant failed to do the necessary due diligence on a third-party with whom it entered into an agreement, the Court of Appeal in holding that the Appellant was negligent held that:

From the foregoing, I am very much certain that a telecommunication service provider who owns and operates a network has a duty to prevent its subscribers from the activities of his numerous independent marketers and resellers who come into the network to dig for gold. When Davoize started using the Appellant's network to woo subscribers registered by the Appellant on the network to press a code and migrate to their own plans, based on the contract Davoize had with the Appellant, it was the duty of the Appellant to also inform the subscribers being wooed and who were not privy to the resell contract of the implication of such a migration. If the Appellant failed to sensitize or warn the subscribers and there are damages, the Appellant will have to be held liable for the breach of that duty of care.

Access provider simply grants access to the patient to possibly interact with the doctors.⁸⁶ It exercises the role of the transporter in the sense that it makes it technically possible for the patient to get access to content, like the advisories of doctors, medical opinions, researches and so on.⁸⁷ It is the responsibility of the access provider to protect its servers against cyberattacks, so its liability would usually emanate for its failure to do so.⁸⁸ It would appear however, that the Code of Medical Ethics extended the roles of medical practitioners in relation to telemedicine to include the role of the access provider by

⁸³Schwemer Sebastian Felix, Mahler Tobias and Styri, Håko, 'Legal Analysis of the Intermediary Service Providers of Non-hosting Nature', *Final Report prepared for European Commission*, <<https://op.europa.eu/en/publication-detail/-/publication/3931eed8-3e88-11eb-b27b-01aa75ed71a1/language-en>>assessed 20 May, 2023

⁸⁴ Ibid.

⁸⁵ (2017) LPELR-43459(CA)

⁸⁶Abid Haleem, MohdJavaid, Ravi Pratap Singh, and Rajiv Suman, 'Telemedicine for Healthcare: Capabilities, Features, Barriers, and Applications' (2021) 2 *Sensors international*, <<https://doi.org/10.1016/j.sintl.2021.100117>>assessed 23 May 2023

⁸⁷ Ibid

⁸⁸Jeff Kosseff, *Cybersecurity Law*, (John Wiley & Sons, Inc., Hoboken,2017) 94

mandating them to “make appropriate arrangements for the security of personal information when it is stored, sent or received by fax, computer, e-mail or other electronic means.” In *Langdon v Google, Inc.*,⁸⁹ the court ruled that no providers should be held liable when taking action, in good faith, to restrict access to objectionable material.

1.6 CRIMINAL LIABILITIES IN TELEMEDICINE

Both the healthcare professional and the service provider could be held criminally liable. Under the Federal Competition and Consumer Protection Act, it is a crime for a service provider to contravene the right of consumers.⁹⁰ The law defines consumers *inter alia* as “any person to whom service is provided”⁹¹, which invariably includes tele-patient. It is the duty of the service provider who is in possession of a patient’s health records to set up control measures to prevent unauthorized access to those records and to the storage facility in which, or, system by which, records are kept; and where it fails to do so, it commits an offence and is liable on conviction to imprisonment for a period not exceeding two years or to a fine of N250,000.00 or both.⁹²

All private health care providers shall establish and maintain a health information system as part of the National Health Information System; and any health care provider that neglects or fails to comply commits an offence and is liable on conviction to imprisonment for a term of six months or a fine of N 100.000 or both.⁹³

It is the duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any person or to do any other lawful act which is or may be dangerous to human life or health, to have reasonable skill and to use reasonable care in doing such act.⁹⁴ The Supreme Court in *Medical and Dental Practitioners Disciplinary Tribunal v Dr John Emewulu Nicholas Okonkwo*⁹⁵ stated that that section does not by itself create an offence but creates a duty where it would have been doubtful whether or

⁸⁹ 474 F.Supp.2d 622 (D. Del. 2007)

⁹⁰ Section 155 *National Health Act*, 2014

⁹¹ Section 167 *Ibid*

⁹² Section 29(2) (h) *Ibid*

⁹³ Section 38 *Ibid*

⁹⁴ Section 303 *Criminal Code*, Cap C38 LFN2004

⁹⁵ (2001) LPELR-1856(SC)

not one existed in criminal law. It establishes liability for consequences of the breach of that duty. In circumstances where it is applicable it makes negligence the basis of criminal liability for offences against the person (excluding murder) where the need to establish intention, knowledge and such mental elements as basis of liability would have been required.

On the other hand, any person who in a manner so rash or negligent as to endanger human life or to be likely to cause harm to any person either by giving medical or surgical treatment to any person who he undertakes to treat or by dispensing, supplying, selling, administering, or giving away any medicine or poisonous or dangerous matter, is guilty of a misdemeanor and is liable to imprisonment for one year.⁹⁶ In *Akere v R.*⁹⁷ where the accused a qualified medical practitioner administered injections of a drug known as sobita to children as a cure for yaws; a number of children died, and he was charged with manslaughter of one of the children, he was found guilty of manslaughter and sentenced to imprisonment for 3 years. WACA upheld the conviction, but the accused further appealed to the Privy Council which held that the negligence of the accused did not amount to gross negligence and allowed the appeal.

1.7 CONCLUSION

Telemedicine creates various liability risks. They include general negligence, criminal liability risks and product liability risks. Telemedicine software developers also face liability claims for design defect and breach of warranty. Even though users are forewarned and made to waive those rights once they accept and download the app, the law ensures that parties who have been injured are entitled to remedy. However, with respect to actions in medical negligence, even though similar principles that would ordinarily apply to conventional practice of medicine applies to telemedicine, there is a level of uncertainty as to when doctor-patient relationship is established, for the purpose of determining duty of care, needed to establish telemedical negligence.

There has to be clarity in the request for medical care via telemedicine and the treatment or advice that should follow. Such clarity could be achieved via

⁹⁶ Section 343 Ibid

⁹⁷ [1942] 8 WACA 5.

consent forms approving the use of telemedicine to examine, consult, diagnose and treat the patient. It could be via email wherein the consent form is emailed to the patient who downloads it, reads it, fills it, signs, scans and sends back to the doctor. Where it is clear that a patient has sought medical care from a physician and both the physician and patient agree to that care, there will be no questions as to the duty of care, which is a prerequisite for establishing telemedical negligence.