ARBITRABILITY OF MEDICAL NEGLIGENCE; THE NEED FOR URGENT ACTION

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ABSTRACT

Negligence means failure to extend duty of care to whom it is owed. Negligence occurs in all spheres of human life including the medical sphere and that is known as medical negligence. This work was undertaken to examine medical negligence, the elements of medical negligence and its arbitrability and it has through decided cases looked into different jurisdictional stands on medical negligence arbitration and the good and shortcomings of arbitrating medical negligence in such places. The findings of the research reveal that medical negligence is arbitrable and as a matter of fact has been arbitrated in some jurisdictions for over 10 years and that some countries have it embedded in their laws. Furthermore, the article revealed that arbitrability of medical negligence is common in the United States of America, United Kingdom and other jurisdictions. It further stated that arbitration of medical negligence will foster good relationship between the parties and it is less expensive than litigation. The work concluded that it is possible to arbitrate medical negligence and recommended that medical negligence should be arbitrable in all countries, however patients should be allowed time to understand the arbitration agreement and should not be forced into signing the arbitration agreement.

KEY WORDS: Negligence, Medical negligence, Arbitration, Arbitrability

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INTRODUCTION

Medical negligence is any negligence by an act or omission of a medical practitioner in performing his duty.[1] Over the years, medical negligence claims have been resolved through tort-based litigation.[2]. Some of the problems associated with the tort system include "the high emotional and financial costs to the litigants, the detrimental effect on the doctor-patient relationship, and the inability of tort litigation to deter physician negligence."[3] There have also been concerns about the quality of medical expert witnesses, the high number of non-meritorious cases, and the high visibility of such litigation.[4] Medical practitioners facing lawsuits strongly defend themselves from lawsuits because of concerns about the loss of reputation and future discipline.[5] While the emotionally charged issues of illness, death, and dying may create compelling reasons for the plaintiff to litigate to the full extent possible,[6] judicial power is an essential prerogative of states, the parties may, if they express the wish to do so, give jurisdiction to arbitrators to settle their disputes, but on the other hand, the state retains the power to prohibit settlement of certain categories of disputes outside its courts. It is then claimed that the dispute is not arbitrable; in such instance if an arbitration agreement is entered into, it will not be valid. In recent times, arbitration is now being used to settle medical negligence disputes, this is because it has proven to be easier than invoking litigation. However there exists still underlying problems to arbitration of medical negligence disputes which will be discussed.

METHODOLOGY

This study adopted descriptive design and doctrinal approach. The doctrinal approach used quantitative method in considering the legal instruments, cases and awards. This evaluates with regulation, medical ethics, medical

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malpractice, negligence, torts among others. The descriptive design adopted structured and some structured interview among the medical practitioners and arbitrators. The content analysis was applied for relevant materials.

Arbitration

Black's Law Dictionary defined arbitration as

> The investigation and determination of a matter or matters of difference between contending parties, by one or more unofficial persons, chosen by the parties, and called "arbitrators," or "referees.[7]

'Words and phrases judicially defined' in defining arbitration states that:

The reference of a dispute or difference between not less than two parties for the determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction.[8]

Halsbury's laws of England defined arbitration as

> the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law[9]

The following are the fundamental features of arbitration[10]

- An alternative to national court
- A private mechanism for disputes resolution
- Parties autonomy
- Finality of decision

Alternative to National Courts

Arbitration is different from National Court, when parties agree to arbitration they remove their relationships and disputes from the jurisdiction of National Courts.

Private mechanism for disputes resolution

Arbitration agreement is private between the parties. When disputes arise, it is resolved privately between the parties.

Parties Autonomy

This is the principal characteristic of arbitration. Parties are allowed to choose by themselves how they want the arbitral proceeding to go. They decide the Seat of arbitration, numbers of arbitrators, language of arbitration, law that would govern the arbitration and so on.

Finality of Decisions

Arbitration unlike other alternative disputes settlement mechanisms produces a final and binding decision called an Award. An award has the same effect as a Court judgment on a dispute.

Advantages of arbitration over litigation

Arbitration is fast growing and it has become a preferred dispute settlement mechanism. It has been chosen by many disputants over litigation for the following reasons:

a. Flexible Procedure

There is no stiff arbitration procedure. This is caused by the fact that arbitration is international in nature, often times parties are from different parts of the world and different rules are applied depending on the subject matter and the parties to the arbitration which in turn makes it inevitable to apply special procedure to each arbitration.

b. Suitability For International Transactions

The issues of jurisdiction and conflict of laws in the international parlance cannot be over emphasized. It has generated more problems during dispute resolution than the main issue in dispute; especially in matters that have to do with enforcement of revenue laws of a particular country in another country.[11] Many people involved in international business transactions, rather than go to Court and have to argue on which law will be applicable to the dispute at hand which will In turn cause delay in settlement of the dispute, would prefer to use arbitration which because of its party autonomy feature would allow the parties to determine applicable laws. This has enhanced suitability of arbitration to international disputes.

c. Easy Enforcement

Enforcement of award is easy, this is because the legal system has recognized that the parties have decided that arbitrators should make the final determination of their dispute as an alternative to the national court and the law therefore gives effect to the Intention of the parties and enforces the award just as it would a judgment.[12]

d. Neutrality

An arbitral Tribunal is expected to be neutral, once an arbitrator is perceived to be partial or likely to

be partial, parties can decide to challenge the appointment of such arbitrator and he would not be part of the Arbitral Tribunal. This to a large extent ensures neutrality during the arbitral proceeding.

e. Expert arbitrators

In the case of arbitration, the parties have the freedom to choose the arbitral Tribunal. They have the opportunity to put into consideration the personality, age, experience, availability, professional background and discipline of the arbitrators to constitute the tribunal.

f. Confidentiality

Arbitration helps to protect the secrets of parties to the arbitral proceeding. This is because the tribunal sits in private and only the parties are usually present. This helps the parties to share freely secrets that may be the solution to the disputes at hand without fear of being put in trouble for saying them.

ARBITRABILITY

Arbitrability is indeed a condition of validity of the arbitration agreement and consequently, of the arbitrators' jurisdiction. It involves the simple question of what types of issues can or cannot be submitted to arbitration.

As rightly said in Rusell on Arbitration

> the issue of arbitrability can arise at three stages in an arbitration; first, on an application to stay the arbitration, when the opposing party claims that the tribunal lacks the authority to determine a dispute because it is not arbitrable; second in the course of the arbitral proceedings on the hearing of an objection that the tribunal lacks substantive jurisdiction and third, on an application to challenge the award or to oppose its enforcement[13]

National Laws often impose restrictions or limitations on what matters can be referred to and resolved by arbitration. Arbitrability may be made subject to certain conditions being met, this is known as 'subjective arbitrability'.

Article 3 (3) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law[14] on secured transactions makes it clear that parties to a security agreement may agree to resolve any dispute between them by arbitration, however under the condition that (I) Local laws allow the use of arbitration in matters of secured transactions (i.e. objective arbitrability), (II) the parties have the legal capacity to conclude a contract (i.e. subjective arbitrability) according to the law of the state in which the individual is citizen or the legal entity has its registered head office and (III) legal domestic approaches are met (i.e. compliance with procedures).

Following the provisions of UNCITRAL MODEL LAW in Article 3 (3) which is explained above a further explanation will be that arbitrability of disputes depends on three fulfillment of three conditions, they are: subjective arbitrability, objective arbitrability and compliance with procedures.

Subjective arbitrability: This is the Legal capacity of a party to act in legal proceedings and to complete an arbitration agreement according to the law of the state in which the individual is a citizen or where the legal entity has its registered head office.

Objective arbitrability: This term determines the subject matters, which can be referred to arbitration. Generally, any claim involving an economic interest or in matters in which the parties are entitled to conclude a settlement are arbitrable.

In the interest of the public certain subject matters are not arbitrable or sometimes arbitrable with limitations (e.g. corporate disputes, family matters, personal status, lease of residential accommodation).

Compliance with procedures: Some disputes can only be resolved by arbitration if certain laid down prerequisites are met.

For example, in Austria, Germany and Poland, disputes concerning contracts with consumers and employment contracts are only arbitrable if the arbitration agreement (i) is contained in a separate document, and (ii) was concluded after the dispute has already arisen, and (iii) a written legal advice on the relevant differences between arbitral and court proceedings was handed over.[15]

The New York Convention provides for the law of arbitrability from the perspective of enforcement.

It requires the enforcing court to look to its own law to determine whether the dispute is arbitrable.

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds out that: The subject matter of the difference is not capable of settlement by arbitration under the law of that country…[16]

This principle has been followed by many countries in determining whether certain subject matters are arbitrable. For instance The Court of Appeal in Genoa in Fincantieri v. Iraq[17] was faced with the question whether disputes as to effects of the United Nations embargo against Iraq were arbitrable and dealing with the question of the applicable law the court held that the answer must be sought in Italian law corresponding to the principles expressed in Arts. II and V of the New York Convention.

Most National Arbitration Laws do not regulate which laws govern the question of arbitrability they only determine which disputes are arbitrable. In many Jurisdictions globally, disputes dealing with the following are not arbitrable due to the fact that they have great influence on public policy and easily generates public interest. Therefore, matters governed by Criminal Law, Labor Law, Consumer Law, Family Law, Bankruptcy, Intellectual property rights, Bribery and corruption.

THE TORT OF MEDICAL NEGLIGENCE

The tort of negligence is defined as the omission or failure to do something which a reasonable and prudent man would do. Negligence is the failure to exercise that care which circumstances demand that is, absence of care according to circumstances.[18] Medical Negligence is the breach of care arising from medical acts.

Types of Medical Negligence include[19]

1. **Failure to treat**: Failure to attend promptly to a patient requiring urgent attention when the medical practitioner was in a position to do so. This also includes failure to recommend required adequate treatment to a patient.
2. **Manifest incompetence in the assessment of a patient**: this type of medical negligence occurs when the medical practitioner gives a wrong assessment of the situation of the patient. For instance, telling a patient that he is prone to die in two weeks from an illness, while the illness such patient has can be managed and he can live up to 20yrs under proper management.
3. **Mis-diagnosis:** This involves making an incorrect diagnosis particularly when the clinical features were so glaring that no reasonable skillful practitioner could have failed to notice them.
4. **Surgical Errors:** this type of medical negligence is common, it occurs in different ways, such ways include; failure to obtain the informed consent of the patient before proceeding on any surgical procedure or failure to advice, or giving wrong advice to a patient on the risk involved in a particular operation, especially if such an operation is likely to result in serious side effects like deformity or loss of organ or function; performing unnecessary surgery, damaging organs, nerves or tissues during surgery, administering an incorrect amount of anesthesia, leaving medical equipment inside the partner or providing inadequate care after the surgery which may lead to complications and often types having another surgery done.
5. **Birth Injury:** this is the most devastating types of medical negligence because those injuries often result in the need for lifelong medical care, which can cost a lot of money. This may occur in different forms, the obstetrician's parental care may have been inadequate, even though the mother sought treatment to ensure her own health and her unborn baby's health. Negligence can also occur during childbirth, leading to birth injuries to mother and child.
6. **Medical Product liability:** this is the situation where the medical devices used on the patients are faulty. If the manufacturer of such device knew or ought to know of the defect, they would be held liable to the victims that is, those that have been affected by the use of such defective device.
7. Failure to transfer a patient in a good time, when such transfer was necessary.

8. Failure to do anything that ought reasonably to have been done under any circumstance for the good of the patient.
9. Failure to see a patient as often as his/her medical condition warrants or to make appropriate comments in the case notes of the practitioner's observations and prescribe treatment during such visits. It also includes failure to communicate with the patient or with his relatives as may be necessary with regards to any developments in the patient's condition.

Elements of Medical Negligence

The elements of medical negligence are: duty of care; breach of that duty of care; causation, that is, a causal link between the individual's injury or property damage and actual damage either to a person or to property.[20] The three-part test connotes that the doctor owed a duty of care to the patient, the duty of care was breached, and as a direct result of the breach the patient suffered harm.

- **Medical Duty of Care:**

The principle of 'duty of care' was established by Lord Atkin in the case of *Donoghue v Stevenson*[21] in 1932 where he identified that there was a general duty to take *reasonable* care to avoid *foreseeable* injury to a 'neighbor.'[22] In that case, a woman in Paisley drank ginger beer from a bottle until she found a decomposing snail at the bottom. As a result the woman became ill and a case was brought against the ginger beer manufacturers for compensation. Lord Atkin held that the company producing the ginger beer had been negligent in failing to ensure the woman's safety during the production process.

The relationship between a doctor and a patient is a special one. When a patient is admitted to hospital, a duty of care relationship is created, which can be applied to any doctor coming into contact with the patient not just the admitting team. Hence, it has been argued by medical law academics that any patient in a hospital environment is owed a duty of care, not only by the doctors the patient comes into contact with, but also by those who are employed by the hospital to deliver patient care.[23]

- **Breach of duty of care**

Bolam v Friern Hospital Trust[24] is a popular case in relation to establishment of breach of medical duty of care. It concerned a patient who sustained fractures during ECT treatment and who alleged that care under anesthesia had been negligent in part because he had not been given muscle relaxation for the procedure, and had not been restrained or warned of the risks of fracture. It was concluded, however, that negligence could not be established, as evidence was provided that at the time it was not universal practice to administer muscle relaxation, as contrasting opinions existed as to the benefits of muscle relaxation balanced against the increased risks of the relaxant. It was argued that if a doctor acted in accordance with a practice that was considered acceptable by a responsible body of doctors that was sufficient and the claimant must show that no reasonable doctor acting in the same circumstances would have acted in that way.

Hence, breach of duty of care can only be established when upon carrying out the reasonable man's test it can be established that the medical practitioner acted in an unprofessional manner and thus breached the duty of care owed the patient.

- **Harm and Causation**

These are harms caused by the breach of medical duty of care. Medical negligence occurs when the doctor's negligent treatment causes injury to the patient, makes the patient's condition worse, causes unreasonable and unexpected complications, or necessitates additional medical treatment. All these amount to the harms caused by the breach of medical duty of care. Legal causation and damages are necessary before medical negligence can be asserted. If the doctor's medical negligence was not a foreseeable result of the patient's harm (causation), or if the doctor's medical negligence actually had no detrimental effect on the patient's condition (harm), a medical negligence claim will fail.[25]

Criminal Negligence

If negligence occurs as a result of carelessness, then where the carelessness has been so severe such as leading to the death of the patient in question, the doctor may be subject to a charge of criminal negligence. Although the requirement to prove criminal negligence is higher as it is same as that of any criminal matter that is, beyond reasonable doubt. The sanctions are greater, may include a custodial prison sentence for any doctor found guilty of such an offence, loss of job and he may also lose his license to practice as a medical doctor.

Vicarious liability in Medical Negligence

Hospital authorities are vicariously liable for negligent acts done by the employees of that hospital. The mere fact that the medical doctor is part-time employee in that hospital does not serve as an exception to the rule of vicarious liability in medical negligence, provided payment was made to the hospital and not the said medical practitioner directly.[26] The only exception being where the medical practitioner in question while giving the treatment was acting in his individual capacity and not as an employee of the hospital.

Defenses

The defenses that can be made by a medical practitioner against whom an action for medical negligence has been brought are:

- That the plaintiff had knowledge of the risk; and expressly co[27]
- That the defendant had impliedly accepted the risk;[28]
- That the plaintiff's action contributed to the negligence;[29]
- That there was an exclusion of liability;[30]
- That the plaintiff was acting illegally, either alone[31] or jointly with the defendant;[32]
- There was an intervening act (novus actus interveniens)[33]

OVERVIEW JURISDICTIONAL STAND ON ARBITRATING MEDICAL NEGLIGENCE

Florida

Florida courts have largely upheld the enforceability of arbitration clauses, which now show up in credit card agreements, cell phone agreements, nursing home documents, cruise tickets, and doctors' offices. These clauses are usually not negotiable, and are included in the fine print of whatever document a consumer is being asked to sign.[34] In response to a perceived crisis in medical insurance costs, the Florida legislature passed the Medical Malpractice Act ("MMA"), which was designed in part to deal with perceived rising medical malpractice costs in the state.[35]

Under the statutory scheme provided by the legislature in Sections 766.207 and 766.209, Florida Statutes, at the conclusion of the pre-suit screening period, provides that either side may offer to enter into voluntary binding arbitration, in which the claimant is awarded damages by an arbitration panel, and liability is not an issue. In order to encourage prospective defendants to enter into arbitration, the legislature provided that non-economic damages would be limited to $250,000 if the offer were accepted and $350,000 if the offer were rejected (the "Arbitration Caps"). This provision has been followed in some cases[36] and has been held to be constitutional. However in some instances it has been argued that it is unconstitutional and does not give rise to equal rights.[37]

A recent case has tested the enforceability of an arbitration clause in a medical malpractice setting. *Hernandez V. Crespo [38]*, the Supreme Court of Florida ruled that a medical malpractice arbitration agreement executed by a woman who delivered a stillborn fetus after being turned away from a doctor's appointment was void as a matter of public policy. In this case, the principal plaintiff was 39 weeks into her pregnancy and experiencing contraction pains when she was turned away by her physician for showing up late to the appointment. The original appointment was scheduled for August 17, 2011, and she was rescheduled for an appointment on August 21, 2011. On August 20, 2011, the plaintiff delivered a stillborn fetus. A little more than a year later, on December 19, 2012, the principal plaintiff and her husband, the other plaintiff in this action, served notice on the doctor from whom she was turned away and Women's Care Florida that they intended to initiate litigation regarding the treatment she received, which they alleged caused the stillborn birth. The plaintiffs ultimately filed suit on May 23, 2013, and about a week thereafter, the defendants moved to stay proceedings and compel arbitration pursuant to an arbitration agreement that had been executed between the parties.

On August 29, 2013, the plaintiffs requested binding arbitration, pursuant to Fla. Stat. S. 766.207,which the defendants rejected, arguing that they sought to enforce the signed agreement, which forestalled the need for arbitration. The trial court ultimately granted the motion compelling arbitration, but Florida's Fifth District Court of Appeals reversed, finding that the arbitration agreement at issue violated public policy. The Fifth District did note, however, that its ruling was in direct conflict with a Second District decision on the issue.

To the plaintiffs' benefit, the Supreme Court of Florida affirmed the Fifth District's decision and repudiated the Second District's contrary ruling. In

affirming the order compelling arbitration in its contrary ruling, the Second District ruled that, although the arbitration agreement at issue in that case required that both parties share the cost of arbitration, it did not violate public policy, for nothing in the MMA precluded claims for medical malpractice from being subject to an agreement outside the statutory scheme.[39]

The Supreme Court of Florida, however, found this reasoning unconvincing.First, the Supreme Court acknowledged that Florida law allows individuals to enter into private contracts that regulate their conduct. Nevertheless, individuals may not enter into agreements that contain provisions that contravene Florida laws or undermine the purposes of such laws. Since the terms of the contract at issue in this case were so clearly favorable to one party, the Supreme Court found that the contract's terms ran afoul of the "'substantial incentives for both claimants and defendants to submit their cases to binding arbitration'" that "the [statutory] arbitration provisions were enacted to provide."[40]

Indeed, the Supreme Court recounted the many ways the arbitration agreement contradicted the terms of the MMA, including the facts that the agreement did not concede liability, did not guarantee independent arbitrators, provided that the parties share arbitration costs, did not guarantee the payment of interest of any recovery by the plaintiffs, did not allow for joint and several liability, and did not permit an appeal of the ultimate arbitral decision. Turning to the Second District's decision, the Supreme Court found that it was clearly in error, for the MMA specifically provides for the defendants to bear the costs of arbitration. Accordingly, the Supreme Court concluded that any medical malpractice arbitration agreement that alters the cost, recovery, and fairness incentives of the MMA statutory scheme is void as a matter of public policy.[41]

This case sustains the age-old principle that arbitration agreements that alter a victim's statutory rights, or which contravene legislative enactment, cannot be enforceable.

In Florida, medical Negligence arbitration is allowed but it must not violate the provisions of the statutes of the state.

California

In California, Medical Negligence is referred to as Medical Malpractice. Arbitration of Medical Malpractice as contained in Section 1295 (a) of the 2007 California Code of Civil Procedure Title 9.1. Arbitration of Medical Malpractice which provides that

> Any contract for medical services which contains a provision for arbitration of any dispute as to professional negligence of a health care provider shall have such provision as the first article of the contract and shall be expressed in the following language: "It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration.

This suggests that arbitration of medical malpractice is not new to the Californian judicial system, it is well known and as a condition to providing medical treatment or insurance. Most California healthcare providers and insurance companies require people to agree to arbitrate any disputes regarding negligence. However the issue with the provision in the Californian law is that once the agreement to arbitrate has been signed by the parties, arbitration of the disputes becomes mandatory and the parties have waived their right to take such dispute to Court.

Furthermore, Section 1295 (b) and (c) of the 2007 California Code of Civil Procedure Title 9.1. Arbitration of Medical Malpractice provides

> Immediately before the signature

line provided for the individual contracting for the medical services must appear the following in at least 10-point bold red type:

"NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT."

(c) Once signed, such a contract governs all subsequent open-book account transactions for medical services for which the contract was signed until or unless rescinded by written notice within 30 days of signature. Written notice of such rescission may be given by a guardian or conservator of the patient if the patient is incapacitated or a minor.

Worthy of note is that the law takes into consideration persons who may sign the contract out of compulsion, due to the bad condition of their health may have signed the contract out of fear of not being treated early enough. Hence the law provides that the party to a contract agreeing to arbitrate medical malpractice may by, written notice, rescind such contract. In the case of Rodriguez V. Witzling,[42] the court stated that because the patient did not have 30 days to consider the arbitration agreement and change her mind, her agreement was void.

California does not require claims of medical malpractice be arbitrated without the parties` agreement to arbitrate. Many hospitals and doctors have patients sign an agreement to go to binding arbitration if there is any dispute. Often, a patient does not even realize he or she has signed a binding arbitration agreement until a lawyer finds this clause in the patient`s medical records. These binding arbitration agreements are typically iron clad. Most arbitration clauses provide that each side bears their own cost. That means that even if the patient wins their medical malpractice claim, they still have to pay all of the costs for the experts and the arbitrators out of their own pockets.[43]

ARBITRATION IN RESOLVING MEDICAL NEGLIGENCE

There is a common saying amongst Medical Practitioners, to the effect that 'God heals, we only try' this saying has been the frequent chant by Medical doctors usually when there is a life at stake. Truly, it is said that Medical Doctors are not God but it would not be out of place to say they are gods as far as the matter of health is concerned. It is however based on this assumption by many patients that doctors are not expected to make mistakes and are believed to know what and what to do when the life of a patient is at stake. It is however sad to know that some Medical doctors who have been seen as gods in the health arena have negligently caused the deaths of their patients. There have been cases where patients lose their lives as a result of fake drugs, wrong diagnosis and prescription and so on.

Niki Tobi, JSC adopting the view of Lord Denning[44] in his book 'The Discipline of Law'

A medical man for instance should not be found guilty of negligence unless he has done something which his colleagues would say 'He really did make a mistake there. He ought not to have done it'… but in a hospital, when a person who is ill goes in for treatment there is always some risk, no matter what care is used. Every surgical operation involves risks. It would be wrong, and indeed, bad law, to say that simply 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 or a surgeon operating at a table, instead of getting on with his work, would be forever looking over his shoulder to see if someone was coming up with a dagger for action for negligence against a doctor is for him like unto a dagger. His professional reputation is dear to him as his body, perhaps more so, and an action for negligence can wound his reputation as severely as a dagger can his body. You must not therefore, find him negligent simply because something happens to go wrong… you should only find him guilty of

> negligence when he falls short of his standard of reasonably skillful medical man, in short, when he is deserving of censure.[45]

Judging from this quote, one would tell that litigating cases of medical negligence has been a bit difficult. Largely because of the stringent requirements for its establishment, the burden is on the plaintiff to prove that the defendant was negligent and the best way to do that is with expert evidence, not speculation as to what the patient or their relatives perceive as the proper care that was owed to their loved one. The quote also went further by stating that what would amount to medical negligence must be accepted by the colleagues of the medical practitioner as medical negligence; this condition would also make it a bit difficult to prove cases of medical negligence as such colleagues might decide that such acts do not constitute medical negligence. All these technicalities prevent patients who could have sued for medical negligence from doing so. It is to avoid these technicalities that it is advisable that arbitration should be used in resolving medical negligence disputes.

Arbitration of medical negligence has been productive over the years, although it has been flooded with many problems. One of such problems is the inability to enforce agreement to arbitrate medical negligence, signed by patients. The patients have argued that they were forced to sign the arbitration agreement and because of their state of health at that time they had no choice but to sign so they could receive adequate treatment... It is advised that for arbitration agreement in the medical sphere, the words of the contract should not be couched mandatorily. It should be made optional such that parties who do not want to arbitrate can decline signing the agreement and still get treated.

An international law on medical negligence arbitration is recommended. This would create uniformity in laws governing arbitration of medical negligence. It would give room for easy enforcement of medical negligence arbitral awards worldwide irrespective of the National laws in each country. Countries are also advised to have National laws that would allow medical negligence arbitration and give room for easy enforcement of awards that come from such arbitration.

CONCLUSION

Medical negligence involves confidential information in addition to the rigorous processes of proving it which has made it so tasking and undesirable for litigation process.

Arbitration is fast becoming a worldwide most acceptable Alternative Dispute Resolution mechanism. This is so as a result of its binding and extremely confidential nature. Litigation is fast becoming a dispute resolution mechanism that people are now avoiding. Parties to disputes now want faster, confidential and binding mechanism to use in settling disputes, especially in matters that involve highly confidential information. It is as a result of these advantages of arbitration that issues relating to medical negligence have become subject of settlement via arbitration.

Arbitrability of disputes largely depends on the national law of a Country or State. Once the national law of a country or state permits such matters to be arbitrable it thus becomes arbitrable. Medical negligence by virtue of the extent of confidential information being disclosed while handling it and the rigorous processes the plaintiff who is to prove the negligence is put through in the court of law has become a matter better settled by making use of arbitration as settlement mechanism.

Medical negligence arbitration called medical malpractice arbitration in some Jurisdictions (e.g. California) has become embedded in the Laws of some States, whereas in some countries, it remains totally strange. The reason why it may be difficult to arbitrate matters relating to medical negligence has been discussed. The basic reason being that there is usually no valid agreement to arbitrate between the parties. However it has been recognized that some countries have tried to give room for rescission of such agreements to arbitrate medical negligence within a period of time after the signing of the agreement. However, it has been recommended that awareness should be created for medical negligence arbitration in countries where it is not known furthermore, countries already practicing medical negligence arbitration should be more flexible so as not to totally oust the option to go to court. Often patients do not know the purpose of the document they are signing as at the point of signing and this may in turn make such an agreement unenforceable.

What is paramount is that such agreement should be standardized and geared towards maintaining an equitable balance between the rights of the patients and the duties of the practitioners. There is urgent need therefore to embark on public enlightenment of this practice globally with the introduction of health insurance scheme in many countries.

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