Special Article

Legal Imperatives of Medical Negligence and Medical Malpractice

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Abstract

Medical negligence and malpractice are becoming a growing concern in Nigeria; even though many victims do not know how to go about seeking redress or demand justice, medical practitioners, too, do not understand the legal implications of their actions. Medical negligence and malpractice are tortious liabilities that can also result in criminal liabilities. It is a fact that health-care practice will occasionally result in circumstances where health seekers suffer some distress or permanent injury in the course of handling by medical practitioners. This distress or injury can be a result of either commission or omission due to the actions or inactions of the medical practitioner. This review was embarked upon using thoroughly studied recent and older literature concentrating on research indications resulting from the fields of medicine and law within and without Nigeria. Common acts that could give rise to lawsuits on medical negligence and medical malpractice include doctor's illegible handwriting, prescription and medication errors, misdiagnosis or failure to diagnose, improper medical treatment, leaving surgical instruments in patients after surgery, lack of informed consent, failure to refer a patient to a specialist, breach of confidentiality, extortion, and deception among others. For liability to come up in negligence, it is imperative that the three main fundamentals of negligence, which include that a duty of care is owed, there was a breach of the duty of care, and injury or permanent disability suffered as a direct consequence of a breach of the duty of care must be well established and proved beyond a reasonable doubt. The inability of a victim to successfully prove a case of negligence against a medical practitioner does not totally absolve a practitioner from charges related to other offences under other aspects of the law, hence the fact that negligence is difficult to prove does not leave a patient deprived of other legal opportunities as may be considered appropriate. Even though the law protects the medical practitioner to the level that liability for medical negligence and medical malpractice has to be proved beyond a reasonable doubt, much more legal protection is needed to allow medical practitioners to discharge their duties of saving lives. Medical practitioners need to be aware of their limits as well as the legal implications of their work; this can be achieved by incorporating medicolegal principles into medical education for medical students, as well as periodic medicolegal lectures for medical practitioners.

Keywords: Legal, liability, malpractice, medical, medical practitioner, negligence

Introduction

Even though English common law had since imposed liability for the unjust acts of others, it was only during the earlier part of the 19th century, when the industrial revolution was induced by a series of accidents caused by industrial machinery that negligence started to gain acknowledgment as a distinct and independent base of tort liability. Tort liability is a legal compulsion of one party to a victim resulting from a civil wrong or injury sustained.[1]

The most distinguishing difference between medical negligence and medical malpractice is intent. In simple terms, medical negligence is an error or mistake that brings about unintended harm to a patient. While medical malpractice is when a medical practitioner intentionally did not adhere to the appropriate standard of care. That is not to say there was malicious resolve to cause harm but causes harm or injury that the medical practitioner knew might have been prevented if different procedures were engaged.[2] Medical errors, which can be due to either negligence or malpractice, occur when

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a medical practitioner undertakes an inappropriate process of care or wrongly implements a suitable method of care.[3]

For medical negligence to be established, it must be revealed that a duty of care has been owed; there was a breach of the duty of care, and there has been a loss or injury suffered as a direct consequence of a breach of the duty of care. A duty of care is owed once a patient is registered and treated in a hospital, or in an emergency case, once a patient approaches the facility.[4]

In medical practice, the standard of care that is obligatory is contained in the rules of professional ethics for medical practitioners in respective countries. In Nigeria, the standard of care is established by the Medical and Dental Council of Nigeria (MDCN). Other bodies such as the Nigerian Medical Association and the Medical and Dental Consultants Association of Nigeria also have principles of ethics controlling their members with disciplinary measures put in place to guarantee compliance.[1]

This review focused on legal imperatives of issues concerning medical negligence and medical malpractices while stressing other legal options available to a victim where negligence is difficult to prove.

Common Acts that could Result in Lawsuits on Medical Negligence and Medical Malpractice

Doctors' illegible handwriting

Not much has been published about doctors' handwriting, but it is commonly known that doctors have unreadable handwriting.[1] The doctors usually know what is written, but other people who are not doctors have a problem reading and interpreting the writing. Sometimes, even pharmacists and drug dispensers are incapable of reading the prescriptions, and so they give the wrong medications to the patients, especially the uneducated ones.[5]

One striking example of this was seen in the *British Medical Journal*, where it was reported that a 42-year-old man died after the pharmacist dispensed Isordil, which he wrongly interpreted as Plendil, caused by the doctor's illegible handwriting. The doctor, a popular cardiologist was then charged to court and made to pay huge compensation to the family of the deceased.[6]

Prescription errors

A prescription is a written demand or order that includes detailed directives of what medication should be given to whom, in what specified doses and preparation, by what route, and frequency of use, time, and duration.[7] Sometimes, there are prescription errors and these can lead to serious damage and even death. Medication or prescription errors fall under medical negligence, for which the medical doctor could be found liable upon the prosecution.[6]

Medication errors can arise when a doctor is involved in prescribing culpabilities such as irrational, inappropriate, and ineffective prescribing, underprescribing, overprescribing of drugs, or prescribing the wrong strength, wrong dose, wrong frequency, or wrong duration of a drug for a patient. An example was the prescription of overdose pain drugs to the late pop singer, Michael Jackson by his doctor Conrad Robert Murray.[1]

Inappropriate medical treatment

Inappropriate or improper medical treatment, sometimes called treatment failure, occurs under any condition, in which a medical practitioner does not correctly handle a patient's health state. It can best be described as an intervention that departs from the accepted medical standard of care that a reasonably experienced and competent medical practitioner would have made under comparable circumstances. If the medical standard of care is violated by inappropriate treatment, it could cause unnecessary harm, as well as other medical issues that are illegal. Improper treatment also includes misdiagnosis and failure to diagnose.[1]

Retained surgical instruments in patients after surgery

Although hard to believe, every year an estimated 4000 objects are mistakenly left inside patients' bodies. A retained surgical instrument also known as a retained foreign object is any item that is unintentionally left inside of a patient when surgery is completed. Besides needlessly protracted hospitalisation, a forgotten or retained sponge or surgical object can cause serious complications. Leaving surgical instruments in patients after surgery can bring litigation against both the doctor and the hospital for medical negligence.[1]

Absence of informed consent

Informed consent is a procedure for getting permission before conducting a health-care intervention, especially a surgical procedure on a person or for disclosing personal information. Essentially, it means that a medical practitioner must explain to the patient all the potential benefits, possible risks, complications, and feasible alternatives to surgical and medical intervention, or another course of treatment, and must therefore get the patient's written consent to commence intervention. Medical treatment without valid consent constitutes trespass to the patient and a criminal law assault.[1]

This is supported by constitutional fundamental human rights[8] of the right to freedom of thought, conscience, and religion. Failure to obtain a patient's "informed consent" before commencing a procedure or treatment is a form of medical negligence and can give rise to a cause of action for battery and even assault.[4]

Failure to refer patients to a specialist

Medical referral is a process through which a medical practitioner at one level of the health system, having inadequate resources or expertise to manage a particular medical condition, refers a patient to a better-resourced facility, to take over the treatment process. It is an acknowledged practice and highly appropriate one, for a doctor to refer a patient to a specialist or another doctor who can better treat the particular condition than the referring doctor. For a doctor to diagnose

or treat a patient for a condition, the doctor is not qualified for would expose the doctor to liability in medical malpractice. Doctors must recognise and accept their limits in areas of their competence and make proper referrals to other specialists when the need arises.[1]

Breach of confidentiality

In Nigeria, a person's right to confidentiality is further protected and guaranteed by the constitutional provision of sections 37 and 38 on citizens' rights.[6] A breach of confidentiality occurs when a patient's private information is divulged to a third party without his consent. Professional secrecy belongs to the patient, not the doctor and the doctor cannot divulge it except in exceptional circumstances, which include if the information is acceptable by law for a public interest, if the information is needed in court on account of a court order, and if the patient voluntarily consents to its disclosure. Any breach of doctor–patient confidentiality can be fatal and may provoke a serious medical malpractice case.[1]

Extortion and deception

Extortion is the practice of obtaining something, especially money, through force, threats, or deception. It is unethical for medical practitioners to deceive or extort their patients.

Methodology

This review was done using thoroughly researched studies as well as nonconventional literature, both print and electronic, concentrating on research evidence derived from the fields of law and medicine within and outside Nigeria.

Legal Options for Claims for Medical Negligence and Medical Malpractice

Professional body disciplinary approach

Under the existing principles of negligence in Nigeria, not all medical errors can be regarded as an act of negligence. For example, a medical error may not give rise to any injury or permanent damages, therefore a claim of negligence depended exclusively on such an act is not likely to succeed, since there is no injury sustained. Such an act may nevertheless result in a disciplinary measure against an erring medical practitioner by professional bodies like the Medical and Dental Practitioners' Disciplinary committee based on a breach of medical ethics. Hence, a breach of medical ethics may not automatically give rise to a claim of medical negligence. It is, however, important to discuss the alternative possibilities accessible by a person who is not able to excellently establish a case of medical negligence but has been a victim of medical errors.[4]

A victim of medical errors can institute professional disciplinary action against an erring doctor by filing a petition to the MDCN, which is the body created by law to regulate the medical profession in Nigeria. The body has a professional disciplinary department that manages allegations and claims of professional misconduct against any doctor from the general public.[1]

Its investigation panel which was established under section 15 subsection 3 of the Medical and Dental practitioners' Act, has the duty of conducting a preliminary investigation into allegations against any medical practitioner or Dental surgeon. Where a prima facie case is recognised against the doctor, he/she would be charged before the Medical and Dental practitioners' disciplinary tribunal, established under section 15 subsection 1 of the Medical and Dental practitioners Act. The Medical and Dental practitioners' disciplinary tribunal has the status of a high court and any doctor who may wish to contest the judgment of the tribunal can only go to the court of appeal.[1]

By section 16 subsection 2 of the Act, the disciplinary tribunal may direct the registrar to strike off the name of a doctor found guilty of professional misconduct, from the MDCN register or to suspend him from medical practice for a period not usually exceeding 6 months, or to caution the practitioner.[1]

Issue of fiduciary relationship

Also known as confidential relationships, which are sometimes breached by medical practitioners, especially when certain actions are taken in the best interest of the patient. Under the rules of justice, a claim can also be based on the acknowledgment of a doctor–patient relationship as one that imposes a fiduciary obligation on the medical practitioner.[9] This can arise when the patient had already given informed consent or when the medical practitioner acted due to the obligation to save the patient's life.[10] An example is when a doctor gives an urgent blood transfusion, without consent, to save the life of an accident victim who had lost so much blood and is in a life-threatening situation. The medical practitioner's deed is less likely to result in medical negligence or a violation of his fiduciary responsibility, particularly in situations where he actually acted in good faith and also in the best interest of the patient.[10]

Fundamental human rights angle and contractual angle

Liability for medical negligence and medical malpractice can also authentically arise as a result of a breach of the fundamental human rights of a patient. Apart from this, patients who suffered any form of injury or permanent disability during treatment may institute an action for breach of contract. All applicable fundamental human rights of the patient must be well known and protected by medical practitioners in the course of treatment. The patient's autonomy must not be ignored by the medical practitioner. The right of patients to make ultimate and decisive choices about their medical care is recognised under the principle of patient autonomy and well captured in the fundamental human rights of individuals, as enshrined in the constitution.[8,11]

The right to freedom to personal liberty, self-determination, and privacy, has been interpreted by courts of competent jurisdiction to include the prerogative of a sound-minded adult to reject treatment that might prolong his life although such

refusal might appear foolish and risky to others.[12] A Nigerian court once noted that in most cases the court does not have the power to override a patient's decision and hence affirmed the power of patients' autonomy.[4]

Standard of care and breach of duty of care

In general, the standard of care used is that of a "reasonable man," which means that of a normal medical practitioner under the same conditions. In terms of medical negligence, nevertheless, the emphasis is on the standard of professional responsibility anticipated from a similar medical practitioner. Arguments have been raised in some quarters that the standard expected from an early-career medical doctor ought not to be the same expected of a medical consultant. After all, the standard anticipated of a vehicle learner, for example, is different from what is mandatory for a professional driver.[13] Therefore, a consultant should be an expert in a special field, and hence the quality of care expected of the consultant should be more advanced than that of a junior doctor and this fact must not be disregarded in deciding liability. An exclusion may nevertheless arise in situations where a less experienced doctor is employed to work as a specialist, the standard that will be compulsory in such condition will be that of a specialist, for example, if a doctor who is not a fellow of any college is appointed as a consultant, in such case, the hospital is also liable for not engaging the services of a qualified specialist to offer specialist care.[14]

Issue of causation

In most cases, the fact that there is substantial evidence that the plaintiff's damage was caused by the medical practitioner is critical enough to establish medical negligence. There must be evidence that the injury was caused by the defendant, and the injury must be a direct rather than a remote consequence of the medical practitioner's action. To this end, Lord Denning in M V. London Borough of Newham (1994) exactly noted that causation is a question of fact, not law. This is particularly applicable to situations where the plaintiff must have died or unavoidably sustained injury regardless of whether there was negligence or not.[1] The issue of causation will likewise be needed to be established in cases where there are possible alternative causes of death or damage.[15] The medical practitioner's skill to rationally anticipate complications or injury is also vital in proving causation as well as establishing cases of medical negligence.[4]

Liability for hospital management

Aside from the liabilities of medical practitioners in their specific capacities, their hospital may as well be liable for medical negligence and medical malpractice. This is possible due to the fact that hospitals are no more seen as mere "centre for treatment" but as "providers of complete health and wellness."[16] This advancement can result in possible liability for hospitals directly or indirectly for acts of medical negligence and medical malpractice. Direct liability for negligence can arise when a hospital fails to make available an enabling environment and standard facilities that should enable the safe handling of patients. For instance, there can be legal charges on the hospital where equipment and items expected to be accessible are not available or are not functional, thereby leading to harm or death of a patient. Examples include a nonfunctional hospital ambulance, an unhygienic hospital environment, and poor maintenance of medical records, among others.[17]

Issue of criminal negligence

Aside from civil liabilities, a medical practitioner's deed may as well result in committing a crime and being liable under relevant sections of the law. Liability may arise, for example, in a case of criminal assault or for causing serious bodily harm to a patient. Therefore, in conduct where there is disregard for life and safety during the course of treatment by a medical practitioner, liability can definitely arise under criminal negligence.[18]

Conclusion

It is a fact that health-care practice will occasionally result in circumstances where health seekers suffer some distress or permanent injury in the course of handling by medical practitioners. This distress or injury can be a result of either omission or commission due to actions or inactions of the medical practitioner. For liability to come up in negligence, it is imperative that the three main fundamentals of negligence, which include that a duty of care is owed, there was a breach of the duty of care, and injury or permanent disability suffered as a direct consequence of a breach of the duty of care must be well established and proved beyond a reasonable doubt. Nevertheless, the inability to successfully establish a claim of negligence does not totally absolve a medical practitioner from charge for medical malpractice or error under other applicable aspects of the law, the fact that negligence is difficult to prove does not leave a patient deprived of other legal opportunities as may be considered appropriate. For instance, a plaintiff can make a plea of res *ipsa loquitor* to the court (meaning "the fact speaks for itself'), and if granted, the burden of proof automatically shifts from the plaintiff (victim) to the defendant (medical practitioner).

Recommendation

Even though the law protects the medical practitioner to the level that liability for medical negligence and medical malpractice has to be proved beyond a reasonable doubt, to the extent that courts are usually hesitant to extend the principle of res *ipsa loquitor* to cases of medical negligence, much more legal protection is needed to allow medical practitioners to discharge their duties of saving lives. Above all, medical practitioners need to be aware of their limits as well as the legal implications of their work, this can be achieved by incorporating medicolegal principles into medical education for medical students, as well as periodic medicolegal lectures for medical practitioners.

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