

AN INSIGHT INTO MEDICAL MALPRACTICE AND LITIGATION

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ABSTRACT

Most, if not all physicians are ill prepared when it comes to facing a medical litigation. The current climate of medical litigation in many countries of the world has sparked extensive discussions regarding its influence on patient care. Nigeria is the most populous country in Africa and most patients still keep quiet about issues regarding malpractice and suits are rare. Medical malpractice otherwise known as a breach of professional obligation and negligence of duty by medical practitioners has been identified as the major cause of emerging medical litigation in Nigeria. Medical personnel must be aware in their practice that patients are becoming more aware of their rights. The public becomes unforgiving when there is perceived harm to patients as a result of medical negligence. Medical professionals all have to be litigious conscious and therefore have a basic knowledge on avoidance of malpractice and litigations.

Keywords: Medical ethics, medical negligence, professional obligation and litigation consciousness

INTRODUCTION

We live in a litigious society, and the medical community is now feeling the impact of this reality¹. The impact is acute among medical service providers, who pay increasing high Medical Malpractice Premiums². Most, if not all physicians are ill prepared when it comes to facing medical litigation. The current climate of medical litigation in many countries of the world has sparked extensive discussions regarding its influence on patient care. Most physicians are therefore aware that they can be sued for malpractice and know they have to be detailed and careful about patient care.

In the US, medical negligence is the third leading cause of death – right behind heart disease and cancer³. In 2012, over 3 billion dollars was spent in medical malpractice payouts, averaging one payment in every 43 minutes³.

Nigeria is the most populous country in Africa and most patients still keep quiet about issues regarding

malpractice and suits are rare. Medical malpractice otherwise known as a breach of professional obligation and negligence of duty by medical practitioners has been identified as the major cause of emerging medical litigation in Nigeria⁴. Negligence in law ordinarily implies a failure to do some act, which a reasonable man in the circumstance will do.

Medical malpractice has been raised as an important problem in daily practice, while the media and public remain unforgiving to those perceived to have harmed their patients. Over the past three decades there has been an increase in

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claims for medical negligence.

There is no doubt that there is an increase in awareness of medical litigation following media coverage of cases involving suspected negligence in patient care. The threat of law suits substantially increases tension in patient-physician relationship and medical costs and leads to defensive practice⁵. Suing for malpractice though not common in Nigeria may soon become a common occurrence in our daily practice and we need to be more aware of this.

Medical malpractice litigation began to increase in the 1960s⁶. Tort Lawyers were able to break the traditional “conspiracy of silence” that discouraged physicians from testifying about the negligence of colleagues or serving as expert witnesses⁶. By the 1970s physicians alleged that malpractice claims were interfering with their medical practices, with insurance companies either refusing to write malpractice policies for them or charging inflated premiums⁶.

SOME MEDICOLEGAL TERMS TO KNOW

(Culled from Microsoft Encarta 2015)⁷

- A. Litigation:** Is the act or process of bringing about or contesting a lawsuit or all lawsuits collectively.
- B. Sue:** To undertake legal proceedings or to take legal action against somebody to obtain something, usually compensation for a wrong.
- C. Fallibility:** Tendency to err or being liable to make mistakes.
- D. Medical Malpractice:** Is professional negligence by act or omission by a health care provider in which care provided deviates from accepted standards of practice in the medical community and causes injury to the patient.
- E. Negligence:** Refers to the failure of a person to exercise sufficient care in his or her conduct. When a person's conduct falls below the reasonable expectation of society and causes

foreseeable harm to another, the person has acted negligently.

A professional who injures a client by providing care that is below the standard for that profession commits the tort of malpractice. A physician who is not able to cure a patient has not committed malpractice. However, a physician who removes the wrong lung or ovary during a surgery has committed malpractice.

Most cases of medical malpractice proceed under the rules of common law, the body of legal judicial opinion derived from precedent cases rather than statutory or legislative rules.

Alleged acts of medical malpractice are almost always tried as torts, governed by the rules of common law.

- F. Tort:** Wrongful act that causes injury to a person or property and for which the law allows a claim by the injured party to recover damages (usually money).

Torts, in the context of **medical malpractice**, can be intentional, unintentional (or negligent).

i) Intentional torts: Most intentional torts in the context of medical practice are claims of **battery**. However, even these are rare in the physician-patient context. **Battery** is broadly defined as unwanted, harmful, or offensive bodily contact that occurs without consent.

ii) Unintentional torts (Torts based on negligence): Most malpractice claims in the medical context are filed as **unintentional torts (negligence)**. These claims are based on allegations that damages resulted from the violation of one or more standards of care.

In such negligence torts, legal responsibility is established by proving **4 elements**:

- **Duty,**
- **Breach of duty,**

- **Causation, and**
- **Damages.**
- **Duty and the Breach of Duty:** The duty of the physician is the legal responsibility to cause no harm and to act in accordance with established standards of care. **A breach of duty** occurs when the physician does not adhere to established methods of diagnosis and treatment or to applicable standards of care.
- **Causation:** is the link or proximate cause between a breach of duty and the injury sustained by the patient. Unless there is proof of causation, no liability exists. Proving causation in obstetric cases is often problematic and almost invariably complex.
- **Damages:** The final component in a negligence suit is damages, or the harm(s) suffered by the patient. Damage must be discernible injury in order for the plaintiff to recover compensation.

Damages can either be: **Economic** (medical expenses, lost wages, etc) or **Noneconomic** (emotional distress, loss of consortium, pain and suffering, etc).

Standards and regulations for medical malpractice vary by country and jurisdiction within countries. Medical professionals are required to maintain professional liability insurance to offset the risk and costs of lawsuits based on medical malpractice.

TEN NOTABLE PHYSICIAN – RELATED MALPRACTICE STATISTICS⁸

1. Most physicians will face a malpractice lawsuit at some point in their careers.
2. Failure to diagnose is a leading driver of malpractice allegations.
3. General Surgery and Obstetrics and Gynaecology physicians are most likely to be sued.

4. Paediatricians and Psychiatrists are least likely to be sued.
5. More malpractice payouts are made to female patients.
6. Patients aged 40-59 years account for the highest number of malpractice payouts.
7. Physicians often win malpractice lawsuits.
8. Malpractice payouts are costing less.
9. Most payouts are due to settlements, not judgments.
10. Five states in the USA continue to have the highest payouts rates. These are Florida, New Jersey, California, Pennsylvania and New York.

A study done in Saudi Arabia⁹ revealed that, Obstetrics leads the way in being the most litigation prone medical specialty. Surgery was second followed by Internal Medicine and Paediatrics being the fourth in order of frequency. The other specialties are somewhere in between. The least number of malpractice lawsuits was filed against the dental professions.

WHAT MUST BE SHOWN TO PREVAIL IN A MEDICAL PRACTICE CASE?¹⁰

While there are various types of medical malpractice claims, generally speaking, a claimant most usually show the following:

- the health care providers owed a duty to the patient;
- the healthcare provider breached that duty;
- the patient suffered an injury; and
- the patient's injury was a proximate cause of the health care provider's breach.

A physician owes a duty to a patient once a “doctor-patient” relationship has been formed. Such a relationship is usually formed when the physician agrees to care for the patient. Nonetheless, even if it is established that a duty existed and the health care

provider breached that duty (e.g, failed to meet the requisite standard of care), a claimant may not recover unless the claimant suffered injuries that were a direct result of the breach. If the breach resulted in no harm to the patient a claimant generally has no right to recovery.

WHO CAN BE HELD ACCOUNTABLE FOR MEDICAL MALPRACTICE?¹⁰

Generally speaking, a medical malpractice claim may be pursued against those who provide medical or health care to a patient, including, physician, registered nurses, hospitals, dentists, nursing homes, and pharmacists. Medical malpractice claims may be brought about against individuals, partnership, professional associations and corporations.

FACTS AND STATISTICS

The number of iatrogenic deaths (those that are caused by misdiagnosis, manner or treatment of a physician) is about 225,000 a year in the United States of America and ranks this as the third leading cause of death in America, behind only heart disease and cancer¹¹. This number includes:

- 12,000 deaths each year due to unnecessary surgical procedures
- 7,000 deaths each year caused by medication errors in hospitals
- 20,000 deaths each year from other hospital errors
- 80,000 deaths each year from infections contacted in hospitals
- 106,000 deaths each year from adverse side effects of or reactions to medications

This is a large number of deaths due to inadequate care by physicians in America. Doctors do have a very difficult job and it should be realized that they are humans and prone to mistakes, but far too many times are these deaths due to carelessness and negligence¹¹. We have to

be aware that this is an issue and that health care providers must be held to a standard of care that is above negligent mistakes.

FREQUENCY AND COST OF MEDICAL ERRORS

Statistics show that approximately 195,000 people are killed every year by medical errors in the US¹². The study notes that 1.14 million patient-safety incidents occurred among the 37 million hospitalizations in the Medicare population over the years 2000-2002. Hospital costs associated with such medical errors were estimated at \$324million in October 2008 alone¹². Between 15,000 and 19,000 malpractice suites are brought against doctors each year¹².

In Nigeria physicians should be litigious conscious as many patients are becoming more aware of presumed negligence¹³ and are willing to sue¹⁴. In a study amongst pregnant women in Ibadan, Nigeria, 67.6% of the women were aware of their rights to sue in case of presumed negligence¹³ and 58.1% of them were willing to sue in the event of malpractice¹⁴.

In conclusion, medical personnel must be aware in their practice that patients are becoming more aware of their rights. The public is unforgiving whenever there is perceived harm to patients as a result of medical negligence. Physicians all have to be litigious conscious and therefore have a basic knowledge of avoidance of malpractice and litigations.

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