

# ADMINISTRATIVE AND LEGAL PROTECTION OF MEDICAL PERSONNEL AGAINST CRIMINAL AND TORTIOUS NEGLIGENCE

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## ABSTRACT

**BACKGROUND:** Medical personnel are bound to experience some difficulties in the course of duty and they may end up criminally or civilly liable in the performance of these responsibilities. Across the globe, many medical employees have lost their license to practice their profession after facing disciplinary committees for breach of duties. Some have been sued by patients for negligent treatment. Administratively, the hospital management boards have protected their staff against liabilities by being sued instead of the staff, paying some patients off or write off their hospital bills to compensate them for the liabilities of their medical personnel. Legally, medical personnel are also shielded from medical liabilities as long as they observe a high level of care and skills in the course of duty, otherwise, the law will remove the veil of protection and charge them as liable.

**METHODOLOGY:** In order to achieve the objectives of this research, the **doctrinal** and qualitative methodology was adopted. The doctrinal approach enables the authors to explore the position of the Nigerian law to examine the liabilities of medical personal in cases of any malpractice whether intentionally or unintentionally. The qualitative approach was used to analyze the administrative protection of medical personnel by the hospital management board.

**CONCLUSION:** The study concludes that as long as there is lack of proper supervision of medical personnel by their superior officers, no constant supply of electricity, no improved welfare package for medical personnel, lack of educational sponsorship for career advancement, deliberate observation of advanced professional ethics and honesty on the part of medical personnel, negligence in the course of treatment would not be abated in Nigerian hospitals.

**KEYWORDS:** Medical Personnel, Negligence, Liabilities, Hospital Management, Law.

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## INTRODUCTION

The issue of liability of medical practitioners arises due to inability to carry out the lawful duty of care to patients, which then leads to damage.<sup>1</sup> Hence, medical negligence occurs when medical personnel do not carry out medical care to a patient with utmost care, and it results in damage to the said patient. When this occurs, civil or criminal proceedings are usually commenced against the providers of the health care services, for their carelessness in performing their given duties. The categories of health care personnel are those who are lawfully registered and are licensed to practice in various medical fields.<sup>2</sup> Examples of such health care providers are nurses, pharmacists,

laboratory scientists, ophthalmologists, dentists, doctors, physiotherapists, radiologists, physiologists, etc. Such people help members of their society and the patients trust them to carry out their duties with the knowledge and skills expected in that profession.

Both criminal and civil liabilities in medical practice have been on the rise across the globe with special attention drawn to developing countries like Nigeria. Human errors in the course of Patient's treatment have always been challenges since the Hippocratic dictum "First, do no harm".<sup>3</sup> Liabilities of medical practitioners could occur in the general process of treatment and is a pertinent cause of mortality among patients with grave consequences for family and public health.<sup>4</sup> The treatment process of a patient ranges from physical examination, prescriptions, scans, analysis of specimens, administration of drugs or

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meals, payment for services rendered etc. and error and liabilities occur during any or more of these stages.

Internationally, about 94,000 people were estimated to have died from medical liabilities in 1990 while 142,000 was the in 2014 estimation and this figure indicate an increase from the 1990 evaluation.<sup>5</sup> However, reports from 2016 showing an annual death of about 251,454 as a result of medical errors in America suggested that 2013 global estimation may not be accurate.<sup>6</sup> In the year 1999, the Institute of Medicine Committee on the level of health care in the United States of America brought to the public and medical attention the issues of medical errors and highlighted the gross under-reporting of medical errors and that the estimates of undisclosed medical errors could be in millions.<sup>7</sup> In the past, medical practitioners are far less likely to be sued for medical errors than they are in the present and it is a common fear in the now that medical error disclosure to the patient and family would incite a lawsuit.<sup>8</sup> However, research studies have shown that the patients and families that considered litigation for medical errors<sup>9</sup> are likely those who were more dissatisfied with the explanation they received from the medical practitioner.<sup>10</sup>

In Nigeria, the relationship between hospital clients and medical personnel is legal; unfortunately not many Nigerians are aware of this fact. In the northern part of the country, the religious belief that "Allah gives and Allah takes" is a major constraint on the patients to sue medical personnel even in glaring circumstances of a breach of that legal duty when they lose their loved ones. On the other hand, for several decades, the Southern part of the country has been experiencing a well exposed clientele with the knowledge of the legal duty between them and medical personnel.<sup>11</sup> The main objective of this research is to know how medical personnel can be protected against medical liabilities in the line of duty and determined if the hospital management boards protects them even in the face of medical negligence.

Through most press media across the globe<sup>12</sup> doctors, pharmacists and nurses are always accused of professional malpractice by concerned citizens usually while the presumption of

innocence until proven guilty is totally ignored. Given the circumstance wherein medical personnel are expected to perform their duties in Nigeria, it is glaring that no matter how much they execute the duty of care, breaches of such are bound to happen.<sup>13</sup> It is settled law that regardless of the presence or absence of an express contract, there exist a duty of care between a medical practitioner and a patient.<sup>14</sup>

## METHODOLOGY

In order to achieve the objectives of this research, the doctrinal and qualitative methodology was adopted. The doctrinal approach enables the authors to explore the position of the Nigerian law to examine the liabilities of medical personal in cases of any malpractice whether intentionally or unintentionally. The qualitative approach was used to analyse the administrative protection of medical personnel by the hospital management board.

### **Negligence as the Main Root of Liability for Medical Personnel**

Alderson B., in the case of *Blyth v. Birmingham Water Works Company Co*<sup>15</sup> stated that "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would do, or doing something which a prudent and reasonable man would not do." Thus, this means that "negligence is the breach of a legal duty to take care which results in damage, undesired by the defendant to the plaintiff".<sup>16</sup> In medical practice, the concept of negligence is to the effect that a medical professional who had the consent to treat a patient did not carry out the duty of treating his patients with the utmost care and standards expected of him under the relevant regulations and laws.

In cases of negligence, the action usually involves three main attributes: (1) The attribute of the duty imposed on the medical professional by the relevant laws; (2) The actual conduct which the law regards as constituting a breach of expected duty; (3) The connecting link between the duty breached and the resulting injury complained about by the victim. Generally, the relationship between medical practitioners and the patient is seen by the court as simply a contractual one,<sup>17</sup>

hence, the law presumes the existence of a contractual relationship between a patient and a medical professional once the patient meets the medical professional for care and the medical professional begins with the care. The duty owed by the medical professional to the patient develops from the contract presumed by law.

In litigation cases involving the liability of medical practitioners, the patient usually commences a case against the medical practitioner in question for supposed failure to carry out the duties with the expected standard of care, such actions are mostly in tort. The Halsbury's Law of England states that "A person who holds himself out as ready to give medical advice or treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person, whether he is a registered practitioner or not who does a patient, consult, owes him certain duties, namely, a duty of care in deciding what treatment to give and a duty of care in the administration of that treatment. The practitioner must bring to his task a reasonable degree of care. Neither the very highest, nor very low degree of care and competence judged, in the light of the particular circumstances of each case is what the law requires; a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a reasonable body of medical men skilled in that particular art, although a body of adverse opinion also existed among medical men".<sup>18</sup> The quotation above can be said to be one that encapsulates the basic attributes of negligence of a medical personnel. Thus, a medical professional will be liable to pay damages if and when he conducts his duty with a level of care below that which is expected of someone of his experience, situation and rank.<sup>19</sup>

### **Hospital Management Board and Negligence**

In the prevention of medical negligence and protection of medical personnel, the role of the hospital management board is very pertinent and cannot be over emphasized. Generally, most hospital management boards ensure the protection of their professionals and shield them from being personally prosecuted for medical liability by their patients But in situations where

medical personnel is found to have been grossly negligent or involved in gross malpractice like murder, sale of hospital materials /properties, unethical relationships with patients/staff, deliberate swapping of babies/specimen and fraud, the hospital management board will not protect such personnel but can hand them over to police authority, refer them to the Disciplinary Committee of various professionals bodies they belong or even official press charges against them.

### **Liability of Hospitals:**

**Vicarious Liability:** This is the liability a master incurs to a third party for whatever wrong committed by the worker/servant during the time he/she works for the master. It does not matter that the master was not at fault himself. This means that for the liability of a master to arise, a relationship of master and servant as distinct from employer and independent contractor has to exist.<sup>20</sup>

This means that in the case of a hospital, the hospital management are also liable for an act of negligence committed by the health care providers it employs. The people who provide this health care are the servants of the hospitals, which employ them: for example, assistant medical officers, radiographers, house-surgeons, anesthetists, etc., are all servants of the hospital management with regards to the issue of vicarious liability, as held in the case of *Roe v Minister of Health*.<sup>21</sup> Vicarious liability of the master arises on the primary liability of the servant. The servant is the principal tortfeasor while the master is the accessory. Thus, a plaintiff could sue both the health care provider and the hospital jointly. He may also sue either of them. The usual thing is to join the employer as a defendant. At times, the plaintiff may not be able to specifically identify which of the several servants of the master was negligent. For example, a patient who has been injured in the course of an operation in the hospital may not be able to identify the exact person or people that were negligent among the team of doctors, anesthetists, and nurses, in the course of the operation.

It was held in *Cassidy v Ministry of Health*<sup>22</sup> that, in such a situation, the management of the hospital will be held vicariously liable, except it is proved that the medical practitioners involved in the treatment were not negligent in carrying out their duties. It is usually better for an injured plaintiff to

join the hospital (master) as a defendant because, it is richer than any of its servants and thus will be more capable to pay compared to the servant (provider).

**Primary Liability of Hospitals:** We should not confuse vicarious liability with primary liability of hospitals. Apart from vicarious liability, a hospital, may commit a breach of the expected duty of care, which it owes to another, i.e. a hospital may be in breach of its own duty to another; for example, where a hospital is at fault for selecting an unskilled person on its staff, and such person conducts himself in a wrongful manner, or allowing such a person to continue in employment; or where it provides defective equipment for use by the health care providers under its service.

**Occupier's Liability:** This is a liability owed to the visitor of a premises by the occupier of such premises. An occupier, according to Lord Denning in the case of *Wheat v Lacon*,<sup>23</sup> and *I.I.T.A v. Amrani*,<sup>24</sup> is "a person who has a sufficient degree of control over premises to put him under a duty of care towards those who come lawfully upon his premises."

Generally, a visitor is a person who has been given either an implied or express direction to enter into the premises by the occupier. An occupier has a "common duty" of ensuring that visitors are treated with care. Section 238 (2) of ASTL 1986 defines this "common duty" as "a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there." This common duty of care therefore requires hospitals to guard against danger, which may arise from the state of disrepair of their premises, or danger arising from ongoing activities on the land, such as construction work, or repairs. Also, it includes the maintenance of lifts, adequate lighting at night for safety reasons and also maintaining other equipment in the hospital.<sup>25</sup> In *Slade v Battersea and Putney Group Hospital Management Committee*,<sup>26</sup> a 67 year old lady visiting her husband in a hospital slipped and fell on a part of the floor of the ward where polish had just been spread, while she was leaving. Due to the fact that polish had just been spread, the floor was slippery and dangerous, and there was no sign to warn users. The woman succeeded in an action for damages against the hospital authority.

Therefore, the hospital authority owes a common duty of care to ensure that its premises are reasonably safe for every person that is on its premises lawfully. If it does not fulfill this duty to the visitor, it will be liable in damages for any injury caused to a person lawfully on its premises. Such visitors include patients and relatives visiting patients, the hospital workers or employees. However, the hospital must in proper cases expect that children will exhibit less care than adults and thus should ensure that the workers try to guard against any special risks "ordinarily incident to that calling".<sup>27</sup> The hospital can of course escape liability by giving warning notice to visitors. If, therefore, it has warned the visitor of danger in the premises, and the visitor still gets injured, the hospital will be absolved from liability, provided that in all the situations, the warning was sufficient to inform the visitor of the need to keep reasonably safe. Consequently, only sufficient and adequate warning that will enable visitors to be reasonably safe will absolve the hospital from liability. To determine the sufficiency of the warning to visitors, all the circumstances must be taken into consideration.

### **Legal Protection**

Medical personnel are bound to experience some difficulties in the course of duty and they may end up criminally or civilly liable in the performance of these responsibilities. This research recognizes the fact that Nigerian Many Nigerian hospitals are not well-equipped and the environment of some are very dirty sites to behold. They are further underfunded and under-staffed, doctors are unpaid and there is no steady supply of electricity. Despite these shortcomings in the running of many hospitals in Nigeria, the medical Personnel are bound to observe extra duty of care and skills in effecting their responsibilities. In this 21<sup>st</sup> century, it is very imperative for medical personnel to know how they are protected by the law in situations of medical negligence as discussed further;

### **Criminal Liabilities: The Legal Framework.**

Criminal law obviously applies to health care providers, and the purpose of prosecution is to ensure punishment and deterrence. Nigeria as a country has two codes guiding criminal prosecution, they are: the Criminal Code which is applicable in the Southern part of Nigeria, and the

Penal Code which is applicable in the Northern part of Nigeria. In a situation where a health care provider is negligent and perform his/her duties without the standard care expected by the regulations, which ultimately leads to bodily harm to the patient, such health care provider will be held criminally liable and will face criminal prosecution.

The law states that, "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; and such a person by reason of any omission to observe or perform that duty".<sup>28</sup> Thus, in the case of *R. V. Adomako*,<sup>29</sup> an anesthetist displayed gross negligence during surgery which led to the death of the patient; he was established to be guilty of the offence of manslaughter.

Thus, if a medical practitioner conducts his/her duty with a level of care which is less than that required, he/she will be said to have been negligent. Hence, if due to lack of this reasonable care, the negligence leads to be death of a patient, he will be held liable for manslaughter. However, it should be noted that the level of the said negligence must be such that reveals a great disregard for the safety and life of the patient, and a crime against the law of the state., as held in *R v. Bateman*.<sup>30</sup>

Consequently, in order for criminal liability to arise with regards to medical practitioners, the level of negligence must be "gross" and not ordinarily "mere" negligence. In *Kim v State*,<sup>31</sup> it was held by the Supreme Court that in order for a medical practitioner to be held liable for negligence, the negligence must not be a mere one, but a gross one. Also, the Courts do not have the power to make out a mere negligence of a smaller degree into a gross one by naming it such. The court made reference to the case of *Akerele v R*.<sup>32</sup> In the case; a drug injection called Sobita was administered to children to treat yaws by a medical practitioner. Thereafter, some of the children died and the medical practitioner was charged with the offence of manslaughter of one of them. The prosecution tried to prove that the accused gave an overdose of the Sobita to the child by making a strong mixture and his action

amounts to gross negligence. The accused was therefore found guilty of manslaughter and was sentenced to 3 years imprisonment. The accused appealed and WACA affirmed the conviction. He was held guilty of manslaughter and sent to prison for 3 years. He then appealed again to the Privy Council, and the appeal was allowed. It was found that the negligence of the medical practitioner was not a gross negligence. The court stated that, "It must be remembered that the degree of negligence required is that it should be gross, and that neither a jury nor a court can transform negligence of a lesser degree into gross negligence by giving it that appellation." Thus, the medical professional owes a duty of care and a duty not to carry out negligent acts to his patient. This is regardless of the existence or non-existence of an agreement.

Therefore, Section 303 of the Criminal Code creates both a duty and a protection to medical practitioners. Medical personnel cannot be found liable for acts conducted with a reasonable degree of care. If this degree of care can be established, then the medical practitioner cannot be guilty of gross negligence and by effect held criminally liable. The requirement is that a medical practitioner performs his/her duties as an average medical practitioner would. Thus, a reasonable skill is what is expected.

#### **Significant Cases of Rash and Negligent conduct:**

The law provides that: "(1) 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... (e) gives medical or surgical treatment to any person whom he undertakes to treat; or (f) dispenses, supplies, sells, administers, or gives away any medicine, or poisonous or dangerous matter;.... is guilty of a felony, and is liable to imprisonment for one year".<sup>33</sup> Hence, where a health care provider endangers the life of a patient or conducts his duty in a way as to cause harm to the patient, such a person will be guilty of a crime. Therefore, in criminal litigation against medical practitioners, the punishment may be either payment of fine or imprisonment, or may be both. Any negligence not of a high level or a gross nature, whether or not it causes death, cannot amount to manslaughter under Section 303 of the criminal code but will be a misdemeanor under section 343 of the criminal code. If such act is grossly negligent but does not result to death, the accused person has committed

a crime under Section 343 of the Criminal Code. Furthermore, the level of negligence which must be proved by the prosecution to ground the crime of manslaughter is different from that which need be proved for misdemeanor. Also, the level of negligence which amounts to a felony must be of a greater degree than that which would establish civil liability which gives rise to claim for damages/compensation. It was held in *Dabholkar v R*,<sup>34</sup> that it is however not so high as to establish manslaughter. Nevertheless, to prove negligence, the prosecutor has to present compelling evidence that will point to the fact that the medical practitioner did not exercise his duty with the standard professional required. This can be done by showing expert evidence of the usual standard. It should be noted that the standard of proof expected by the prosecutor in this circumstance in order to stand the case, is proof beyond reasonable doubt.

Other Ways Medical Practitioners Can Incur Criminal Liability Other Than Through Negligence: Refusal to treat gunshot victims,<sup>35</sup>,<sup>36</sup> and fraudulent sales of body parts and cadavers.<sup>37</sup>

## RESULT

The research literature finds that Disregard for professional ethics and code, Stress especially during surgery, Disregard for professional ethics and code, laziness, inadequate and obsolete equipment and lackadaisical attitudes are the major causes of medical negligence.

Administratively, the hospital management will protect medical personnel from liabilities by paying off the patients or canceling their bills. On the other hand, hospital management will not hesitate to officially discipline and even prosecute medical personnel that engage in glaring gross liability or misconduct to serve as deterrence for potential others.

Legally, medical personnel are protected under the relevant provisions of the relevant laws as long as they have maintained a reasonable duty of care and skill which a reasonable man would have shown in a similar situation. Several cases have proved this rule of law in the Nigerian courts. Furthermore, there is no specific law on medical negligence or a separate court set up to hear such cases so as to ensure speedy hearing of such matters which go on for as long as ten years in the regular courts.

## RECOMMENDATIONS

### Administrative Recommendations:

In order to ensure that medical personnel are constantly protected from both civil and criminal liabilities in Nigeria, there should be constant monitoring and supervision by superior officers on their junior colleagues at every stage of treatment for patients. The hospitals should be well funded and equipped with constant power supply for the smooth running of various treatment techniques and preservation of human lives, specimen and materials. The hospital management boards are to hold periodic seminars that will enlighten medical personnel on the implications of medical liabilities and how to avoid them. Educational sponsorship that will advance the career of hospital staff should be observed by the hospital management board. Improved welfare package like upgraded salary that will also prevent brain drain from hospital workforce and enough off days to reduce stress should be given to medical personnel.

There is a need for the proper codification and reconstituting of the laws on medical negligence in Nigeria. This is important as both the constitutional law of Nigeria and the international human rights law recognizes the Right to Health of the Citizens of Nigeria. This right to health is absolute and sacrosanct, and it encompasses the right to good and effective medical health care.

### Legal Recommendations;

The authors recommend that there should be a separate law that will specifically address the issue of medical negligence in Nigeria since this will ensure further protection of medical personnel. This further help patient on how to implement their rights and secure justice in instances where negligence is committed on them in the course of treatment. The prosecution of such cases should be fast tracked and not delayed by all stakeholders. This is why it is apposite that every citizen be educated on the rights and how to enforce such rights, with regards to efficient health care in Nigeria.

Alternative dispute resolution like compensation or settlement out of court in cases of medical liabilities is encouraged to protect medical personnel from series of prosecution by aggrieved patients since this move will protect not only protect the medical personnel but also the hospital

board from negative media publicity. The Nigerian President is advised to always appoint a council at Medical and dental Council of Nigeria (MDCN). This is to ensure that the Medical and Dental Practitioners Disciplinary Tribunal decides on malpractice issues of medical Doctors (MDPT) promptly so that cases will not be pending for a long time and that all doctors can be put on their toes in the performance of their responsibilities.

## CONCLUSION

Generally, the medical profession is one that comes with its own number of risks. The human body is delicate and must be treated with care at all times especially when in need of medical attention. However, there are still bound to be human errors. This human errors most times caused by mere negligence can be classified under civil liabilities. However, some negligence are higher in degree than others, and they are referred to as "gross" negligence. This degree of negligence is what amounts to criminal liability which could be a misdemeanor or a capital offence of manslaughter. Thus, medical practitioners are expected at all times to exhibit a reasonable standard of care in treating patients. In a case where failure to exercise the degree of care expected leads to bodily harm to the patient, such medical practitioner will be held criminally liable. The study concludes that as long as there is lack of proper supervision of medical personnel by their superior officers, no constant supply of electricity, no improved welfare package for medical personnel, lack of educational sponsorship for career advancement, deliberate observation of advanced professional ethics and honesty on the part of medical personnel, negligence in the course of treatment would not be abated in Nigerian hospitals.

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