

MEDICAL NEGLIGENCE AND CRIMINAL LIABILITY: AN EVALUATION OF THE NIGERIAN POSITION*

Abstract

This paper evaluates the criminal liability in medical negligence, using Nigeria as a case study. The term negligence is holistically appraised and discussed vis-a-vis several decided cases on the issue and the fact that the polity have failed always to ascribe criminal liability to medical negligence at all times. This article shall consider a number of cases that have been tried by in Nigeria and in the United Kingdom and the punishments in cases where the Respondents were found to be culpable. We shall also do an exposition as to whether medical practitioners have ever been subjected to criminal trial due to negligence in the discharge of their dutie,in Nigeria, thereafter we shall make a few recommendations.

Introduction

Negligence is basically a breach of a legal duty to take care, which occasion some form of damage to the claimant¹Negligence is held to be a failure to take reasonable care where there is a duty and it is attributable to person where person where failure to take reasonable care has resulted in damage to another. See UAC Ltd V Achara²

Medical negligence is therefore, a breach of a duty of care by a person in the medical profession, to a patient, which results in damage to the patient.³ Criminal or civil proceedings may be instituted against health care providers for negligence in the performance of their duties. These health care providers could be said to be those who are qualified and appropriately registered (where necessary) to practice any of the health related professions within the medical field. They include doctors, nurses, physiologists, physiotherapists, ophthalmologists, Dentists Pharmacists, Laboratory scientists, radiologists and a host of others.⁴ These people have held themselves out to serve members of the public and their patients rely on their skills and knowledge. The existence of this relationship between the provider and his patient gives rise to duty of care, the breach of which makes the provider liable where the breach is unjustifiable. Thus any individual who has been injured by the wrongful act of such a health care provider, should have the State to institute criminal proceedings against such health care provider, in order to punish him for the offence he committed⁵

A Medical Doctor who has performed an operation and negligently left scissors in the patient's abdomen, thereby causing the death of the patient should be prosecuted by the state for the said wrongful act. This paper shall discuss Medical Negligence and criminal liability and an evaluation of the Nigerian situation.

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¹ W.V.H Rogers Winfedd and Jolowicz on Tort (17th end London sweet & Maxwell 2006) p 152

² (1990) NWLR (pt 156) at 254 particularly at 295 para C-D.

³ I. Enemo, Medical Negligence, Liability of Health Care Providers and Hospitals (Published in the Nigerian Judicial Review, Vol. 19, 2011-2013) Faculty of Law UNN, P 112

⁴ I. Enemo, Supra, P 113

⁵ I. Enemo, Supra, P 113

What Constitutes Negligence?

For a case of negligence to succeed in the field of medicine, the Plaintiff/Prosecution must establish the following:⁶

- (1) That the Defendant owed him a duty for care
- (2) That there was a breach of this duty of care, which amounts to a requirement to demonstrate that the standard of the treatment given by the Defendant fell below the standard expected of him by the law.
- (3) That because of the sub-standard treatment, the Plaintiff suffered a legally recognised harm (for example, physical injury or psychiatric illness)⁷ This is otherwise known as Causation: did the Defendant's act or omission cause the Plaintiff's harm?

If successful in proving all the elements, the plaintiff is entitled to compensation, while the Defendant is seen to be guilty, if it is a criminal proceeding. We must herein reiterate the fact that the Administration of Criminal Justice Act (ACJA) 2015, which has been domesticated in many states in Nigeria as the Administration of Criminal Justice Laws, provides a situation where complainants are entitled to compensation, even in the event that the Defendant is found guilty and sentenced accordingly.

Duty of Care

How do you know if your doctor owes you a duty of care? The answers in most cases, is disarmingly simple, because he is your doctor. That is, an automatic legal duty of care arises if a health care professional has accepted to treat you or a general practitioner has accepted you onto his files. A duty of care will also arise in the case of a private patient by virtue of his contractual relationship with his doctor (or the hospital) and within a public national health system.⁸

Duties in law can be assumed or imposed. The paradigm example for an assumed obligation (of case) is that of contract where parties voluntarily agree to be bound to each other. The standard legal and policy position in respect of all duties of care in tort is to ask whether it would be just and reasonable to impose such a duty in the given circumstances⁹

Criminal Liability

Criminal law obviously applies to health care providers and the purpose of criminal prosecution is to punish the offender¹⁰. In Nigeria, the criminal code laws apply in the South while the penal code laws apply in the Northern States, as well as the Federal Criminal Code Act¹¹ and also the Federal Penal Code Act.

If health care providers in their practices become grossly negligent, causing bodily harm, or reckless in the care of others, they will be liable in criminal proceedings¹². Section 303 of the Criminal Code provides that, it is the duty of every person who, except in case of necessity, undertakes to administer surgical or medical treatment to any person, or to do any 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. An anaesthetist was found guilty of

⁶ J.K Mason & G.T. Laurie, *Laws and Medical Ethics* (7th ed, Oxford University Press 2006) p 305

⁷ *Fairlie V Perth and Kinross Healthcare, NHS Trust* 2004, SLT, 1200

⁸ J.K. Mason & G.T. Laurie, *Op Cit.* P307

⁹ J.K. Mason & G.T. Laurie, *Op Cit.* P307

¹⁰ *Caparo v Dickman* (1990) 2 AC, 605

¹¹ Criminal Code Act, CAP C38, Laws of the Federation of Nigeria 2004.

¹² I. Enemo, *Supra*, *Op Cit*, P 113

manslaughter, where he caused the death of a patient due to his gross negligence in attention during surgery¹³

It follows, therefore that if a health care provider does not use reasonable care or his conduct falls below the standard of care required by law, he is said to be negligent. This means that, if he does not use reasonable care or he negligently performs his duties and thereby caused the death of a patient, he is guilty of manslaughter. However, his negligence or incompetence must be so great as to show a disregard for life and safety and to amount to a crime against the state conduct deserving punishment¹⁴ Generally, for criminal liability, the degree of negligence required of health care provider. In *KIM v STATE*¹⁵, the Supreme Court held that the degree of negligence required in the medical profession to render a practitioner liable for negligence is that it should be gross and not mere negligence and that the court cannot however transform negligence of a lesser degree into gross negligence by giving it that appellation. The court referred to and followed the case of *AKERELE v R*¹⁶, here the accused, a qualified medical practitioner administered injections of a drug known as Sobita to children as cure for yaws. A number of children died and he was charged for manslaughter of one of the children. The case of the prosecution was to the effect that the accused had concocted too strong a mixture and thereby administered an overdose on the deceased amounting to gross negligence. He was found guilty of manslaughter and sentenced to imprisonment for 3 years. The West Africa Court of Appeal (WACA) upheld the conviction, but the Accused further appealed to the Privy Council, which held that the negligence of the accused did not amount to gross negligence and allowed the Appeal. According to the court, “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 health care provider owes to his patient or client, a duty of care not to act negligently. This is so, whether or not there is an agreement between them. He must possess reasonable skill and use that skill in every case. What is important is that the provider acts as an average reasonable health care provider would act in the circumstances of the case¹⁷

The provisions of section 343 of the Criminal Code is noteworthy at this juncture. It provides thus:

- (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 misdemeanour and is liable to imprisonment for one year while this section creates the offence of misdemeanour for negligent act, which only endangers human life or is likely to cause harm to another person. Section 303 of the criminal code creates the offence of manslaughter for grossly negligent acts which cause death.

Therefore, the punishment in criminal proceedings instituted against a health care provider may be imprisonment or fine or both.

¹³ R V Adomako (1944) ER 78

¹⁴ I. Enemo, *Supra*, Op Cit, P 113

¹⁵ (1992) 4 NWLR (Pt 233) p 17

¹⁶ (1912) 8 WACA, 5.

¹⁷ I. Enemo, *Supra*, Op Cit, P 113

Conclusion

Medical negligence is predominantly a civil matter, but a spate of prosecutions in the early 1990's served to remind doctors that the loss of a patient may sometimes lead to criminal prosecution, such prosecution used to be rare, their increase points to heightened interest in the external regulation of medicine and to a diminution in the professional immunity which doctors may previously have enjoyed. In some respects, this process is healthy; in others it is a matter for regret. The principle that doctors and indeed all professionals should be accountable for their failures is entirely acceptable.

No doubt criminal liability for negligence has been mostly limited to prosecutions for manslaughter in many jurisdictions of the world, however the Nigerian criminal code Act provides for lesser offences in medical negligence. The level of negligence which a doctor must have manifested is considerably above that which civil liability may be incurred. Traditionally it has been defined as "gross" or extreme" negligence and sometime, somewhat tautologically as criminal negligence. The essential concern is that it surpasses the civil test, as was stressed in *R v BATEMAN*¹⁸, per Lord Hewart CJ

In order to establish criminal liability, the facts must be such that... the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment.

This, of course does not answer the question of when conduct goes beyond the compensation level but it is probably impossible to be much more specific. It is clear that what is required is conduct that the accused deserves punishment for what he did.

Recommendations

1. We recommend a possible amendment of the Criminal Code Act/Penal Code Act to accommodate, several other lesser offences arising from medical negligence.
2. We also recommend that the Medical and Dental Council of Nigeria (MDCN) be granted more powers such that they can convict and sentence erring Medical Doctors and Medical Professionals to jail terms as opposed to merely striking out of their names or suspension of their members who are found guilty/liable.
3. We also recommend that special courts be created to try cases of Medical Negligence.
4. We also recommend that the government should carry out enlightenment/awareness campaigns to sensitize the public, on what constitutes criminal liability in medical negligence.

¹⁸ See *R.V Bateman* (1925) 133, L.T. 30 @ 732, see also Okonkwo and Naish, *Criminal Law in Nigeria* (Ibadan, Spectrum Books Ltd 2006) p17