

THE PROFESSIONAL'S DUTY OF CARE: A DIAGNOSTIC APPRAISAL OF THE MEDICAL PRACTITIONER'S LIABILITY OF NEGLIGENCE IN TORT.

I. INTRODUCTION.

Negligence is the most important and dynamic of all torts. It is a species of law which regulates the interactions of all people. Therefore, it is an aspect of tort that is not peculiar to Medical doctor- patient relationship¹, but to other fields like school teachers, legal practitioner, gaolers, etc. All stand in special relationship to take care of their neighbours². Failure to do so may warrant action in negligence.³ Thus a patient who wish to complain that a Medical practitioner⁴ did not tell him or her of the risk or side effect of particular treatment or the medical practitioner has done a shoddy job in trying to treat such patient will have cause of action in negligence⁵. In the light of this, the paper will attempt to examine the general principle of negligence, and its applicability to Medical practice.

II. GENERAL PRINCIPLE OF LAW OF NEGLIGENCE

...in strict legal analysis negligence means more than heedless or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person, to whom the duty was owed⁶

In *U.T.B v Ozoema*⁷ the Supreme Court of Nigeria defined Negligence to mean:

Lack of proper care and attention; Carelessness behaviour or conduct; a state of mind, which is opposed to intention; the breach of duty of care imposed by common law and statute resulting in damage to the complaint"

From the above definitions, the following are deductible as the element of negligence:

- I. A duty of care owed by the defendant to the plaintiff;⁸
- II. Breach of duty of care by the defendant⁹; and

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² See J. Devereux, *Medical Law: Text, Cases and Materials*, (Australia: Cavandish Pub. Ltd, 1997),p.105.

³ The Neighbour principle was laid down in the case of *Donoghue v Stevenson* (1932) A. C .562, thus:" The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer's question," who is my neighbour? Receives a restricted reply. You must take reasonable care to avoid act or omission which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour?. The answer seems to be persons who are so closely and directly affected by act that I ought reasonably to have them in contemplations as being so affected when am directing my mind to the acts or omissions which are called in question"

⁴ R P Balkin ,JLR Davis, *Law of Torts*, (2nd Edition,1996) p:217, and Michael E, *Emergency Law*, available at <http://books.gogole.com.ng/books?id>, pp.36-37.

⁵ This is a person concerned with maintaining or restoring human health through the study, diagnosis, and treatment of disease and injury; and accomplishes these through a detailed knowledge of anatomy, physiology, diseases and treatment. See <http://en.wikipedia.org/wiki/physician> accessed on 2/5/09.

⁶ See J. Devereux, op. cit.

⁷ In the case of *Conchelly Iron & Coal Co v Mc Mullan* (1934) AC at CP: 25 as cited in Kodilinye & Aluko, *The Nigerian Law of Torts*, (Ibadan: Spectrum Books Limited ,2007) P: 38

⁸ (2007) 3 NWLR (pt.1022) 453. See also *Dirisu Abu & Niger construction Ltd. v Ambrose Abulime* (2007) ALL FWLR (pt.396) 683.

⁹ The duty of care will be owed whenever in the circumstances it is foreseeable that if the defendant does not exercise reasonable care. This is determined by a-Relationship of Proximity; b- Conditions to negate or reduce the scope of duty .See *Anns v London Borough of Merton*(1979)2ALLER492

III. Damage to the plaintiff resulting from the breach¹⁰.

Although the legal position is that "*He who assert must prove*"¹¹. However, in negligence, there are instances where the plaintiff will not be able to adduce direct evidence to prove its case by pleading the doctrine of "*Res ipsa loquitur*"¹²

III. APPLICATION OF THE GENERAL PRINCIPLE OF NEGLIGENCE TO MEDICAL PRACTICE

The application of the principle of negligence to Medical practice can be summarized as follow:

- (i) The existence of a duty of care towards a patient reposing in the Medical Practitioner;
- (ii) A breach of that duty by the Medical Practitioner;
- (iii) Damage caused as a result of the breach of duty; and damage caused was reasonably foreseeable.¹³

(i) Duty of care

High Court of Australia defined duty of care as "the law imposes on a medical practitioner a duty to use reasonable care and skill required is that of the ordinary skilled person exercising and professing to have that special skill"¹⁴

A medical practitioner, whether as a doctor in a private hospital or public hospital, and the Hospital, in their professional capacity, owe a duty of care to the patient to use caution in undertaking the treatment.¹⁵

(a) A medical doctor.

The Medical doctor's duty of care owe to the patient is that of general duty of care. In *R. v. Bateman*¹⁶, Lord Hewart CJ observed:

⁹ Here the court need not considered whether or not a reasonable man placed in the defendant's position would have acted as the defendant act. The court is obliged to apply the following test: (i) The likelihood of the harm; (ii) The seriousness of the injury that risk; (iii) The importance or utility of the defendant's activity; (iv) The cost of and practicability of measures to avoid the harm. See *Bolton v Stone* (1951) AC 850. See also *Hilder v Associated Portland cement manufacturers Ltd* (1961) 1 WLR 1434. Note that reasonableness is determined by the following factors: (a) Intelligence; (b) Knowledge; (c) Skill. See Kodinlinye and Aluko, op. cit at Pp42-47

¹⁰ In proving this element, the defendant must show that the act complained of, in fact, caused the damage. See *Sanyaolu v Farinbe* (1978) LRN 327. See also *Bernett v Chelsea and Kesington Hospital Management Committee* (1986) 1 ALL ER 1068; and that the consequence of the defendant's act is not too remote in law. See *Overseas Tankship (U.K) Ltd v Morts Dock & Engineering Co. Ltd.* (1961) AC 388.

¹¹ See S135-138 Evidence Act, CapE14, LFN, 2004. See also

¹² This literally means "Fact speaks for itself". See *Ojo v Gharoro* (2006) 3 SCNJ 52. See also, *Scott v London and St. Katherine's Docks Co.* (1865) 159 ER 665. Note that where *Res ipsa Loquitur* is successively invoked, it shall have the following effect: (i) establishment of prima-facie case; and (ii) Shifting of onus proof to the defendant. See Kodinlinye and Aluko, op. cit at p.49. The court will only apply the doctrine where (a) that the thing that caused the damage was under the full control of the defendant; and (b) That the accident would not have happened in the ordinary course of thing, without negligent act of the defendant or his servant. See Kodinlinye and Aluko, op. cit at p.49

¹³ See J. Devereux, *Medical Law: Text, Cases and Material*, op. cit, at p105. See also J. K. Mason and R. A. McCall Smith, *Law and Medical Ethics*, (London: Butherwort and Co. Publishing Ltd., 1983), p.130. see also I. Kennedy & A. Grubb, *Medical Law, Text with materials*, (2nd ed., London: Butherworth and Co. Publishing Ltd., 1994), pp.397-398.

¹⁴ See *Roger v Whitaker* (1992) 175 CLR 479 at 483, See also <http://www.haffmans.com.au/medical/negligence>, assessed on 1/5/09.

¹⁵ See *R. v. Bateman* (1925) 94 LJK791 (CCA). See also *Barnett v. Chelsea and Kesington Hospital Management Committee*, supra, at p428. See also Picard, "The Liability of Hospitals in Common Law Canada" (1981) 26 McGill LJ 997 cited in I Kennedy and A Grubb, op. cit at pp.402-403. Note that the existence of duty of care between the medical practitioner is independent of contractual agreement. See Jones, M, *Medical Negligence*, (London: Sweet and Maxwell, 1991), cited in J. Devereux, op. cit at p.106. See also I Kennedy and A Grubb, op. cit at p. 400.

¹⁶ Supra. See also I Kennedy and A Grubb, op. cit at p. 400. See also J. K. Mason and R. A. McCall Smith, *Law and Medical Ethics*, op. cit at pp.130-131

“ If a person holds himself out as possessing special skill and Knowledge, and he is consulted, as possessing such skill and Knowledge, by or on behalf of a patient, he owes a duty to the Patient to use due caution in understanding the treatment...”

The gist of the above is that if a medical practitioner undertook to be patient's doctor, he must exhibit standard degree of care and competency in treating his patient, otherwise, he will be liable in Tort of Negligence.

In *Barnett .v. Chelsea and Kensington Hospital Management Committee*¹⁷ where the three watchmen started vomiting after drinking some tea. The three men approached defendant's hospital for treatment. The Nurse telephone the doctor, who is a casualty officer. The doctor without seeing them, advice them to go home and see their own doctors. The Court held that there was the necessary undertaking on the part of the doctor such that he had thereafter to behave reasonably.

It merits mentioning that a medical practitioner is not expected to behave unreasonably, but to a certain degree of reasonable and ordinary standard of care and skill as stated in *R .v. Bateman*¹⁸ where Mc Nair stated thus:

...the Jury should not expect the highest or very high standard, nor should they be content with a very low standard

In *Bolam .v. Friern Hospital Management Committee*¹⁹. The Court in applying the principle stated in Bateman's case observed as follows:

The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is a well- established law that it is sufficient if he exercises the ordinary skill of an ordinary man exercising that particular act.”

Base on the authority cited above, a Medical practitioner is not expected to be a miracle worker guaranteeing a care or a very highest skill in his calling.

Instances where a medical practitioner had failed to exercise normal standard of care and skill are: Failure to diagnosis²⁰ where required; Errors relating to consent and advice²¹; Substandard treatment²²; Drug and Anaesthetic accidents²³; Retained surgical products²⁴; and Childbirth, Sterilization and Conception²⁵.

¹⁷ Supra

¹⁸ Supra.

¹⁹ supra

²⁰ Diagnosis is the basis of clinical judgement as it determines, firstly whether there is a need to treat, the mode of treatment required, to make proper diagnosis, the medical practitioner must take (a) full history; (b) conduct proper examination; and (c) proper test, if possible. See <http://www.injury-advice-solicitors.co.uk/pages/medical-Negligence-claim.aspx>.

²¹ This is the failure to give the patient adequate advice and warning whether in a therapeutic or a non-therapeutic context. See <http://www.injury-advice-solicitors.co.uk/pages/medical-Negligence-claim.aspx>.

²² This arises in cases involving retained swabs and other instruments after operations, burns, anaesthetic mishaps and cases where the wrong operation was performed. See <http://www.injury-advice-solicitors.co.uk/pages/medical-Negligence-claim.aspx>.

²³ This is the administration of an incorrect drug or an incorrect volume of the drug. See <http://www.injury-advice-solicitors.co.uk/pages/medical-Negligence-claim.aspx>.

²⁴ For example, swab left in after a caesarean operation,, a drain tube left in after a mastectomy, etc. See <http://www.injury-advice-solicitors.co.uk/pages/medical-Negligence-claim.aspx>.

²⁵ Examples are, accidents in the use of Forceps and accidents during caesarean section (*Whitehouse v Jordan*), anaesthetic mishaps, etc See <http://www.injury-advice-solicitors.co.uk/pages/medical-Negligence-claim.aspx>.

(b) **The Hospital**²⁶.

The Hospital shall have duty of care to the patient in the following:

- a. Selection of competent and qualified medical practitioner and other supporting staffs;
- b. Instruction and supervision of the employees;
- c. Provisions of proper facilities and equipment; and
- d. Establishment of systems necessary to safe operation of the hospital.²⁷

The standard of care required of the Hospital is that the Hospital has to carry out the above duties as competent as the reasonable hospital in the circumstances and, even if found substandard.²⁸

(ii) **The Breach of Duty of Care**

Failure of a Medical practitioner, and/or Hospital to observe their respective duties of care as required by law will result in breach of a specified duty. Example of situations where the required duty have been breached are:

a. **Failure to take medical history and later results to damage.**

For a medical practitioner to properly treat or diagnose a patient, he needs to take full medical history of that patient. If a doctor fails to take such history, he will be liable in negligence.²⁹

In *Chin Keow v Government of Malaysia & Anor*³⁰, a doctor treated the deceased without enquiring into the medical history of the deceased. The Court held him liable for negligence as a result of the breach of duty to enquire into the medical history of the deceased.

It merits mentioning that the duty to take medical history is an ongoing process, in that it is part of medical practitioner's duty to always enquire as to progress of medical history of a patient whenever he is to diagnose or treat the patient. A medical practitioner who fails to listen and act on the complaint of complications made by a patient shall be liable in negligence.³¹

In *Guirelli v Girgis*,³² the plaintiff consulted a Surgeon, the defendant concerning a broken leg. The plaintiff was subsequently referred to a physiotherapist. The patient made several complaints of pain in the leg and commented on its inability to bear any weight. The plaintiff had been a 'difficult' patient, constantly complaining, so the defendant dismissed the patient's view concerning his own leg. When the steel plate was removed, the leg gave way. Another surgeon had to perform an operation on the plaintiff. As a result of this, the plaintiff sued for negligence. The court held:

...I find that it was not a gross tendency, and that in the circumstances it was within the competence of a specialist orthopedic surgeon exercising ordinary competence to discover the truth about the degree of pain experienced by this patient on

²⁶ Herein referred to as Private and Public hospitals.

²⁷ All these duties are referred to as Non-delegable duties. See I Kennedy and A Grubb, op. cit at p. 403. See also *Wilson & Clyde Co. v English* (1938) AC 57. See also *Roe v Minister of health* (1954) 2ALL ER131. Note that hospital may directly be liable to a patient or vicariously liable for the act of its employee. See *Albrighton v Royal prince Albert Hospital* (1980) 2 NSWLR 542 at 561. See also *Cassidy v Minister of Health* (1951) 2 KB 343.

²⁸ See I Kennedy and A Grubb, op. cit at p. 403.

²⁹ See J. Devereux, opcit at p. 114.

³⁰ (1967)1WLR813

³¹ See J. Devereux, opcit at p. 115.

³² (1980) 24 SASR 264.

full weight bearing from time to time... I find that Dr Girgis was negligent in the treatment of the plaintiff's fractured tibia,...³³

b. Causing an injury to a patient while undergoing surgery.

In *Paton and Anor. v Parker*³⁴. In that case, the plaintiff was admitted to hospital for operation. She sustained burns while in operating theatre when a bottle where a bottle that was being used as anesthetic was split and the exposed wire of electric radiator used to heat the room ignited the spirit vapour. She sued for negligence. The court was of the opinion that the doctor in charge ought to know the danger with the radiator

c. Errors in treatment.

Many issues have been addressed as errors in medical treatment. Errors such as failure to ensure adequate sterilization, the choice of the wrong drug treatment, premature discharge of patient from hospital, failure to spot the warning signs of infection.³⁵

d. Failure to remove foreign objects inserted into a patient

Foreign object may include; Scalpel, Forceps, Retractors or Swabs.³⁶

e. Error in diagnosis

Failure to diagnose is not actionable per se, unless the plaintiff can prove that failure to properly diagnose results into injury³⁷

(iii) Consequential damage

It is not enough that a medical practitioner owes a duty of care; the breach of the duty of care, it is also important to show that there is consequential damage as a result of the breach; otherwise, the claim of the patient will fail.³⁸

In *Barnett v Chelseal and Kensington Hospital Management Committee*³⁹, a widow's action for negligent against medical practitioner failed not because even though the doctor was negligent in failing to diagnose his condition. Yet medical evidence revealed that her husband will still not survive even if proper medical treatment had been rendered.

It merits mentioning that the legal burden of prove is placed on the patient, however, there are instances where the patient will be unable to proffer or difficult to provide direct evidence to prove negligence, hence, such a patient can rely on the doctrine of Res ipsa loquitor⁴⁰.

In Canadian case of *MacDonald v York County Hospital Corporation*⁴¹. In that case, the plaintiff was admitted for treatment of a fractured ankle and left with an amputated leg. The court held that although the plaintiff is unable to explain what really happened, all the requirement of Res ipsa loquitor are present, hence the defendant is liable in negligence.

³³ Ibid at p.22. See also *Locher and Anor v Turner* (unreported, supreme court of Queensland, 22 December 1994. (1941)65CLR 187.

³⁴ *Geisman v Okefe and Anor.* SCNSW, unreported, 25 Nov. 1994.

³⁵ See *Mahon v Osborne* (1939) KB 14.

³⁶ See *Barnett v Chelseal and Kensington Hospital Management Committee* (supra)

³⁷ See O. Olapade, op. cit, at p.114.

³⁸ Supra

³⁹ See J. K. Mason and R. A. McCall, opcit at pp. 138-139. For the meaning of the doctrine of Res ipsa loquitor, see (n 12.)

⁴⁰ (1972)28DLR(3d)521. See also *Cassidy v. Ministry of Health*, (supra), *Mahon v Osborne* (supra).

V. DEFENCES

(i) *Contributory negligence*

In this defence, the Medical practitioner would have to prove that it was basically the negligence of the plaintiff himself which combines with his in bringing about the actual damage. On this Kodlinye and Aluko said

A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable⁴² prudent man, he might be hurt himself; and his reckonings he must take into account the possibility of others being careless⁴³.

We must note however that, this defence is not all encompassing because :

Where any person suffers damage as a result of his own fault and partly, of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage but the damages recoverable in respect thereof, shall be reduced to such extent as the court thinks just and equitable, having regard to the claimant share in the responsibility for the damage⁴⁴

The defence of contributory negligence in medical practice is to the effect that a patient has certain duties of care towards a medical practitioner and to himself with particular standard of care of a reasonable patient. If he breaches this duty and results into damage to himself, he shall be liable in contributory negligence and his damages will reduce accordingly.⁴⁵

In *Crossman v. Stewart*⁴⁶, a patient obtained prescription drug from an unorthodox source, using them on prolonged basis, and not consulting her. The patient later became blind as a result of continuance usage of the drug. The court held that the patient was liable in contributory negligence as a result of obtaining drug from unorthodox source, using them on a prolong basis without consulting her doctor.

(ii) *Volenti non fit injuria*

On the defence of *volenti non fit injuria* (no injury is done to one who consents). Consent itself is a defence to intentional torts⁴⁷ as such, it may also be a defence to an action in negligence. It is a defence where the patient relieved the medical practitioner of his professional duty of care without recourse to standard of care. If a defendant is successful in his plea of *volenti*, he will have complete defence, and the plaintiff will be unable to recover any damages⁴⁸. However, consent should not be obtained by means of fraud, threat, intimidation, deceit and duress.⁴⁹

⁴² For what constitute reasonableness in such circumstances, see the decision in *Vaughan v Menlove* (1837) 132 ER, 490

⁴³ Quoting Lord Denning L.J. in *Jones v Livox Quarries Ltd* (1952) 2 QB 608 at P: 615

⁴⁴ See section 1 (1) of the Law Reform (Contributory Negligence) Act 1945.

⁴⁵ See I Kennedy and A Grubb, op. cit at pp.492-497.

⁴⁶ (1977)5CCLT45. See also *Robitallie v. Vancouver Hockey Club Ltd* (1979)19BCLR158(S. C).

⁴⁷ Kodilinye & Aluko, Op Cit, P: 89

⁴⁸ Ibid, see also Babara .H., "Cases and Commentary on Tort", Pitman Publishing London (1996) generally on the practical way of putting up a defence in the Tort of Negligence

⁴⁹ See O. Olapade, op. cit at p119. See also *R. v. Flattery* (1877)2QBD. 410. See also *R. v. Case* (1850)4CoxCC220.

(iii) *Mistake*

The distinction has to be made between medical mistake which is excusable in law and mistake which will constitute negligence. In medical mistake, the law regards as excusable this is because the court accepts that ordinary human fallibility preclude liability, while in mistake that constitutes negligence, the conduct of the defendant is considered to have gone beyond the bounds of what is expected of the reasonably skilful or competent doctor.⁵⁰

In *Whitehouse v Jordan*⁵¹ the court states thus:

The true position is that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant holds himself out as having, and acting with ordinary care, then it is negligence. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligent.⁵²

It should be noted that gross mistake is always treated as medical negligence.⁵³

V. CONCLUSION AND RECOMMENDATIONS

This paper has examined the principle of negligence as it relates to medical practice. Generally, in negligence, both the legal burden and evidential burden of prove is placed on the claimant. Therefore, in medical practice, a patient who is aggrieved from the way he/she was treated; or he/she does not give consent to treatment shall have cause of action in negligence. In the light of this, a patient is expected to prove that the medical practitioner owes him a duty of care; he has breached this duty, and the breach result in consequential damage.

On duty of care, a medical practitioner is not expected to be a miracle worker who will guarantee cure, but he is expected to carry out the duty of care owed to the patient on the standard of care set by law. However, if a medical practitioner treats in contrary to the standard of care set by law, he may be liable in negligence. Also, a Hospital equally has its own duty of care owe to a patient on administrative matters, such as employment of competent staffs, provision of safe equipment, etc. the standard of care expected of a Hospital is that of a reasonable hospital placed in the same category. It merits mentioning that failure of a medical practitioner or Hospital to exhibit respective standard of care will amount to breach of duty of care which may result in to damage.

As stated earlier, the burden of proving negligence is placed on the patient, however, there are instances where the patient will be unable to prove or proffer evidence to prove negligence, hence, the need for the doctrine of *Res ipsa loquitor*. And if successively pleaded and upheld, the medical practitioner or the Hospital shall be liable in negligence.

⁵⁰ J. K. Mason and R. A. McCall Smith, op. cit at p. 134.

⁵¹ *supra*

⁵² *Ibid*, Lord Fraser at 281.

⁵³ J. K. Mason and R. A. McCall Smith, op. cit at p.135.

It merits mentioning that justice is not a one way traffic. In the light of this, a medical practitioner or Hospital will have opportunity to defend itself and plead certain defence (Contributory negligence or *Volenti non fit injuria*) in order to mitigate or completely exonerated from liability in negligence.

In negligence generally, it is not in doubt that to prove negligence is not an easy task, at times it requires calling of Expert witness to give expert evidence before a patient will succeed in an action in negligence.