THE
NIGERIAN JURIDICAL REVIEW

Vol. 10 **(2011 - 2012)**

FACULTY OF LAW
UNIVERSITY OF NIGERIA, ENUGU CAMPUS
Sylva Prints, Enugu

NIGERIAN JURIDICAL REVIEW
VOLUME 10 (2011 – 2012)

To be cited as (2011-2012) 10 Nig. J. R.

ISBN

CONTRIBUTIONS

The Journal welcomes articles in any area or related subjects for publishing considerations. Articles and correspondence should be forwarded to:

The General Editor,
Nigerian Juridical Review,
Faculty of Law,
University of Nigeria,
Enugu Campus, Enugu, Nigeria.

Published by
The Faculty of Law,
University of Nigeria,
Enugu Campus

Sylva Prints, Enugu
+234-08063978826; +234-08181610325
e-mail: onyekasylvanus@yahoo.com

MEDICAL NEGLIGENCE: LIABILITY OF HEALTH CARE PROVIDERS AND HOSPITALS*

Abstract

The health care system in Nigeria has recorded unimaginable and unsatisfactory performance in quality delivery for a very long time. Medical services are still not accessible to many people, especially the poor. When accessed, patients receive sub-standard care in many cases due to the negligence on the part of one health care provider or another. On the other hand, when services are unaffordable, the patients go to quacks who may provide cheaper services, while causing greater harm or damage to the injured patients and their families. The truth is that many people in Nigeria do not know their rights, and many have limited knowledge. Certainly, if those patients become better informed of their rights and the reality of their taking out successful law suits against negligent health care providers, the quality of health care may improve in Nigeria. This paper therefore discusses the liability in negligence of these health care providers whether civil or criminal while suggesting a stiffer punishment for quacks who have continued to cause havoc in the society by their nefarious activities.

Introduction

Generally, negligence is a breach of a legal duty to take care which results in damage to the claimant.[1] 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. 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, ophthalmologists, physiologists, physiotherapists, dentists, pharmacists, laboratory scientists,

* Ifeoma P. Enemo, LL.B (Hons.) (Nig), LL.M (Lagos) Ph.D (Nig) BL, Professor of Law, Faculty of Law, University of Nigeria, Enugu Campus. ifeoma.enemo@unn.edu.ng.

[1] W. V. H., Rogers, *Winfield and Jolowicz on Tort,* (17th ed., London: Sweet & Maxwell, 2006), p. 132.

radiologists, and a host of others. 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 has the right to institute civil action against him or her in order to be compensated for the injury suffered. On the other hand, the State can institute criminal proceedings against such health care provider, in order to push him for the offence he committed.

A medical doctor who has performed an operation and negligently left scissors in the patient's abdomen, thereby causing the death of the patient, may be sued in a civil action for damages, and he may also be prosecuted and convicted for committing the crime of manslaughter. Therefore, both civil and criminal proceedings may be taken out against such negligent health care provider for the same wrongful act.

This paper discusses the liability in negligence of health care providers/hospitals with a view to determining the extent of the liability arising therefrom.

1. Criminal Liability

Criminal law obviously applies to health care providers, and the purpose of criminal prosecution is to punish the offender. In Nigeria, criminal law codes apply, i.e., the Criminal Code which applies in the Southern States, and the Penal Code, which applies in the Northern States as well as the Federal Criminal Code,[2] and Federal Penal Code.[3]

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 proceedings. Section 303 of the Criminal Code provides 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

[2] Criminal Code Act, Cap. C38, Laws of the Federation of Nigeria 2004

[3] Penal Code (Northern States) Federal Provisions Act, Cap P3, Laws of the Federation of Nigeria, 2004

that duty. An anaesthetist was found guilty of manslaughter where he caused the death of a patient due to his gross negligent in attention during surgery.[4]

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 causes 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, and conduct deserving punishment.[5]

Consequently, for criminal liability, the degree of negligence required of health care providers is that it should be "gross" and not "mere" negligence. In *Kim v State*,[6] 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.*[7] Here, the accused, a qualified medical practitioner administered injections of a drug known as Sobita to children as a cure for yaws. A number of children died, and he was charged with 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 to the deceased, amounting to gross negligence. He was found guilty of manslaughter and sentenced to imprisonment for 3 years. 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."

---

[4] *R. v. Adomako* See *R. v* [1944] 3 All E. R. 78 (HOL, England)

[5] See *R v. Bateman* (1925) 133 L.T. 30 at 732, (1925) 133 L.T. 30 at 732, in Okonkwo and Naish , *Criminal Law in Nigeria,* (Ibadan: Spectrum Books Ltd, 2003) p. 250

[6] [1992] 4 NWLR (Pt. 233) p. 17

[7] [1942] 8 WACA 5

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 case.

Special Cases of Rash and Negligent Act.

By section 343 of the Criminal Code,

> (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[8] for negligent act which only endangers human life or is likely to cause harm to another person, section 303 creates the offence of manslaughter[9] 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. So long as negligence, whether it causes death or not, is not of such a high degree or is not gross as to be sufficient to convict for manslaughter, the charge should come under section 343 of the Criminal Code. It is the same where an act that is grossly negligent does not result in death. Here, one cannot be convicted of manslaughter, but may be conveniently convicted under section 343.

It is noteworthy that the degree of negligence which the prosecution must prove to establish the offence of manslaughter differs in cases of misdemeanour. Although the negligence which constitutes the offence of misdemeanour must be of a higher degree than the negligence which gives rise to a claim for compensation in a civil court, it is not of so high a degree as that, which is necessary to constitute the offence of manslaughter.[10] Nevertheless, the prosecutor in proving negligence is required to

[8] This is less serious offence than a felony.
[9] This is a felony and a serious offence.
[10] See *Dabholkar v R.(*1948) AC 221 at 224-225.

present compelling evidence to show that the health care provider's action fell short of the required professional standard. This, he will do, by presenting expert evidence of what that standard should be. The prosecutor in the circumstance is indeed expected to establish his case beyond reasonable doubt.

The Unskilled Person

An individual who is unskilled may decide to act as a health care provider.[11] Such a person cannot excuse his act by saying that he did his best, if his best fell below the required standard of care. For instance, if a carpenter holds himself out as a doctor and performs an operation on another person, he will be expected to show the average competence normally possessed by qualified medical doctors. He will be guilty of the consequence of falling short of that standard. This is because the law requires him to possess the requisite skill and to use it. He will, in any case, be guilty of an offence involving negligence only if his conduct is negligent. It is the same in the case of a nursing sister, who runs a maternity home, parades as a doctor, and performs a caesarean section on a pregnant woman, who subsequently dies by bleeding to death. Obviously, she does not have the knowledge of a qualified surgeon. Therefore, she acted in an incompetent manner in reckless disregard for the life and safety of the woman. She will be found guilty of the consequences of her act.

The activities of quacks, in the area of healthcare, have taken a toll on the lives of many Nigerians, especially the women folk. The courts, therefore, seem to punish them seriously for their negligent acts in order to discourage them. In the case of *State v. Okechukwu*,[12] where a quack was sentenced to nine years imprisonment for manslaughter, the court noted as follows:

> …I would stress that the incidence of medical quackery has been a cankerworm which must be stamped out if lives of innocent citizens must be protected from sudden and unnatural death. It is extremely dangerous for an ignorant mountebank like the accused to dabble in medical science for which he is least qualified. This type of offence is very common nowadays and a deterrent sentence is called for in this case. Ignorant

[11] Such an individual is known as a quack. In Nigeria, quacks abound.
[12] (1965) E.N.L.R 91

persons should not be allowed to experiment with lives of others.[13]

In spite of decisions like this, the activities of quacks continue to increase. It seems that if greater punishment like life sentence is given to them, they will definitely be deterred from carrying on with their deadly activities.

2. Civil Liability

When health care providers are alleged to have failed to observe the legal principles and standards concerning the care of patients, civil litigation may result. The most common and potent basis of civil liability for medical malpractice cases is negligence.[14] Thus, where a health care provider administers treatment to a patient negligently and injury is caused to the patient, he may sue for negligence against the provider for the injury suffered. The rationale for liability for negligence of a health care provider is that, someone harmed by the actions of such a provider deserves to be compensated by the injuring party.

In law, a plaintiff must establish three elements in order to succeed in an action for medical negligence. The elements include:

a. that the health care provider owed the plaintiff a legal duty of care;
b. that the provider was in breach of that duty;
c. that the plaintiff suffered injury/damage as a result of the breach.

Duty of Care

A health care provider owes a duty to a patient. Thus, if he undertakes to care for, or treat a patient, whether there is an agreement between them or not, he owes that patient a duty of care. He does not owe a duty of care to anyone who needs aid and who can be reasonably assisted;[15] rather he owes the duty to a patient he has undertaken to care for/treat, whether there is an agreement between them or not. The question is what is meant by a duty of care? "Duty" simply means that obligation recognized

[13] *Ibid*, at p. 94.

[14] D. Giesen, *International Medical Malpractice Law* (Mohr & Martins Nijhoff, 1988), p. 13.

[15] See C. O. Okonkwo, "Medical Negligence and the Legal Implications" cited in B. C. Umerah, *Medical Practice and the Law in Nigeria* (Nigeria: Longman Nigeria Ltd., 1989), p. 123

by law to take proper care to avoid causing injury to another in all circumstances of the case.

In *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,[16] Lord Morris noted as follows**:**

> **…**it should now be regarded as settled that if someone possessed of a special skill undertakes quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise…

Again in *R v Bateman*[17] the court explained that:

> …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 or client, he owes a duty to the patient or client to use due caution, diligence, care, knowledge and skill in administering treatment…

Therefore, where a patient relies on the skill and knowledge of a provider with respect to his/her health, a duty of care arises. Providers owe a duty to give adequate counselling to patients, to warn patients of the risks involved in the medical treatment being offered, to conduct a proper examination and to make proper diagnosis; duty to administer injections, anaesthesia, x-rays, etc properly, to avoid wrongful treatment, to see their patients or clients, to inform patients adequately, etc.

Similarly, hospital authorities owe the same duty of care to patients accepted for treatment in their hospitals. In America and other jurisdictions where "Good Samaritan Laws" exist, if a nurse or doctor freely offers services to someone in an emergency situation, he would not be held liable if anything goes wrong. Thus, a nurse who hears a neighbour's shout for help, because she is delivering her baby in the staircase, and offers her services, would not be exposed to civil liability if something goes wrong; it is the same in the case of a doctor who renders help at a scene of a road accident. However, this "Good Samaritan Law" does not apply in Nigeria. Rather, the health care provider in such cases will be held liable to the degree of care of a reasonable health care provider in the circumstance.

Breach of Duty

Breach of duty means that a defendant's conduct fell below the required standard expected of him. A health care provider will be

[16] [1957] A. C. 555.
[17][(1935] 94 K.B. 791.

in breach of the duty he owes a patient or client if he fails to exercise the standard or care, which the law expects of him. For the health care provider, the standard is that of the ordinary, reasonable health care provider with the skill of the defendant.

The fact that a mishap occurs does not establish negligence on the part of the provider as long as he followed the approved procedure for the treatment offered. There must be some form of standard against which the conduct of the health care provider has to be examined – that is the standard of a reasonable, skilful health care provider of the same experience, placed in the same circumstances. It is noteworthy that the standard is relative, i.e. in each circumstance, the standard will be judged by factors as time, place and availability of facilities.[18] For instance, if a provider acts under emergency conditions, where he may act without the necessary equipment, the standard expected of him may be lower than that of one acting under normal conditions. But this is no excuse for a provider who knows that facilities are unavailable and inadequate, to undertake treatment under such conditions, especially when there is a nearby hospital or medical centre with necessary facilities.

Similarly, the standard of care expected from local providers in villages cannot be in accordance with current trends in some urban areas like Lagos, where there has really been a lot of technological development. In the case of *Warnock v Kraft*[19] it was explained that:

> …a doctor in a small community or village not having the same opportunity and resources or keeping abreast of the advances in his profession, should not be held to the same standard of care and skill as that employed by physicians and surgeons in large cities…

Even a house officer is not expected to show the same standard of skill and care as a registrar or a consultant who is a specialist in a particular area. It is pertinent to note that, a doctor, nurse, anaesthetist, or any other health care provider, who holds himself out to a patient as possessing special skill and knowledge in a particular area of health care, must exercise the same degree of care and skill as those who generally practice in that field. A nurse who undertakes a complicated In-Vitro Fertilization (IVF) surgery must conform to the standard of a qualified obstetrician. If not,

[18] B. A. Susu, *Law of Torts*, (Lagos: CJC Press Nigeria Ltd., 1996), p. 155.
[19] (1938) 85 p. 2nd 505 in Susu, *Ibid*; p. 156.

she will be liable in negligence for undertaking such treatment with full knowledge that as a nurse, she does not have the special skill and knowledge and facilities required for that type of surgery. Thus, the standard of care is that of the member of the skilled group to which she holds herself as belonging. The more skill and knowledge you hold yourself as possessing in the profession, the more the standard of the professional with such skill you will be held to have. A chemist who holds himself out to be a pharmacist will be judged as if he were a pharmacist.[20] It is apparent, therefore, that the test is the standard of the ordinary skilled man exercising and professing to have that special skill which is not part of the ordinary equipment of the reasonable man.[21] In *Bolam v. Friern Hospital Management Committee*,[22] the court said:

> …But where you get a situation, which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill; neither that of a specialist of perfection; nor that of one with Olympian reputation, but an average yardstick of reasonableness and objectivity. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.

It should be noted that members of various professions, from their own expertise and experience, have practice standards or guidelines by which their disciplinary authorities determine and measure the competence and standards by which providers have performed their various tasks. The consequence of having such practice standards is that, providers who fail to comply with them, may be held to be in breach of their duty. In Nigeria, for example, the Medical and Dental Practitioners Act[23] regulates the medical and dental professions. This Act sets up the Medical and Dental Council of Nigeria. The Council listed acts constituting

[20] See *Kelly v. Carrol* (1950) 219 p. 2nd 79 A.L. R. 2nd 1174.
[21] See *Blyth v. Birmingham Water Works* (1856) 11 Ex, 781.
[22] See McNair J. in *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582 at 586.
[23] Cap M8, Laws of the Federation of Nigeria 2004.

professional negligence to include, making mistake in treatment, failure to advise or proffering wrong advise to a patient, making incorrect diagnosis, failure to attend to a patient, etc.[24] In the case of one Mrs. Olabisi Onigbanjo, decided by the Medical and Dental Practitioners Disciplinary Tribunal (M.D.P.D.T.),[25] a doctor who was charged with negligently leaving a large surgical drape in the abdomen of the woman after surgery, was found guilty. He was suspended from practice for six months.[26]

Apart from the disciplinary action which may be taken against the medical practitioner by the Medical and Dental Council of Nigeria, or by an employer, for negligently performing his duties below the practice standards, the courts can of course use those standards to measure such a provider's duty of care. The court may hold a provider liable because he has performed below those standards. But, for the court, compliance with those standards does not necessarily mean that the legal standards have been satisfied. The court, at the end of the day, sets the standards, and "may find that the standard of practice the profession has set is unacceptable to the wider community."[27]

Interestingly, medical science is an area where changes do occur, and therefore, a health care provider must be in tune with current skill. He must keep abreast of new developments, and is expected to be familiar with his own specialist literature.[28] In *Roe v. Minister of Health*,[29] the anaesthetist injected the two plaintiffs with contaminated anaesthetic, which caused them paralysis from the waist downwards. The anaesthetist was held not to be negligent because the risk of such contamination was not generally appreciated by competent anaesthetists at that time. However, there is a textbook published in 1957, which contains a clear warning on the use of this anesthetic;[30] so that any provider

[24] See Rule 28, Code of Medical Ethics in Nigeria, Revised ed, (Medical and Dental Council of Nigeria, 2004), p. 41.

[25] See s. 17 of the Medical and Dental Practitioners Act , LFN 2004.

[26] R. Abati, "Health Care and Negligent Doctors"; *The Guardian Newspaper*, Tuesday 4th January 2005.

[27] R. J. Cook, B.M. Dickens, M. F. Fathalla, *Reproductive Health and Human Rights: Integrating Medicine, Ethics and* Law. (Oxford: Clarendon Press, 2003) p. 130.

[28] Okonkwo, *op. cit.* p. 126; see also R. I. Cook, B. M. Dickens. M. F. Fathalla., *op. cit*, p. 131.

[29] [1954] 2 QB 66.

[30] See Okonkwo, *op. cit.*

that continues with the old system after this warning will not escape liability for negligence. Before the warning the danger was unforeseeable.

There is need to maintain a balance between the skill and the due diligence required of a provider at a point in time. McNair explained as follows:-

> …Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view. At the same time, that does not mean that a medical man can obstinately and pigheadedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion. Otherwise you might get men today saying: I do not believe in antiseptics. I am going to continue to do my surgery. That clearly would be wrong…[32]

It is necessary to take the circumstances of each case into consideration. Where a provider recognizes the limits of his skill, it is advisable that he should make timely referral of his patient to other appropriate provider who will be able to offer the patient the care he or she needs. This is to avoid his being involved in any breach of duty.

A provider may not only be liable in negligence due to lack of skill or care in the performance of the procedure, but may also be liable where the injury is caused by defective disclosure of information, because, had relevant information been given, the patient would have chosen not to have the procedure, and therefore may not have been exposed to its risk. It is for the provider, in order to avoid negligence, to ensure that "appropriate information is provided. This is to assist the decision made by, or on behalf of the patient concerning what, if any treatment to receive."[33] For example, a provider may give assurance that a procedure will terminate a pregnancy, or that fertilization procedure will exclude the risk of pregnancy. In the case of *Thake v. Maurice*,[34] the plaintiffs not wishing to have any more children, consulted the defendant, a surgeon , to see if the plaintiff could be sterilized by vasectomy. With the 1st plaintiff's consent, the surgeon performed the vasectomy operation, yet the 2nd plaintiff

[32] *McNair in Bolar v Friern Hospital Management Committee, supra,* p. 587.
[33] R. I. Cook ., B. M. Dickens., M. F. Fathalla., *op. cit* pp. 238 - 242.
[34] (1968) Q. B. 644. See also *Eyre v. Measday* [1986] 1 All ER 488

became pregnant, and by the time she recognized the symptoms, it was too late for abortion. In an action against the defendant, the plaintiff partly claimed that the defendant failed to warn them that there was a small risk that the 1st plaintiff might become fertile again. There was no evidence to show that that the defendant had not performed the operation properly, and at the time of the operation it was known in medical circles that in rare cases, the effect of the operation could be reversed naturally. The court held that the failure by the defendant to give his usual warning that there was a slight risk that the 1st plaintiff might become fertile again amounted to a breach of duty of care which he owed to the plaintiffs because, the warning was necessary to alert the 1st plaintiff to the risk that she might again become pregnant. Moreover, the risk of this 1st plaintiff failing to appreciate promptly that she had become pregnant ought to have been in the reasonable contemplation of the defendant.

In every case, the law requires that the health care provider's conduct must not fall below expectation or standard. Therefore he must always act like a reasonable, skilful and competent provider in order to avoid liability.

Damage

In an action for negligence, when a plaintiff has proved existence of duty of care and its breach by the health care provider, he must prove that he suffered damage as a result of the breach in order to succeed and be compensated. This remedy is recognized by law in order to assuage the feelings of the injured plaintiff. But, it must be shown that the health care provider's breach of duty, as a matter of fact, caused the damage. That is to say, that the plaintiff must show a causal link between the damage he suffered and the provider's act. In *Ajaegbu v. Etuk*,[35] the plaintiff was unable to establish that the damage suffered was as a result of the breach of duty by the medical practitioner.

The onus of proof lies with the plaintiff, and usually, if a provider does not admit negligence in a given case, then the plaintiff will have to call evidence to show negligence on the part of the provider i.e. to show that the conduct of the provider fell below the required standard in a particular case. Such evidence which assists a plaintiff and even the court in determining that a provider acted below the required standard of care is primarily the

[35] (1962) 6 ENLR. 196.

testimony of experts, which in turn relies on learned treatises, articles in medical journals, research reports, etc. Expert evidence is used because it is only a health care provider who can show that another health care provider in the same field acted below the required standard. The problem encountered here, however, is the reluctance of these providers to give the needed expert evidence, because they do not want to blame or expose a colleague. According to Okonkwo, this silence is sometimes referred to as the "conspiracy of silence". [36]

In *Hatcher v Black*, [37] Lord Denning stated that:

> …It would be wrong, and indeed, bad law, to say that simply because a misadventure or mishap occurred, the hospital and the doctors are thereby liable. It would be disastrous to the community if it were so. It would mean that a doctor examining a patient or a surgeon operating at a table, instead of getting on with his work, would be forever looking over his shoulder to see if someone was coming up with a dagger. His professional reputation is as dear to him as his body, perhaps more so, and an action in negligence can wound his reputation as severely as a dagger can his body…"

In the same vein, Okonkwo opines that,

> … a surgeon is not liable in negligence merely because an operation is unsuccessful or because grave harm results from or because a mistake, or an error of judgment has occurred. If it were so, doctors would out of fear of litigation, rarely show that degree of initiative and confidence which is necessary for the proper exercise of their noble profession.[38]

As true as the above statements are of doctors and probably of other health care providers, yet if a provider's mistake or error of judgment can be shown to be the result of a breach of duty, which has caused damage to a plaintiff, he should not be allowed to escape liability. In other words, if damage would not have occurred but for a provider's act, then his act caused the damage and he should be liable. On the other hand, if the damage would have occurred despite the provider's act, then his act did not cause the damage and he should escape liability. In *Barnett v Chelsea and Kensington Hospital Management Committee*[39], the

---

[36] C.O. Okonkwo, *op. cit*., 127.
[37] (1954) *Time*s, 2nd July, cited in Okonkwo, *ibid*, p. 125.
[38] See Okonkwo C.O. *Ibid.*
[39] [1969] 1 Q.B. 428.

claimant's husband and two of his fellow night watchmen went to the hospital and complained that they had been vomiting for three hours after drinking tea. The nurse called the casualty doctor by telephone and told him of the complaint. Instead of going to see them, the doctor instructed the nurse to tell them to go home and consult their own doctors later. This was an error of judgment and a breach of the doctor's duty of care. In any case, the men left and later that day the claimant's husband died of arsenic poisoning, and the coroner's verdict was that of murder by persons unknown (arsenic was introduced into the tea). The court, however, found the doctor/hospital in breach of duty, but the breach was not a cause of the death because, even if the deceased had been examined and treated with proper care by the doctor, it would probably have not been possible to save his life. Thus, there was no causal link between the negligent act of the doctor and the injury eventually suffered by the claimant's husband. The claimant's case failed.

Remoteness of Damage

Assuming the doctor's act in the above case caused the injury suffered, would the law hold him liable for all the direct consequences of his act? The answer is in the negative because, he will be held liable only for those consequences of his act, which a reasonable man would foresee as the natural and probable consequences of his act. But those consequences, which a reasonable man would not foresee, are regarded by the law as being "too remote". In such case, the defendant escapes liability. The next question is: what is the defendant expected to foresee? He is not expected to foresee the exact extent of the damage suffered by the plaintiff or the precise sequence of its infliction .According to Lord Denning M. R., "it is not necessary that the precise concatenation of circumstances should be envisaged… ."[40]

However, it is enough if the damage that is foreseeable is of the same "kind" as the damage, which actually occurred.[41] In that case the provider will be held liable for that damage.

Proof of Negligence: *Res Ipsa Loquitur*

The burden of proving negligence[42] rests with the plaintiff, and if, at the conclusion of evidence, it has not been proven on a balance

[40] *Stewart v. West African Terminals Ltd*. (1964) 2 Lloyds Rep. 371 at 375.

[41] See *Overseas Tankship (UK) Ltd. v. Miller Steamship Co Pty Ltd. (The Wagon Mound) (No. 2)* [1967] A. C. 617.

of probabilities, that the defendant was negligent, the plaintiff's case fails.[43] The plaintiff, who suffers injury, must therefore prove affirmatively that his injury was caused by the carelessness of the defendant.

At times, the establishment of the relevant evidence may be very difficult for the plaintiff, that is, to show that some specific act or omission of the health care provider was negligent. This is so, because the plaintiff is most likely to be a layman, and medical science is a very specialized area. He may not, therefore, know or understand what actually happened. Consequently, he needs to call expert evidence; if not, he will find himself going through an impossible burden of proof and in the end will fail to establish what in truth, is a valid claim. More so, the judge will also have to rely on expert evidence to decide the case, as he may lack the knowledge or even the experience to be able to draw the appropriate inferences. For example, he may not know the standard required in a complicated surgical operation or the required composition of the ingredients for a particular drug. Only medical experts will know. The judge would, therefore, need expert evidence too. Unfortunately, as already noted, these health care providers are usually reluctant to testify against fellow providers. All these are obstacles that hinder prosecution of cases against them.

Justice would not be done if the plaintiff is allowed to go without a remedy because of the difficulties encountered in proving his case. Though the plaintiff may not be in a position to locate the exact act or omission that caused the injury, and the defendant alone may know, the plaintiff is assisted by the doctrine of *res ipsa loquitur*. This is a Latin expression, which means that "the thing speaks for itself". The entire doctrine was stated by Erle, C. J. in *Scott v London and St. Kathrine Docks Co*[44] thus:

> …Where the thing is shown to be under the management of the defendant or his servant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of care…

---

[42] That is, proving duty of care, breach of the duty and consequential damage to the plaintiff.

[43] See *Adeoshun v Adisa* [1986] 5 NWLR (Pt. 40) p. 225.

[44] (1865) 3 H & C 596. See *Osuigwe v Unipetrol* [2005] 5 NWLR (Pt. 918) 261.

Once the plaintiff can show that the thing that caused the damage was under the management or control of the defendant or his servants, and the accident was such as would not ordinarily have happened if proper care was taken, the court will infer negligence against the defendant. The plaintiff will no longer be called upon to prove negligence on the defendant's part because, the surrounding circumstances amply raise an inference of negligence. The onus of proof then shifts to the defendant, which if not discharged, will lead to his liability.

In cases of *res ipsa loquitur*, the plaintiff is saying he does not know how the damage occurred. If he knows, the maxim will not apply. The doctrine therefore only applies when looking at a set of facts, which the plaintiff cannot explain, the natural and reasonable inference to be drawn from them is that what has happened was the result of some act of negligence on the part of the defendant. In the case of *Igbokwe & Ors v. University College Board of Management,*[45] a woman who just delivered her baby fell from the 4th floor of the hospital building. A doctor had specifically asked a nurse to keep an eye on her, but she was found fatally wounded after her fall. The court found the hospital negligent on the application of *res ipsa loquitor*.

The doctrine of *res ipsa loquitur* has been applied in the medical cases. In *Mahone v. Osborne,*[46] it applied where after abdominal operation, swabs were left in the body of the patient. The same was the case in *Fish v Kapur,*[47] where a dental extraction resulted in a jaw fracture. Again the maxim was applied in the case of *Cassidy v Ministry of Health,*[48] where a plaintiff who entered a hospital to be cured of two stiff fingers ended up after the treatment with four stiff fingers, and as a result, lost the use of his left hand.

Contributory Negligence

The defence available to health care providers is that of contributory negligence. If the plaintiff's own negligence leads to the damage he sustains, in whole or in part, it is known as contributory negligence. Contributory negligence is want of care by a plaintiff for his own safety, which contributes to the damage,

[45] (1961) WNLR 173.
[46] [1939] 2 K.B. 14.
[47] [1948] 2 All E. R. 176.
[48] [195]) 2 K. B. 343.

while also the defendant's fault partly contributes to the damage. The court will reduce the damages recoverable, so that the plaintiff will not recover in full. Section 234 of Anambra State Torts Law 1986 provides as follows:

> …Where any party suffers damage as the result partly 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 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 regarded to the share of the claimant in the responsibility for the damage.

The onus is, therefore, on the defendant to raise the defence of contributory negligence.[49] He does not have to show that the plaintiff owes him a duty of care, rather, he has to show that the plaintiff has failed to take reasonable care for his own safety in respect of the damage in question, and that by reason of this, the plaintiff contributed to his own injury. The standard of care expected of the plaintiff is the same as that in negligence itself, the same reasonable man's test is applicable to him.

With respect to apportionment of damages, the judge in appropriate cases would reduce damages to such an extent as he thinks just and equitable, having regard to the share of the claimant in the responsibility for the damage.[50] There is no mathematical formula for this.

3. Liability of Hospitals

Vicarious Liability

Vicarious liability is the liability a master incurs to a third party for the wrong of his servant committed in the course of employment. 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.[51]

A hospital authority is, therefore, vicariously liable for the negligence of the health care providers it employs. These health care providers are the servants of the hospitals, which employ

[49] *NRC v Emeahara & Sons* [1992] 2 NWLR (Pt. 352) 206.
[50] See section 234 (1) ASTL, 1986 and other Torts Law of various states.
[51] I. P. Enemo, *The Law of Tort* (Enugu: Chenglo Ltd, 2007) p. 306.

them: for example, radiographers,[52] house-surgeons,[53] full time assistant medical officers,[54] anaesthetists, etc, are all servants of the hospital authority for the purposes of vicarious liability.[55]

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 during an operation in a hospital may not be able to identify which one or more of the team of surgeons, anaesthetists, nurses, etc, involved in the operation was careless. It was held in *Cassidy v Ministry of Health*[56] that, in such a situation, the hospital authority will be vicariously liable, unless it can show that there was no negligent treatment by any of its servants. 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 will be in a better position to pay than 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 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 who 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 employment.

Occupier's Liability

This deals with liability of an occupier of premises for damage done to visitors to the premises. An occupier, according to Lord

[52] C. C. [1942] 2 K.B.293.
[53] *Collins v Hertferdshire C.C.* [1947] K. B. 598; *Cassidy v Ministry of Health* [1951] 2 K.B. 343.
[54] *Cassidy v Ministry of Health, ibid*.
[55] *Roe v Minister of Health*, [1954] 2 Q.B. 66.
[56] *Supra*.

Denning in the case of *Wheat v Lacon*[57] 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." A visitor is generally a person to whom an occupier has given express or implied permission to enter his premises.

An occupier owes a "common duty" of care to visitors to his premises. This "common duty" is defined in section 238 (2) of ASTL 1986[58] 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.[59] In *Slade v Battersea and Putney Group Hospital Management Committee*,[60] 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 all persons lawfully on its premises to ensure that its premises are reasonably safe. If it does not fulfil 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 be prepared for children to be less careful than adults and may expect that a person, in the exercise of his calling, will appreciate and guard against any special risk "ordinarily incident to that calling".[61] The hospital can of course escape liability by giving warning notice to

---

[57] [1966] A. C. 522, 577; see also *I.I.T.A v. Amrani* [1994] 3 NWLR (Pt. 332), p. 296.
[58] Same as s. 2 (2) Occupiers Liability Act 1957.
[59] See Okonkwo, *op. cit.*, p. 129.
[60] [1955] 1 All E. R. 429.
[61] See s. 238 (3) ASTL 1986

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 in all the circumstances, the warning was enough to enable the visitor to be 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.

Conclusion

The health care system in Nigeria has really recorded unimaginable and unsatisfactory performance in quality delivery for a very long time. Patients who are able to access medical services receive sub-standard care in many cases due to negligence on the part of one health care provider or another. Those who cannot afford the services of professionals go to quacks that may provide cheaper services, while causing greater harm or damage to the injured patients and their families. In order to eliminate or minimize this ugly situation, patients should not hesitate to sue negligent health care providers. Hospitals should also employ only qualified health practitioners in order to improve healthcare delivery. The law should provide stiffer punishment for gross negligence so as to deter quacks from toying with lives of the vulnerable who consult them for medical treatment. Such a step would promote a better and safer health care delivery system in Nigeria.