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ACCESSING JUSTICE FOR MEDICAL NEGLIGENCE CASES IN NIGERIA AND THE REQUISITE FOR NO-FAULT COMPENSATION

By

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Introduction

Medical negligence and errors have become a very disturbing issue with increasing daily occurrence in Nigeria as it is with most of the African countries.[3] Litigation in the field of medical negligence is likely to grow in volume with the ever increasing sophistication of medical procedures and greater awareness on the part of patients, of their legal rights and willingness to protect such legal rights. In Nigeria, following increase in level of awareness and the rapid access to information on health and human rights, patients are increasingly becoming aware, and there is more litigation consciousness among the populace.[4]

Unlike in recent past when the medical practitioner was seen as a 'revered demi-god', patients/victims of medical negligence and relations are now demanding from medical practitioners explanations for treatments or surgeries that go awry.[5] However, with the increasing level of awareness and the rising number of cases of medical negligence brought before the courts, there seems to be many odds against patients/victims in achieving a successful outcome in medical negligence cases before the courts.[6]

This article examines medical negligence and the challenges associated with achieving a successful litigation outcome in Nigeria. It posits that the adversarial nature of medical negligence torts litigation requiring proof of fault, poverty,

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[3] F. Chukwuneke 'Medical incidents in developing countries: A few case studies from Nigeria' *Nigerian Journal of Clinical Practice* vol.18 no.7, 2015, pp. 20 – 24.

[4] A. Ogwomwa, 'Medical Negligence and Jurisprudence', The Nation, 13 November 2012, Retrieved from thenationonlineng.net on 7/4/2017

[5] M. Brazier and J. Miola, 'Bye-Bye Bolam: A Medical Litigation Revolution? ' *Medical Law Review,* vol. 8, 2000, p.86 see also J. Allsop and L. Mulcahy 'Maintaining professional identity: Doctors' response to complaints', *Sociology of Health and Illness* vol. 20, no. 6, 1998, p. 803

[6] Y. Ali 'The Prospects of Litigation in Medical Malpractice in Nigeria: An Analysis'. Retrieved from www.docplayer.net/672198 on 7/4/2017

religious and cultural beliefs, illiteracy, lack of expert witness amongst other factors militate against successful pursuit and favourable litigation outcome.

The article therefore proposes a reform in the law of torts on medical negligence in Nigeria. It advocates for the introduction and hybridization between the present fault based tort system of compensation and no-fault compensatory system in cases of medical negligence in Nigeria

This article will amongst other issues discuss the following:

What is medical negligence?

What are the ethical or legal implications of medical negligence for the medical professional?

What are those obstacles to successful medical negligence litigation?

What is no-fault compensation?

How is it being practiced in other jurisdictions and how can this be integrated into the Nigerian law of torts?

What role can professional self-regulatory bodies play in developing a no-fault compensatory system for medical negligence cases in Nigeria?

Negligence in legal parlance

Generally, negligence as an aspect of the Law of Torts is defined as the breach of a legal duty of care owed by one person to another person, which results in damage/injury to that other person. The meaning of negligence is further expounded upon in the popular case of *Blyth v. Birmingham Waterworks*[7]:

> "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 not do. It is not for every careless act that a man may be held liable in law."[8]

While negligence may involve an act of carelessness or recklessness, not all acts of carelessness will be regarded as negligence.The concept of negligence presupposes the existence of a defined relationship between two parties in which one party owes the other a duty of care. In such relationships, there is a standard of care required of one party towards the other and any injurious conduct falling below the standard of care required in law, constitutes an act of negligence.[9]

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[7](1856) 11 Ex 781, 784. See also *Odinaku* v *Moghalu* (1992) 4 NWLR pt 233, 1 where Negligence was defined as the omission to do something which a reasonable man, under similar circumstances would do or the doing of something which a reasonable and prudent man would not do.

[8]Per Alderson B in *Blyth* v *Birmingham Waterwork Co.* supra

[9]Yussuf Ali op cit. p. 5

Over the years, many duty relationships have been defined and found by the courts in various relationships, buttressing the popular statement of the renowned Master of Rolls, Lord Denning, when in one of his memorable quotes he states "the categories of negligence are never closed".[10] One of such duty relationships which has created a well-established category of negligence is the medical or therapeutic relationship.

Generally, in a case of negligence, the claimant/ plaintiff must establish the existence of a duty of care owed to him by the defendant, a breach of that duty by a conduct falling below the standard expected of a defendant and a consequential damage traceable to the act or omission of the defendant. In all, 'the theoretical underpinning of the law' in the tort of negligence is that the claimant/plaintiff must establish the fault of the defendant. This requirement of proving fault has no doubt placed an onerous burden on claimants/ plaintiffs in negligence litigation but it seems that the burden to prove fault placed on the claimant/plaintiff in medical negligence cases have been made more stringent overtime by the development of some rules and principles.[11]

Medical Negligence

Medical negligence is a type of professional negligence related with the delivery of health care services. It is an act or omission by a medical practitioner in which care provided deviates from accepted standards of practice in the medical community and causes injury or death to the patient.[12] In effect, medical negligence occurs when a medical practitioner fails to exercise reasonable degree of care and skill required in the treatment of the patient thereby causing such patient to suffer injury. In this regard, it is apposite to state that though the terms 'medical negligence' and 'medical malpractice' are often used interchangeably, the two words are not synonymous *stricto sensu*. While medical negligence may be regarded as a form of medical malpractice, other forms of misconduct fall within the ambit of medical malpractice.In practice, medical negligence is a failure to live up to proper medical standards, and those standards are set, not by lawyers, but by doctors.[13]

Generally, medical practice is regulated by a recognised body operating under specified rules and code ofethics. In Nigeria, the Medical and Dental Council of Nigeria (MDCN) is the regulatory body for medical practitioners guided by the Medical and Dental Practitioners Act[14]which sets the code of conduct for medical

[10]Donogue v Stevenson (1893) 1QB 491, 497; See also Caparo Industries v Dickman & Ors.(1990) 2 AC. 605, Bowhill v Young (1943) AC 92.

[11] Some of these rules and principles which have developed through judicial and sometimes established by administrative pronouncements will be highlighted in the course of discussion.

[12]I.Enemo 'Medical Negligence Liability of Health Care Providers and Hospitals' *Nigerian Juridical Review* vol. 10, 2012. pp. 112 - 113

[13]M. Jones, *Medical Negligence*, London, Sweet & Maxwell, 1991 p. 13.

[14]Medical and Dental Practitioners Act, Cap M8 Laws of Federation of Nigeria 2004

and dental practice[15] Medical practitioners are bound by the established rules and code of ethics which sets the acceptable standard of medical practice and conduct in relation to patients and the public.[16]Pursuant to the provision of the Medical and Dental Practitioners Act, medical practitioners are guided by the provisions of the Code of Medical Ethics of the Medical and Dental Council 2004;[17] Rule 28 (A- I) of the Code makes specific provision for acts and omissions which constitute medical negligence on the part of the medical practitioner.

Medical negligence ranges from severe cases of retention of operation objects in the patient's body, to removal of patient's vital organ and other conducts resulting in death of the patient.[18] With the increasing advancement in medical technology, and the oratory prediction of Lord Macmillan, that 'the categories of negligence are never closed'[19] there may be no end to the list of medical negligence events.Medical negligence does not necessarily result from unsuccessful medical treatment or surgical procedures, otherwise medical practitioners may adopt a defensive mode of practice which restrains them from being innovative or may limit high risk medical procedures.[20]

Medical Negligence Litigation

While it is easy to identify a lazy, reckless or negligent member ofother professions, it is not easy to do the same in relation to a medical practitioner[21] It is usually difficult to establish a case of negligence against a medical practitioner because more than all other professionals, the assessment of the quality and carefulness of the medical practitioner is usually left tosurmise.[22] More so, medical services and activities are carried out by medical practitioners behind closed doors away from public scrutiny. In spite of this, patients are not left without remedy for injury suffered from medical negligence.

[15]Sec. I (2) (a-f) of the Medical and Dental Practitioners Act CAP M8 Laws of Federation of Nigeria 2004.

[16]In *Tega Esabunor & Another v Dr Tunde Faweya & 4 Others*(2008) 12 NWLR part 1102 at page 799 particularly at page 810 paragraphs A – B. It was held that the code of ethics of the medical profession otherwise known as published code of ethics enjoins a Doctor not to allow anything including negligence or religion to intervene or interfere between him and his patient and that he must always take measures that lead to the preservation of life. This code of ethics places a great burden on medical practitioners in such a way that they cannot accede to the wish of a parent or guardian who will allow a child to die on account of religious belief.

[17] This replaced the Rules of Professional Conduct for Medical and Dental Practitioners in Nigeria. The Code of Medical Ethics complement statutory provisions governing medical practice in Nigeria.

[18]*Hoking v Bell (1948) 1 All E R, 141; Mahon v Osborne (1939) 2 K.B. 14.* In *Abi v CBN.*(2012) 3 NWLR (pt 1286) 1C.A a patient sued his doctor and the hospital for negligently diagnosing, prescribing and administering a drug on him that made him deaf or difficult of hearing, although his appeal failed on the grounds of failing to call medical expert witness and pleading *res ipsa loquitor* instead

[19]*Donoghue v Stevenso(1932) AC 562.*

[20] F. Emiri .*Medical Law and Ethics in Nigeria* Lagos Malthouse Press, 2012, p. 268

[21]Y. Ali op cit p.2

[22] E. Malemi, *Law of Tort.* Lagos Princeton Publishing 2013, p. 264

The Medical and Dental Practitioners Investigation Panel and the Medical and Dental Practitioners Disciplinary Tribunal are established under the Medical and Dental Practitioners Act as disciplinary bodies responsible for handling allegations of professional misconduct.[23]While these bodies focus on the medical practitioner and may exercise disciplinary powers in cases of medical negligence, the tort law makes provision for patients to obtain remedies for injuries suffered through the Court system. Remedies obtainable from the courts range from the award of general damages to specific or special damages in the form of monetary compensation. Usually, cases of medical negligence are instituted by the patient who has suffered damage from the medical practitioner's negligence or their relatives on their behalf.[24]

Medical negligence litigation is based on a tort system which stipulates that the claimant/plaintiff must prove the existence of certain conditions establishing the fault of the medical practitioner; and except in the cases of presumed negligence where the applicabledoctrine of *res ipsa loquitur* gives rise to an inference of negligence on the defendant's part.[25] Where a defendant is not able to rebut this inference, a case of negligence is already established for the plaintiff. It follows therefore that if the defendant successfully rebuts the inference of negligence, the onus to prove fault remains that of the claimant/ plaintiff. In order to succeed in an action for medical negligence therefore, the claimant/ plaintiff has to prove the following:

Duty of Care

First, the claimant must establish the existence a doctor-patient relationship between him and the defendant medical practitioner in which the defendant medical practitioner owed him a duty of care. The responsibility of a medical practitioner towards a patient commences right from the moment he consents to undertake a medical examination of the patient.[26] Such consent may be express or implied. In the case of surgical procedures however, the consent of the patient must be written. Irrespective of the existence of an agreement between the doctor and patient, once a doctor undertakes to treat a patient, a duty of care arises.[27]For instance, a doctor who is an employee of a hospital or any health- care provider owes a duty of care to the patients in the ward where he is employed to work. It is

[23] 15 (3) of the Medical and Dental Practitioners Act CAP M8 Laws of Federation of Nigeria 2004

[24]E. Malemi, op. cit. p. 264

[25]The general and erroneous notion has been that res ipsa loquitur shifts the onus of proof to the defendant, but this has been changed by the current weight of opinions and cases which favour the view that the doctrine does not shift the onus but only raises a rebuttable inference of negligence. See Mason & McCall Smith op cit, p.234, J Flemming Law of Torts (check recent ed.) p....

[26] See *Ojo v Akerele (2006) 10 NWLR 987,173*

[27] B. Abegunde, 'Legal Implications of Ethical Breaches in Medical Practice' *Asian Journal of Humanities and Social Sciences* vol.1 no.3, 2013 p. 77

immaterial that the medical practitioner is rendering such a service ex gratia.[28]The responsibility of the medical practitioner towards the patient ceases when a patient no longer requires the services of the medical practitioner and discontinues.[29]

If a doctor holds himself out to a patient as possessing special skills and knowledge in a particular field of medicine or surgery and as such he is retained by the patient, the doctor owes the patient the duty to exercise the same degree of care and skill as a doctor who generally practices in that field.[30]

In a case where an orthopaedic surgeon undertakes a complicated neurosurgery case, the orthopaedic surgeon must conform to the standard of a neurosurgeon. If the orthopaedic surgeon does not possess the special skills and facilities required for neurosurgery, should damage ensue where he undertakes the treatment, it would amount to negligence on his part.However, the orthopaedic surgeon would not be held liable in emergency situations, where he in rendering first aid assistance to a patient performs a simple procedure to ease pain but fails to achieve the results that one would expect from a neurosurgeon.[31]

Generally, a medical doctor is expected to exercise the standard of care and skill of an ordinary and average competent doctor exercising the ordinary degree of professional skill. The standard of care however varies in relation to the professional standing of the medical doctor in respect of grade and experience of the medical doctor involved. A house officer is not expected to show the same standard of care and skill as required of a consultant.[32]The fact that a medical practitioner is predisposed to unreasonableness, carelessness or recklessness due to certain congenital defects, does not absolve him of the duty of care expected of a reasonable man.[33]

Breach of Duty of Care

A claimant must also show that the medical practitioner breached the duty of care by failing to conform to the relevant standard of care.The court balances all the relevant circumstances in order to decide whether the medical practitioner's conduct has fallen below what constitutes a reasonable standard of care. He is judged according to what a person in a particular circumstances "ought to have done and person's foresight is similarly assessed according to circumstances and

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[28] E. Okojie Professional medical Negligence in Nigeria Retrieved from www.nigerianlawguru.com/articles/torts/professional/medical/negligence on 5/4/2017

[29]However, in cases of discharge against medical advice upon request by patients or their relations, the medical practitioner is discharged of his responsibility towards the patients and as such the request should be documented as evidence. Professional Medical Negligence in Nigeria

[30]*R v Bateman (1925) All E R 45. 48*

[31]*Whitehouse v Jordan (1981) 1 WLR 246, 258*

[32] E. Okojie op cit.

[33]*Glasgow Corporation v Muir (1943) AC 488.*

risks which ought to have been foreseen.[34]In the Supreme Court case of *SurgeonCaptain C. T. Olowu v The Nigerian Navy*[35] acts of non- performance of duty as a consultant obstetrician /gynaecologist resulting to mismanaged labour and failure to conduct a personal examination on an admitted patient, constituted breach of duty of care in medical negligence.

Damage Resulting from the Breach of Duty of Care

It is not every breach of the legal duty of care that will render the medical practitioner liable for medical negligence. Iyioha's statement which aligns with the thought of the authors of this article is that injury may not be a sole result of a negligent action by a medical practitioner but may be a result of systemic factors such as lack of appropriate technology or equipment.[36]Thus, it is important to be able to trace the resultant damage to the medical practitioner's negligent acts or omission otherwise a claim of medical negligence fails. The claimant must establish that he has suffered damage as a result of the breach of the duty of care by the medical practitioner and that the breach isthe proximate cause of the injury.[37] The patient must establish that he/she suffered loss as a result of the breach; such loss could be physical, as in loss of vision or vital body organ, as well as emotional, such as loss of enjoyment of life due to a disability or loss of a loved one or pecuniary loss such as medical expenses, lost salary etc.[38]

Medical negligence litigation may involve civil or criminal proceedings.[39] Generally, the type of proceedings involved in a case of medical negligence is determined by the gravity of the breach of duty of care and its effect on the patient. Rule 30 of the Code of Medical Ethics provides that where a medical practitioner's negligence results in permanent disability or death of the patient, the practitioner will be guilty of gross negligence.

The damage suffered by a patient as a result of medical negligence may be of such magnitude that a charge of manslaughter or culpable homicide not punishable with death may be preferred against the medical practitioner in the case of gross negligence.[40] However, it is unlikely that a medical practitioner will be made criminally liable for medical negligence in all situations where the breach of duty of care results in the death of the patient. This is based on the

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[34]I.Iyioha 'Medical Negligence' in I. Iyioha and R. Nwabueze (eds.), Comparative *Health Law & Policy.Critical Perspectives on Nigeria and Global Health Law*, Routledge, London. 2015, p.80

[35] (2011) 18 NWLR, Pt 1279, 695, SC

[36] Ibid p.81

[37]The principle of causation. Reference for all the conditions the Claimant must prove: B. Dickens 'Medical Negligence' in J. Downie, T. Caulfield and C. Flood, (eds.),*Canadian Health Law and Policy*, 4th ed. Markham, Ont.: LexisNexis 2011p.101.

[38]In *Barnett v Chelsea and Kensington Hospital Management Committee (1969) 1 QB 428*, the court held that there was no nexus between the negligence and the death of the plaintiff because death would have nonetheless resulted to the deceased if the doctor was not negligent in the circumstances.

[39]F. Emiri, op. cit. p. 269.

[40]ibid

premise that the medical practitioner may not possess the requisite legal intent '*mens rea*' to commit a crime.[41] All other cases of medical negligence involve civil proceedings.[42]

A single case of medical negligence may involve both civil and criminal liability,This is particularly true in cases involving culpable homicide where the medical practitioner becomes liable in a criminal matter instituted by the state and equally liable for damages in civil proceedings instituted by the patient's relatives or personal representatives.[43] The provisions of Sec. 303 and 305 of the Nigerian Criminal Code govern criminal liability for medical negligence.

Burden and Standard of Proof in Medical Negligence

In a civil action for medical negligence, the principle of the law of evidence that "he who alleges must prove" applies.[44] The burden of proof rests on the claimant to establish the concurrence of all the necessary conditions for establishing a claim of medical negligence. Thus, in an action for medical negligence, the claimant must show that hehas suffered some harm as a result of the medical practitioner's negligence; otherwise, there is no basis for a claim, irrespective of whether the medical practitioner was negligent.

> "A claimant cannot succeed in an action against a doctor for medical negligence unless the claimant has suffered some harm as a result of the doctor's negligence. It is not sufficient that a doctor was negligent in giving medical treatment to the claimant and the claimant suffered some harm. It must be shown that on balance of probabilities the harm was so caused. Usually, expert medical testimony is called to prove this causation. This often raises difficult legal problems but the courts adopt a broad approach in resolving them. If the damage would have occurred despite the doctor's negligence, then the negligence did not cause it."[45]

Following this with the reasoning of Lord Woolf when the case for the introduction of no fault compensation for medical injury came up for discussion in the United Kingdom, the learned Lord Justice 'singled out medical negligence as an area for special consideration as civil justice has "failed most

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[41]I.Iyioha 'Medical Negligence' in I. Iyioha and R. Nwabueze (eds.), Comparative *Health Law & Policy.Critical Perspectives on Nigeria and Global Health Law*, Routledge, London. 2015, p.80.

[42] H. Olaniyan ' Liability for Medical Negligence in Nigeria' *Nigerian Journal of Health and Biomedical Sciences* vol. 4, no. 2, 2005, pp. 165-167

[43]In *Denloye v Medical & Dental Practitioners Disciplinary Tribunal(MDPDT) (1986) 1All NLR, 3*06 the Supreme Court held that where the unprofessional conduct of the practitioners amounts to a crime, it is a matter for the courts to deal with; and once the court has found the person guilty of an offence, it comes within the type of cases referred to in Section 13 (1) (b) of Medical and Dental Practitioners Act, then the Professional Tribunal may proceed to deal with him under the Act

[44]Section 134, Evidence Act, Cap 112. Laws of Federation of Nigeria 2004

[45]E.Iyioha, op.cit

conspicuously" in this area'[46]The difficulty in medical negligence actions revolves round the burden of proof over causation of harm/injury.Although claimants have the burden of proof especially in establishing a deviation from the required standard of care, proving such a deviation is usually challenging.It is easier to discharge the burden of proof in cases where the management of a hospital or health institution has established the 'negligence' of the medical practitioner based on a complaint by the claimant and proper investigation.

In a criminal case of medical negligence however the standard of proof is even more stringent as the case must be proved 'beyond reasonable doubt'.

Remedies for Medical Negligence

In an action for medical negligence, Court may award compensatory or punitive damages. In civil actions for medical negligence, the aim is usually to achieve restorative justice for the claimant as much as possible in form of compensation forboth economic and non- economic damages.These damages may be assessed for past and future losses. Non-economic damages are assessed for the injury itself which may be physical or psychological.[47]

While it has been established that the main objective of the law of torts is to compensate the injured while punishment *stricto sensus* is the proper aim of criminal law, other writers like Olaniyan have held that the aim of proceedings in medical negligence litigation is to punish an 'erring medical practitioner' rather than compensation of victims of medical negligence.[48] This article disagrees with the latter opinion on the grounds that the aims of these two areas of law are clearly defined and delineated. Torts remedies in outcomes though sometimes show punitive or deterrence traits in the character of tort, the sole aim of tort law is to compensate victims for injuries rather than punishment, which we maintain should be within the exclusive precincts of criminal law.

Having established therefore that compensation is the crux of torts, it is only desirable that the aim of the tort system must not be defeated by insurmountable hurdles of the fault focused tort system particularly in medical negligence litigation where the burden of proving fault is more onerous on the claimant than in other torts.

Faults and Problems of Medical Negligence Litigation

In principle, the tort based system appears fault-focused and equally victim-focused but it is not without its own faults and inadequacies. First and most prominent of which is the difficulty with establishing a medical negligence claim.

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[46]Access to Justice: Final Report to the Lord Chancellor on Civil Justice System in England and Wales (1996) 15. 2, see also Mason & McCall Smith , Law and Medical Ethics, op cit. p.218

[47]P. Danzon, 'Liability for Medical Malpractice', *Journal of Economic Perspectives* vol. 5, no. 3. 1999, pp.64- 65.

[48]H. Olaniyan, op. cit, p. 168

It is usually difficult for a patient who has suffered a medical injury to prove negligence in Court. The reasons for these are obvious; the patient hardly knows enough of what has gone wrong. In addition to this, doctor's conspiracy of silence and general colleague solidarity prevents the availability of relevant evidence for the patient.[49]

Where the claimant succeeds in establishing his claim, the final outcome may be unsatisfactory. Lump sum damages (the usual form settlement) may not cover the long-term costs of care and other expenses because of inaccurate actuarial predictions, poor investment, mismanagement or misuse.

No-Fault Compensation

No fault compensation generally means awarding compensation to an injured party without finding fault or negligence. The no- fault compensation system is 'a widely canvassed alternative to negligence actions'[50]This obviates the need to prove that the other party was at fault (through the court system). A no-fault compensation scheme is one in whichemphasis is on compensating victims for related expenses(without following the fault based tort system and proving another party is liable for damages). This is based on the notion that accidents and injuries are inevitable and as such medical personnel should not be 'crucified' for events which are inevitable in the course of practising their profession.

However, it may be arguedthat in relation to medical negligence, the no-fault system is likely to increase the number of injured patients who may be entitled to compensation than in the fault-based litigation system.No -fault system of compensation offers a prospective means of promoting effective and more patient friendly system of hearing and investigating patients' grievances. This system will also satisfy potential litigants whose major desire is to have an explanation for what went wrong. In such situations, mere apology may suffice or a settlement out of court may be preferred to litigation.[51]

New Zealand, France and the Scandinavian countries are well-known for the practice of no-fault compensation system. In some other jurisdictions the system is widely used in relation to third-party motor vehicle accident and workers compensation claims.[52] In the United States[53] for example, no fault programs have

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[49] F. Emiri, op.cit, p 297

[50]Mason & Mc Call Smith, Law and Medical Ethics 5th Ed. Butterworths London. 1999, p.216

[51] T. Douglas, 'Medical Injury Compensation beyond No-fault' *Medical Law Review* vol. 17 2009. Pp. 32- 36

[52]In Sweden and New Zealand, where the no-fault compensation plans exist, injuries are considered for compensation once they are reported to the authorities. Compensation is available for all injuries and not just those caused by negligence. In France, medical negligence claims against the state are handled under an administrative law scheme, separate from the civil justice system and compensation for hospital mistakes is automatic.

[53]States of Florida and Virginia

been introduced for iatrogenic injuries.[54] These programs provide compensation for injuries caused by medical care without regard to the fault or negligence of the medical provider. Such programs propose a shift from the rule of liability as claims would be adjudicated by a special administrative agency rather than by the courts and benefits would be payable according to a schedule. The intent is to reduce delay and expense in claims adjudication and permit more payment to victims, most of whom are automatically excluded from potential compensation by the fault requirement.[55]

Thus, in helping the patient procure compensation, the physician is not admitting error, though accepting that errors do occur but rather, that mistakes can be made by everyone in their line of work, and the physician is not expected to be perfect.[56]

Advantages of no-fault compensation:

1. More timely compensation

A no-fault system is potentially capable of compensating more patients than litigation.While it may take a longer period of time running into years to resolve medical negligence claims, no-fault compensation system is more efficient in terms of time and cost.[57] Puteri Nemie Kassim P argues and the authors quite agree that the no-fault compensationsystemwould enable victims of medical accidents to be compensated quickly and at little administrative cost. The cost of litigation usually represent more than a half of the eventual Court settlement where the claim succeeds.This is especially true where the Court makes no separate award for the cost of litigation as distinct from the monetary compensation awarded to the patient.[58]

2. More effective processes for complaint resolution

A no-fault compensation scheme for medical negligence obviates the unnecessary delay associated with litigation. 'Cases can take years to be settled or decided, denying claimants early access to necessary care and rehabilitation. Expert-hired witnesses, some of dubious professional status, are called upon because the busiest specialists are reluctant to become involved in what can be a time-

[54] Iatrogenic injuries refer to injuries induced inadvertently by a physician, surgeon or by medical treatment or diagnostic procedures.

[55] P. Danzon, 'Liability for Medical Malpractice', *Journal of Economic Perspectives* vol. 5, no. 3. 1999, pp.64- 65.

[56] T. Brennan, Just Doctoring: Medical Ethics in the Liberal State, University of California Press, 1991, pp.140- 143.

[57] D. Sohn, 'No-Fault Compensation System: Are there Benefits to not Assessing Blame?' See generally D. Sohn ' Negligence, genuine error and litigation'*International Journal of General Medicine* vol. 6. 2013, pp.49 -56

[58] P. Nemie Kasim 'No-fault compensation for Medical Injuries: Trends and Challenges *Medicine and Law* vol. 33, pp. 21-54.

consuming and intimidating exercise.'[59]The uniformity in compensations for similar types of injuries with fixed compensation saves time and consequently, cost. The no-fault compensation system focuses on the injury of the patient and delivering justice to the patient in terms of compensation without wasting time on determining the party at fault. New Zealand is the greatest exponent of the no-fault system having replaced the tort system since the early seventies, after the report of the Woodhouse Commission.[60] The patients seek compensation for medical injuries through a no-fault compensation system. Injured patients receive government funded compensation and in turn relinquishing the right to sue for damages arising from personal injury except in rare cases of reckless conduct.[61]

3. Maintaining Cordial Relationship between Parties

In every society, there are norms and values that inform the general behaviour of the people. In communal societies like Nigeria, the adversarial system is apposite the culture of the people, which explains the long years of lethargy for litigation in medical negligence cases. In the culture of the people and common to all the varied ethnic communities is the notion that the court system of adversarial litigation does not give room to fostering future cordial relationships. Any other alternative peaceful and amicable settlement of disputes outside the adversarial system will obviously be easily embraced. Unlike in other jurisdictions where medical negligence litigation is the norm in cases of injury to patients, a no-fault compensation approach will be more appropriate and convenient.

Another reason for preferring no fault compensation in medical injury cases is that injury may have been caused to a patient by more than one medical personnel. In such a situation, the patient is usually faced with the difficulty of locating the negligence or choosing from an array of possible tortfeasors, which may include; surgeons, nurses, hospital and other hospital health personnel.

The financial constraints that litigation places on claimants particularly in protracted litigation is another reason for preference for no fault compensation in medical negligence. Legal aid representation in civil matters is nearly non-existent despite the 1999 Nigeria Constitution provisions on legal aid representation in civil and criminal cases.[62] No fault compensation devoid of protraction and litigation expenses presents a viable economic option to claimants and also medical professionals in cases of medical negligence.

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[59]D. Studdert and T. Brennan 'No-fault Compensation for Medical Injuries; The Prospect for Error Prevention *Health Law and Ethics*, vol. 286, no. 2, 2001, pp. 217- 220

[60]W. Gaine, 'No-fault compensation systems' *British Medical Journal* vol.10, no. 326, 2013, pp.997 -998

[61]M. Bismark and R Paterson 'No-fault compensation in New Zealand : Harmonizing Injury Compensation, Provider Accountability, and Patient Safety' *Health Affairs* vol. 25, no.1, 2006, p. 27883

[62]Section 46(4)(b)ii 1999 Constitution of Federal Republic of Nigeria (as amended)

Protection of Public through Self-Regulation

The need to protect the public against sub-standard practice which is the role of the MDCN and other bodies of medical personnel is another ground for advocating for no fault compensation. The role of these professional self-regulatory bodies will be more effective under the no fault system of compensation through monitoring, investigation and laying down a complaint procedure and providing compensation. For example, in cases where negligence is revealed during pathology ground rounds, there is need to put in place administrative and professional rules of practice making it incumbent upon doctors, other medical personnel and hospitals to inform victims, patient relatives if there had been an act or omission on their part which may have caused injury or death to the patient.[63]

While it may be argued that this approach may affect the sensitive nature of the relationship between patients and medical personnel particularly the doctor and patient relationship, it can also be argued that it will ensure that medical care and procedures are carried out with more care and sense of duty.[64] More importantly, this approach will include a mediation process via which compensation can be offered to victims and or relatives where injury results in death. The self-regulatory bodies of the medical professionals can establish a common insurance policy to fund compensation in deserving cases.[65]

Arguments Against No-fault Compensation

The arguments that have been canvassed for retaining the present fault based system of tort have been both negative and positive.[66] Medical negligence litigation is liability based tort system focused on deterrent value of the system. The argument in favour of the fault based tort system views the advantage of retaining the threat of litigation and the disadvantage of removing this threat and replacing it with a no- fault compensatory system. The position of the argument is that the removal of the threat of litigation will make medical professionals less careful in the treatment of their patients.[67]

According to the proponents of this argument, a recent survey conducted in the United States, revealed that doctors are likely to be more careful in the care of their patients if there is a threat of litigation.[68] This argument has however been countered by another, which maintains that upholding the standard of practice can

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[63] I. Enemo, op. cit. p. 128

[64] D. Studdert and T Brennan 'Medical Malpractice' *New England Journal of Medicine* vol. 350, no.3, p286

[65] R. Mann and J. Harvard(eds) No Fault Compensation in Medicine, London, being record of proceedings of joint meeting of the Royal Society of Medicine and the British Medical Association held in January, 1989, p. 163.

[66] Mason & McCall Smith, op cit.p.217

[67] R. Mann and J. Harvard(eds) op. cit. p. 165.

[68] P. Nemie Kasim op.cit.p. 46.

easily be achieved by granting the professional body (regulatory body) such as the Nigeria Medical and Dental Council the extensive power to deal with doctors who fall below the expected standard of practice.[69] This argument to the authors of this article is considered a viable option and more superior argument as this will allay the fear of increased cases of negligence as envisaged by the proponents against no-fault compensation. Although the no fault system is more efficient and less costly for providing compensation to patients, it limits the patient's right to appeal and it appears that there is a trade-off between deterrence and lower litigation costs.[70]

Furthermore, it has been argued that a no-fault compensation system appears to be structured to focus on compensation for injury only rather than ensuring safe health care services and deterring negligence in medical practice. It has been said that physician communication in the aftermath of a medical error has a direct impact on a patient's inclination to sue. Patients and family members' motivation to sue is most often spurred primarily by their desire for information about the source of error, their need to hear apologies and expressions of empathy by medical staff, and their desire to prevent future mishaps, rather than their desire for monetary compensation.[71]A no fault compensation system however, assumes that the aim of litigation is to compensate victims of medical negligence which is not necessarily the case.[72]

While the no-fault compensation may be a viable system for workmen compensation and third party motor vehicle accidents claims there are strong arguments against the application of the system to medical negligence.Puteri Nemie Kassim says it is not easy to design a no-fault scheme for medical accidents which is simple to run, straight forward in operation and acceptable in costs. While a no-fault compensation system appears more equitable and efficient in principle, its practical implications and the potential costs of operating such a system is more complex. In many of the countries where the no –fault compensation system is practised, it is usually financed through taxation.[73]

Court decisions can have positive effect on standard of care.The fear of litigation may encourage doctors and health authorities to take greater care and help reduce the number of accidents by raising quality of treatment.[74]Litigation may generate more accountability for health care providers than the no-fault compensation system.

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[69]F. Chukwuneke, op.cit. p. 24.

[70]World Bank, 'Medical Malpractice Systems around the Globe: Examples from the US-tort liability system and the Sweden – no fault system', Retrieved from siteresources.worldbank.org/malpractice on 4/08/2017

[71]Ibid. p. 129.

[72]S. Mor and O. Einy 'Quality of Healthcare and the Role of Relationships: Bridging the Medico-Legal Divide, *Health Matrix* vol. 22. no 123, 2012, p 125.

[73]World Bank, 'Medical Malpractice Systems around the Globe: Examples from the US-tort liability system and the Sweden – no fault system', Retrieved from siteresources.worldbank.org/malpractice on 4/08/2017

[74] ibid

Nevertheless, no-fault compensation in medical negligence merits close consideration for its efforts to compensate injured patients quickly and equitably, while offering accountability mechanisms focused on ensuring safer care rather than assigning individual blame. The no-fault compensation system should be complementary to the tort based system rather than supplanting it.

Conclusion

Medical negligence is no longer a matter between two parties; it is now a matter of concern in political, legal, medical and governmental circles as there is a growing concern for the incidence of medical injuries[75] and access to justice for victims of medical injuries.

In the preceding discussion, this article examined the fault based system of compensation in medical negligence cases, exposing the challenges of proving fault in a case of medical negligence. The article also examined the no fault compensation as against the fault based system of compensation highlighting the advantages and disadvantages in both systems.

The adversarial system of litigation is fraught with a lot of odds against the claimant/ plaintiff in a case of medical negligence; from the onerous burden of prove, to financial constraints, unacceptable delays and lower success rates. The injured is often left frustrated and without any form of compensation.

The failure of the adversarial system to ensure justice in the form of compensation for the victim of medical negligence calls for a review of the existing fault based compensatory system. There is the need to adopt a more patient friendly and victim focused approach in the form of no fault compensation for victims.

The current paradigm shift in accessing justice is moving away from adversarial and need to prove fault based system of adjudication. New strategies allowing out of court settlements and compensation are rapidly gaining grounds in accessing justice for victims in cases of medical negligence.

No fault compensation is a strategy that offers the claimant/ plaintiff a better hope and certainty of compensation in case of injury or death due to medical negligence.

Settlement of this genre of cases out of court will be more acceptable and preferred to the adversarial within our own indigenous cultural setting and society.

[75] Mason & McCall Smith , Law and Medical Ethics op cit. p 215