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An appraisal of employers' liability in medical facility under health laws in Nigeria

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Abstract
The health sector in Nigeria is controversially intertwined with issues bothering on Negligence, Indolence and Indiscipline etc. These has created a lot of issues in the sector. The downward trend of good health and harmonious living in Nigeria are occasioned by this vices. There are Incessant cases of negligence and other weird reports against the Nations Health Industries. Hospitals and other Health providers are often seen to be guilty in tort. These lessons, has force the employers of labour in the health sector to be proactive and to ensure that they are careful in activities that could cause harm to patients and to also avoid the wrath of vicarious liability on them through the act of their employees. It is remarkable that the tortuous act of a worker is usually on the master. Therefore the tortuous act of any medical workers or health providers in any medical facilities would be examine on the principal. The rule of strict liability provides that an employer cannot be exonerated from any act of breach of professional conduct committed by his employee. This work provides a downtime to sufferers of any forms of negligence or malpractice in medical outfits. The paper also supports a complete state of mental and social wellbeing for every individuals in Nigeria through environmental cleanliness free from all forms of contaminations and psychosis as a necessary succour for good living The method emphasized on this work is doctrinal, which involves the use of library, medical journals, bulletins and medical textbooks. A survey of medical centres in selected jurisdiction is also consistent with this work. It is the conclusion of this paper that employers must be proactive on issues bordering the health industry as no amount of compensation could indemnify any gory casualty occasioned by mediocres.

Keywords: Hospital, negligence, strict liability, tort

Introduction

Vicarious liability is on every Employer of labour to be held accountable on every aspect of his workers' negligence in the performance of lawful duties at work place. It is trite law that employers must be held liable for the conduct of their employees at anytime. even if the Employer had no intention to cause harm or played any physical role in the harm that has occurred. Employers are seen as directing the behaviour of their Employees and accordingly, must share in the good as well as in the bad result of their activities. By this, the employer is legally entitled to the rewards of the employee's labour. The employers have the same liability if the same activities results in harm. Whenever someone is injured in the course of employees' activity and the need arises to be compensated, the Employers' are liable in Tort for the necessary compensation instead of the Employees. The Employers are vicariously liable under the doctrine of 'Respondent Superior' for the negligent act or omission by their employee. This same doctrine is often used in determining vicarious liability in medical practice, it means, 'let the master answer'. In other word, an Employer of any medical facility must be held responsible for the negligence of the Employees.

The doctrine of Respondent Superior is however subject to the following rules:

1. The employee must commit the negligence during defined work hours.
2. The negligence occurred during an activity or task the employee was hired and paid to perform.
3. The activity during which negligence was committed also benefitted the employer in some ways.

What is Negligence?

In the word of Lord Wright, 'In strict legal Analysis, negligence means more than needless 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 owing. It can also be defined broadly as the breach of duty of care which result in undesired damages by the defendant against the plaintiff [1].

Negligence is a failure to exercise the appropriate ethical care to be exercised among specific circumstances.

Doctors dealing with patient must exercise a high degree of care which he owes the patient in the hospital [2].

Negligence must be established on these principles

1. That a duty of care was owed by the offender
2. That the offender has breached the duty
3. That damage has occurred as a result of the breach by the offender [3].

Medical Negligence

This is a malpractice that usually result in the breach of duty of care imposed by law on health practitioners while dealing with his patience that has occasioned harm which [4] consequently, the health practitioner can be sued for, and a further stress can lead to the adoption of the doctrine of 'respondent superior' i.e. let the 'Master Answer'.

The following constitutes medical negligence:

1. Failure to give prompt attention to patient.
2. Incompetent assessment of patient.
3. Incorrect diagnosis.
4. Mistake on treatment.
5. Wrongful advice to patients about drugs and post operation.

Medical Error

Medical errors occurs when a medical practitioner chooses an inappropriate method of care or improperly executes an appropriate method of care. A medical error is a commission or an omission with potentially caused negative consequences to the patient that would have been judged wrong by skilled and knowledgeable peers at the time it occurred, independent of whether there were any negative consequences [5].

Acts that constitute medical errors may or may not give rise to a claim in medical negligence under the extant principles of negligence, not all medical errors and malpractices will qualify as an act of negligence. For instance, a medical error may not have given rise to any injury or damages and thus, a claim of negligence hinged solely on such an act is unlikely to succeed. Such an act may however give rise to a disciplinary action against such medical practitioner by professional bodies.

As such, breach of medical rules and ethics may not suffice to necessarily give rise to a claim in negligence. It is thus important to adopt alternative options available to a person who is unable to successfully establish negligence but who has been a victim of medical wrong or malpractice.

Apart from the above, patients who have suffered some form of damage or injury in the of course treatment may bring an action for breach of contract. This may be a viable option especially in cases where negligence cannot be proved. Inherent in doctor-patient relationships that is largely contractual is an implied term, that the doctor will exercise reasonable skill and care in the treatment of patients. As such the law will imply the existence of a contract in cases where a patient submits to treatment by a medical practitioner. The rationale for this as seen in most breach of contract cases is that the defendant is made to put the patient in the position he would have been if treatment was properly performed. The claim for damages will also lie where the breach of the medical practitioners' warranty has caused the patient to incur some extra costs. To succeed in an action for breach of contract unlike in negligence cases, it suffices for the patient to prove the existence of a doctor-patient relationship; breach of the implied or express term of the contract- to treat; and injury arising from or in the course of treatment.

In the same vein, under the rules of equity, a claim may also be hinged on the recognition of a doctor-patient relationship as one which imposes a fiduciary duty on the medical practitioner. A fiduciary duty to protect the patients' interest may be imposed on the medical practitioner in favour of the patient. This was successfully done in *Norbery* v. *Wynrib* [6] where the court upheld this view to uphold and defend the patient's fundamental and personal interest. There are also cases where the patient suffers damages or injury but has no valid claim against the medical practitioner. This will arise where the patient has given informed consent or where the medical practitioner acted based on compulsion to save the life of the patient. An apt example will be the removal of a patient's uterus during a caesarean section operation. The medical practitioner's action is unlikely to amount to negligence or breach of his fiduciary duty especially in circumstances where his actions were in good faith and in the best interest of the patient.

Mistake in diagnosis will also not amount to negligence if the required standard of care has been duly observed. In cases where there is some form of doubt on the part of the medical practitioner as to specific diagnosis to make, such a person ought to make a referral to a specialist [7] failure to do so may however amount to negligence. The standard of care required from alternative medical practitioners appears to be lenient especially where the act is not such that will give rise to liability for criminal negligence.

4. Medical Malpractice

It should be noted that not all cases of medical negligence result to malpractice claims negligence on its own does not merit a medical malpractice [8]. But when negligence is the cause of injury to a patient, there may be good case to refer to malpractice.

The following elements are required to prove a case of mal-practice:

1. A standard of due care under the circumstances.
2. A failure to meet the standard of due care.
3. The foresee ability of harm resulting from failure to meet the standard of due care.
4. The fact that the breach of this standard proximately caused the injury to the plaintiff.

5. Medical Ethics

Every professional course that leads to practice of such profession as expert requires ethics in the practice of such profession, Medicine is not excluded. Medical malpractice has necessitated the Medical council to issue medical ethics as control measures to the practice of medicine.

Invasion of Privacy is a form of malpractice in health institutions and it is also against medical ethics.

The right to privacy is a fundamental rights of the individual. The right to be free from unwanted publicity and exposure to public view, as well as the right to live one's life without having one's name, photograph, or private affairs made public [9]. Any violation of this is tantamount to invasion of personal privacy and medical ethics.

Other malpractices are

1. Illegal abortion on patients.
2. The use of unqualified health providers to administer to patients.
3. Assault in patients.
4. Battery of patients.
5. Defamation of patients' character.

The use of actual physical force or touch is not necessary to constitute false imprisonment.

A good example of this malpractice in health institutions are:

1. A reasonable fear or force which may be implied by words, threat, or gesture used to detain a patient is sufficient to constitute false imprisonment.
2. Refusal to allow the patient leave the hospital until all bills are paid also constitutes an act of false imprisonment.
3. The thoughtless use of restraints to keep a patient on bed, also constitute an act of false imprisonment
4. It is important to note that there shall be no liability if the medical practitioners compels a client with a contagious disease to remain in the hospital to avoid the spread of the disease or for a mental patient to stay in the hospital if the patience constitute danger to the society.

Improper Conduct

Improper conducts of health professionals also constitutes a breach of health ethics for which the proprietor of any medical centres can be held liable, a good examples are:

1. Committing adultery with a patient by a health practitioner is an improper conduct.
2. Enticing a patient's wife or husband, thus causing him or her to separate from his or her legal partner.
3. Physical assaulting a patience for whatever reason.

Illegal Act by health professionals

Illegality is strictly forbidden in medical enterprise because it contravened the rules of health ethics, good examples of this practices are:

1. False imprisonment: this is the restraint of the liberty of any free individual, not necessarily be in prison yards. The fundamental requirement of the tort that the plaintiff's freedom of movement in every direction must have been restricted. A partial restraint is not sufficient [10] false imprisonment is an unlawful restraint of an individual's personal liberty [11] without proper consent from the person. It is a thoughtless use of restraint

The Nigeria medical council in line with the various medical Assembly declarations established a medical tribunal to try erring medical doctors who violated the code of conduct [12] in famous conducts were listed amongst other things to be that medical practitioner shall not engaged in adultery [13]. The judiciary system has taken steps in making definite pronouncement on some issue relating to medical malpractices and how the tribunal reached each decision [14]. *Bode Allison v General Council medical Education and Registration the court* held that in famous conduct, it is where a medical man pursuit of his profession does something which is regarded as disgraceful or dishonorable by his professional brethren of good repute and competent conduct [15]

The following are considered as infamous conduct of a medical practitioner, for example, addiction to alcohol which may ultimately impair the reasoning and judgment practitioner in carrying out his duties towards his patient, Inducement of hard drug, therapeutic drug to induce abortion with Nigeria except in extreme circumstances [16], Sexual abuse of patient in another infamous [17]. It is trite, that any doctor who engages in any of these conducts will be banned from further usage of his license [18]

Legal problems have arisen from the decision of medical administrative panel. The law is clear, following the decision of *Garba v University of Maiduguri*. That an administrative panel lacks the power to adjudicate on matter relating to cocaine. Also in Alakija v Medical Disciplinary Committee, that the decision of the panel striking of the name of the plaintiff from the qualified medical practitioners on the decision of an administrative panel of inquiry is against the principle natural justice, based on the fact that the registrar who carried out sanction to be effective, the cause of the patient must be actionable.

Medical Practitioner: Responsibility

As soon as the patient's consent to examine is sort, the doctor is expected to exercise a high degree of care to avoid Negligence of his duty in law [19]. The presumption of consent is not allowed except in an emergency situation when cannot be obtained. But in surgical operation consent is required except in emergency the doctor must always armed himself with documentary evidence in the events relative request for a discharge of the patient after consent has been given [20]. All these procedures are part of the procedures and practices of medicine in Nigeria, as part of labour relation [21].

This is any act which is considered unlawful or wrongly which the medical doctor may carry out against his patient when it occurs the patient has a right of cause of action before the law can consider an act malpractice it must be, there is a manner set out by training, and study require in that before, Malpractice is considered as a tort which is a wrong [22].

Medical Practice and Vicarious Liability of the owner

Vicarious liability is a type of torts that consists in fixing an employer with liability for the wrong committed by his employee while the latter is in the course of his employment.

The concept of vicarious liability has no universally accepted definition that is conclusive enough to preclude all other definitions [23]. The matter is made worse when we consider that there appears to be no statutory definition of the concept either. What follows hereunder are the various attempts by text writers and judicial formulations aimed at defining the concept.

The Black's Law Dictionary [24] defines vicarious liability as 'Liability that a supervisory party bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties.' The Oxford Dictionary of Law [25] defines vicarious liability as the legal liability imposed on one person for torts or crimes committed by another although the person made vicariously liable is not personally at fault.

While writers like Holmes contended that the doctrine of vicarious liability originated from Roman law, others like Wig more opined that it originated from Germany. Still, some other scholars like Baty made light of the origin but concluded that the doctrine came into English law at the close of the 17th century, According to Holds worth [26], during the middle ages, a master was held liable at civil law for all the torts of his servant, and later for only those mischiefs of his servant done by his command and consent. However, following the expansion of commerce and industry in the 17th century, the 'command theory' could no longer stand the test of time, resulting in the enlargement of vicarious liability.

Hospital Liability

The liability of a hospital in cases of medical negligence could be direct or vicarious. Direct liability in this sense would mean a deficiency in the services provided by the hospital thus making it unsafe and not suitable for treatment [27]. Vicarious liability, on the other hand, would refer to the liability of the hospital as an employer for the negligent acts of its employees.

Some of the conditions under which a health care is directly liable are:

a. Improper maintenance of hospital resulting in an injury to or death of the patient.
b. Failure in providing a safe and suitable environment as necessary when the patient is affected by

malfunctioning equipment, incompetent staff, inadequate accommodation, etc.

c. Deceptive or misleading signboards, advertisements, and notices, false claims of availability of certain facilities which may be seen as a deficiency in services or as unfair trade practices under the Consumer Protection Law
d. Charging for a facility which was not provided, or charging more than what is mentioned in the displayed list of charges or agreed.

The employer is responsible not only for his acts and omissions but also for those of his employees, as long as such acts occur within the course and scope of employment [28]. This liability is based upon the maxims "Respond at Superior" which means "let the master answer"

and "*qui facit per aliumfacit per se*" which means “He who acts through another does the act himself”.

An exception to the above principle is seen in the "Borrowed servant Doctrine" according to which the employer shall not be liable for acts of an employee when that employee is working under the direct supervision of another employer [29], for example, when a surgeon employed by one hospital visits another for conducting a surgery, the other hospital where the surgery is performed would be seen liable for the acts of the surgeon [30]. However, in present times most doctors are not employees of the hospital and are independent contractors instead. Whether or not a doctor is an employee of the hospital would depend upon the nature of his relationship with the hospital.

But a hospital cannot escape its liability by merely saying that it cannot *suo moto* perform any operation or amputation and that it provided only infrastructural facilities, nursing services, support staff, technicians. The hospital is not only responsible for the staff it provides but also for independent contractors such as anesthetists or surgeons or doctors in some cases-who admit or operate a particular case, This was held in the case of *Smt. Rekha Gupta v*. Bombay Hospital Trust and Anr [31] 'by the National Consumer Disputes Redressal Commission.

In Joseph Alias Pappachan v. Dr. George Moonjerly [32], it was held that "persons who run hospitals are in law under the same duty as the humblest doctor: whenever they accept a patient for treatment, they must use reasonable care and skill to ease him of his ailment. The hospital authorities cannot, of course, do it by themselves; they have no ears to listen to the stethoscope, and no hands to hold the surgeon's knife. They must do it by the staff which they employ; and if their staffs are negligent in giving treatment, they are just as liable for that negligence as anyone else who employs others to do his duties for him.

In the case of negligent acts that take place in public facilities it has been held that the state can be directly held liable in case there is a lack of proper facilities, equipment or staff and it may be vicariously liable for negligent acts of its doctors. In a few cases, the court has granted compensation to the complainant paid by the government doctor whose negligence has been established but not without bottle necks and long period of resistance.

Medical negligence of tortuous principle of negligence per Lord

Atkin in the 1932 case of *Donoghue v. Stevenson* [33], Crystallized an act or omission by a medical practitioner which falls below the accepted standard of care resulting to injury or death of the patient [34], The case established a general duty to which reasonable care against foreseeable injury to another. Therefore, qualification of negligence must be shown that a duty of care was owed; which had been a breach of that duty; and that damage or injury was suffered as a direct result of a breach of the duty owed. In medical negligence and going by the definition above, medical practitioners who undertake the care and treatment of patients owe a duty of care to such patients. A duty of care is necessarily implied when a patient is registered and being treated in a hospital. The view has been expressed that, care of medical practitioners ought not to be limited only to the patients under their direct management but to be extended to any patient whom they come across in their professional environment and as such, a medical practitioner owes the duty to care for every patient found within the hospital premises whether or not he is on the management team of such patient [35]. This view appears extreme an usually not well in practice in most Nigerian hospitals, this may minimize incidents of direct or vicarious liability by a hospital as an entity for negligence.

Apart from the liability of medical practitioners in their individual capacities, a hospital may also be liable for negligence. This is especially because hospitals are no longer being regarded solely as 'venues for treatment’ but as ‘providers of treatment’.

This development has given rise to the liability of hospitals either directly or vicariously for acts of negligence. Direct liability for negligence will arise where a hospital has failed to provide an environment and facilities that will facilitate safe treatment of patients. Vicarious liability on the other hand will arise where the hospital is being held liable for acts, omissions and failure of its staff, in the discharge of their responsibilities in the hospital. This view was well expounded by Lord Denning in the 1951 case of *Cassidy v. Minister of Health* [36]. A senior medical practitioner may also be held vicariously liable for the actions or omissions of a junior or any member of the medical team that he leads or who is under his supervision and control [37].

This doctrine rests on the fundamental premise that the employer is best placed financially, to pay compensation for damages caused in the furtherance of his business by his agent [38]. This doctrine in the bid to champion public policy, creates an avenue, for servants to intentionally cause harm, defraud others and make someone else pay inasmuch as he is careful to do it, within the course of his employment. It is advisable at this junction to legislate laws which would further fine tone this principle, so that wrong doers are given his proper dose’.

The Way Forward.

Upon the filing of pleadings by the plaintiff stating facts which caused the damage as a result of the Negligence the defendant (doctor) would file pleading tending to show his defense to alleged negligence. In the Case of *Miss Felicia Osagiede Ojo v. Dr. Gharoro & UBTH Management* Board the court reviewed the case of *management Enterprises Ltd v. Oguarekpe* apart from these attitude or court towards medical negligence and litigation vicarious liability is another huge task as a hospital can be held liable for tort in such circumstance [39].

Although many relationships may give rise to vicarious liability, the relationship is classically one of master and servant. What remains to be examined is the approach of Nigerian and English courts in determining when a master/servant relationship exists. Under English law, the present position is that for there to be an employer/employee relationship, there need not necessarily be a contract of employment. The epicenter of this legal quake' in England is traceable to the decision of the United Kingdom Supreme Court in the case of *Various Claimants v Catholic Child Welfare Society* [40] which was further magnified by the same court in the case of Cox v Ministry of Justice [41].

This expansive approach to the relationship test beyond the delineation of a contract of employment is, according to Lord Phillips, to ensure fairness and justice so that once the relationship is not strictly one of employer-employee properly so-called, but it is, nevertheless, 'akin' to it, then it will be just and reasonable to impose vicarious liability on the employer.

The reason being that such a situation binds the tortfeasor into a closer relationship with the defendant than would be the case for an employee, thereby strengthening, rather than weakening the case for imposing vicarious liability [42].

Here, the concern is to trace the present position of the law under Nigerian and English legal regimes. There has been a remarkable development in respect of the course of employment test in England. This development has the effect of broadening the field of activities within which an employee could be said to be acting in the course of his employment. This landmark decision was delivered by the United Kingdom's Supreme Court in the case of *Mohamud v. Morrison Supermarkets Plc* [43].

The court considered a host of cases that ultimately manifested vicarious liability as an area of law continually on the move [44] and the expansive nature of the course of employment test, to wit *Central (Glasgow) Ltd v. Cessnock Garage and Motor Co, Lister v. Hesley Hall Ltd and Dubai Aluminum Co. Ltd. v. Salaam, inter alia.* Thus, by holding the respondent supermarket liable in damages to the appellant the court, per Lord Toulson, gave it yet its most expansive interpretation. The law Lord rejected the notion that an employee who commits a tort outside the immediate environment of his employer's business has 'removed his uniform' and thus acted outside the scope of his employment.

Although cases on vicarious liability in Nigeria do not come as frequently as they do in England, with the expansion of the course of employment test in the latter, it remains to be seen how Nigerian courts would approach the test going forward. Whether they will be inclined to be persuaded by Mohamud's case is a speculative venture that only time will reveal.

This being what it is, the recent case of *Buildwell Plant Equipment (B.P.E) (Nig.) Ltd v Roli Hotels Ltd* [45]. may further shed some light on the approach of Nigerian courts to the course of employment test. In that case, the Court of Appeal was of the opinion that since the defendants (employees) worked from 8am and closed by 5pm, as a trailer drivers, lighting a candle in a hotel room where they were accommodated and leaving it unattended had nothing to do with their ppppemployment, as they at that moment were on a frolic of their own.

However, it must be noted that in the recent case of Anambra State Environmental Sanitation Authority (ASESA) v Ekwenem [46] the Court of Appeal did show some inclination of giving the test a wider interpretation. Although this case did not turn on the scope of employment test, the Court of Appeal upheld the judgment of the trial court to the effect that the appellant was vicariously liable for the destruction and theft of the respondent's property by the appellant's employees. It is only a pity that this progressive interpretation of the scope of employment test was subsequently distorted by the same court in the case of Buildwell Plant Equipment (Nig) Ltd v. Roli Hotels [47]. The English law has enjoyed considerably a wide variety of the test of expansive interpretation of the subject of labour of employment liability of workers, than in the Nigerian nascent jurisprudence which is a 'copy and paste' concept of foreign juris [48].

Conclusion

The essence of the tort of vicarious liability is that a master must pay for the defect committed by his servant, and this would serve as deterrent against non-challant attitudes as often found among Masters and Servants. Though not all defect caused by servants can be tied to the master. With the complexities of industrial development, the court evolved the command theory upon which facts are based. Under this rule, the master was held responsible only for acts which he had specially ordered or which he had ratified. With further industrial development and the greater complexities of the structure of the society, the courts found the command theory rule, not too practical for establishing the vicarious liability of master. Eventually, the theory of vicarious liability emerged which laid emphasis on the time and the context of the servants 's wrongful conduct and the consequences authorization of the conduct by the master.

In view of avoiding the liability of the Masters of Health Care Centres from vicariously Liability of the infractions of their subordinates, the following are suggested:

1. Adequate concern should be shown by the master in the day to day running of the Hospital.
2. Making sure that his employees accepts and internalize the fact that the essence of health care is to administer to the sick.
3. And to serve humanity and not necessarily to acquire material gain.

Recommendation

a. Top officers of Health institutions and Chief executives of Organization should serve as watchdogs for the observance of professional ethics and medical laws governing health facilities in the country.
b. Feedback mechanism should be established at various Health Centres to collect information directly from clients to ascertain the level of violation of Health ethics and medical laws in the country.
c. Health practitioners are to strictly observe health laws to avoid negligence for which the master and servants could be held vicariously liable.
d. The country should provide adequate and modern state of the art equipment to medical facilities for easy diagnosis and treatment. The gesture should also be extended to Private Health Centres.
e. Proprietors of medical centres should make sure that they are trained in the practice of Health services for easy supervision of their staffs

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40. [2012] UKSC 56: [201312 AC 1 (The Christian Brothers Case) See also Province (Tyneside) Ltd v Thermal Transfer (Northern) Ltd [2005] EWCA Civ 1151: [2006]QB
41. Various Claimants v Catholic Child Welfare Society (2016] UKSC 10, per Lord Reed (with whom Lord Neuberger, Lady Dyson and Lord Toulson agreed). This case followed the Christian Brothers Case to the fullest effect.
42. Cox v Ministry of Justice (supra) at 13, per Lord Reed
43. 2016] UKSC11, per Lord Toulson (with whom Lord Neuberger, Lady Hale, Lord Dyson and Lord Reed agreed).
44. Mohamud v. Morrison Supermarkets Plc (supra) at pp.18 -19, per Lord Dyson.
45. Supra
46. [2001] FWLR (pt. 51) 2034 at 2054
47. Supra
48. Curran Hall, Bobinski Kross & Orentlicher Yonda, Health Care Law And Ethics (Aspen Law & Business 1998).