Comparative Analysis of Medical Negligence between Nigeria and the United States of America: Case Study, the State of Nigeria and Texas

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Abstract- ***The paper compared the medical negligence jurisprudence in Nigeria and United States of America with particular reference to the state of Texas. It was thereafter discovered that the medical negligence jurisprudence in Texas is robust, structured and well defined when compared to what is obtainable in Nigeria. The paper therefore recommended an overhaul of the Nigerian medical negligence jurisprudence and the adoption of Chapter 74 of the Texas Medical and Civil Remedies Code in terms of burden of proof, cap, medical evidence, pre-requirements for filing and statute of limitation. The authors used the doctrinal as well as comparative research method to achieve the aim of this research paper wherein both primary and secondary materials were consulted.***

I. INTRODUCTION

Medical negligence today in the world is a serious cause of concern. Both in Nigeria and the US, the menace of medical negligence is considered the third leading cause of death. A recent report in the US indicated that medical errors account for more than 250,000 annual deaths.[1] With regard to Nigeria, a similar position was also confirmed.[2] These incidences often occur where the health care providers fall short of fulfilling their sacred professional obligation to their patients through failure to follow either established standard of practice in their field as it relate to treatment or offer substandard care or poor quality of service as a result of which causes preventable injury, damage or in some instances death; thereby exposing the health care practitioner to either civil or criminal liability in tort or contract.

In Nigeria and US due to the corrosive effect of the menace of medical negligence, legislations have been put in place to tame this dangerous practice that often have dire consequences on the patients and their families with the view to entrench a system of deterrence and ensure effective and efficient practice in the health care sector. In Nigeria for instance, the Medical and Dental Practitioners Act (MDPA)[3] established the Medical and Dental Council in Nigeria and invested the body with the power to regulate medical practice in the country and in line with this mandate, the Council promulgated the Code of Medical Ethics[4] in Nigeria which defined the relationship between medical practitioners and their patients, right of patients and practices that could amount to medical negligence. Aside from the MDPA, the National Health Act[5] is another legislation that compliments the MDPA and defined the rights and obligations of users and health care personnel in Nigeria. The Act established for the first time a national health system for Nigerian and imbued them with the right to health care.[6]

In the US however, medical negligence laws are within the domain of state governments, therefore, different states have their respective medical negligence laws. In Texas for instance, health care liability claim is regulated by one of the most technical and complex law in the US in terms of burden of proof, statute of limitation, caps on amount that could be recovered on economic loss, pre-registration procedure and medical evidence required to ground a claim for health care liability.[7] It does not matter the merit of the claim, where a claimant fail to comply with the law as regard condition precedent for initiation of health care claim, the claim may be rejected by the court at the filing stage or dismissed at the pre-hearing state.

Unlike in Nigeria where the MDPA, the NHA and the Code of Conduct for medical practitioners failed to provide a framework that set requirements for proof of medical negligence, therefore, the resort to general principle of tort as established in the case of *Donoghue v Stephenson*[8] and court decisions in this regard, in Texas, Chapter 74 of the Texas Civil Practice and Remedies Code regulate the filing of health care claim in the State. Other states in the US, i.e. California, Florida and many more also have the same frameworks, though with different requirements. It is on this basis that this paper is set to comparatively study the health care jurisprudence in Texas and Nigeria in other to discover the differences in the two legal systems and propose how Nigeria can strengthen it system from what is obtainable in Texas.

II. PREVALENCE OF MEDICAL NEGLIGENCE IN NIGERIA AND THE STATE OF TEXAS

It is noted that the menace of medical negligence has over the years kept increasing unabatedly in Nigeria. This is largely attributed to staff' rudeness, negative attitude to patients, lack of care and compassion such as staff not doing enough to ensure patients are comfortable, inadequate response to requests[9], wrong diagnoses, administering wrong treatment, surgical accidents like leaving surgical instruments in the body cavity, accidentally severing vital blood vessels or nerves, operating on the wrong part of the body or removal of healthy tissues or organs, and handling of patients by unqualified health personnel.[10] This is further worsened by an increase in cases of unqualified medical personnel as noted by the Medical and Dental Council of Nigeria (MDCN)[11] with quacks and unlicensed medical persons boldly operating in public and private hospitals unnoticed.[12] There are also several cases of pharmacists, nurses, medical laboratory scientists and technicians as well as other health personnel parading as doctors and rendering medical services only doctors are licensed to render to unsuspecting members of the public thereby leading to considerable harm to the patient.[13] Though there is a dearth of data to show the extent of the prevalence of medical negligence in Nigeria with certainty, a 2017 survey on medical errors published by Archives of Medicine and Health Sciences showed a prevalence of negligence at 42.8 percent per 145 medical practitioners.[14] The report also revealed that the three most common errors were error of medication prescription, which was put at 95.2 percent; error of radio-laboratory investigation ordering at 83.9 percent, and error of physician diagnoses at 69.4 percent.[15] The author further noted that according to a paper by Ogundare, "Empirical work by a researcher shows that 61.69 per cent of Nigerian patients feel that medical practitioners in Nigeria are arrogant and careless about their conditions and plights.[16] Also, 33.3 per cent of Nigerian patients indicated that their doctor's treatment had caused them extra injury beyond the ones, which took them to the hospital.[17]

In spite of this large number of victims, the number of cases recorded or filed, as lawsuits are low.[18] The reason for low-level of claims includes a cultural notion of adverse medical events, poverty, illiteracy, limited option of treatment, reluctance to seek redress against the medical practitioner and most of all ignorance."[19] Furthermore, Onyeji in the same vein attributed the prevalence of this error or negligence on the part of the medical professionals in Nigeria to failure of the country to adhere to World Health Organization directives on the number of doctors to a patient ratio. He noted that "Nigeria's ratio of doctors to patients is about eight times below the World Health Organization (WHO)'s recommendation of one doctor to 600 patients.[20]

In the US however, the prevalence of medical negligence isat an alarming level. For instance, in a recent survey conducted by Johns Hopkin, it was discovered that more than 250,000 people die every year from medical errors.[21] The study also found that medical errors or negligence is the third leading cause of death in the country aside from cancer and heart disease.[22] Maurice corroborated this assertion when he noted that, ten percent (10%) of deaths in the US are caused by medical errors or mistakes.[23] The author also revealed that the top four states where this staggering numbers are recorded are California, Texas, Florida and New York.[24] Another study conducted by the Institute of Medicine in the U.S in 1999 estimated that between 44,000 and 98,000 patients die in the U.S hospitals as a result of medical negligence.[25] In 2011, in another related

development, a data that originated from the U.S Department of Health and Human Resources and the Agency for Health care Research and Quality showed that, out of the 35 million consumers who seek treatment annually in the U.S, over 400,000 mortalities are recorded every year.[26] Aligning with this position, Donald noted that "the reality of the matter is that, there is an epidemic of medical negligence and that 80 percent of these incidences involved death or serious injury to unsuspecting patients, bringing preventable, needless and untold grief to families, literally leaving patients worse than they were before they came to the hospital for assistance."[27]

The American Medical Association in one of its routine publication noted that, America has a broken medical liability system that over the years has forced many physicians and health care professionals to alter their professions for fear of being sued.[28] In 2017, the same association (AMA)in one of its report found that 34% of all physicians in the States had been sued at some point in their careers and that the percentage increased with age.[29] For instance, the report found that half of physicians aged 55 and older had been sued and nearly 30% had been sued two or more times in their life time. It was further revealed that over 75% of general surgeons and obstetricians/gynaecologists (ob-gym) aged 55 and older faced a claim at some point in their careers and that more than half had been sued even before they turned 55.[30]

It is therefore without doubt, giving the data and available statistic that, the prevalence of the menace of medical negligence in developed and less developed nations are alarming with dire consequences. This is in spite of the recent advancement in science and technology as well as sound and well structured legal frameworks. As seen above, many factors contribute to aggravate this menace and unless genuine legal frameworks are put in place to curb this menace, many families will continue to be affected by this menace.

III. PROVE OF MEDICAL NEGLIGENCE IN NIGERIA

The Nigerian Dental and Medical Practitioners Act is the principal legislation that regulates medical negligence in Nigeria. The MDPA creates two bodies; the Medical and Dental Practitioners Disciplinary Tribunal(MDPDT)[31] and the Medical and Dental Practitioners Investigative Panel. The Tribunal is empowered with the competence to determine matters referred to it by the Panel established under subsection 3 of section 15[32] and any other case of which the Disciplinary Tribunal has cognizance under the following provisions of this Act.[33] The Panel is therefore empowered the investigate cases where a medical practitioner is alleged to misbehave in his or her professional capacity.[34]

The Tribunal is enabled to appropriately sanction any registered medical practitioner that is adjudged to have been found wanting in the act of infamous conduct and could order for the name of the culprit to be struck out from the register of members[35], suspension from practice[36] or admonish the person. Clearly, the exercise of this power is conditional upon the investigation of the Panel and referral in that regard.

Over the years, there have been controversies regarding the Tribunal's power to determine cases that involves questions of medical negligence particularly as it relates to civil and criminal prosecution. This question was eventually settled in the case of *M.D.P.D.T v. Okonkwo*[37] where the Supreme Court finds that the power of the Tribunal is limited to where the medical practitioner is guilty of infamous conduct in professional capacity. The Court went further to define infamous conduct thus:

A charge of infamous conduct must be of a serious infraction of acceptable standard of behaviour or ethics of the profession. It connotes conduct so disreputable and morally reprehensible as to bring the profession into disrepute if condoned or left unpenalised. Although the medical profession is the primary judge of what is infamous conduct, it cannot do so without paying attention to what the law permits, either of the patient or of the practitioner.[38]

Therefore, the powers or jurisdictions of the MDPDT and the MDIP are activated where the medical practitioner misbehave in professional capacity and is found of committing infamous conduct. It is an administrative procedure designed by the Act to tame and discipline medical practitioners that derailed in the cause of their discharge of their professional duties to patients. It then suffices that a private person that is injured by the action of a registered medical practitioner in Nigeria will be divested of the competence to approach the MDPIP and MDPDT for a remedy in terms of compensation or damages from breach of duty except the formal law courts.[39]

Therefore a plaintiff that alleges that a medical practitioner or healthcare facility offered to him or her substandard care that resulted in preventable injury must approach the formal court to file a civil or criminal action in that regard. To establish the claim for negligence, the law requires the plaintiff to not only plead the duty of care breached but to lead credible and competent evidence to show positively the attendance damages sustained as a result of the breach of duty of care owed.[40] This was confirmed by the court in the case of *Otti v Excel-C Medical Centre Ltd & Anor*[41] where it was held that for the medical professional to be liable in medical negligence claim, it must be established that what the medical professional did is what his professional colleagues would say that he really made a mistake and that he ought not to have made it. Put differently, the action would be such that falls short of the standard of a reasonably skillful medical professional in that field. Adejumu and Adejumu while validating this reasoning observed that in proof of medical negligence, the focus is on the standard of professional duty expected of a comparable medical practitioner.[42] Therefore, the standard of care expected of the medical professional usually differs depending on the level of skill required and the nature of care expected. On this note, the standard of care expected of a house officer or a young officer medical officer/resident should not be the same standard expected of a consultant.

It is therefore without doubt, that in Nigeria to convincingly succeed in establishing cases of medical negligence, the following elements must be set out and clearly proof:

.1. Existence of duty of care'
2. Breach of duty of care
3. Injury or damage sustained as a result of the breach

Existence of Legal Duty of Care

The existence of duty of care is the foundation upon which the claim for medical negligence will find footing, absence of which it will be baseless. Therefore, it is the existence of duty of care that will midwife the claim for breach of duty of care. On when duty of care arises, Malami summarized the following as constituents of duty of care; duty to provide adequate counseling, duty to warn patients of the likely side effects of treatment and risk thereof, duty to carry out proper diagnosis, duty to administer proper treatment, duty of emergency medical service; and Duty to obtain consent and respect for privacy and confidentiality.[43]

Therefore, duty of care is anchored on the fiduciary relationship existing between the plaintiff and the Defendant. This relationship is the building block of the claim of negligence and can arise as a result of contract, trust or operation of law. For instance when a patient visits a hospital and opens a file, there arises implied or contractual obligation on the part of the hospital that imposes duty of care on its employees to treat the patient with due diligence, otherwise, any breach of duty that occasions harm on the patient may be actionable in terms of medical negligence. This position was validated in 1988 case of *Heave v Pender*[44] where it was held that" whenever one person is placed by circumstances in such a position in regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger".[45]

The question therefore is when does duty of care arises? Aderayo in an attempt to answer this question opined that once a doctoragrees to treat a patient, regardless of non-existence of a written contract, there is an implied dutyof care.[46] The general notion is that duty of care can arise from contract, trust or operation of law. The Court in the case of Hed*ley Byrne & Co Ltd v Heller & Partners Ltd*[47]per Lord

Morris noted that if someone possessed special skills and undertake irrespective of contract to apply the skill for the assistance of another person who relied on him solidly, this undertaking will be construed as creating duty of care giving rise to binding obligation. The same position was reiterated by the court in the case of *R. Bateman*[48]where the court noted that where a person hold himself as possessing special skill and he is consulted on that basis, he owes the patient duty of care to use due caution, diligence, care, knowledge and skill in the administration of treatment.

Drawing from this position, the court in Nigeria in the case of *Owoyele v Mobile Production Nigeria Unltd*[49] added a dimension to this position where the court held that in construing whether a duty of care exist, the court must look between the alleged wrongdoer and the person who has suffered damaged to infer whether there is sufficient relationship of proximity or neighborhood such that in the reasonable contemplation of the former, carelessness on his part may likely cause the damage to the latter.[50] This position was reiterated in **Okonkwo V. M.D.P.D.T**[51] where it was held that the measure of care required of medical doctors in relating with their patients as the relationship of doctor and patient is a very special one, the patient having put his health and his life in the doctor's hand, the use of reasonable care is required of the doctor.[52]

- Breach of Duty of Care

Breach of duty of care is central to the proof of every medical negligence case in Nigeria. The centrality of this issue in the claim for medical negligence was noted by Chief Justice C.J. Robertson who stated that :

"Medical malpractice is a legal fault by a physician or surgeon. It arises from the failure of a physician to provide the quality of care required by law. When a physician undertakes to treat a patient, he takes on an obligation enforceable at law to use minimally sound medical judgment and render minimally competent care in the course of services he provides. A physician does not guarantee recovery… A competent physician is not liable per se for a mere error of judgment, mistaken diagnosis or the occurrence of an undesirable result.[53]

Furthermore, in the case of *McCourt v Abernathy*,[54] the Court similarly noted that:

The mere fact that the plaintiff's expert may use a different approach is not considered a deviation from the recognized standard of medical care. Nor is the standard violated because the expert disagrees with a defendant as to what is the best or better approach in treating a patient. Medicine is an inexact science, and generally qualified physicians may differ as to what constitutes a preferable course of treatment. Such differences due to preference…do not amount to malpractice.

I further charge you that the degree of skill and care that a physician must use in diagnosing a condition is that which would be exercised by competent practitioners in the defendant doctors' field of medicine….

Negligence may not be inferred from a bad result. Our law says that a physician is not an insurer of health, and a physician is not required to guarantee results. He undertakes only to meet the standard of skill possessed generally by others practicing in his field under similar circumstances.[55]"

The true test of breach of duty of care was established by the Court in the case of *Bolam v. Friern Hospital Management Committee*[56] where the Court held thus:

…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 is 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 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 is therefore glaring that it is not every breach in standard of care that will amount to claim for negligence. This assertion is premised on the fact that, the medical practitioner is not indeed an insurer

of health or life. However where the breach is manifestly clear and established with certainty, the medical practitioner or health care facility will be liable for medical negligence. This position was corroborated by the court in the case of *Delta State Hospitals Mgt Board &Ors V. Onome*[57] where the court maintained that negligence is a question of fact, for the plaintiff to succeed, the plaintiff must proof the existence of duty owed and its correspondent breach, otherwise the claim will fail.

No doubt, it will be practically impossible to establish a competent case of medical negligence without proving the breach that occasion the claim. Breach of duty of care could therefore manifest in refusal to obtain consent before surgery, wrong diagnosis, fail to make referral where it is necessary, wrong prescription and so on.

- Injury Sustained as a result of the Breach of Duty of Care

There are risks that are inherent in medical practice; therefore, to hold medical professionals liable in negligence for every error or mistake as a result of the discharge of their duty will be counter-productive to the development of the profession. This will cause crisis and invariably stifle invocation that may lead to defensive medicine as obtained in some states of the US prior to the tort reform. It is in this regard that the courts have been consistent that for the medical practitioner to be held liable for medical negligence, it must be shown that the negligible act constitute actual breach of care that resulted in preventable injury to the patient. In this regard, a link must be established between the breach of duty of care and the injury sustained. This is the position of the Court as held in the case of *Otti V. Excel-C Medical Centre Ltd &Anor*[58] where the Court held thus:

"It is rudimentary law that in order to find a medical professional guilty of negligence, the situation has to be such that what he did is what professional colleagues would say that he really made a mistake and that he ought not to have made it. Put differently, the action would be such that falls short of the standard of a reasonably skillful medical professional.[59]

So also in the case of *Adebayo V. Chairman, Mdpip&Ors*[60]the court held that for the medical practitioner to be liable in negligence for breach of duty, it must be shown that he fails to follow the established standard of practice as required of him or her and this can only be done when having regard to comparable knowledge of a similar practitioner in the same circumstances. Therefore, to hold medical practitioner negligent for breach of duty of care, it must be proven that he or she falls short of the standard of a reasonable skillful medical man. This position was given legal backing in the case of *Ojo V. Gharoro&Ors*[61]where it was held that it will be a bad law to hold a medical practitioner liable for every error committed in the cause of treatment as there are inherent risks in the medical practice. To constitute actionable negligence it must be shown that negligence act is such that" his colleagues would say: "He really did make a mistake there. He ought not to have done it' ... You should only find him guilty of negligence when he falls short of the standard of a reasonable skillful medical man, in Short, when he is deserving of censure.[62]

In discharging this burden, the Court in the case of *Delta State Hospitals Mgt Board &Ors V. Onome*[63] held to the effect that the onus is on the Plaintiff to establish the negligence and that claims founded on medical negligence have been known to be difficult to establish and expensive as well. The court further reasoned that the evidence required to be adduced by the injured party is usually in the domain of the hospital and doctors and that where records are tendered in Court, it does not have much impact but that the injured inevitably relies on expert testimony to tell the Court whether a reasonable person in the standing of the Doctor would have made the same diagnosis treatment or produce.[64]

The above irresistibly show that it will be difficult to find a medical practitioner liable for negligence where nexus is not established between the breach of duty and the injury sustained. To achieve this, based on the peculiarity of medical practice, the plaintiff must as a matter of law secure the evidence of not any medical practitioner but one with required knowledge, skill and experience in the area complained of, otherwise the claim will fail. This is however quite different from what is obtainable in

Texas as the law requires as a mandatory requirement, the testimony of expert witness and set requirements for the qualification of the said person. The law also allowed for the challenge of the testimony and qualification of the said witness. For instance, in Texas, 120 days after the filing of the claim, the Claimant must furnish the defendant with the testimony of the witness inclusive of his curriculum vitae which must encompass his medical record for the past five years. This strong requirement is obviously lacking under the Nigerian medical negligence jurisprudence and is highly recommended. Furthermore more, in Texas, the standard of care and the breach are clearly captured in the medical report of the expert witness and there is determination of the authenticity of the report at the preliminary stage before hearing. Though this is complex, but to our mind, it is helpful for the speedy determination of the matter and this is highly recommended in Nigeria.

IV. PROVE OF MEDICAL NEGLIGENCE IN TEXAS

Medical malpractice claim in Texas are principally governed by Chapter 74 of the Medical Liability of the Texas Civil Procedure and Remedies Code (CPR).[65] The law is technical in that it provides special procedure in terms of burden of proof; strict damage caps, expert report requirements and statute of limitation in proof of medical liability claim that a claimant must comply otherwise, the claim may be dismissed notwithstanding the merit of the claim. Prospective claimants are therefore enjoined to follow carefully the provisions of the Code while initiating any claim before the Court.

One of the major requirements for a claim to qualify as a healthcare liability claim in Texas under the Code is for the Claimant to bring the claim under the confines of what a healthcare liability connote by virtue of Chapter 74 of the Code which defined healthcare liability claim as:

A cause of action against a healthcare provider or physician for treatment, lack of treatment or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury or death of a claimant, whether the claimants claim or cause of action sound in tort or contract.

It therefore clear having regards to the above definition that it is not all cases of claim for health care liability that will automatically translate to a healthcare liability claim. To situate the claim within the confines of health care liability claim, the claimant must anchor the claim on the basis of treatment or lack of treatment or other claimed departures from accepted standards of medical care, healthcare, or safety or professional services that is directly related to health care, and that the act of omission complaint of cause injury or death of the claimant.[66] Added to this requirement going by the definition, the claimant must also show that there is proximate cause between the injury suffered or cause of death with the negligent act or conduct. The court in the case of *City of Gladewater v. Pik*[67]*e* described proximate cause as:

That cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred; and in order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that event, or some similar event, might reasonably result there from….

The burden of proof is generally on the claimant who alleged negligible conduct to succeed on the strength of his evidence place before the Court. This position was affirmed by the court in the case of *Kramer v Lewisville Memorial Hospital*[68] where it was held that the standard of proof for establishing the defendant breach of duty was the proximate cause of the plaintiff's injury which is normally that of reasonable medical probability.[69] Furthermore, in the case of *.McClure v. Allied Stores of Texas, Inc*[70] the Texas Supreme Court noted that the two elements of proximate cause are; cause in fact and foresee-ability.[71] In this respect, cause in fact means that the negligence was a "substantial factor in bringing about the injury and without which no harm would have occurred whereas foresee-ability means that the defendant, "as a person of ordinary intelligence,

would have anticipated the danger that his negligent act created for others.[72]"

There is further requirement for the evidence of a medical expert. This position was validated by the Court in the case of *Hart v Vanzandt*[73]where the court stated that for the plaintiff to establish casual connection between the defendant negligent conduct and the plaintiff's injury, the Plaintiff must employ the service of a competent medical expert who will establish the breach of duty of care and the probable cause of same through medical report file as his testimony. The Court further held that a medical malpractice case that involve highly specialize art of treating disease, the court and jury must be dependent on expert testimony. There can be no other guide."[74]

It is pertinent to note that the medical probability in this regard goes beyond mere possibility, speculation or summation.[75] The court reaffirmed this principle when it held that the words reasonable probability in proof of health liability claim are not magic words that constitute evidence of causation simply by their use or utterance, evenly expert medical witnesses, rather, reasonable medical probability means that it is a more likely than not' that the negligence caused the ultimate condition or harm of the Plaintiff.[76]

- Filing of Medical Liability Claim in Texas

The Texas Code made it mandatory for the Claimant to file his or her claim within two years of the accrual of the cause of action. Where however the claimant failed to initiate the claim within the prescribed period, it will not matter the merit of the case, same will be dismissed. This period of limitation differs in most states of the US, for instance in the state of California, the claimant must file the claim within one year of the discovery of the negligent act, unless where there are cases of foreign body, fraud, intentional concealment and minors which may stole or extend the period of limitation. These exceptions are however absent in Texas statute and therefore inapplicable.[77] In the state of Ohio, the statute of limitation is for period of 1 year unless in the case of discovery which may toll the period of limitation.[78]

It is important to note that, Texas law does not recognize exception to the limitation period with regard to tolling the period of limitation. This therefore suffice that, prospective litigants must be mindful not to file their claim outside the prescribed period, otherwise, it will be dismissed. The failure to codify this exception as obtainable in California and Ohio and other states of the US exposes the Claimant to the likelihood of his or her case being dismissed if not properly filed within the ambit of prescribed time.

- Pre-suit Requirements for Medical Malpractice in Texas

It is pertinent to note that the law in Texas set a special procedure that must be followed for health care liability claim to be considered competent. This condition serves as legal limitation to the initiation of the claim, as any defect in complying with it may expose the claim to many challenges that may affect the life span of the claim. First of this requirement is that, before filing the claim, the Plaintiff must serve on the prospective defendants a Written Notice of Health care claim to each of the Defendants 60 days prior to the filing of the Suit.[79] There is also the mandatory requirement that the said notice must be communicated to the Defendant(s) through certified mail, return receipt registered to each of the Defendants against whom the claim was initiated against. Failure to file this Notice may invalidate the claim and make it liable for dismissal.[80] Added to this is that the Defendant will also be served with Authorization Form for the release of protected information of the Plaintiff to the Defendant. The import of this authorization is to enable the Defendant have before-hand information concerning the Plaintiff medical record for the past five years prior to the filing of the claim.[81] Another essence of the form is to facilitate settlement of the matter between parties. Paragraph B.2 of the form requires the Plaintiff to authorize all doctors and health care providers who attended to him in the past five years to release his protected medical record to the Defendant. Failure to provide this authorization may also be fatal to the claim as it may lead to dismissal of the suit.[82] Failure to provide the said form could also abate the proceeding to another 60 days. It is therefore expected that both the Notice of Health care claim alongside the Authorization form be served on the Defendant, and where this requirement is met, it may toll the proceeding.

Aside from the above notices, the Claimant will also provide a written Notice of claim within six months of the date of the incident complained about.[83] This notice must reasonably describe the damage or injury claimed, the time and place of the incident and the incident. Failure to comply with this requirement will also be penalized with dismissal of the suit. The only exception to this is where the government has actual notice of the injury or death which may in effect obviate the necessity of the notice of damage and limitation.

It is also noted that after fulfilling all the pre-suit requirements, the Claimant must take steps to serve each of the Defendants with the medical record within 120 days after the defendants have filed their original reply to the Plaintiffs petition. This is important because, failure to file the report may also rob the court of the competence to tolerate the claim. In the case of *Baylor Scott and White, Hillcrest Medical Center, vRuthen James Weems III*[84]The Supreme Court of Texas held with regard to filing of medical report that, failure to file medical report will automatically lead to the dismissal of the Suit. Therefore, in health care liability claim, the Claimant will timely serve an adequate medical report to the Defendant; otherwise the suit will be dismissed.

- Requirement for Expert Witness

One of the clear distinguishing attribute of proof of health liability claim in most states of the US is the mandatory requirement of evidence of a medical expert. This is due to specialized nature of medical cases. In Texas, the Code expressly provide for testimony of medical expert as well as set guidelines to who qualifies as medical expert for his opinion to be admissible in proof of health liability claim. This suggests that, it is not the evidence of every physician that is admissible in every case. For instance in the case of *Broders v Heise*[85]the Constitutional Court of Texas held that simply because a witness is a physician does not mean that he is qualified to testify on issues of causation in every medical malpractice case.

On the qualification of medical experts, the code set the following requirements:

1. Is the witness practicing medicine at the time of such testimony or practicing at the time the cause of action arose.
2. Does the experts have the knowledge of accepted standard of medical care for the diagnose care or treatment of the illness, injury or condition involved in the claim; and
3. Is the expert qualifying on the basis of training or experience to offer an expert opinion regarding those accepted standards of medical care.[86]

The Defendant can challenge the qualification of the said medical expert 21 days after his deposition or upon being served with his curriculum vitae. Where this challenge is lodged against the competence of the medical expert, the court is mandated to as soon as possible conduct hearing to determine whether such witness is qualified to testify in the case. This is instructive because, the testimony of the expert witness is the fulcrum or plank upon which the entire case rested. The Court in the case of *Du point De Nemours & Co v Robinson*[87]held to the effect that for the testimony of the expert to be admissible in health care liability claim, it must be shown that the expert is qualified and the testimony is relevant and based on reliable foundation.[88] Furthermore, the court also observed that the expert witness must also have true expertise and actual experience on the opinion he or she sought to give.[89]

The above succinctly show indeed without doubt that the legal framework for health care liability claim in Texas is comprehensive and adequate when compared to the Nigerian Legal framework and the Nigerian medical negligence jurisprudence can learn a lot from Chapter 74 of the Texas Health Care Code.

V. OUR TAKE AND PROPOSITION

Deducible from the above analysis of proof of medical negligence in Nigeria and Texas, it is clear that there are significant differences in the two legal frameworks with regard to proof of medical negligence. For instance, while medical negligence is called medical negligence or malpractice claim in Nigeria, in Texas however, the nomenclature has change to healthcare liability claim. Another notable area of divergence is in the area of legal framework regulating the claim. In Nigeria, claim for medical

negligence is nationally regulated by the Medical and Dental Practitioners Act as well as the National Health Act, in Texas however, claim for Health Care Liability claim is regulated by the state legislation and this is applicable to most states in the US. It is further noted that, not all claim for Health Care liability will qualify as health care liability claim in Texas, the claimant is duty bound to bring his or her claim within the confines of the Health care liability claim as envisaged by the law, otherwise, the claim will collapse. Therefore, claims outside breach of medical care, treatment and lack of treatment will not qualify as Health Care Liability claim. This is however not the case under the Nigerian medical negligence jurisprudence wherein claim for medical negligence can either be maintained under the tort of negligence or breach of contract and there is no special requirement attached to this.

It is also noted that, Chapter 74 of the Texas Remedies Code is instructive as it provide for statute of limitation with regard to filing of claim for Health Care Liability Claim, the scope of the claim, caps to the amount that can be recovered, claim under emergency situation and the necessity of expert witness in the proof of Health care liability claim. These are notable aspect of the Texas jurisprudence that is obviously absence in the Nigerian legal framework. Therefore in Nigeria, there is no express requirement for expert witness in proof of medical negligence claim. A claimant is at latitude to claim any amount provided the court is inclined to grant same. a claimant can also rely on the case of *res ipsaloquitor* to aid in the establishing of the wrongs of the medical professional. These are notable attribute that I believe if it can be incorporated in the Nigerian medical negligence jurisprudence; it may indeed reduce the incidences of medical negligence in the country which are rampant and embarrassing.

CONCLUSION

From the above analysis, it is clear that the proof of medical negligence in Nigeria, though share the same principles are however different. The legal framework in Texas is comprehensive and adequate when compared to what is obtainable in Nigeria. In any case, there are striking similarities in the two legal frameworks as can be seen in the principle of duty of care, breach and injury sustained as a result of the breach. It is also noted that in terms of statute of limitation, cap on compensable damages to be claim, evidence of medical expert and discovery, the Texas legal framework has set a pace and the Nigerian system can learn from that well-defined jurisprudence, this is highly recommended.

It is therefore recommended that chapter 74 of the Texas Code with regard to cap on economic damage, statute of limitation, expert witness be codified in Nigeria by the legislature and if this is done, it will go along way in redefining the medical negligence jurisprudence in Nigeria. It is also recommended that the definition of health care liability claim as obtained under the Texas liability jurisprudence be considered in Nigeria. This definition when adopted will change the scope of medical negligence in Nigeria and shape the jurisprudence as administrative staff and health care institution will become subject of medical negligence as well. It is also our recommendation that the states be empowered to enact legislations that will define standard of medical negligence within their domain with peculiarities as seen in most states of the US.

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