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"Development of Medical Negligence law in Tanzania"

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Abstract

The tort of negligence in general, is the creature of the court. It formally developed by English court in *Donoughue v Stevenson* (*1932)* by Lord Atkin (developed the neighbor's principle). The medical negligence in particular falls under professional negligence in which the elements constitutes negligence are also the pillars in order to constitute medical negligence. Many people since then, have been the victim for professional misconduct in one way or another—people got injuries, lose their body organs and even got life disability because members of medical professional breach their duties and exercised bellow the required standard. This paper highlighted the medical negligence by enshrining the concept of negligence and medical negligence in particular, elements to constitute the same, common negligence falls under medical negligence, code of ethics by nurses and midwifery as well as their pledge, finally the paper addresses the redress available under the law to lodge the complaints as well as the common defence by the defendant.

Key words: negligence, medical professional, doctor, nurses or midwifery, duty of care, medical duty of care.

Negligence—general concept

Negligence can be defined as a breach, which are fundamentally a legal duty made by the way of an act or omission —in which the said act or omission cannot be done by prudent and a reasonable man the same standard.[2] Alderson B., in *Blyth v Birmingham Waterworks Co. (1856)* it was held that "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." For an act to fall under the tort of negligence the said act or omission should fall under three important keys: duty of care, failure to exercise the duty, and damages resulted by defendant's breach. These are here explained hereunder as follows:

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[2] Sigh, P. G; *The Law of Torts*, Wadhwa publishers, *New Delhi*, (2004), p. 441

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a) Duty of care

In order to constitute the negligence, the foremost thing, a defendant must owe a duty in which he breached. This element, among others must be satisfied for a claimant to establish the defendant liability on the said claim in dispute. For a person to be held liable, he who alleges that the defendant is liable for negligence he must be able to establish that defendant had a duty to take care in he has violated.[3] This principle was originally developed by Lord Atkins in the case of *Donoughue v Stevenson (1932)*. In this case, Lord Atkin in his dictum he said:

> Love your neighbor principle entails not to put a neighbor into the injuries. A neighbor in legal perspective implies to a person who are closely and directly to be affected by the act or omission of a person in question. One is ought to take one is ought to take reasonable care to avoid foreseeable act and omission which would likely or cause injury to your neighbor.

As per neighbor's principle developed in this very case, duty of care will be laid to the one whose acts or omission is directly affects the defendant. Under her, the defendant has to exercise reasonable care and foresee the consequences of acts which are likely to injure the 'neighbor" (defendant). In *Heldley Byrne & Co. Ltd v Heller & Partiners Ltd*[4] a new duty was developed and recognised. In this case the court in relation to negligence, it ruled that the tort of negligence extends even to a person who possesses certain skills where other person comes to inquire because of trust. As long as the fiduciary relationship is established then the breach of duty among the other will result the negligence.

In the English case of *Anns v Merton London Borough* (1978) Lord Wilberforce proposed a significant extension of the duty of care would exist. In proving if the requirement was met in that situation as per case, then the court should direct its mind on *two-stage* test.[5] In the first stage, the parties should satisfy; in which the claimant should sufficiently prove that the claimant was the one who could reasonably required foreseeing the said risk or harm.[6] The *Prima facie* duty laid on the shoulders of the defendant to ensure no harm is happening to the claimant(s).[7]

b) Breach of duty

After the plaintiff has shown that the defendant owed a duty to him, the plaintiff to succeed in a claim of negligence, then he has to show that the defendant has a duty that he has breached.[8] In proving whether defendant has breached a duty, then the test will be of 'reasonable or prudent

[3] *Ibid*
[4] (1964) AC 465 (HL)
[5] Elliot & Quinn; Tort Law 6th edition, England, Pearson Longman, p 18
[6] *Ibid*
[7] *Idem*
[8] *Ibid* no.2

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man'. In measuring this, then the question to ask is whether the act or omission done by the defendant would have been done by a reasonable man? If the answer is in affirmative then one will not be condemned to have breached a duty, but if the answer to the question is 'no' then it will be a sufficient ground for an act or omission to constitute the negligence.
In a nutshell, the act committed negligently is measured by the standard of the prudent man as per existing situation defined as per particular case. The amount of care applied by a person who possesses a special skill may differ to large extent from one person or place to another however the standard itself—the care or diligence of careful among others remains the same.[9]

c) Damages caused by the defendant's breach

Claimant must prove that the harm would have not occurred if the defendant could act reasonably. In order to prove the causation of the damage, the plaintiff has to establish that the defendant has the duty of care and that; he has breached the said duty on a particular subject matter. In order to determine the disputed matter which falls on this category, one should ask whether the said damage would have occurred except by the breach of such duty; this referred as the 'but for' test.[10] The position as per this test has been held by the court in *Barnett v Chelsea and Kensington Hospital Management Committee (1968)*. In this case, a night-watchman came at his work place (at the defendant's hospital) while is suffering from nausea, after he took a cup of tea at work. The nurse on duty telephoned the casualty doctor, and he refused to examine the man, and simply advised him to home, relying to the expertise advice a man went back home and died just after a short time. The action was instituted against the hospital for being negligent thought the plaintiff lost the case. The court had the opinion that the defendants owed a duty of care to deceased, and the breached of duty occurred when they fail to make the diagnosis, as a result he lost the life. However, the death had not direct connection with the said breach. The medical evidence proved that it was too late the treatment offered to deceased to rescue his life, since the deceased were reported to hospital at the later stage there hadn't possibility to rescue his life however; the treatment would be possible if it were reported at the early stage. As per this case the hospital is not supposed to be condemned for negligence which resulted to death.

The same position was reached in the case of *Brooks v Home Office (1999)* where the claimant was woman serving her imprisonment sentence in prison while she was pregnant with twins. The medical diagnosis classified that her pregnant is a high risk, so she need the regular ultrasound scans. One of the scans showed that one of the twins was not developing properly; the prison doctor had a little experience in this area of medicine, waited five days after the scan. The affected twin has been discovered to have been died after two days since the scanning was taken. The Home Office sued as he was responsible for the prison service. The bases of the argument were that, she was required to be given the same standard of care as it is given to women outside

[9] Sigh, P. G; *The Law of Torts*, Wadhwa publishers, *New Delhi*, (2004), p. 462
[10] Elliot & Quinn; Tort Law 6th edition, England, Pearson Longman, p 94

the prison. Five-day delay by a doctor since the seeking of expert advice fell below the standard however the death could not claimed to have caused the death.

Development of Medical Negligence law

From Donough's case to Bolam's case

The member of medical professional, before they dully entered into the role of their professional they might take an oath which will bind them to abide with the ethics. Historically, the physicians were taking the *Hippocratic Oath.* From historical perspectives, this oath was taken by physicians as a pledge that they will observe the standard when offering the service to patients. This oath is much familiar in the Greek texts.[11] The Oath requires newly enrolled physicians to swear to the healing gods, that they will uphold the guiding ethical standards.[12] Under the Hippocratic Oath, there are assumptions under which the physicians pledge that they will always work for benefit of the patient and protect the patient from harm.[13]

The medical negligence has ever been rooted from the statute; rather it has been developed by the court of law. The millstone decision have reached by court in *Donough v Stevenson* where the neighbor's principle was developed—'a neighbor' to mean a person who is directly affected with act or omission by the defendant. Actually, this case developed the principle of 'duty of care'. Lord Atkin reiterated that, there existed general duty to take a reasonable care in order to avoid the injury which can be foreseeable to another ('neighbor'). The action arose when a woman in Paisley took a beer (ginger) in which there was a decomposed snail at the bottom. This resulted here to get injury and triggered her to institute a case against the manufactures (of ginger beer) for compensation. The court ruled that the manufacturer company owed the duty to ensure the consumer's safety. It was established that a general duty of care owed to a neighbor; in this case neighbor was defined as 'someone who may reasonably contemplated as closely and directly affected by an act. In this case, it doesn't matter who brought the ginger beer would have suffered the same consequences and could therefore be considered under the 'neighbor' principle.[14]

Medical negligence—ingredients

The medical negligence can be defined to mean an act or omission done by the medical professional personnel particularly the physicians, medical assistant, dentists, nurses, pharmacists among other members of professional—when their practices has been done below

[11] Dr. Sigh, J; Medical Negligence & Compensation, 2nd Ed, Bharat Law publications, 1999, New Delhi, p.3
[12] Ibid
[13] Veatch Robert, M; Hippocratic, Religious, and Secular Medical Ethics: The points of Conflict, George town University Press, 2012 pp 256 available http://www.jstor.org/stable/j.ctt2tt2m7 retrieved on 3rd July 2020
[14] Storey, I *et al; Duty of Care and Medical negligence*, continuing Education in Anaesthesia, Critical Care & Pain, Volume 11Number 4, 2011 p. 124

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the accepted standard and causes the patient to suffer death or injury.[15] The ingredients which are need to establish the medical negligence, does not differ far from the common negligence. Taking consideration from the ordinary standard of negligence, where the court in *Blyth v Birmingham Waterworks co. [1856]* where negligence is defined to mean an act or omission which cannot be done by reasonable person who possesses the same professional and standard, in this, the same test is applied when identifying whether the said action falls on negligence. For the action on medical negligence it has to stand on the same criteria as per common negligence which requires to elements to consist:

1. There must be a duty of care
2. there must be the breach of duty by the defendant
3. The said breach led the claimant to suffer (substantial) damage.

However, arises when a person is in such immediacy to the medical negligence element does not much differ from that of common negligence. For claim on the medical negligence the victim has to build his case on the following pillars:[16]

- That, the health service giver owed a duty of care.
- That, the service provider failed to the care reasonable care he ought to take.
- The complainant has suffered injury.
- The said injury is the result of the conduct of the professionals.

The issue of 'duty of care' among the other ingredients of negligence, is the cornerstone whenever the claim on negligence is raised, the claimant have to ensure that the proof is made, that medical expert had owe the professional duty. Lord Justice Gould enunciated that, the medical duty the health provider. The doctor-patient relationship important—the duty of care is automatically arises when a patient is admitted to hospital, the same duty can be applied both to doctor and the admitting team who comes into contact with the patient.[17]

The Medical duty of care

The common law test for the breach of duty of care was given by English court in *Bolam v Frien Hospital Management Committee [1957]* (which is popularly referred to as 'the Bolam test')[18] the victim named Bolam express his willingness to be a patient at mental health institution which run Hospital Management Committee of Frien Hospital. It was agreed that he had to undergo the electro-convulsive therapy. In the course of making the said therapy, the muscle relaxant had to

[15] Md Rafiqul Islam Hossaini (2016);*Medical negligence in Bangladesh: criminal, civil and constitutional remedies)*, International Journal of Law and Management vol.58 No.0, 2017 p.3

[16] *Ibid*

[17] Daniel Bryden &Ian Storey; *Duty of care and Medical negligence,* continuing Education in Anaesthesia, Critical Care & Pain, Volume 11 Number 4, 2011 p.125

[18] Nicholas v Todd; *Medical* negligence. An overview of legal theory and neurosurgical practices: duty of care, *British Journal of Neurosurgery, April 2014*, p 209

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be administered something which was not done. This led the victim (Mr. Bolam) to suffer some serious injuries, including fractures of the acatabula. This made him to raise the action against Hospital Management Committee for compensation. Bolum reasoned that he should have been anaesthetized and if it would have been done so then no fracture would have been occurred. The court agreed with the team of expert which submitted that the fracture would not have occurred if the victim (Mr. Bolam) had been anaesthetized. As per this case, the court laid down the following principle:

> The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that that particular art…in case of medical man negligence means failure to act in accordance with the standards of reasonably competent medical men at the time…therefore be one or more perfectly proper standards; and if a medical man conforms with one of those proper standards then he is not negligent…; a doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art…putting I the other way around a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view. At the same time, that does not mean that a medical man can obstinately and pig-headedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion. Otherwise you might get men today saying "I don't believe in anaesthetic. I don't believe in antiseptics…"[19]

For the people with the professionals and special skills they are required to show the high standard of competence as the ordinary standard which would be expected to be offered by any other member of that profession. A defendant who falls short of that level of competence, with the result that damage is done is likely to be held negligent.[20]

The House of Lord's *dictum* in *Chester v Afshar (2004)* reiterated that professionals not only owed a duty to take rational steps but also to insure that when giving advice they have to give right and sound advice on the bases of their profession as well as expressing the thinking behind that device.[21] In this case the claimant received the back problem operation by the defendant surgeon, when recommending the surgery; he surgeon had not to inform the patient on the side effect when the operation is carried out. After the operation had been carried out, the claimant

[19] Bolam v Frien Hospital Management Committee [1957] 1 WLR 583
[20] Elliot & Quinn; Tort Law 6th edition, England, Pearson Longman, p 81
[21] Ibid p. 84

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suffered severe nerve damage something resulted to one leg paralysis. The doctor was sued. The House of Lords found the doctor not negligence as he carried out the operation. The paralysis was something that could happen even when the surgery was carried out properly, as it had been there. The House of Lords stated the surgeon's failure to give warning to the victim on the risk which he will incur is negligence. The warning which is given to the patient will give him or her chance to choose whether or not to accept the consequences. The house conceded that it was the doctor's duty to provide the information to the patient.

MEDICAL NEGLIGENCE IN TANZANIA: THE GENERAL OVERVIEW

The medical negligence as in the other common laws countries falls under the professional and special skills. Under the medical profession who falls under this category, especially physicians, dentist, nurse, medical assistant, pharmacist or any other medical service providers[22] will be liable for medical negligence for their acts or omissions if they will exercise their skill below the degree of competence. For example, in the patient-doctor case, there will be established the breach of duty by doctor when the doctor-patient relationship has been established. The duty of care for medical profession especially under the doctor-patient relation arises when a patient is admitted to hospital. Not only the doctor who is in contact to the patient will have the duty but same duty extends to the admitting team. In case of any injury even the can involved into the case.[23] For example, a patient who has a cardiac arrest on a hospital corridor is owed a duty of care by any doctor who happens to be passing.[24] The elements which, when appears to exist in the course of negligence to be proved—*duty of care, breach of duty and damage caused by such breach*[25] are also required to be proved the question of medical negligence arises. The law defines the 'professional misconduct' to mean the conduct done by the medical, dental, and allied health professional personnel, which fall short to the standard expected to be met by a member of the profession, as such a failure the law consider them unacceptable or dishonorable to profession.[26]

The Nurses and Midwives in Tanzania works under the guide called The Code of Ethics and Professional Conduct.[27]The said Code of Professional Conduct is established by Tanzania Nursing and Midwifery Act, 2010 (here in after 'the law') which came into force in July 2015. Under this provision of law the Council is made an overseer of this profession.[28] The Council among other powers has the mandate to receive the complaint which relates with misconduct by

[22] Md Rafiqul Islam Hossaini (2016);*Medical negligence in Bangladesh: criminal, civil and constitutional remedies),* International Journal of Law and Management vol.58 No.0, 2017 p.3
[23] Daniel Bryden &Ian Storey;*Duty of care and Medical negligence,* continuing Education in Anaesthesia, Critical Care & Pain, Volume 11 Number 4, 2011
[24] Ibid
[25] *Blyth v Birmingham Waterworks Co. [1856]* and Donough v Stevenson (1932)
[26] Section 3 of the Medical, dental and allied Health Professional Act, 2016.
[27] Made by Tanzania Nursing and Midwifery Council, 2015
[28] Section 6(e) of Nursing and Midwifery Act, 2010 establishes the Tanzania Nursing and Midwifery Council

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nurses or midwives. The council has established the etiquettes[29] which they supposed to adhere with. The Nurses and Midwife are enrolled under section 15 of the Act.[30] The law has included to the nursing practice, those individuals or group of people who do as assistants in maintaining the basic health the whole time of the life process by conveying their health status establishing nursing finding, evaluation responses for care and treatment and provision of nursing care among others.

The conducts which regards to disgraceful, dishonorably or unworthy ―as per the nursing or midwifery professional is amount to Professional misconduct. Under this 'code of ethics'[31], the Nurses or Midwifery pledges to the public to honor, abide and adhere to the professional conduct when offering services. The pledge implies the commitment that he promises to the patient and the community at large. The pledge is given by the Nurses and Midwives during the completion occasion. This is what they promise:

> I…….Solemnly pledge myself before God and in the presence of this assembly; to pass my life in purity and practice my profession faithfully.
> I will abstain from whatever deleterious and mischievous and will not take or knowingly administer harmful drugs.
> I will do all in my power to elevate the standard of my profession, and will hold in confidence all personal matters committed to my keeping and all family affairs coming to my knowledge in the practice of my profession.
> With loyalty will endeavor to give to my clients and devote myself to the welfare of those committed to my care.[32]

The vow makes the Nurses or Midwife personally liable for their practice, in case they fail to honor their obligation as per established Code of professional conduct. When caring for patients and clients, the nurses or midwife have to observe the following principles:

1. Giving value to humanity and life
2. Obtain consent before providing care
3. Maintaining proficient competency and improvement
4. To accept liability and being accountable for their acts
5. Be honest and exercise fairness
6. interconnection with others and team working
7. Protect confidential information.

[29]The Code of Ethics and Conduct for nurses and midwives is a guide for nurses and midwives
[30] The Nursing and Midwifery Act, 2010
[31] Code of Ethics and Professional Conduct for Nurses and Midwives in Tanzania―established by Tanzania Nursing and Midwifery Council, 2015
[32] Id. p. 11

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If you read all guidelines properly, all establishes the duty of care for nurses or midwifery when caring for the patients of clients. Whenever there's the breach of duty then the same will attract the professional negligence case to be lodged.

Common examples of Medical Negligence cases:

Most of the time, medical negligence occurs when members of the medical profession (such as doctor, nurses etc) offers to the patient improper or harmful medication.[33] When the medical professionals mistake occurs, it sometimes difficult for many of people to identify but they occurs very often. The most reported errors in the angle of medical negligence are as follows:[34]

i. Misdiagnosis

There are many cases from various jurisdictions in which the matter of such nature occurs. Most of the time the Medical negligence case involves misdiagnosis or delayed diagnosis mostly is when a patient with a serious illness delayed or misdiagnosing it can leave serious effects on a patient. Failing to diagnose a patient correctly can hinder them from receiving effective treatment early on. You will find a patient was not properly diagnosed in one hospital or a health centre by a well skilled doctor, and he took an action to seek more medical treatment in another hospital the cancer is discovered but to late as it result death.

ii. Incorrect medication

Medication to the patient should be given subject to the prescriptions to avoid harm. Improper medication has been blamed by many; especially when wrong prescriptions of drug's use are given to cover the illness or when the medication of one patient has been given to another. This results to the victim to suffer another problem. For example a patient has been the pills which should be given to a person suffer the heart failure, and then the improper administration will leave him or her with the problem. Sometimes this problem can be catalyzed by improper record-management and because many are ignorant with their right then they fails to report the problem for redress. Sometimes a patient may receive an incorrect dosage by the errors made by a doctor, or because a nurse misread a report and administer the wrong dosage. Incorrect administering of dosage is amount to the medical negligence. Some of professional negligence made by medical professionals seems to be difficult to identify, but when identified then the redress may be sought.

iii. Surgery Mistakes

Surgery mistake can be done by the surgeons in operation theatres in which the high standard of care should be applied. It is great mistake when the surgeon leaves the surgical tools in the body

[33] https://www.schreuders.com.au/common-examples-of-medical-negligence-cases/ retrieved on July 3rd 2020 at 13:08 pm

[34] https://www.schreuders.com.au/common-examples-of-medical-negligence-cases/ retrieved on July 3rd 2020 at 13:08 pm

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in which they can result the punching another organs all cause the infection or serious harm to the body. Though leaving of tools into the body of the patient when the surgery is taking place is occurs rarely in many place and when it happen it leaves a very serious injury to the victim.

iv. Anesthesia administration

Anesthetic management is something very sensitive in medical treatment. It has been regarded as the most serious medical negligence if an error is made involving anesthesia administration. If the anesthesiology made a mistake in administering anesthesia then the patient may suffer the permanent brain damage and even death. Among the medical negligence which can be done by anesthesiologist includes the failure to inquire a patient history, inadequate delivery of information about the risk, using faulty equipment or administering too much anesthesia to a patient.[35]

The position laws pertaining medical negligence in Tanzanian legal, still there is no a comprehensive in which somebody can rely in case there is any infringement. Not having the comprehensive law in relation to medical negligence which is almost occurring everyday in one way or another, denies the victim the proper avenue with reference with the law which would victim to rise an before the court of law.

Judicial reaction on medical negligence cases

The professional negligence particularly for medical in Tanzania, has been rooted from the judicially reaction. In the case *Theodelina Alphaxad Minor s/t next friend v The Medical Officer I/C, Nkinga Hospital*[36] in the High Court of Tanzania at Tabora. This case has made a precedent on medical negligence in Tanzania. The matter was instituted by claimant (the next friend of Theodelina Alphad, a minor of six years aged against the Medical Incharge of Nkinga Hospital claiming Shs. 5,000,000/= as a damage with interests, and costs of the suit, and such further reliefs as may be commensurate to the occasion, for the loss of the left fore-arm, that was amputated, claimedly and allegedly, because of faulty and negligent treatment of the same, by the defendant. The court directed itself to the two importance issue in respect to the case brought by it—whether Nkinga hospital was negligent in the medical treatment of Theodelina Alpha, as to lead to limb amputation and. What relief(s), if any, are the parties entitles to? In respect to the issues raised, the court held that;

> If a person is admitted as a patient by a hospital, and is, in medical treatment occasioned injury through the negligence of some medical staff, it is unnecessary for him to pick upon any identifiable particular employee for suing purposes. The said hospital is vicariously liable;

[35] Kone J, El Bouychi MA, Tsala G, Bensouda A, (2015), *Anesthetic Management of an A trial Septal Defect in Adult.,* Case Report. J Anasth Crit care open access 3(5): 00112 DOI: 10.15406/jaccoa. 2015.03.00112

[36] [1992] TLR 235

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> Where the doctor, consultant, etc. are selected and employed by the patient himself, the question of vicarious liability by the hospital does not arise, and such liability does not attach to hospital;
>
> Where in a hospital, the doctor engaged, has seen him and the patient, established the doctor and patient relationship, by accepting him/her for treatment purposes, the said doctor has a duty of care, and has to exercise the same with skill attendant to modern medicine surgery, under permitting circumstances. Such general duty is not subject to dissection into a number of component parts, to which different duty of care apply, or combination of both, i.e. that the investigation and, or treatment of the plaintiff was in accordance with current standards of medical practice, or, that, the plaintiff's injuries were not caused by any negligence on behalf of defendants.

In per standards established in the common law cases in relation with the professional negligence, medical negligence in particular, the same has been decided in this case. Justice Katiti in *Theodelina Alphaxad's case* (Supra) laid the possibility for the medical negligence to be instituted against an individual (a doctor/ medical practitioner) where the profession misconduct has occurred at the time the patient-doctor relationships exists. But also the institution can be sued as well, under vicarious liability (the liability can be attached to the hospital) for medical negligence.

Medical negligence occurring almost every day in one way or another and the majority of victims fails to realize the legal mechanisms to address their matter. When a victim has been overdosed or when a patient is prescribed a wrong drug by doctor or medical attendant (in the hospital or pharmacy) and said action by medical practitioner has left the injury however slight is, it amount to negligence. The important thing is for victim to prove beyond the standard of probability that the injury suffered would have been not occurred if the medical practitioner would be acted within the reasonable standard.

A person who offers the medical advice and treatment is believed to have been acquainted with the said knowledge which he offers. The skill he possesses can give him a rational judgment on whether to take a case to decide the treatment as well as administering the treatment. Murphy has termed it as an 'implied undertaking' on the part of medical professional.[37] It have been argued, however the specialist is well acquainted to a certain angle of medical professional still he can make a mistake either in detecting or in making diagnosis on true nature of a disease. A doctor

[37] Murthy, KKSR; Medical negligence and the law, *Indian Journal of Medical Ethics, vol. 4* DOI: http://doi.org/10.2059/IME. 2007-046

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cannot be held liable for any harm occurs to the victim rather when it has been proved that a said doctor has acted below the ordinary standard of skill.[38]

Redress on Medical Malpractice in Tanzania

In Tanzania, there is the Medical Council of Tanganyika—statutory body established by Tanzanian laws with legal powers to oversee the medical and dental practice in Tanzania public against undesirable practices.[39]

Powers of the Medical Council of Tanganyika

The Medical Council of Tanganyika (her in after 'Council') assumes the number of functions, among other function is to make a general supervision on the medical, dental and allied health professionals conduct; to caution, censure, suspend from practice, erase from the Register, Roll and list of names of practitioners, after being found guilty and convicted of an offence of professional misconducts; to receive complaints and inquire whatever the charge or allegations raised against any medical dental or allied health professionals recognised by the law based on the improper conduct.[40] For the matter of matter of professional misconduct, the medical, dental or allied health professional conduct, then the council may exercise its power by giving the warning, suspend a person from the practice or erase from the Register among other powers which can be taken by the council.[41]

The procedure to lodge the complaints before the Council

The law requires all the complaints to be instituted to the Registrar before referring matter[42] to the Council.[43] Those complaints to be lodged to the Registrar are those in respect with the medical, dental or an allied health professional. Sub-section 2 of section 43 of the Act, lays-out the conduct if done by a medical, dental or an allied health profession will make him or her being disqualified from the practice among other conducts is where a person breached a code of ethics, has committed malpractice, negligence, to use the abusive words against the client, in any other way, whether physical, sexually or abandoning a patient who is in need of attention etc.

In lodging the complaints to the registrar, the complainant should make it into a written statement on his/her behalf or someone interested in the act giving rise to the complaint. [44] After

[38] Observation of Lord President Clyde in *Hunter v. Hanley* (1955) STL 213. In: Nathan HL. Medical Negligence. London: Butterworth; 1957

[39] Is statutory body established under Section 3 of the Medical Practitioners and Dentists, Act [Cap 152 RE: 2002] the replaced by and the same council re-established under Section 4 of the Medical, dental and allied Health Professional Act, 2016.

[40] Section 6 of the Medical, dental and allied Health professional Act, 2016

[41] Section 7 of the Medical, dental and allied Health professional Act, 2016

[42] After the Registrar has received the complaints he will forward to the matter to Council

[43] Section 43(1) of the Medical, dental and allied Health professional Act, 2016

[44] Section 43(4) of the Medical, dental and allied Health professional Act, 2016

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the complaints being submitted to registrar who referred to the Council, it may initiate an inquiry against a member of profession *suo mottu* subject to information it has received if satisfied that the information received warrants to begin the preliminary injury.[45]

The procedure of making inquiry before the Council, the complainant should establish the *prima facie* case for the direct inquiry to be held.[46] The defendant will be given an opportunity to answer the alleged misconduct either himself or by legal representative. The consequence for non-appearance by defendant may result the Council to proceed *ex parte*.[47] Then the decision of the inquiry by the Council then will be served in respect of whom an inquisition was held.[48]

The complaints before the Court (the High Court of Tanzania) will be lodged by the way of appeal by the aggrieved party within thirty days since the decision of the Council delivered.[49]

Medical negligence—common defences

Defences like in other torts, differs from one tort to another[50]. Like in other torts, also medical have the specific defences in which if well established by the defendant will help him or her not being liable. Like in any other civil or criminal suits where a defendant can raise the defences; in medical malpractice cases defendant may raise the defence put him free from liability. One can raise a defence on malpractice case on the following bases:[51]

a) Foreseeability

Generally, the foreseeability test, in negligence three elements has to be proved, namely: duty, breach of duty and damage. The damage required in this context which must flow from the breach of the duty to take care must be proximate that is there must be a direct link between the two, like "cause" and "effect".[52] In relation with the medical negligence, a doctor can only be held accountable if he early knows the risk which will face the patient on his care and he failed to exercise such care. In order words, they are responsible for protecting against anticipated risks or dangers. However, the doctor may claim that the injury was an unforeseeable upshot of the medical treatment. In *Roe v Minister of Health*[53] two claimant were anaesthetized and waiting for a minor operations. It was alleged that, the anaethetic which were injected was alleged to have been contaminated with a sterilized fluid. The claimants became paralysed as a result of the injection. The anaesthetic contamination occurred during the storage. The glass ampoules were

[45] Section 43(5) of the Medical, dental and allied Health professional Act, 2016
[46] Section 44(1) of the Medical, dental and allied Health professional Act, 2016
[47] Section 44(3) of the Medical, dental and allied Health professional Act, 2016
[48] Section 45 of the Medical, dental and allied Health professional Act, 2016
[49] Section 46 of the Medical, dental and allied Health professional Act, 2016
[50] Elliot & Quinn; Tort Law 6th edition, England, Pearson Longman, p 111
[51] https://www.apmlawyers.com/practice/medical-malpractice/the-top-5-defences-to-medical-malpractice-claims/ retrieved on 8th July 2020 at 04:10 PM
[52] Binamungu, S.c; Law of Torts in Tanzania, Research, Information and Publications Department, (2002), p 50
[53] [1954] 2WLR 915 Court of Appeal

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used to store anesthesia which were emerged in the sterilized fluid. It was proved that ampoules used to store anesthesia had the cracks which were not easily detected with naked eyes. In keeping anaesthetic safe from contamination, the hospital took all reasonable precaution required in making the storage. It was not in the knowledge of the normal procedures used for storage could cause the anaesthetic be contaminated. The court held that the risk was not foreseeable and it declared that there was no breach of duty.

b) Patient has caused or contributed the injury

The court of law hearing a matter which arises out of the matter of death or injury caused by negligence, then it will direct its mind to ascertain whether there had the issue of contributory negligence among the parties.[54] The court, in order to come out with the sound and genuine judgment then it will direct itself into the following issues: 1) whether the death has occurred because of defendant's negligence. 2) Whether the deceased's or the plaintiff's negligence was solely responsible for the death or injury; and 3) whether both parties have the contribution to the occurred death or injury.[55] In response to claims raised by claimant (victim) on negligence, the bases of allegation can be the injury suffered by patient is the resulted from non-compliance from proper medical advice. For example, the prescription of the doctor to patient is that, a patient had to attend for a chest X-Ray as per his failure he died from undiagnosed lung cancer.

c) a risk was not recognised

Practice wise, before the large operation is taken place, a doctor has to notify the patient on the consequences (whether positive or negative), then a patient if he is of the sound mind may express his or her consent before the operation it carried out. Most of the time expression of his or her signification should made in writing and the records will be kept. If the patient is incapable to give out the consent then the closely relatives may give the consent on his or behalf. But sometimes, both the situation of someone to give consent cannot happen. For instance a doctor is attending a one has fatally injured by car accident, and no one could assist him. Under this circumstance a doctor will no longer wait for the consent rather he will act upon his profession and the best of his skill in order to rescue the life. Presumably, no one would deny giving consent in helping a patient. In this case if doctor has reasonably explain the risks to the patient and patient himself or on his behalf agrees to assume the risk then a doctor will not be held liable for injury considering that he acted on the ordinary standard.

d) if a doctor was not a cause of the injury

If is happen that victim before is taken to hospital for medication has passed through some local means of getting treatment from people who are not legally qualified to offer treatments something which led his disease not to be identified, and when the situation reached at the climax then he is taken to hospital and the problem being discovered (let assume that the disease discovered is censer) if the cancer will led victim to lose his leg then a doctor cannot be blamed

[54] Sigh, P. G; *The Law of Torts,* Wadhwa publishers, *New Delhi,* (2004), p 544
[55] Sigh, P. G; *The Law of Torts,* Wadhwa publishers, *New Delhi,* (2004), p 545

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to why he has failed to highly exercise his ability in order to rescue victim from losing a leg while the improper treatment was initiated by someone else. A doctor may be able to defend himself that, if the matter reported at the early stage the medication could be possible, the moment used by a victim to seek treatment from unprofessional personnel would be sufficient to cure the problem if it were to be reported early. Under this circumstance a doctor would claim that he is not responsible for the injury caused.

e) the injury before the one

Let take this example, a doctor has exercised a reasonable standard when doing the surgical treatment to patient who had had other kind operation before the one carried recently. If the injury has occurred during the current operation in because of the effect caused by the previous treatment then the doctor's defence can be, the injury (problem) caused was not as result of negligent surgery rather it has been caused by the previous surgeries.

Conclusion

The medical negligence tort is new area for majority of people, though many people are victim in one or another. This is proved by number of cases reported and the judgment delivered thereto. To establish the negligence in respect with medical professional, three pillars should be raised strongly. One, there must be the duty of care (where the doctor-patient relationship should exist); second, breach of duty, and last. The damage caused by such breach. If altogether exists then the complainant will have the sound ground to lodge a case. The medical negligence does not end only to doctors; rather it extends to other officers for instance the nurses and midwifes who have pledged to protect the life of the patient among the thing by observing the code of professional conduct, and the violation of rules (e.g. using the abusive words to patient/clients) will be the good grounds for victim to file the complaint against a nurse/midwife for professional misconduct.

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