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Review Article

Researching Into Medical Law and the Surge in Medical Negligence in Ghana: Proposition for a Specialized Healthcare Court to Deal with Such Cases

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Abstract

Medical law and health law are the subject matter of this study. Medical negligence is a branch of medical law and covers all medical activity on the view of carelessness and rashness. *In Frimpong V Nyarko [1998-99] SC GLR 734*, where the Supreme Court was confronted with a problem whereby applying the law would have severe consequences on the party, Wiredu JSC(as he then was) said at page 742: *" The justice to be dispensed is justice within the law and not one of sympathy. Judicial sympathy, however plausible can never be elevated to become a principle of law. The appellants are out of court, and their case would deservedly be put out of court in accordance with law"*. Again taking a cue, in my respectful opinion, no matter how strong the sympathies I may feel for the Plaintiffs that cannot override the principles of law that I have applied. Is the principle of law as applied in medical negligence against patients? Maybe, Prof. Justice Date-Bah has the answer, "Medicine and the Law is a battle area and we need to bring the rule of law into that area. In Ghana, it is said that health professionals never testify against themselves and therefore there is a real hurdle to litigation of medical malpractice cases. It is important that health professionals should put the public interest first. On the other hand, we do not want to go the other way such as in America where doctors may fear to touch patients for fear of malpractice. There has to be a middle way somewhere". In recent times, there has been a surge in allegations of medical negligence cases against medical professionals in Ghana in the media. This has become worrisome, resulting in some media houses waging a war on medical negligence. This paper therefore aims to conduct extensive review on medical negligence and the legal principles applied. It also aims to create awareness on medical negligence, provides futuristic policies in medical law direction in Ghana. The author recommends a specialized healthcare court and legislative instrument for a clear legal pathway for patients to curb the cases of alleged medical negligence.

Keywords: Medical Law, Negligence, Malpractice, healthcare court, legislative Instrument.

INTRODUCTION

I would like to begin this discussion with this quote from this case, *Frimpong V Nyarko [1] SC GLR 734*, where the Supreme Court was confronted with a problem whereby applying the law would have severe consequences on the party, Wiredu JSC(as he then was) said at page 742:

". The justice to be dispensed is justice within the law and not one of sympathy. Judicial sympathy, however plausible can never be elevated to become a principle of law. The appellants are out of court, and their case would deservedly be put out of court in accordance with law"

Again taking a cue, in my respectful opinion, no matter how strong the sympathies I may feel for the Plaintiffs that cannot override the principles of law that I have applied. In recent times, there has been a surge in the media on alleged cases of medical negligence in the country. This is quite disturbing for our country and the medical profession. The medical profession should do everything possible to avert proliferation of law suits against their industry in this country as pertains to the advanced countries. In the advanced countries, proliferation of such cases had created liabilities for the medical practitioners. This also has it negative stance as more doctors tend to practice defensive medicine and placing burden on the patients.

Medicine and the law

According to Dr. Beates, the legal interpretation of what constitutes the practice of medicine and which has played havoc with the laws regulating its practice is as follows:

i. "To practice medicine is to treat diseases and accidents by means of drugs or medicines, and if the treatment of these is conducted without drugs or medicines, one so doing is not practicing medicine." If we add to the above that the practice of surgery, as defined by certain courts, consists in the treatment of disease or disability by means of the knife, or other surgical instruments, we will have an idea of the narrow and false construction put upon these terms by certain courts [24].

Also in *Smith v lane, 21 Hun (N.Y.) 633[2]*, lays the foundation of medicine and surgery: "The practice of medicine is a pursuit very generally known and understood, and so also is that of surgery. The former includes the application and use of medicines and drugs for the purpose of curing, mitigating, or alleviating bodily diseases, while the functions of the latter are limited to manual operations usually performed by surgical instruments or appliances."

The Rule of Law and Medicine

According to Prof. Justice Date-Bah, "Medicine and the Law is a battle area and we need to bring the rule of law into that area. In Ghana, it is said that health professionals never testify against themselves and therefore there is a real hurdle to litigation of medical malpractice cases. It is important that health professionals should put the public interest first. On the other hand, we do not want to go the other way such as in America where doctors may fear to touch patients for fear of malpractice. There has to be a middle way somewhere" he said this in 2018 during a workshop to train healthcare professionals on medical law.

What could go wrong with proliferation of suits against doctors?

As Prof. Date- Bah asserted "On the other hand, we do not want to go the other way such as in America where doctors may fear to touch patients for fear of malpractice". Malpractice in law refers to "any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practices, or immoral or illegal conduct."

Meaning that, practising medicine without a valid license is a ground for a malpractice suit as well. Negligence on the other hand, refers to *"carelessness or failure to take reasonable and prudent measures to ensure that others are not harmed by one's actions".* It may include performing an action incorrectly (*commission*) as well as failing to take appropriate action (*omission*). Incorrect performance of an otherwise proper or lawful act is known as *misfeasance*, while failure to perform a necessary action is called *nonfeasance.* Malpractice and negligence are classified as *torts*, which are civil cases involving wrongful conduct that result in harm to another person or to property. Studying law and practising holistic medicine actually opened up my understanding in the healthcare industry. The subject of my interest is tort law; this is where you would see the many suits cases against medical professionals. Tort law covers intentional as well as unintentional acts. It is decided by common (*court) law* rather than *statutory law*; that is, a civil court rather than the legislature determines whether a wrongful act involves tort liability.

Malpractice litigation is generally considered a contributing factor in the shortage of physicians in many parts of the United States and in the rising cost of healthcare. In February 2005 the American Medical Association reported to the United States House of Representatives that 20 of the 50 states are in a crisis situation because of the numbers of physicians leaving the practice of medicine altogether, relocating to other states, or no longer performing certain procedures because of the risk of litigation. One study found that ***48%*** of medical students mentioned liability as a factor in their choice of specialties, as some specialties (emergency medicine, obstetrics/gynecology, neurosurgery, orthopedic surgery, and radiology) are at considerably higher risk of malpractice lawsuits than others. Another group of researchers [3] reported in 2005 that 93% of the physicians they surveyed practiced so-called *defensive medicine*; that is, they ordered imaging tests and diagnostic procedures that were not always clinically necessary. Another 43% of survey respondents reported that they had restricted their practice in the preceding three years by eliminating complex procedures or by avoiding patients perceived as likely to sue.

"Assurance behavior" such as ordering tests, performing diagnostic procedures, and referring patients for consultation, was very common (92%). Defensive medicine is highly prevalent among physicians in Pennsylvania who pay the most for liability insurance, with potentially serious implications for cost, access, and both technical and interpersonal quality of care.

In a 2002 poll, Harris Interactive surveyed 300 physicians, 100 hospital-based nurses, and 100 hospital administrators. Physicians responded that they order unnecessary tests (79% of respondents), make unnecessary referrals (74%), suggest unnecessary biopsies (51%), and prescribe unneeded antibiotics (41%) with the goal of protecting themselves against malpractice claims.

Examples of unnecessary care and avoidance of risky care include performing breast biopsies in women with lumps unlikely to be cancer, hospitalizing

low-risk patients with chest pain, and eliminating high-risk procedures or abandoning the practice of medicine altogether.

The Case for Argument

Recently, the Director of the Ghana Institute of Languages, Dr Emmanuel Kuto, whose wife lost her life at the Greater Accra Regional Hospital (GARH), Ridge Hospital, started campaign to raise awareness on medical negligence. Speaking on Angel FM morning Show hosted by Captain Smart, on 29th June, 2020 to be accessed at https://www.ghanaweb.com/GhanaHomePage/entertainment/I-don-t-have-a-womb-Nana-Yaa-Brefo-reveals-993244.

He revealed how doctors offered his wife a wrong medication which led to her unfortunate demise. Dr Kuto further revealed that following the airing of his sad story, authorities at the hospital have called him into a meeting. His story is similar to that of Mustapha Muhammad who lost his wife at the same facility somewhere last year when she had gone to deliver her first born. According to him, the medical officers at Ridge Hospital later accused him of failing to provide the needed medicine for the surgery. "And this is not true…," he told Captain Smart.

The story of Mustapha's late wife was enough to push Nana Yaa Brefo Danso to make public her long-held secret. "Do you know that as I sit here, I am like you, there is no difference between you the man and me sitting here? What makes me a woman is missing, I have no womb…yes, I have had to live without a womb for 13 years…," she revealed on the show. "I almost died at the time…I got to a time that I found it difficult to even walk, I lost that baby because of this negligence and I stayed in the hospital just to take care of the baby I lost. Nana Yaa further revealed that she had to wear a catheter as a result.

The Problem with suing Public Hospitals

In practice, the challenge with suing these government hospitals is that, it is the same public purse that would eventually suffer if the plaintiff wins. This is due to the fact that, medical staff working at these public facilities have been employed by the government, hence, they are sued through the Attorney General and the Ghana Health Service for medical negligence due to vicarious liability in tort. For private facilities, it is easier and the purse of the private owners suffers! So private hospitals staff turn to take extra measures in dealing with patients so they do not lose their livelihoods.

What the patient needs to know is that, when you receive treatment at a medical facility, you are typically attended by more than a treating doctor. Other doctors may visit you and help in diagnosis, a technician may perform medical tests on you, and a nurse may perform a variety of other tasks. When medical negligence occurs in such a case, it is harder to determine exactly who was responsible. In such and other scenarios, the principle of vicarious liability may apply. Vicarious liability is when a parent or superior entity, such as the hospital, is held responsible for the negligence of its employees. In doing so, the theory of respondeat superior is used in a malpractice lawsuit.

DISCUSSION

Based on their stories, there are two typical situations where a doctor might be held liable for negligence: the first is negligence in the performance of a medical procedure (*The old Mantra*); and the second is failure to disclose the risk of a medical procedure to the patient for the purpose of getting consent (*The new mantra*). The first discussion will centre on the Traditional Bolam Test and the second will be on the new Montgomery [4] test. When an issue of medical *negligence* arises and the medical blunder has resulted in a patient being injured, the medical practitioners involved in that medical treatment may be liable for any injuries caused, for medical practitioners in general owe a duty of care to patients.

The duty of care owed by a medical practitioner to a patient and the standard of such duty

Duty of Care

Standard of Care

It is well-established that a medical practitioner owes a legal duty to take reasonable care to avert undue harm and injuries to a patient under the medical practitioner's control. As set out in the *locus classicus* is Bolam *v Friern Hospital Management Committee [1957] 1 WLR 582*, the standard of care required of a medical practitioner is the standard of the ordinary skilled person exercising and professing to have that special skill. In other words, the person need not possess the highest expert skill at the risk of being found negligent and it is sufficient if the person exercises the ordinary skill of an ordinary competent person exercising that particular art. In case where a medical practitioner fails to meet the required standard in the course of exercising his or her professional skills, he or she will breach the duty of care owed to his or her patient. Nevertheless, not every single error of judgment will amount to medical negligence.

The English House of Lords decided in *Whitehouse v Jordan [5] 1 WLR 246* that an error of judgment will amount to medical negligence only if such error would not have been made by a reasonably competent medical practitioner with the standard and the type of skill concerned, acting with ordinary care. McNair J. in *Bolam Case* had this to say in negligence: I must explain what in law we mean by 'negligence.' In the ordinary case which does not involve any special skill, negligence in law means this: "Some failure to do some act which a reasonable man in the circumstances would do, or doing some act which a reasonable man in

the circumstances would not do; and if that failure or doing of that act results in injury, then there is a cause of action ... But where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. 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 particular art".

Interesting, in Harry Street, *The Law of Torts (7th ed) at 117* [6] it is stated: "*When a person has held himself out as being capable of attaining standards of skill either in relation to the public generally, for example, by driving a car, or in relation to some person for whom he is performing a service, he is required to show the skill normally possessed by persons doing that work. A doctor failing to diagnose a disease cannot excuse himself by showing that he acted to the best of his skill if a reasonable doctor would have diagnosed it. One must, in this class of case, be careful to ascertain exactly what skill the defendant held himself out to have*."

The Ghanaian Perspective

In Ghana, for instance, an appeal by the plaintiff against the judgment of the High Court, Kumasi presided over by Okyere J, by which the plaintiff's action against the defendants was dismissed. The case had to do with *Gyan v. Ashanti Goldfields Corporation [7] 1 GLR 466* where a senior nurse at the out-patient department of the Defendant Company's Hospital at Obuasi mistakenly thought that the child of the Plaintiff was suffering from malaria and gave him a chloroquin injection without any prior test or reference to the doctor on duty. It turned out that the child had polio and not malaria and so the injection led to the paralysis of the infant child's right leg. The plaintiff sued per his next friend, his father, for negligence on the part of the Defendants' Hospital servant. The Defendant denied liability and called a specialist to testify on its behalf that giving the injection without diagnosis was not out of place. The main ground of negligence was the contention that if a proper diagnosis had been made prior to the treatment, it would have been discovered that the plaintiff was suffering from polio or at least, polio should have been suspected. The Court of Appeal stated the law in regards to medical negligence when it dismissed the Plaintiff's appeal because the trial Court ruled against him that:

"When a plaintiff pleaded negligence against a defendant, he could not succeed in a court of law if he did not substantiate by credible evidence the allegations of negligence upon which his claims was based. In the instant case, since the negligence alleged related to the practice of medicine, it implied negligence in the exercise of a particular skill. The true test for establishing negligence in diagnosis or treatment on the part of a doctor was whether he had been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care. Therefore as the evidence on record showed that the nurse who treated the infant plaintiff did what most, if not all, medical men would have done in the circumstances on that occasion and as the plaintiff had failed to lead any evidence to substantiate his allegation that the nurse had failed to follow laid down medical regulations, the plaintiff had failed to prove that his paralysis was attributable to any omission or negligent act of the defendants and the action would therefore be dismissed".

However, On the basis of the law and the facts, the Court had this to say: *"I find that the nurse was negligent in attempting to play the role of an experienced doctor on his own with the serious consequence of crippling the plaintiff for life. I accordingly, find the Ashanti Goldfields Corporation vicariously liable".*

The Court *allowed* the appeal and *awarded* the total expenses claimed by the Plaintiff being ¢94,000. In another recent case involving *Dr. Sandys Abraham Arthur v. The Ghana Medical & Dental Council Civil Appeal No: H1/214/2012[8]*, the learned Judge, Ofoe JA in his concurring judgment stated the law as "I will agree with the appellant when he contended that in diagnoses and treatments there are differences of opinion between medical officers. A medical officer is not negligent merely because his conclusion differed from the other professional or because he displayed less skill or knowledge than the other", this is akin to the case in *Hunter v. Hanley 1955 SC 200 and Whitehouse v Jordan [9]*.

Also in *Wiafe v. Kom [10] 1 GLR 240*, the *Court* held that: "*In the assessing of evidence and the weight to be given to it, the correct principle is as stated by Lord Mansfield that "all evidence is to be weighed according to the proof, which it was in the power of the one side to produce and the power of the other to have contradicted". In the instant case, according to the learned judge, "I have not been impressed with the evidence adduced by the Plaintiff as it did not in my opinion satisfy the evidentiary standard on the balance of the probabilities to enable the Plaintiffs succeed*".

In the case of *Obeng v The Republic [11] 2 GLR 107* Christiana became pregnant by her boyfriend, a school boy. She therefore conceived of the idea of terminating the pregnancy. The name of the appellant was mentioned to her and she sought him out. Before then, she had discussed her intentions with a friend, Georgina Afriyie, who expressed her fears about the course of conduct proposed and endeavored

unsuccessfully, to dissuade her from embarking upon it. Upon her persuasion, however, Miss Georgina Afriyie accompanied her to the appellant's house.

In the presence of Christiana's friend, the appellant agreed to perform an abortion on Christiana. Subsequently the appellant, in the absence of Georgina administered four injections and following the last injection he arranged for Christiana to stay with one O. who was informed of what had happened. During the night Christiana bled and she was taken to the hospital by O. In due course, the Appellant was convicted of attempting to cause an abortion.

On appeal, he lost. The Court of Appeal (Majority) was of the view that the friend was not present when the injections were administered and therefore she was not an accomplice.

In *State V K. Nkyi [12] GLR 197*, a student nurse responded to the call of a friend's cousin that the baby was unwell. He mistakenly injected the baby with arsenic instead of mepacrine. The baby died and he was charged with manslaughter and practicing without license. The court held that with regard to the charge of manslaughter, the voluntary assumption of the treatment of the child without the needed skill amounts to negligence. However, the negligence of the accused in mistaking arsenic for the drug he intended to administer did not amount to a reckless disregard for human life.

In *Asantekramo Alias Kumah V. Attorney-General [13] 1 Glr 319* the plaintiff (who was, in all other respects, a healthy housewife of nineteen years of age) was referred to the Okomfo Anokye Government Hospital by a private medical practitioner after he had diagnosed a case of ruptured ectopic pregnancy. The doctor in charge of the government hospital, examined the plaintiff and decided that she needed an urgent operation. In the course of the operation (which was successfully carried out) her right arm became swollen and gangrenous, following blood transfusion administered to her by the nursing staff, through a vein in the right arm. The arm was later amputated to save her life. The plaintiff therefore sued the State (represented by the Attorney-General as the nominal defendant) claiming damages for negligence on the part of the hospital staff.

The plaintiff gave the particulars of negligence in her statement of claim and also pleaded that she would "rely on the doctrine of res ipsa loquitur." Even though she failed to prove that the particulars of negligence, as pleaded, caused the swelling and the gangrene and the consequent necessity for the amputation, the trial judge found that the facts as proved raised a presumption of negligence, i.e. a case of res ipsa loquitur.

Another case is *Asafo V. Catholic Hospital Of Apam [14] 1 Glr 282*. In December 1969 the plaintiff's six-week-old daughter was admitted as an in-patient at the defendant's hospital. The child was kept in the special ward for children and was fed three times a day only on the instructions and at the invitation of the hospital staff on duty. Due to the age of the child her mother had to sleep at the hospital in order to breast feed her but neither the plaintiff nor the mother had access to her except at the invitation of the hospital authorities. On or about 14 January 1970 the child disappeared and nobody knew her whereabouts. The plaintiff instituted action against the defendants for damages for negligence and relied on the doctrine of res ipsa loquitur. The defendants neither called evidence nor offered any explanation for the child's disappearance. The court Held:
(1) By accepting the child into their custody for treatment the defendants became duty bound to ensure her safe custody and to deliver her back to the plaintiff whether dead or alive. A breach of that duty would entitle the parents of the child to institute action against the defendants for damages provided negligence and the subsequent loss of the child could be proved.
(2) Where an event occurred such as would not in the ordinary course of things have occurred without negligence, as in the present case, then the doctrine of res ipsa loquitur could be applied. In the absence of any evidence that the disappearance of the child was consistent with due diligence or no lack of reasonable care on the part of the defendants the plaintiff was entitled to rely on res ipsa loquitur. *Brooks Wharf and Bull Wharf Ltd. v. Goodman Brothers [15] 1 K.B. 534 at pp. 539 540, C.A. cited.*

(3) On the evidence the plaintiff was entitled to damages but to place a monetary value on a human being was against public policy. In the circumstances what the plaintiff should be entitled to should have bearing on what he was likely to have gained had the child not disappeared due to the negligence of the defendants. This would depend on a number of factors such as the age of the child and injury to the feeling of the plaintiff but most of such matters were of conjecture and speculation incapable of arithmetical calculation. Where the need had arisen for the courts to award damages in similar situations such as the loss of parts of human body as a result of negligence they had adopted the method of what was fair and just to award having regard to the particular facts of each case and the same method would be adopted in this case.

A more recent case is *Kwaku Agyire-Tettey & Paul Kwaku Sodokeh v. The University Of Ghana & 2 Others [23]*. The facts of the case are that the Plaintiff's late wife, Juliet Sodokeh Agyire-Tetteh underwent treatment for fertility issues at the University of Ghana Hospital before she got pregnant in September 2014. According to Mr. Agyire-Tettey, during the early weeks of pregnancy, his deceased wife was attended to by the

same doctor who treated her for infertility until she was issued with a Maternal Health Records Booklet on the 5th of May 2015. The Plaintiff asserted that during the regular ante-natal check-ups, his wife was told she will undergo a Caesarean operation during delivery because she had a fibroid and an Elective Caesarean Section procedure was scheduled between the 7th and the 14th May 2015. According to the Plaintiff, his late wife was assured that "*the fibroid will be taken out during her delivery hence the need for the Caesarean Section delivery*". Mr. Agyire-Tettey further told the Court that "*my wife with her knowledge of customer service in the medical field from her previous job as a Customer Service Lecturer for Doctors and Nurses enquired from both consultants if there were any risks associated with the removal of fibroid during Caesarean delivery and was told it was a normal and regular practice without any risks*".

The further case of the Plaintiffs is that the Consultant who was in charge of the deceased travelled to Israel before her delivery date and so she was assigned to Dr. Maya to attend to her till delivery. Mr. Agyire-Tettey further testified that "… we had at least three ante-natal sessions with Dr. Maya before her delivery date."

The further evidence of the 1st Plaintiff was that "*on the last session, we were presented with dates we could choose from for my wife's surgical procedure since Dr. Maya had to travel outside Accra for a World Health Organization program. Dr. Maya also told us I could be present in the theatre on the day of the surgical procedure was going to be performed. We were advised to pay for blood in case it would be needed so that it could be reserved and we did that*".

Mr. Agyire-Tettey further testified that he and the deceased wife attended the hospital on the 10th day of May 2015 at around 3:00pm and she was admitted and prepared for the surgery which was scheduled for 11th May, 2015. The 1st Plaintiff testified to the challenges he faced in obtaining the blood which had been requested by the Anesthetist. According to him, after running around between the theatre and the laboratory when he eventually got to the theatre "*I was told my wife had delivered a baby boy and he had been sent to the maternity ward so I could go and see him, which I did. I was told the blood was not used after the surgery was performed*". Mr. Agyire-Tettey further said "*my wife and son were kept at the hospital for two days after the surgery before she was discharged on the 14th day of May 2015 in the morning*". He also said his wife was given a prescription for medication to boost her blood production which she found to cause her a lot of nausea.

It is also the case of the Plaintiffs that the deceased regularly complained of dizziness, tiredness and so on and therefore they went back to the hospital on 19th day of May 2015 to see the doctor in the morning. He said upon physical examination the doctor prescribed medication for his wife. Let us further hear from Mr. Agyire-Tettey again:

"*I am advised and verily believe same to be true that if the doctor had examined her well he would have admitted her and given her blood. My wife complained of pains in her lower abdomen and she coughed anytime she lay down. I am advised and verily believe same to be true that the doctor ought to have examined her further to know the cause of the pains in the lower abdomen and the cough which was precipitated by the accumulation of blood in the abdomen*".

Mr. Agyire-Tettey further testified that on Wednesday, 20th May 2015, they went back to the hospital in the evening to see the doctor because his wife kept complaining of severe abdominal pains. According to him the doctor said she needed two pints of blood for transfusion which "I quickly arranged for it to be given to her that night". I revert to the 1st Plaintiff's testimony as to what happened the next day:

"*I arrived at the hospital the next morning around 5:00am to check on her. She gave me a smile and said she will be well. I smiled back even though I saw the pain on her face. I left her around 8:30am but I was called back after about 15 minutes that my wife needed additional blood. Upon my return to the hospital, the Nurse in-charge told me that my wife needed four more pints of blood. The University of Ghana Hospital did not have the specification required so I quickly arranged for it to be delivered from Achimota hospital. I am advised and verily believe same to be true that if proper exanimation had been done and proper care had been taken, the total amount of blood that my wife needed would have been estimated on the 20th day of May 2015*".

Mr. Agyire-Tettey further testified that his late wife was transfused with "*two pints of packed cells blood together with some intravenous fluids between 10:00am and 2:00p.m*." and after that, oxygen was fixed on her since she had difficulties in breathing. According to him at about 5:00 p.m. his wife was told go for a scan on her lower abdomen". He further testified that he took his wife in a wheel chair because she couldn't walk but when they got there they were told that the facility had closed for the day.

He said when they returned to the ward, his wife was taken to a different room "with more hospital staff around her and more gadgets fixed on her and I was told I could spend the night with her". He also said that by 8:00p.m. his wife was moved back to the theatre and he was told if the situation persisted they would refer her to another hospital. According to Mr. Agyire-Tettey at about 11:30p.m, an ambulance was called to

take the deceased to the Korle-Bu Hospital. Again the 1st Plaintiff told the Court that "*I am advised and verily believe same to be true that if the decision to refer her was taken in the afternoon, my wife would have survived*".

Mr. Agyire-Tettey further said on their way to the Korle Bu Teaching Hospital, "*the ambulance stopped at Okponglo Junction Traffic light and when I enquired why they stopped I was told her folder had been left behind and that I should go and get it from the hospital and meet with them at Korle-Bu*". He said when he arrived at Korle-Bu a doctor took him to where his wife was receiving treatment and he observed from outside that to resuscitate her they were using electrical shocks and also an incision had been made in her chest.

The Plaintiff says this went on till about 1:45a.m. when a Consultant at the Cardio Unit told him that that they had done their best but were unable to save her. His wife had passed on. A post-mortem was conducted and a copy of the report which speaks to the cause of death was tendered at trial as "Exhibit C". Mr. Agyire-Tettey further testified that "*I am advised and sincerely believe that we were ill-advised that there were no risks associated with a Caesarean Section and Myomectomy performed together and that, the scan which was not performed, would have revealed that the cause of death as confirmed by Exhibit C that she indeed bled into her womb*". He concluded his testimony by stating that he has since been the primary care-giver of the baby with its attendant challenges of caring for a motherless child. He also said, a lot of resources and time have since been invested in his son's care and upkeep whilst he has endured a lonely and difficult period of recuperation at his own expense without an iota of support and concern from the hospital. Based on all of the above the Plaintiffs say they are entitled to their claims endorsed on the writ of summons.

In this case, the *Bolam principle* was administered and one of the respondent, Dr. Maya in reacting to the Plaintiff's allegation that the deceased should not have been discharged at the time she was discharged, Dr. Maya said "discharging patients who are deemed medically fit on post-operative day three (both obstetric and gynaecological major case) is not peculiar to the maternity ward of the Hospital. Throughout my postgraduate training and beyond, and in all the facilities I have worked, patients are discharged on post-operative day three if they are deemed medically fit".

Other physicians testified for the Defendant as the case in *Bolam principle*. Their individual evidence relates to their respective roles in treating the deceased and they collectively denied the allegation that they fell short of the standard required as Physicians when they treated the deceased. In effect, they denied the alleged negligent conduct.

The Court, in their decision, ruled out any act of negligence on the part of the Physicians. They had this to say "*based on all of the evidence that on the balance of probabilities there is no credible evidence that the Defendants' servants were negligent when they treated the deceased as a patient at the University of Ghana Hospital. It is clear that the deceased death cannot be attributed to the doctors who treated her because they fell short of the standard required of them. There is no cogent evidence that the 1st Plaintiff's wife death was due to the negligent actions and/or in actions of the Defendants' servants. In arriving at the above conclusion, I reject the sole evidence of the Plaintiffs proffered by the 1st Plaintiff as bald allegations which were not backed by any acceptable cogent evidence"*

The judgment further asserted that, "*Having found that the Defendants' servants were not negligent and therefore not culpable for the death of the 1st Plaintiff's wife, I also find that the 1st and 2nd Defendant cannot be vicariously responsible for alleged torts committed. If the Doctors at the University Hospital did no wrong legally and are not responsible for the death of Mrs. Juliet Sodokeh Agyire-Tettey then the University and the Hospital and the director of medical services are not liable to pay any compensation to the Plaintiffs. It follows, therefore, that my analysis ends here as it will serve no useful purpose to consider the claims in respect of the financial loss to the Plaintiffs and other expenses in taking care of the little child*".

Patient's Vulnerability and Human Right

The Ghana Health Service Patients Charter outlines the rights and responsibilities of the patient. However, according to *Ernest Owusu-Dapaah, [17]*, there has been increasing concern over patients' clinical experiences and healthcare in general in Ghana. His thesis specifically outlines 'vulnerability' from the patient's perspective. He further posits that; a field of law does not emerge in a vacuum; it is usually driven by significant needs. He had this to say: "According to Irurita, *'vulnerability* means being susceptible to physical and/or emotional hurt, harm, or injury, defenseless or weak in relation to self-protection, open to assault.' Thus, patient vulnerability refers to 'an inability of patients to retain control of their life situation or to protect themselves against risks/threats to their integrity.' Integrity in this context is defined by Irurita as 'having control over one's life (situation), - being able to protect oneself, - maintaining dignity as a human being, remaining whole, intact, undiminished (physically and emotionally); and being in as good condition or as sound or unimpaired a state as possible.' Working with this definition, a large segment of the patient population in Ghana can be said to be saddled with the problem of patient vulnerability since many kinds of diseases render the sufferer incapable of being

fully in charge of him or herself, including being unable to make autonomous choices. Kennedy aptly explains patient vulnerability, noting: As between the doctor and the patient, there is an inevitable imbalance or disequilibrium of power. The doctor has information and skill which the patient, who lacks these, wishes to employ for his benefit. When it is remembered that among the powers possessed by the doctor is the privilege to touch and even invade the body of another and as a consequence exercise control to a greater or lesser extent over that person, it will be clear that with the best will in the world, and conceding the good faith of the doctors, such powers must be subject to control and scrutiny, from an abundance of caution".

There are few judicial decisions that are relevant to the issue of the exploitation of patient vulnerability for discussion:

The first case is an unreported case involving *Darko v Korle-bu Teaching Hospital, Suit No. AHR 44/06, Judgment by Accra Fast Track High Court dated 24/06/2008[18]*. In this case, instead of the right knee being operated on, the team of surgeons in the leading teaching hospital in Ghana operated on the left knee of a patient. The hospital refused to further attend to the patient as a protest over a medical negligence suit the patient had initiated against them. Clearly, the decision of the hospital to refuse further treatment when the patient sued them can reasonably be attributed to the obvious imbalance of power in the doctor-patient relationship. Indeed, the posture of the hospital seems to suggest that, in so far as a patient had consented to the doctors treating him, he did not have any right whatsoever to challenge an act or omission by them, let alone drag them to court for redress.

The second is another unreported case involving *Elizabeth Vaah v Lister Hospital and Fertility Centre, suit number is HRCM 69/10 Fast Track Court, High Street, Accra. In this case,[19]* it took court intervention before medical records were released. This case presents many compelling ethical issues. These include the Physician-Patient relationship, ownership of Health Records and the fiduciary duties of the Physician to the patient. In simplicity, it deals with the issue of whether patient has right to access their medical records from the doctor or the hospital? The outcome was that Elizabeth Vaah is entitled to a copy of her medical record from Lister Hospital.

The applicant, Elizabeth Vaah, by motion invoked the jurisdiction of the Superior Court of Judicature, in the High Court of Justice (Human Rights Division) in Accra before his Lordship, Justice Uuter Paul Dery, High Court Judge. This was pursuant to articles 21 (1) (f), 33 (1) of the 1992 [2, 21] Constitution and Order 67 of the High Court (Civil Procedure) Rules, 2004 (C. I. 47) for the following reliefs:

I. A declaration that a patient is entitled as a matter of right to his or her medical records within the custody of a health service institution subject only to the payment of reasonable fees for the production of copies of the record and any other limitations as recognized by law, and notwithstanding that the patient made statements in public media;
II. An order compelling the respondent, Lister Hospital and Fertility Centre, to furnish the applicant with her medical records within the possession of the respondent forthwith
III. Cost

It is evident from Vaah that a patient is helplessly vulnerable in their clinical experience unless the law intervenes to guarantee certain safeguards. A reasonable inference from the decision of the hospital not to disclose medical records to an aggrieved patient is ostensibly to conceal alleged malpractices perpetrated against the patient.

The facts of the case which was disclosed by two affidavits and which was not disputed by the respondent were as follows:

On or about the 23-10-2010, the applicant, who was then an expectant mother, began receiving antenatal services from the respondent with a view to delivery at the respondent hospital. A financial guarantee was signed to assure the respondent of the readiness of her employers to pay any bills the applicant may owe after delivery. Several tests and scans ran on the applicant and the baby proved that she was carrying a healthy fetus and the baby was perfectly normal. On Monday, 08-03-2010, at about 10 p. m., the applicant's membranes ruptured and she was rushed to the respondent hospital without delay. The next day, Tuesday, 09-03-2010, at about 3:30 p. m., the applicant gave birth to a fresh still-birth baby. A post mortem examination revealed that the applicant's baby died of "multiple organ hemorrhages most probably due to a bleeding diathesis/coagulation defect with the bleeding precipitated by 'trauma' of labor (child birth)'. From the post-mortem report, the pathologist is not completely sure what caused the multiple organ hemorrhages. Applicant plans on having another baby in the future and wish to put at the disposal of any doctor who attends to her, whether in or outside of Ghana, her entire medical records. She, therefore, wished to have access to her medical records at the respondent hospital in order to have complete information on her health status. She, accordingly, caused her solicitors to write to the respondent for a copy of her medical records upon payment of reasonable fees for production of the copies. The respondent acknowledged the applicant's right to the records and indicated that, under normal circumstance, they would have given the report out but it is unwilling to do so because the applicant have spoken in public

media about the circumstances in which she gave birth at the respondent hospital. The respondent, therefore, wrote to the applicant informing her that it will only give out the records when compelled by a court or on the orders of the Medical and Dental Council. The applicant's case is that her fundamental human rights have been violated by the respondent when the latter refused to release her medical records to her. She, thus, seeks redress pursuant to article *33 (1) of the Constitution and order 67 of C. I. 47.*

Article 33 (1) of the Constitution provides that:

"Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress." Order 67 of C. I. 47 provides the procedure for the enforcement of the fundamental human rights. It provides in Rule 1 thus: *"A person who seeks redress in respect of the enforcement of any fundamental human right in relation to the person under article 33 (1) of the Constitution shall submit an application to the High Court." The complaint of the applicant is that her fundamental right to information as guaranteed in article 21 (1) (f) of the Constitution has been and is still being violated by the respondent. It provides that: "All persons shall have the right to … information, subject to such qualifications and laws as are necessary in a democratic society."*

On the issue of medical ethics, Lister Hospital erred on many fronts. There is a plethora of studies on the imperative on physicians and hospitals to disclose medical errors that may have arisen in the course of treatment. Patients often want disclosure of all errors in treatment, why the error happened, and how the associated problems would be fixed. The Ghana Medical Association Guiding Principles 1-2 states: *"Patients have a right to receive relevant information about their own medical condition and its management… Medical and Dental practitioners must always inform patients promptly of any significant errors that may be occurred in the course of investigation or treatment."* This principle implies that the patient has a right to his or her medical records, whether or not there is medical error. Medical error "is the failure of a planned action to be completed as intended or the use of a wrong plan to achieve an aim"

The third case of the mistreatment of patient vulnerability existed in *Somi v Tema General Hospital, (1994-2000)[22] CHRAJ 196* where a 36-year pregnant woman was rushed to hospital with an ante partum haemorrhage. The doctor on night duty had finished earlier than expected at 4.00 a.m. instead of 8.00 a.m. and the morning doctor on day duty did not report until 10.00 a.m. The nurses tried to keep the patient alive but they could not hear the heartbeat of the unborn child. The patient was finally taken to the theatre after an inordinate delay. Neither the mother nor the baby survived the operation. Significantly, this case reveals a glaring lack of respect for a patient's right to receive reasonably prompt care at a health institution in an emergency case. Indeed, if there was a vibrant culture of consciousness of patient rights among healthcare professionals, it would be more likely that the necessary accountability mechanism would have been put in place in the defendant hospital to check the lateness of the doctors, in order to avert a recurrence of this incident.

Lastly. the situation where student nurses or medical students are allowed to attend to patients without supervision is also a typical case of vulnerability. For instance, in the *State v Kwaku Nkyi [16]*, as discussed in this article. According to *Ernest Owusu-Dapaah [15]*, it is reasonable to deduce here that the case of allowing a student nurse to treat a child without supervision by a properly qualified healthcare professional is symptomatic of the vulnerability of patients in Ghana.

The Healthcare Court

With the recent spikes in alleged negligence cases and advocacy, I believe that medical negligence needs attention and there is the need for a specialized healthcare court to handle this specialized area in law just as we have the land court and others. I am of the opinion that the medical association and stakeholders review policies that will ensure excellence, and dedication to the job of saving lives, and taken seriously.

Notwithstanding, patients should remember that they have rights, the right to ask questions, the right to get second opinions, right to choose their preferred treatment options and a voice to complain as enshrined in the Ghana Health Service Patient Charter. We may not be able to solve all of our challenges arising from medical negligence; however we can collectively make efforts to make it bearable. The potential advantages of health courts include decreasing administrative costs, improving access to compensation for injured patients, and disincentivizing defensive medicine. By using trained judges and independent experts, health courts advocates hope to achieve more fair outcomes at lower costs.

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