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AN ANALYSIS OF THE SUITABILITY OF THE NO-
FAULT MEDICAL COMPENSATION SCHEME IN
NIGERIA

BY

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requirements for the degree of Master of
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ABSTRACT

Medical malpractice incidence no doubt has been on the increase in the world regardless of the sophistications in equipments and the advancement recorded in the practice of modern medicine. Profession of medicine carries along with it the highest risk, despite the tremendous benefits that has been brought to humanity through the practice of medicine. On this basis, it is imperative to focus on the procedural steps and the aftermath effect of the compensation available to medical malpractice victims and see how the present tort system which is still prevalent in most countries of the world has fared, and how it could be replaced with the no fault compensation scheme developed and tested in New Zealand. The research makes a holistic analysis of the tort system from the strongest points and the attendant effects it has brought to the practice of medicine especially in Nigeria. This position is juxtaposed with the no fault system of compensation by considering the antecedents, viability and funding challenges inherent in the adoption by Nigeria. Since there is no system that is fault free, the issues raised by the research statement of problem are equally addressed. The methodology to be adopted for the purpose of the research shall be multidimensional. The Islamic general position on medical malpractice will be given a good coverage.

ملخص البحث

تزداد أخطاء الأطباء في علاج المرضى في أي بقع من بقاع العالم، على الرغم من التطورات العديدة التي لحق بمجال طبي من حيث التكنولوجيا المتمثلة في الأدوات والأجهزة الحديثة. فإن في المجال الطبي غاية الخطر في حياة البشر، وإن كان قد أفقار الناس في النواحي المتعددة استفادة لا تحصى وتعد. وعلى هذا يحاول هذا البحث الكشف عن النظام الوارد في تعويض المرضى بغرامات يدفعها الطبيب للمريض الذي أخطأ أثناء علاجه، والذي أدى به الخطأ إلى حالة أسوأ مما كان قبله. وفي الوقت الحاضر، يشيع في الدول المتقدمة مثل أماركان، وبرطانيا، وفرنسا، رفع أمر الأطباء الذين وقعوا في خطأ وآخر في علاج المرضى إلى المحكمة لأخذ الغرامة على قدر أخطاءهم تعويضاً للمرضى. ولكن ترى دولة نيوزيلاند عدم ضرورة رفع الأطباء الخاطئين أثناء علاج المرضى إلى المحكمة قبل تعويض المرضى، وقد شاركها في ذلك بعض الدول في العالم أمثال، سويدين، ودينمارك، وولاية فلوردا في الولايات المتحدة. ومن هنا جاءت أهمية هذا البحث في كيفية إمكان تطبيق نظام نيوزيلاند هذا في دولة نيجيريا، لما يترتب عليه من الفوائد الجمة، وإن كانت لكل نظام على وجه الأرض إيجابيته وسلبيته، على سبيل المثال كيف توجد مصادر الأموال التي تعوّض بها المرضى إذا لم يتم رفع الأطباء إلى المحكمة. وفي دراسة وجوهات نظر الإسلام تجاه هذه القضية. واقتراح الحل الوسط لنيجيريا في عدم إمكان تطبيق مثل هذا النظام، كاستخدام طريقة المشاورة، والاتفاق، وحلا المشكلات. وتأتي منهجية هذا البحث، في الاطلاع على الكتب المطبوعة والمجلات، والمقالات الواردة في الصدد وجمع البيانات المفيدة عبر الانترنت.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion, it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Law.

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DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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**AN ANALYSIS OF THE SUITABILITY OF THE NO-FAULT MEDICAL
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In the Name of Allah, Most Beneficent, Ever Merciful

This dissertation is dedicated to the memory of my late mother (Alhaja Kudirat Olubukola Ajidele) whose encouragement and love had sustained my focus in life.

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Section 35 National Health Insurance Scheme Act 1991 (NIG)

LIST OF ABBREVIATIONS

AC	Appeal Cases
ACC	Accident Compensation Corporation
ADR	Alternative Dispute Resolution
All ER	All England Law Report
ANPA	Association of Nigerian Physicians in Americas
BC	Before the birth of Christ
C.E.	Common era, Christian era
CFRN	Constitution of the Federal Republic of Nigeria 1999
H.C	Hijrah Century
I.L.R.	International Law Report
JAAP	Journal of America Academics of Paediatrics
MDCN	Medical and Dental Council of Nigeria
MED LR	Medical Law Report
NMA	Nigerian medical Association
Rep.	Report
SAW	<i>salallahu álayhi wa salam</i> , may peace and blessings of Allah be upon him.
SWT	<i>subhānau wa ta ‘ālā</i> , glory be to Allah, the Most Exalted
WLR	Weekly Law Report

CHAPTER ONE

GENERAL INTRODUCTION

1.1 INTRODUCTION

Medical negligence, generally known as medical malpractice, is said to arise where a physician gives improper treatment to a patient who in turn causes a fresh or worsening health condition. Even though the primary health condition of the patient when he reported for consultation is not the responsibility of the medical doctor, subsequent problems caused by improper approach in curing the health problem is the sole responsibility of the doctor that treated the patient.

The crises of medical malpractice have now risen to alarming rates globally. Both the developed and the developing countries have been seriously affected. For example in the United States of America, every year more than 150,000, 00 deaths and over 30,000 serious injuries arise due to physician and hospital negligence.¹ But as serious as these problems seems to be, it must be pointed out that these medical errors are not intentional in all cases but occurred majorly through what is known as human mistakes which in turn leads to a tort litigation known as medical malpractice claim.

Malpractice in medicine at times do occur due to failure or delay in

¹ See David J Goldberg “*Medical Malpractice Commentary: Litigation vs. Mediation which is better*” <http://www.modernmedicine.com/modernmedicine/Medical> (accessed 28 October, 2009).

diagnosing the illness, a mishap, which happened during anaesthesia or surgery, or if the doctor omits/refuses to get the valid consent of the patient by providing incomplete details of when a surgery or an operation is to be performed and all the risks involved in such operation.

Similarly, where a correct diagnosis was made, subsequent improper treatment of the identified illness by a doctor will also, amount to medical malpractice. In addition, all implants medical devices or prescription and drug misuse also forms part of medical malpractice. Meanwhile, the increasingly high cost of medical malpractice cases, coupled with the degree of time, energy and expertise required in sustaining a tort claim for medical malpractice has seriously affected the quality of healthcare in those countries where fault has to be established.

Not only this, most doctors in have increasingly resorted to what is known in medical parlance as ‘defensive medicine’, they do this to protect themselves from medical tort liability, and those who cannot embraced this method have altogether abandoned specialised area of medicine.²

However, in all countries that practice tort based system statute of limitations applies to medical malpractice cases. Thus, where a patient waits for a longer period before filling his claim, he cannot receive any compensation no matter how genuine the case may be. After the malpractice takes place, a claim

²See Bob Gatty “*Medical Malpractice costs linger*” <http://www.modernmedicine.com> (accessed 29 October, 2009).

should be filed for example within 3 years in the United Kingdom. The medical malpractice, even though, involves tricky exceptions and procedures which among other specifically limits the period when an action in tort could be filed, but there are some exceptional circumstances where the court will still allow the victim of medical malpractice to file a claim outside the 3 years period, where doing so will serve the interest of justice better.³

The recourse to no-fault compensation in medical malpractice cases developed as a result of difficulties being faced by all parties to the fault-based systems. Under the fault-based, there is a requirement hurdle that the plaintiff must establish, for him to succeed in his claim for compensation. But with the advent of no-fault scheme, the medical malpractice victim will now have the opportunity to receive compensation for any medical mishaps without any need to establish that the doctor is negligent.

By adopting the principle of no-fault scheme, apart from the fact that any patient or victim of medical malpractice will receive some degree of compensation, this will also, preclude any action in tort and that only the medical panel empowered up by government like the New Zealand's Accident Compensation Commission (ACC) that will now determine what actually the medical malpractice victim's could recover. Therefore, it is implied that the doctor who had committed the alleged wrong will be shielded from any liability and it is

³ See the Limitation Act 1980 (c.58) section 11 (4-5).

the health institution where the said doctor work that will takes such responsibility.

No-fault compensation basically, is an alternative to traditional litigation method by which a medical review panels set up by the government shall grant a compensation of personal injury to the plaintiff (victim) without the requirement that injuries sustained was caused by someone else fault. No-fault compensation schemes which originated from New Zealand had grown up as a result of the criticism of the elusive search for fault in medical malpractice cases. Apart from the fact the tort system not only wastes enormous times and resources, it leaves majority of such victims uncompensated at the end of the litigation. No-fault schemes which first appeared in workers compensation plans at the turn of the last century has now been extended to almost every endeavour in which human activity can cause personal injuries. The workings of such plans vary widely, depending on the types of compensation offered⁴.

Under a fault-based System for instance, the plaintiff must demonstrate that the defendant had strayed from the recognized standard of care in the profession. This imposes upon the plaintiff the burden of establishing first what the professional standard of care is in any given case and the fact of the defendant's departure there from.

⁴ See R. Mahoney "no-fault compensation" *The Oxford Companion to Medicine*. Stephen Lock, John M. Last & George Dunea. Oxford University Press. 2001.

Generally, the only acceptable manner of proof of the standard of care is another doctor's testimony. This often poses an insurmountable obstacle to the victim who routinely has to face the unwillingness of one doctor to provide evidence which might impose liability on another colleague. What has aptly been dubbed as a 'conspiracy of silence' has effectively prevented numerous medical malpractice claims from prevailing at trial and deterred others from instituting litigation. By refusing to testify, the medical profession is able to thwart the awarding of compensation to individuals injured at the hands of its members.

In Nigeria however, there is no existing data through which deaths or injuries that occurred as a result of medical malpractice could be established. Generally, most victims as a result of ignorance hardly challenged or contest the reasons/excuses of doctors when medical mishaps occurred. Even in cases of apparent breach of duty of care, cases do not go to court of law so as to establish negligence, what happens in practice is that an aggrieved party has a right to lodge a complaint against the alleged doctor before the "Medical and Dental Practitioners Investigating Panel". Appeal against the findings of the panel goes to "Medical and Dental Practitioners Disciplinary Tribunal"⁵. The Medical and Dental Council of Nigeria is the only body that regulates and supervises the activities of doctors and medical practices in Nigeria.

⁵ See the Medical and Dental Practitioners Act Cap 221 (now Cap M8) Laws of the Federal Republic of Nigeria 2004. This is the legal instrument through which Medical and Dental council on Nigeria was established. The council was given the power to establish both the Panel and the Tribunal.

Since this research is centred mainly on having an analysis of the suitability of the no-fault scheme for a country like Nigeria, then it presupposes that the legal analysis will not only cover the tort-based system but the viability of the no-fault scheme as an alternative. The inhabitation affecting the present tort system in Nigeria will be addressed. The Islamic position on what amounts to medical malpractice and the legal remedy provided by the Shariah will also be addressed in this research.

1.2 OBJECTIVE OF THE STUDY

This research seeks to achieve the following aims and objectives:

1. To study the experiences of some countries that relied on tort based system of establishing and compensating medical malpractice victims.
2. To examine critically the efficiency of the tort based system as it relates to the numbers of victims that suffered mishaps, those who filed an action and those that actually received compensation.
3. To examine an alternative ways of resolving issue of medical malpractice compensation by probing into the New Zealand's no-fault compensation scheme.
4. To evaluate the suitability of applying no-fault medical compensation scheme for Nigeria taking into consideration the huge financial implication to do so.

5. To suggest a mechanism through which Nigeria would be able to fund and implement no-fault scheme without compromising healthcare provisions.

1.3 HYPOTHESIS

It is manifestly clear that the burden of proof required for medical malpractice victims to succeed in an action under fault-based system are quite challenging. Some countries have adopted no-fault scheme as an alternative, but the critics of this scheme readily points out the huge resources needed to fund no-fault and that the scheme does not serve as deterrents to would be tortfeasor's.

Meanwhile, applying this arguments into the situation of Nigeria medical malpractice compensation as of today which no doubt is fault-based, this study main area of focus is to explore alternative measures through no-fault where medical malpractice victims will be able to receive the needed compensation upon the occurrence of any medical mishaps without going thorough the rigid process of proving fault. In addition, apart from funding, the research explores on how the adoption of no-fault scheme in Nigeria could bring the much needed developmental changes with proper overhauling of the healthcare provisions.

1.4 LITERATURE REVIEW

All stakeholders in the medical malpractices claims the world over are unanimous in their positions that the present fault-based system of proving