LITIGATION IN MEDICINE

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SUMMARY

Medical litigation is now more frequent as more patients are becoming aware of their rights and seek for explanations and compensation when there are mistakes concerning treatment, and when explainable deaths and permanent damage occur following treatment. Some of these mistakes can be prevented by, following the practice guidelines and checklists. Negligence, which is one of the causes of medical litigation, is the lack of reasonable care or skill, which leads to deterioration of the patient. Proper documentation is one of the tools a physician can use when sued for negligence andor malpractice; as anything not recorded is considered not to have been done or administered. Litigation cases can be unpredictable.

***KEY WORDS**: Litigation, Physician, Negligence, Defensive Medicine*

INTRODUCTION

Medical practice is a much respected profession requiring great skills and training despite these doctors are not perfect, so medical doctors has reached new horizons facing many ethical and legal challenges in the practice of the profession [1,2]. Medical ethics is a code of behaviour imposed by the profession itself and voluntarily accepted by doctors. In any profession the moral obligation is embedded, but when it comes to the medical profession this obligation tends to have a great importance as it is directly related to public health [3]. Ethics consists of standards of behaviour and the principle of right and wrong developed by professional regulatory bodies and associations. The medical profession has been from time immemorial and universally still remains, the most learned and the only noble among the original three learned professions [4].The doctor-patient relationship is changing swiftly and adversely[2]. It is the primary duty of every doctor to maintain this primal position in the society[4]. A patient approaching a doctor or hospital expects the best medical treatment available at any corner of the globe and in case the results are not favourable considers medical negligence as a sole culprit [2]. According to the Longman dictionary of contemporary English, to litigate means to make a claim or compliant against someone in a court of law [5]. Litigation is a legal dispute or lawsuit and medical litigation is the process of carrying out a lawsuit or civil action as opposed to criminal proceedings [6]. Doctors all over the world are facing escalating litigations, with marked increase in the number of litigation claims and value of financial awards [7, 8]. During the litigation process the plaintiff refers to the person who initiates the suit while the defendant refers to the person sued in a civil action or a person accused of a crime [6].

Commercialization of modern medical practice, ignorance towards medical ethics, zero tolerance and high expectation of patients, have been increasing the incidence of litigation against doctors and the hospitals [2]. Medical litigation occurs when the client or patient feels not satisfied with the treatment, especially when complications, lack of communication or preventable injuries have occurred. In medical litigation, the patient or his family are usually the plaintiff while the doctor or hospital is the defendant [5]. Even if the physician is shown to have provided

substandard care, the plaintiff still must prove that the substandard care caused their injury. In some cases this is not difficult such as when surgery is performed on the wrong body part [9]. Critics say the litigation system for resolving medical malpractice claims is flawed and claims take a long time to be resolved [10]. Over the years, myriad fears have fuelled physicians' and hospital administrators' reluctance to speak openly with patients about not only medical mistakes, but even complications that can occur in the absence of negligence. These fears are natural aversions to confronting angry people, concerns that disclosure might invite a claim that otherwise would not have been made and anxiety that the discussion will compromise court room defences later [11]. Legal costs are high and settlements and awards are unpredictable. Many legitimate claims may never reach the courts [12]. The litigation process can provide a means for patients and their families to gain more information about the causes and circumstances of medical injuries [13]. Medicine is an imperfect science and medical care in most cases, involves encounter with dangerous diseases and situations every day. They practitioners are required to reasonably apply their knowledge and exercise their judgements[14]. One additional concern that deserves at least reflection is that the medical practitioner may be an adviser, consultant, researcher and of course also a witness[15]. Medical litigation is high in some countries and low in most developing countries. Litigation against the medical professionals in developing countries like Nigeria is minimal; cases have been reported especially in teaching hospitals [8]. The threat of medical malpractice litigation constitutes a serious obstacle to improving the reliability of healthcare organizations and patients safety [16]. Medical practitioners are advised to protect their professional practice by regularly taking a medical insurance [4]. This paper aims to address some of the issues that can lead to medical litigations and suggestions made on how to prevent these.

CAUSES OF MEDICAL LITIGATION

Medicine can never be free of mishaps [7]. By far the commonest areas in which doctors are found culpable of a breach of conduct are in the areas of negligence, lack of care, wrong judgement, abortions and euthanasia [8]. Patients are becoming aware of their rights and getting litigation conscious as a result of what they consider to be professional negligence [17]. Medical litigation occurs when patients feel that they have not received adequate answers to questions about their outcomes, when they sense the absence of accountability for what happened to them, and when they worry that some mistake could be made in another patient's care [9]. The rise in litigation in recent years has been dubbed a 'negligence or malpractice rise'. Generally malpractice is carrying out professional duties improperly or late. Malpractice may be due to incompetence or improper management. Malpractice may also be due to negligence or delay[18]. Most malpractice litigations are based on negligence [9]. Negligence may be defined as the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or do something which a prudent and reasonable man would not do [15]. Failure or deviation from medical professional duty of care-a failure to exercise an accepted standard of care in medical professional skills or knowledge, resulting in injury, damage or loss is medical negligence [7]. It is the failure on the part of a medical practitioner to exercise a reasonable degree of skill and care in the treatment of a patient [16]. The following among others constitute professional medical negligence: failure to attend promptly to a patient requiring urgent attention when the practitioners were in a position to do so, manifestation of incompetence in the assessment of a patient[19]. Some reasons why patients sue doctors includesurgery performed on wrong patient, surgery performed on wrong body part, surgery scheduled but wrong procedure performed, objects left in the body after surgery, pressure ulcers and falls in the hospitals. It is essential for all clinicians to understand the elements of medical negligence and reasons why patients sue doctors and the process of medical litigation [7].

The threat of litigation alone may discourage negligence and other substandard medical care. In the courts recovering damages for negligence is a multistep process. As part of the process, the attorney for the injured person (the plaintiff) must establish usually through expert witness testimony, the standard of care to which the healthcare provider is accountable. The attorney must also prove that the provider failed to meet that standard causing an injury resulting in damage or loss [10].

SUGGESTIONS ON HOW TO PREVENT MEDICAL LITIGATION

Some litigation can be prevented while others are almost inevitable. Preventable medical errors are common though few injured patients file law suits [11]. A doctor being aware of his own duties towards a patient should also remain conscious of patients' rights vis-a-vis a doctor [20]. The ultimate answer of how to avoid medical negligence claims lies in prevention not cure [21]. The under listed outline could reduce medical litigation

PROPER RECORD KEEPING:

A proper documentation of the date, time, history, positive physical findings, investigations, treatment and instructions to the junior staff and the patient is necessary [20]. A health record may be defined as any relevant record made by a healthcare professional at the time of, or subsequent to a consultation and or examinations or the application of health management. A health record contains the information about the health of an identifiable individual recorded by a health care professional. Records should be kept as direct evidence in litigation [22]. Medical records are a collection of information or data generate in the process of attending to patients [23]. One of the duties of any medical practitioner is to keep records of all consultations and procedures performed on their patient population.

Medical records provide documentation of a patient's medical history and are useful in the continued care of patient and for research purposes [23]. This applies to all medical disciplines. The medical record is the cornerstone of defence in a malpractice suit [24]. The medical record is the primary source of evidence in any malpractice action. The first thing a plaintiff attorney does in the quest for evidence of liability is to review the medical record. If the chart is orderly and the information is concise, consistent and accurate, the case is likely to be dropped. Poor charting exposes the physician to significant liability in the event of adverse outcome of patient care. The medical record should have everything so that anyone coming fresh to that patient's care can pick up where other colleagues have left [25]. Medical records serve as legal documents in the case of law suit. They can be sub opened by law courts and medical disciplinary tribunal [23]. Records should be made at the same time as they occur or as soon as possible afterwards. The medical record notes when not organised and completed properly can lead to litigation [25]. The medical record is a powerful tool that allows the treating physician to track the patients' medical history and identify problems or patterns that may help determine the course of health care. The primary purpose of the medical record is to enable physicians to provide quality healthcare to their patients. It is a living document that tells the story of each encounter with the patient of the health professionals involved in their care. Complete and accurate medical records will meet all legal, regulatory and auditing requirements. Medical records are legal documents and administrative matters when the patient care provided by a physician is questioned[26]. Proper record keeping is of increasing importance in the medical field [27],as anything not written down is considered not to have been done [21]. Thorough medical record keeping can reduce the risk of litigation [25]. An in-patient must be seen as often as is consistent with good patient's care and the doctor seeing the patient must make adequate notes in the case folder every time he sees the patient [4].

USE OF PRACTICE GUIDELINES

Evidence has shown that applicable standards of practice where strictly followed is the key to preventing a successful legal challenge to a suboptimal patient outcome [21]. Some medical disciplines have guidelines and checklists which help to avoid some preventable medical injuries and litigations. These practice guidelines are in place because they have an important role to play that is why they are put in place. This also involves the use of universal precautions at all times. Studies have shown that clinical practice guidelines have an impact on the outcomes of cases [28].These include: the World Health Organization surgical safety checklist and pre-anaesthetic machine checklist which enables the anaesthetists to check that the anaesthetic machine and its accessories are in good condition and safe for administration of anaesthesia. Litigation cases have occurred when it was not noticed that a wrong gas was bottled by the gas company in the wrong cylinder. In the midst of surgery, accidents have occurred when it was noticed that the suction machine was faulty. Practice guidelines may be time consuming but they protect against litigations. Compliance with relevant clinical guidelines plays a dual role in medical malpractice claims. They can be used in litigation by an accused physician as a defence

and by patients alleging a breach of the standard of care[28].

SAFE PRACTICE AND SAFETY AT ALL TIMES

Doctors and dentists owe a duty of care to their patients in every professional relationship [4]. Safety which is very important can be improved by being vigilant and careful always. Forgetfulness or carelessness or delay of removal of tourniquet once its use has elapsed had led to litigation. Incidence has occurred where a child's limb became gangrenous when the doctor forgot to remove a tourniquet after establishment of intravenous access. The child had been rushed into the health facility convulsing and the intravenous access was needed to carry out resuscitation and save the child's life. Blood to be transfused should be properly screened. The patient should also be screened so that any pre-existing blood borne disease is identified. Labels of drugs and infusions should be read for its name both market and pharmacological name, manufacturing and expiry dates even if it was purchased by the patient. Removal of a paired organ is another source of litigation. The good organ should be marked before removing the diseased one. Litigations have occurred where the good organ was mistakenly removed noticing the error.

Doctors should exercise reasonable skill and care in diagnosis and treatment. There should be proper documentation and record keeping after procedures, treatment, surgeries in addition to the doctor exercising reasonable skill and care in consultation, diagnosis and treatment of the patient [20]. Doctors in operating rooms should also guard what they say especially during a procedure when the patient may be having awareness under anaesthesia. It is required that the practitioner upgrades his skill as best as possible in the light of advancing knowledge in the profession. Regular participation in programmes of continuing medical education is a necessary condition for the practitioner to remain relevant in practice and to achieve renewal of practising licence in most countries. A practitioner must see and attend to all patients on admission under his care, as frequently as their condition demands [4].

COUNSELLING AND COMMUNICATION

A doctor is required to give the patient sufficient, information about the ailment, the treatment proposed, as well as the possible risks so as to enable the patient understand the position fully and make an intelligent decision [16]. The outline of this explanation should be recorded in the cases notes when this has been done. Most procedures carry recognized complications despite being carried out by the most skilled and experienced operator. If complications arise they should be taken seriously, appropriately managed and the patient and relatives should be fully informed. Advice from senior colleagues should be sought at an early stage. If a mistake has been made, it is good practice to admit it and apologise to the patient personally. This does not necessarily imply negligence. Indeed, failure to disclose the error, provide information and offer an apology increases the risk of litigation [7]. It is the duty of a registered practitioner who has a patient under his care to communicate with the patient or his relation with regard to any developments, progress or prognosis in the patient's condition [4]. Good communication and appropriate counselling can decrease litigation drastically.

MAINTAINING ETHICAL STANDARDS

Ethics is a system of rules that govern or influence the practice of a profession[8]. Every profession whether medical, religious or legal is governed by ethical codes or regulations in order to maintain acceptable standards and customs of the profession. Ethics consist of standards of behaviour and the principle of right and wrong developed by professional regulatory bodies [29]. Medical ethics is a study of things that the professional ought to do, or not do in medical practice and helps in the distinction between what is right and wrong[30]. Ethics is the science of criteria, norms and values for human action and conduct. The aim of ethics is to safeguard human dignity and promote justice, equality, truth and trust [29]. Medical ethics hinges on the four cardinal principles of beneficence, non-maleficence, patients autonomy and justice[31].In the teaching hospitals, the consultant has the responsibility to maintain quality patient care and should therefore ensure that the resident doctors in his charge maintain ethical standards. Physicians must remember at all times that they owe it to themselves, their profession and their patients to maintain high ethicalstandards[32].

CONSENT

Consent should be obtained for all procedures and written consent for surgical procedures and special procedures as the case may be. Under common law it

is well recognized that every person has the right to protect their bodily integrity against invasion by others. As a general rule, medical treatment even of a minor nature should not proceed unless the doctor has first obtained the patient's consent. Failure to do so may constitute battery leading to civil claims and disciplinary procedures [7].

WORKING WITHIN COMPETENCE AND LIMITS

A doctor must always maintain the highest standards of professional conduct. Practising beyond one's competence for any reason at all is an ethical crime [8]. Whenever an examination or treatment is beyond his capacity he should summon another doctor who has the necessary ability [4]. In developing countries, where specialists are not enough to go round especially in the rural areas, many young doctors practice above their competence especially during emergencies[18]. Every medical or dental practitioner should know his limitations, in terms of skills and facilities and should not take on cases which he cannot effectively handle [19]. Such doctors can improve their competence by attending continuous medical education and networking closely with other colleagues.

EFFECTS OF MEDICAL LITIGATION ON MEDICAL PRACTICE

It is of ethical significance for registered practitioners to continuously assess and avoid medico-legal pitfalls in areas such as confidentiality, professional competence, legal and registration status of the specialist being consulted, equipment reliability, and sustainable continuity of patient management and timely referral of treatment [19]. Medical litigation has reduced the amount of practitioners in some specialties as no one likes to go to court or lose his practicing licence. Medical law and ethics are becoming increasingly important in all medical specialties but especially in obstetrics and gynaecology [7]. In some countries where litigation is high, it has reduced the number of physicians in some specialties especially in obstetrics and gynaecologists. Another effect of medical litigation is the practice of defensive medicine. The defensive practice of medicine is the 'deviation from sound medical practice that is induced primarily by a threat of liability and it includes supplemental care, such as additional testing or treatment, replaced care such as referral to other physicians, and reduced care including referral to treat particular patients[33]. It is fiscally and physically counterproductive to employ defensive medicine tactics to avoid attacks by the legal enforcers of alleged negligent care [21]. Defensive medicine takes place when hospital staff performs unnecessary treatments or avoids high risk procedures to reduce its exposure to malpractice litigation[14]. Doctors in particular prescribe tests, procedure or specialists visits (positive defensive medicine) or alternatively avoid high risk patients or procedures (negative defensive medicine) [15]. The goal of defensive medicine is to ensure that if the patient later sues, the physician has gone above and beyond what is required. Defensive medicine is directly traced to medical malpractice law. Without the threat of litigation; there would be no reason to practice defensively[33]. Defensive medicine is a damaging effect of medical litigation. It increases the cost of the health care system and exposes patients to unnecessary risks. The number of negligence claims against doctors is continuously increasingly [14]. A large number of legal initiatives taken by patients have induced many doctors to adopt a defensive strategy to avoid jeopardizing their careers [14].

No physician wants to be sued on the premise that he or she did not do enough[33]. According to researchers, doctors tendency to make an excessive number of tests and to avoid risky procedures is due to the concern generated by the over exposure of the problem of medical malpractice in the media from which patients have derived their suspicious attitude towards doctors. Learning from errors is significantly influenced by the institutional dilemma of blame. Individuals in organizations may be reluctant to report negative information especially when this can lead to disciplinary sanctions or result in being blamed or ridiculed because of an error [14].

RECOMMENDATIONS

Interdisciplinary care conference per patient is necessary. Residents and trainees should always be supervised. Remove bias and assumptions should not be made that it is a bad case which may discourage necessary therapeutic effort. Most mistakes are not intentional. There is need for organization of regular seminars, workshop and symposium on the medical ethics. The employers of medical staff preferentially the clinician should get insurance for their staff.

CONCLUSION

Medical litigation cases are increasing in developing countries as more people are becoming educated and know their legal rights. Some of these litigations can be avoided by good practice and safety measures, observing practice guidelines and checklists, and proper record keeping while some others cannot be prevented. Most litigation cases arise from negligence and malpractice. Medical litigation is one of the reasons why some medical errors are not openly discussed as it may lead to litigation. Patients are becoming more aware of their rights and getting litigation conscious as a result of what they consider to be professional negligence.

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