Faculty of Law
University of Abuja

Publication Article **University of Abuja**

January 2013

UNDERSTANDING THE BASICS OF DOCTOR-PATIENT RELATIONSHIP

Barr. Uwakwe Abugu*
LL.M, B.L, FICA

**** Senior Lecturer, Department of Public and International Law, Faculty of Law, University of Abuja.***

1.0 Introduction

It is supposed that every second of every minute of the day at least a patient is either calling his doctor, or undergoing one form of test or the other, or receiving one type of treatment, diagnosis or advice or the other. And more often than not neither the patient nor the doctor adverts his or her mind to the legal implication of the relationship. In fact they hardly know that by the phone call by the patient, or the first laying on of hand by the doctor, a special relationship is developed with reverberating legal consequences. In the paper an attempt is made to define a doctor and a patient. It also ex-rays how and when the relationship of a doctor and a patient may be created both independently of the will of the parties and by way of contract.

2.0 Initial Union between Doctor and Patient leading to the relationship

By law many medical practitioners may not answer to the description "doctor". First, most, if not all, statutes which provide the legal basis for training and admission of medical practitioners to practice do not describe them as doctors. They are described as medical practitioners or dental surgeons as in Nigerian or simply as medical practitioners as in England. Secondly, most medical practitioners do not possess doctorate degree in any field of medicine. So, the appellation doctor actually got attached to medical practitioners by convention. The answer to the question, who is a doctor, may be that he is a person who is qualified to practice as a medical or dental practitioner and who is fully or

provisionally registered to practice as such or registered to practice for a limited purpose.[1]

On the other hand, the word patient may deceptively yield itself to an ease of understanding. He may be described as a person who is sick or down with an ailment and who is receiving medical attention. This description may suffice for casual layman usage which does not attract any legal consequence. In law, the word "patient" depicts a legal status of a person in a special relationship with a doctor, a team of doctors or a hospital. This relationship usually begins with a request for medical service by the individual and an undertaking by a doctor to provide this service. Once the 'request' and "undertaking" is established, the law imposes a duty of care on the doctor in favour of the individual, now his patient.

The "request" and "undertaking" scheme may well represent the normal case. There are several sets of facts and circumstances which may not neatly fit into it. In some cases, the request may be made by another person; while in emergencies, there may not be any request at all. The bottom line, however, is that in all cases where a doctor-patient relationship is to be found, there must be some form of undertaking by the doctor to provide medical service to the person who will turn out to be his patient. In all such circumstances, the duty imposed on the doctor arises independent of contract. According to Lord Nathan, "the medical man's duty of care arises… quite independently of any contract with his patient. It is

[1] See Section 6(3) and 18(2) of the Medical and Dental Practitioners Act, Cap M8,I,FN, 2004.

based simply upon the fact that the medical man has undertaken the care and treatment of his patient."[2]

The liability for the breach of this duty exists *non ex voluntate partium, sed ex auctoritate legis*, it is implied or imposed by the law and does not rest on the joint will of the parties.[3] The independence of this duty from liability in contract is further strengthened by the principle that they attach whether the patient has furnished consideration for the treatment or not. It does not matter that the service is undertaken gratuitously or for a token or even for the full professional fee.[4]

3.0 When Does the Relationship Arise?

If as it is agreed, that for the doctor to owe the patient a duty of care, there must have been an undertaking on his part, it may be necessary to decide with some degree of precision when the undertaking is actually given. Usually each case comes with its peculiar facts and circumstances. But in a normal case, Kennedy and Crubb suggest that, it "arise somewhere along the continuum which begins with the patient being at home and ends with the doctor embarking on the first laying on of hands." In these days of modern technology, the undertaking may even arise without the doctor sighting the patient. That would be the case where a person calls a doctor on phone, lays his complaints and the doctor recommends the steps or drugs he would take. Doctors must apply great circumspection in the use of telephone in making diagnosis and prescription for as has been rightly observed

---

[2] Medical Negligence, 1957, pp. 8 and 10, cited in Kennedy, I. and Grubb, A.: *Medical Law: Text with Materials,* (London, Butterworth, 2nd Edition 1994), p. 68

[3] Dieter, op. cit., p.24.

[4] See Collins v. Hert Fordshire CC (1947), AU ER 633, Goore v. Nash (1979) 21 SASR 419 (FC), Ritchy v. West 231 1 329 (1860), Rule v. Cheeseman, 317 P 2d 472 (Kan 1957).

"in this context the telephone may be the physician's greatest ally or his worst enemy".[5] The authors proceeded to hand down this advice:

"Even with an established patient with a new complaint, it is most unwise to try to diagnose and treat it over the telephone without at the same time as a follow-up, making an appointment to see the patient, taking a proper history, and conducting a physical examination as soon as possible."[6]

In some cases the undertaking to diagnose or treat may be made in a casual professional relationship without the physician realizing that a doctor-patient relationship has been consummated. For instance, a doctor may offer medical advice, give prescription or even diagnose in a social situation or in the church or other place of worship. In such a case, the doctor would be responsible for the treatment prescribed and necessary follow up but may not advert his mind to it. Thus this situation has been aptly described as a "booby trap" which should be avoided as much as possible.[7] However, where a patient is admitted in a doctor's hospital or ward without his knowledge while awaiting his arrival, it will not be supposed that the doctor has undertaken to care for the patient.

In big hospitals like Specialist and Teaching Hospitals, doctors work in a team under a consultant as the team leader. The law here is that each member of the team of doctors will be deemed to have separately undertaken the care of the patient when so assigned by the consultant. The consultant on his part has a continual undertaking as to the care of the patient until he is discharged.[8] Where a doctor from another team is requested by nurses to help attend to a patient

[5] Blackman and Bailey op. cit. P. 68
[6] Ibid
[7] Ibid
[8] See Kennedy & Grubb op. cit, 69

belonging to another team, the principle is that "the law does not require a doctor to act as a Good Samaritan towards any person in the absence of an undertaking by the doctor to take care of the person."[9] However, the presence of the doctor at such scene and the need for medical intervention, may if not legally, ethically lead to the conclusion that there is an undertaking.

4.0 Nature of Liability in the Doctor-Patient Relationship

4.1 Liability in Torts

It must be emphasized that in most cases, the doctor-patient relationships arise independently of contracts. Patients while "requesting" for treatment hardly actually think they are embarking on a contractual relationship. The law simply imposes duty of care upon the doctor considering the nature of the relationship which emanates from the trust of both the society on the medical profession generally, and of the patient on the particular doctor. A breach of this trust has over the centuries been taken seriously by the law. As far back as 1768, Sir William Blackstone expressly referred to damage caused by the neglect or unskillful management of a patient by his physician, surgeon or apothecary. He emphasized that:

> *It had been solemnly resolved that mala praxis is a great misdemeanor and offence at common law, whether it be for curiosity and experiment, or by neglect, because it breaks the trust which the party had placed in his physician, and leads to the patient's destruction.*[10]

[9] Ibid
[10] Cited in Dieter, op.cit, p.7.

4.2 Liability in Contract

Essentially for the same reason of trust and the unequal relationship between "a vulnerable person seeking to be healed and another professing to heal" and the subsequent growth of the law of contract, the liability arising from the doctor-patient relationship began to be viewed as contractual. Thus, even though patients never actually thought about contractual relationship, the law implied it. Blackman and Bailey rationalized the basis for the implied contract in the following words:

> *At the time of the implied contract between patient and physician, it is taken for granted that the doctor knows more than does the patient about the patient's condition and the proposed treatment, therefore, the doctor is legally assumed to be in a much stronger position than the patient regarding the terms of such an agreement. Accordingly, the courts will almost routinely favor the weaker party (the patient) in the legal proceedings that follow some technical violation of the terms of the implied contract.*[11]

The general consensus now appears to be that whether liability for medical malpractice arises by tort or contract, "the barriers between the two categories are breaking down"[12]. The law of tort and the law of contract certainly serve different purposes. While the one aims at preventing wrongful harm caused by others, the other aims at vindicating a party's legitimate expectation from another's promise and to put him back, as far as possible, to his *status quo ante* in the event of any breach of the promise. But in practice the difference in the claim for damages for breach of contract for medical services and damages for breach of duty of care by the physician is that between six and half-a-dozen. Contractual terms implied by

[11] Op. cit., p. 46.
[12] P.H. Windfield & J.A. Jolowiz on Torts, pp. 6-7, cited in Dieter, op.cit., p. 9.

law in medical claims are essentially the same duty of care owed the patient by the doctor. Even in the wider conception of the law of contract it has been posited that a tort suit is very like an action for damages for breach of contract, where also the amount claimed is deemed as compensation for harm which the defendant has caused wrongfully, by breaking his words[13]. Generally, in medical claims, an action in contract only goes to reinforce the peremptory duty of care and skill owed the patient by the doctor in tort "to respect the patient's interest in the integrity of his body."[14] Accordingly, an action in medical malpractice sounding in breach of contract does not preclude a similar action for breach of implied duty of care and skill on the part of the doctor. But in practice both causes of action are brought under one claim.

5.0 Contract for Medical Service

If action for failure of duty in medical practice is also founded on contract, it is important that the time when the contract comes into existence is ascertained. This is because no liability in contract can precede the formulation of such contract. The common elements of contract are settled in law. There must be an offer and acceptance, consideration, intention to create a legal relation and capacity. The existence of each of these elements in a particular contract between the doctor and the patient is far from being certain at each point in time. For instance, between the doctor and the patient, who makes the offer? Is it the patient who requests for medical treatment or the doctor who offers to treat? Ellen Picard appears to have settled the controversy surrounding offer, acceptance and consideration when she

[13] Lifted from Dieter, Ibid quoting T. Weir, P. 1
[14] Ibid, p. 10.

offered that "the offer could be found (in law) in the patient's request for treatment and the acceptance in the doctor's commencement of care. Consideration (is) not a problem unless the patient (is) unable to pay. In such circumstances the law of contract (is) that the patient's submission to treatment (is) sufficient consideration for the doctor's services."[15]

Even where it is found that there is a contract for medical service between the patient and the doctor, there are still some gray areas peculiar to such contract. Unlike commercial contracts, the principal aim of a contract for medical services is not the maximization of profit. Underlying this motive is the presumption that commercial or merchantile contract is between two consenting adults freely entered with equal bargaining power. On the other hand, a medical contract is usually between two persons where the bargaining power tilts in favour of the doctor. The superior bargaining position of the doctor is captured in the following words: "Physicians hold great power over their patient, ultimately that of life and death. This provides the potential for great good, but also potential for great harm."[16]

The inequality of bargaining power between the doctor and his patient justifies why the liability of the doctor is not left by the law of the vagaries of the hackneyed doctrine of freedom of contract. The law imposes strict and high legal obligation on the doctor in favour of the patient. Apart from paying the doctor's professional fees there is hardly any other obligation owed the doctor by the

[15] *Liability of Doctors and Hospitals in Canada* (2nd Edition, 1984) at pp. 1-2. see also Banbury v. Bank of Montreal (1918) AC 626.
[16] Blackman & Bailey, op. cit., p. 47.

patient. In contrast, the doctor is fully responsible for the patient's health and for the consequences of the treatment administered or prescribed. He must at all time exhibit a high degree of care and skill in the discharge of his duties. The result is that "the doctor's stronger position originally in the patient-doctor relationship results in his weaker position legally."[17]

A caveat need be entered in favour of the doctor. Ordinarily, a commercial contract by its very nature implies good result. A party is entitled to vindicate his claim in a breach of contract suit where his expectation of good result is not met. But commercial contracts are hardly attended by limitless uncertainties that are inherent in provision of medical services. In so far as a doctor has exhibited reasonable care and skill in his diagnosis, treatment, disclosure of facts, referral etc., he is taken not to guarantee the expected result of the patient in the medical procedure. Doctors are only capable of supplying competent medical care but certainly not miracles. Accordingly, neither in contract nor in torts can a conclusion be drawn as to negligence on the part of a doctor from mere fact that an accident happened or the result was not in accordance with expectation.[18] The conclusion can only be that medical science has not yet reached (and may indeed never reach) the stage where the law ought to presume that a patient must come out of an operation better than he went in.[19]

5.1 Terms of Contract for Medical Service

[17] Ibid
[18] See Hucks v. Cole (1968/1125) 483 C.A., Davy v. Morrison (1931) 4 DLR 619 (Ont. C.A.), Holmes v. London Hospital Trustees Bd (1977) 5 CCLTI, 1718 (Ont. HC), all cited in Dieter op. cit., p. 19.
[19] See Pulvers v. Kaiser Foundation Health Plan, 160 Cal Rptr 392 (App. 1980), ibid.

Between the extremes of the high level of care and skill expected of the doctor and the imperative limit of medical wizardry, comes some terms which the law has settled can bind the doctor to his patient. The terms may be expressed or implied.

5.1.1 Express Terms

There is really nothing wrong with a doctor promising to achieve a particular result or to use a particular medical procedure in the course of the relationship with the patient. So where parties make express undertaking as to their rights and obligation in a medical contract, they are as much bound to such terms as any other contract. A good example of an express term in a contract for medical services may be found in a consent form.[20]

In ***Lafleur v. Cornelis***[21] the defendant, a cosmetic surgeon, performed a procedure to reduce the size of the plaintiff's nose. He failed to inform her that there was a 10% risk of scarring. She, in fact was scarred. In addition to succeeding in an action for negligence, the plaintiff established a breach of contract. The court found that, that was not the kind of a contract which the defendant entered into with the plaintiff. The patient told the defendant what she wanted, namely, a smaller nose, The defendant drew a sketch on his notes to show the changes he would make if the plaintiff paid him a fee of $600.00. There was no misunderstanding whatever. Both parties were at idem as to what was to be done. The defendant stated to the plaintiff: "no problem. You will be happy". The court

[20] See Thake v. Maurice (1986) 1 ALL ER 407, and Fyre v. Measday (1986) 1 ALL ER 488.
[21] (1979) 28 NBR (2d) 569

held that the parties made a contract, and the defendant breached it, leaving the plaintiff with a scarred nose.

Also in ***Guilmer v. Campbell,***[22] a doctor who made a specific, clear and express promise to cure a peptic ulcer stating thus: "Once you have an operation, it takes care of all your troubles" was held to have breached the contract between him and the patient when the operation failed to do so as promised.

Once a doctor has undertaken to achieve a specific result or to adopt a particular medical procedure, it has the effect of expanding his liability beyond an undertaking to use reasonable care and skill. The fact that he followed acceptable medical practice or used the highest possible professional skill will not avail him in a claim for the breach of such undertaking. The New York Supreme Court articulated the law in the following words: *"If a doctor makes a contract to effect a cure and fails to do so, he is liable for a breach of contract even though he uses the highest possible professional skill."*[23]

According it has been held that a dentist who undertakes to remove a tooth by a "painless process" may be strictly liable if pain is caused in the process of extraction.[24]

The expanded liability of a doctor under express promise extends to where he agrees to arrive or undertake a particular medical procedure at a particular time. In ***Alexdandris v. Jewett,***[25] neither the obstetrician nor his highly skilled partner was

[22] (1971) 188 NW 2d 601 (Mich sup ct)
[23] Safian Aetna Life Insurance, 24 NYS2d692 (App. Div 1940).
[24] See Edwards v. Mallam (1908) 1 KB 1002 CA
[25] 388 F 2d 829 CCA 2, Mass, 1968.

able to arrive in time to deliver the baby of a woman who had been in labour, despite a specific prior promise made to the patient. The episiotomy that was performed by the resident physician resulted in persistent rectal incontinence. The promising doctor was held liable in a breach of contract for failing to arrive on time.

5.1.2 Implied Terms

The law implies the duty to use reasonable care and skill on the part of the doctor in every relationship with his patient independent of contract. However, where a contract for medical service is established between a doctor and his patient the law equally implies the same duty into the contract. In ***Eyre v. Measday***[26] Slade L.J. expressed this principle when he said:

> *I think there is no doubt that the plaintiff would be entitled reasonably to assume that the defendant was warranting that the operation would be performed with reasonable care and skill. That, I think, would have been the inevitable inference to be drawn, from an objective stand-point… The contract did, in my opinion, include an implied warranty of that nature.*

In ***Thake v. Maurice***[27] Neil L.J. also emphasized that "it is common ground that the defendant contracted to perform a vasectomy operation on Mr. Thake and that in the performance of that contract he was subject to the duty implied by law to carry out the operation with reasonable skill and care".

The implied duty to use reasonable care and skill has become so domineering that it has been described as a mesmeric phrase which is not only a compendious, but

[26] Supra
[27] Supra

also an exhaustive, definition of all the duties assumed under the contract created by the retainer and its acceptance.[28]

This ever present duty is but one of the many complex duties and rights that flow from a contract between a doctor and his patient. A doctor may, for instance, undertake an operation with reasonable care and skill but leaves a surgical blade inside the patient's body or disappears soon thereafter and the wound deteriorates. In such circumstances, the law will imply for example, that the surgeon will not leave forceps within the patient's abdominal cavity after removing his appendix[29] or will after the operation continue to "give the necessary supervision until the discharge of the patient."[30]

The term to be implied in a medical contract depends on the nature and circumstance of each case. What is important is that where any such duties is implied by law, the doctor is exposed to liability for the breach even where he proves that he exercised sufficient professional competence, care and skill in the medical procedure.

Where the provision of medical service is accompanied by the supply of a medical product, the law implies that such product must be fit for its purpose. Thus a dentist who undertakes to make a denture for a patient also impliedly undertakes that given reasonable cooperation by the patient, the denture will be fit for its purpose.[31] In all cases involving the supply of "products", "goods" and "materials"

[28] See the dictum of Oliver J (as he then was) in Midland Bank Trust Co. Ltd V. Hett, Stubbs & Kemp (1979) ch 384.
[29] Coklin v. Draper, 241 (NYS 529 (App. Div 1930), Klingbeil v. Saucemn, 160 NW 1051 (Wis 1917).
[30] Morris v. Winsbury-Whie (1937)4 AU ER 494, Per Tucker J.
[31] Samuels v. Davis (1943) KB 526

in the course of medical treatment, the patient is free to bring action under the Sale of Goods Act 1893 where the product, etc. turns out not to be fit for its purpose or not of merchantable quality. Thus in a veterinary case where cattle became ill when a toxiod with which they were injected to prevent disease proved to be faulty, the cattle owners sued the veterinary surgeon in contract and recovered damages. The court implied a condition in the contract to the effect that the substance used for inoculation would be reasonably fit for the purpose for which it was required.[32]

6.0 Conclusion

The relationship between the doctor and his patient is a special one which is not left to conjecture by the law. This is essentially due to special privilege accorded medical practitioners to enjoy monopoly of medical practice. The necessary consequence of this societal trust and privilege is the heavy duty imposed on the doctor by the law, some of which are express and the bulk of which are implied. Such duty may sound in the law of tort, contract or a combination of them.

[32] Dodd (RN) and Dodd (FL) v. Wilson & McWilliam (1946) 2 ALL ER 691, Dieter, op. cit., p.21