

DESCRIPTION OF THE LAW OF TORT AND ITS APPLICATION TO HEALTH CARE

BY

**COMFORT PETER UDOBANG
DEPARTMENT OF PHYSICAL AND HEALTH EDUCATION
FACULTY OF EDUCATION
UNIVERSITY OF UYO, UYO**

ABSTRACT

Accurate and sensitive communication of health care information is essential to effective patient management in the pain clinic, operating room, other health care settings. However, information relating to the health care status of a patient is sensitive and may be embarrassing or damaging if it falls into the wrong hands. Ethical cannons of medicine and statutory provisions have emphasized the obligation of the physician to safeguard patient confidences and to avoid the tort of negligence. However, threats to the confidentiality of medical information abound and are even more significant in our age of instantaneous communication characterized by the growing use of email, facsimile, and the Internet. This article outlines the description of the law of tort and its application to health care.

Key words: Law of tort, negligence, health care, confidentiality

INTRODUCTION

LAW OF TORT AND ITS APPLICATION TO HEALTH CARE

The word ‘Tort’ comes from the Latin term ‘torquere’, which means “twisted or wrong”. A Tort is a civil wrong that causes someone else to suffer loss or harm resulting in legal liability to the person who commits the tortuous act, called a tortfeasor, such harm being due to negligence or accident (Williams, 2002). Again, Tort, in common law jurisdictions, is a civil wrong that unfairly causes someone else to suffer loss or harm resulting in legal liability to the person who commits the tortuous act. Torts comprise such varied topics as auto accidents, medical accidents, false imprisonment, defamation, product liability, copyright infringement, and environmental pollution (toxic torts) (Umanah, 2001).

Tort refers to the set of laws that provide remedies to individuals who have suffered harm by the unreasonable acts of another. The law of torts is derived from a combination of common-law principles and legislative enactments. LaMence (2013) stated that a tort law is a body of rights, obligations, and remedies that are applied by courts in civil proceedings to provide relief for persons who have suffered harm from the wrongful acts of others. Bassey (2003) sees a Tort law as the body of laws that enables people to seek compensation for wrongs committed against them. When someone’s action causes some type of harm to another, whether it is physical harm to another person, or harm to someone’s property or reputation, the harmed or injured person or entity may seek damages through the court.

John and Holder (2007) wrote that the person who sustains injury or suffers pecuniary damage as a result of tortuous conduct is known as a plaintiff, and the person who is responsible for inflicting the injury and incurs liability for the damage is known as the defendant or tortfeasor. Tort law is based on the idea that people are liable for the consequences of their actions, whether intentional or accidental, if they cause harm to another person or entity. The Legal injuries are not limited to physical injuries and may include emotional, economic, or reputational injuries as well as violations of privacy, property, or constitutional rights.

Damages are a monetary award ordered by the court to be paid to an injured party, by the party at fault. Damages may be awarded in compensation for loss of, or damage to, personal or

real property, for an injury, or for a financial loss. The types of damages that may be awarded by the court for civil wrongs, called “tortious conduct”, of an individual or entity include; Reimbursement for privacy loss or property damage, medical expenses, pain and suffering, loss of earning capacity, punitive damages, etc.

Objectives of the Law or Tort

According to Twerski (2009), the objectives of the law of Tort can be summarized as follows:

1. **Compensation:** The most obvious objective of Tort is to provide a channel for compensating victims of injury and loss. Tort is the means whereby issues of liability can be decided and compensations assessed and awarded.
2. **Protection of Interests:** The law of Tort protects a person’s interests in land and other property, in his or her reputation, and in his or her bodily integrity. Various Torts have been developed for these purposes.
3. **Deterrence:** It has been suggested that the rules of Tort have a deterrent effect, encouraging people to take fewer risks and to conduct their activities more carefully, mindful of their possible effects on other people and their property. This in effect generates a greater awareness of the need for risk management by manufacturers, employers, health providers and others.
4. **Retribution:** An element of retribution may be present in the Tort system. People who have been harmed are sometimes anxious to have a day in court to see the perpetrator of their suffering squirming under cross-examination. In any event, most cases are settled out of court and the only satisfaction to the claimant lies in the knowledge that the defendant will have been caused considerable inconvenience and possible expense.
5. **Vindication:** Tort provides the means whereby a person who regards himself or herself as innocent in a dispute can be vindicated by being declared publicly to be “in the right” by the court. However, again it must be noted that many cases never actually come before a court and the opportunity for satisfaction does not arise.
6. **Loss Distribution:** Tort is frequently recognized, rather simplistically, as a vehicle for distributing losses suffered as a result of wrongful activities. In this context loss means the cost of compensating for harm suffered. This means redistribution of the cost from the claimant who has been injured, to the defendant, or in most cases the defendant’s insurance company.
7. **Punishment of Wrongful Conduct:** Although this is one of the main functions of criminal law, it may also play a small part in the law of Tort, as there is a certain symbolic moral value in requiring the wrongdoer to pay the victim. However, this aspect has become less valuable with the introduction of insurance.

The Law of Tort in Nigeria: The law of Tort is a part of the common law of England, which itself is a part of the English Law. This Law of Tort came into Nigeria when English Law was received into Nigeria by virtue of local statutes that permitted the application of English Law in Nigeria. This English Law as introduced into Nigeria is made up of three aspects:

Categories of Tort Law

Tort Law divides most torts into three general categories: Intentional torts, Negligent Torts, Strict Liability torts. While many torts are the result of negligence, Tort law also recognizes intentional torts, where a person has intentionally acted in a way that harms another, Quasi-torts which are torts similar to but different from typical torts (Chamallas, Vriggins, 2010) and Others, like Privacy Torts, Economic Torts, etc.

- a) **Torts of Negligence:** The standard action in Tort is negligence. Negligence is a tort which arises from the unintentional breach of the duty of care owed by one person to

another. (Ferrari, 1994) For example, when a doctor gives his patient wrong medication which in turn makes her ill, he can be sued for negligence in following his duty of care to give her the right drugs. In certain cases, negligence can be assumed under the doctrine of *res ipsa loquitur* (Latin for “the thing itself speaks”). (Twerski, 2009).

- b) **Intentional Torts:** Intentional torts are any intentional acts to cause harm to an individual and that do so, an intentional tort requires an overt act, some form of intent, and causation. Intent is a key issue in proving intentional tort by the injured party: the plaintiff must prove to the court that the other party, the respondent or defendant, acted intentionally. Knowing it would cause him harm.
- c) **Strict Liability Torts:** The result of harm incurred due to the action of another, with no finding of fault by the defendant; these kinds of torts impose liability on the defendant without proving negligent fault or intent to cause harm. The purpose of strict liability torts is to regulate activities that are necessary and useful to the society but pose an abnormally high risk of danger to the public; e.g. transportation, storage of hazardous substances, keeping of certain wild animals in captivity; those torts are to keep individuals or corporations undertaking such dangerous acts diligent in taking every possible precaution to keep the public safe.
- d) **Tort of Proximate Causes:** Proximate cause torts are torts in which the plaintiff must be able to show that the harm was caused by the tort they are suing for and not a prior cause or another invented cause. For example, someone who already had a bad back being injured in the back in a car accident and years later is still in pain, must prove that the pain is caused by the car accident, and not by the natural progression of the previous problem with the back, or another cause like being injured after the accident by malpractice committed by the doctor who worked on the individual (Deakin and Markensinis, 2008).
- e) **Statutory Torts:** A statutory tort is like any other, in that it imposes duties on private or public parties; however they are created by the legislature, not the courts. Statutory torts also spread across workplace health and safety laws and health and safety in food. To prevail in a products-liability action, the plaintiff must demonstrate that the injury-causing product was defective, that the defect existed at the time the product left the control of the defendant, and that such defect was the proximate cause of the plaintiff’s injury. In some cases federal or state statutes may pre-empt tort actions.
- f) **Tort of Nuisance:** “Nuisance” is traditionally used to describe an activity which is harmful or annoying to others such as indecent conduct or a waste heap. Nuisance either affect private individuals (Private nuisance) or the general (Public nuisance). The claimant can sue for most acts that interfere with the use and enjoyment of their land; the case of Jones versus Powell (1629) provides an early example, in which the person’s professional papers were damaged by the vapours of a neighbouring brewery (Cavert, 2009).
- g) **Defamation Torts:** Defamation is tarnishing the reputation of someone; it has two varieties, slander and libel. Slander is a spoken defamation, and libel is printed or broadcast defamation. The two otherwise share the same features; making a factual assertion for which evidence does not exist.
- h) **Business Torts:** Business or economic torts typically involve commercial transactions, and include interference with trade, or contract, fraud, injurious falsehood, and negligent misrepresentation. These torts are likely to involve pure economic loss, which has been less-commonly recoverable in tort. (Sorenson, Davidson, White, 2012), This kind of torts also includes the tort of deceit for inducement into a business contract (Chen-Wishart, 2007)

Relationship between Tort Law and Other Legal Areas

Tort law overlaps with Contract law and other legal areas to some degree: (Gergen, 2002).

1. **Contract Law:** Tort and Contract law are similar in that both involve a breach of duties; these duties can be blurred, and may not be clear whether the action is in Tort or Contract; if both apply, the court will determine which is the most applicable. Circumstances, such as those involving professional negligence, may involve both Torts and Contracts.
2. **Criminal Law:** There is some overlap between Criminal law and Tort. A tort allows a person, usually the victim, to obtain a remedy that serves their own purposes (for example, as in the payment of damages to a person injured in a car accident. Criminal actions on the other hand are pursued not to obtain remedies to assist a person but to remove the liberty of the offender on the state's behalf. This explains why confinement or imprisonment is usually available as a penalty for serious crimes, but not actually for Torts (Simmon, 2007).

Matthew (2012) opined that Tort law is different from Criminal law in that:

- a. Torts may result from negligence as well as intentional or criminal actions and
- b. Tort lawsuits have a lower burden to prove, such as preponderance or substantial evidence rather than beyond a reasonable doubt in Criminal law which depicts a higher burden or prove.

Sometimes Tort law governs life's most intimate relations, as when individuals are held for knowingly transmitting communicable diseases to their sexual partners. When a loved one is killed by a tortuous act, surviving family members may bring a Wrongful action to recover pecuniary loss. Sometimes a plaintiff may prevail in a Tort case even if the person who allegedly caused harm was acquitted in an earlier criminal trial. For example, O. J. Simpson was acquitted in criminal case of murder but later found liable for the Tort of wrongful death. (Martins, 2012). Again unlike criminal prosecutions, which are brought by the government, Tort actions are brought by private citizens.

Description of the Law of Tort

Three elements must be established in every Tort action. These are:

1. A duty of care owed by the defendant to the plaintiff – First the plaintiff must establish that the defendant was under a legal duty to act in the particular fashion.
2. Breach of that duty by the defendant – Second, the plaintiff must demonstrate that the defendant breached this duty by failing to conform to his or her behaviour accordingly.
3. Damage to the plaintiff resulting from the breach – Third, the plaintiff must prove that the suffered injury or loss as a direct result of the defendant's breach.

Application of the Law of Tort to Health Care

Within the general field of health care there is a good deal of discussion of the Tort because Tort actions comprise what are more commonly known as medical malpractice or medical negligence actions. Medical malpractice or medical negligence suit is premised upon the physician or health care provider having violated some standard of care that is recognized in the medical industry. A standard of care is simply a minimum threshold level of expertise that the health care provider is expected to exercise in terms of providing medical services to the patient. (Aniedi, 2015).

Tort law is directly applicable to health care mostly in the area of negligence and torts of negligence, specifically in malpractice. Malpractice is a Tort, and it is a kind of Tort that people who hold licenses can be held liable for, and medical malpractice is one of these; Tort law is

generally and directly applicable to health care in the area of health care safety; Tort law governs health care and safety in the prevention of events of Medical Malpractices.

Umanah (2001) stated that medical malpractice is the failure to exercise reasonable care, resulting in harm to a patient. Generally Doctors are mostly sued for malpractice, but nurses, therapists and other medicals can certainly be sued as well. There are extreme cases of negligence, such as amputating the wrong limb, or a failure to exercise reasonable care that results in post-operative infection. In all cases which a health care professional is held liable, Tort law prevails and is applicable; in the form of negligent Torts, the plaintiff must establish that there is a duty, that it was breached by failure to exercise reasonable care, that there was harm to the patient, and that the failure to exercise care caused the harm.

Generally, it is in the area of Torts and the Law of Torts that most legal impacts occur in health care and health care safety; a malpractice suit is usually a Tort action. (Aniedi, 2015).

Torts of Negligence in Health Care

As earlier stated, the law of Torts is generally applicable to health care in the form of laws governing medical malpractices resulting from negligence: Torts of negligence.

1. The Tort of negligence is defined as the omission or failure to do something which a reasonable and prudent man would do, or doing something which a reasonable and prudent man would not do. Negligence is the failure to exercise that care which the circumstances demand, i.e. absence of care according to the circumstances. It is also defined as the breach of a legal duty to take care, which breach results in damage undesired by the defendant to the plaintiff.

However, there are two types of negligence in health care: Professional Negligence and Medical Negligence.

- a. **Professional Negligence:** Professional negligence occurs when a professional performs his or her duties improperly, but out of ignorance or carelessness; for instance, carelessly forgetting a surgery pin inside a patient after surgery.
- b. **Medical Negligence:** Medical negligence comprises the majority of medical suits.

A person establishes a case of medical negligence by establishing these four elements:

- i. **Duty owed to the patient:** That there is or was a duty owed to the patient. Medical professionals have both compulsory duties like notifications and responsibilities to the State and voluntary duty, like responsibilities to patients, medical examinations, operations, medico legal examinations and certificates, etc.
- ii. **Deviation or Breach of the Standard of Care:** That there was a breach of the duty or standard of care owed to the patient by the professional, the patient having proved that the professional was indeed negligent and committed the Tort of negligence from a certain expected and normal standard of care.
- iii. **Damage to the Patient:** That there is damage to the patient after the actions of the medical professional.
- iv. **Direct Cause:** That the deviation or breach by the medical professional is the direct cause of the harm to the patient. Just because a case turned out poorly may not imply that the doctor was negligent; the damage, in whatsoever form, must be directly caused by the actions of a careless Doctor (Woldu, 2004).

Duty of Care

Efiok (2006) commanded that a health care provider owes a duty to a patient. Thus, if he undertakes to care for, or treat a patient, whether there is an agreement between them or not, he owes the patient a duty of care.

There are Types of Acts or Omissions that would amount to medical negligence – Code of Medical Ethics in Nigeria 2008, as templates to illustrate medical negligence. Rule 29.4 of the Code of outlines examples of what acts or omission constitute professional negligence as follows: Failure to attend promptly to a patient requiring urgent attention when the practitioner was in a position to do so;

1. Manifesting incompetence in the assessment of a patient;
2. Making an incorrect diagnosis particularly when the clinical features were so glaring that no reasonable skillful practitioner would have failed to notice;
3. Failure to advice, or proffering advice to a patient on the risk involved in a particular operation or course of treatment, especially if such an operation or course of treatment is likely to result in serious effects like deformity or loss of organ, or function;
4. Failure to advice, or proffering wrong advice to a patient on the risk involved in a particular operation or course of treatment, especially if such an operation or course of treatment is likely to result in serious effects like deformity or loss of organ, or function.
5. Failure to obtain the informed consent of the patient before proceeding on any surgical procedure or course of treatment when such consent was necessary.
6. Making a mistake in treatment, e.g. amputation of the wrong limb, carelessness that results in the termination of a pregnancy, prescribing the wrong drug or dosage in error for a correctly diagnosed ailment, etc;
7. Failure to refer, or transfer a patient in good time, when such a referral or transfer was necessary;
8. Failure to do anything that ought reasonably to have been done under the circumstance for the good of the patient and
9. Failure to see a patient as often as his medical condition warrants or to make appropriate comment in the case notes of the practitioner's observations and prescribed treatment during such visits.

Joseph (2004) opined that it is important for patients to know that they have inalienable rights as to what to expect in terms of treatment from the personal physician as regards the following:

Confidentiality: This is the state of having the dissemination of certain information restricted. The relationship between your Doctor and you is a trust that is placed upon him. This form of confidentiality is impliedly imposed by law and does not need any form of agreement whatsoever between you.

Information: A patient must be adequately and clearly informed about his true state of health and the mode of treatment or the course of treatment the Medical Practitioner has decided to follow.

This also extends to explaining the risks and benefits involved in the application of drugs on the patient.

Consent: In medical procedures especially, as regards surgery, invasive or non-invasive, and fundamental or novel course of treatment, your consent must be sought as a patient. This consent must be exact and unequivocal. It should be noted that this principle is not without exceptions as regards under-aged children, an unconscious patient whose next of kin or relative cannot be immediately ascertained or contacted, and in saving lives in an emergency situation, etc.

Thus victims of Medical Negligence have a number of options for redress; they may pursue civil claims against physicians or other health care providers for alleged “torts”, that

is, breaches Of duty that result in personal injury, or file a complaint with the regulatory body (e.g. the Medical and Dental Council of Nigeria). He could also report to the Police who could conduct Criminal Investigation and where the investigation reveals gross negligence, recklessness or wanton disregard for life of the victim, the police can prosecute or forward the case file to the office of the Attorney General of the State for possible prosecution of deserving cases.

Harpwood (2009) stated that nursing staff, like other health care practitioners, owe a duty of care to the patients in their care. A nurse must attain the standard of competence and skill to be expected from a person holding the post by showing competence in delivery as a midwife, giving the right drugs, dose, site, time, and to the right patient. As regard Pharmacists, they have the “last opportunity” to safeguard a patient from a dangerous drug. A Pharmacist does not discharge his duty by disputing as written on the prescription presented to him. He should recognize and check with the Doctor where a dangerous dosage of a drug is prescribed. Today, Hospital authorities are vicariously liable for the negligence of their employees, such as nurses, physiotherapists, laboratory technologists or even senior consultants.

Conclusion

A Tort law deals with the wrongful actions of an individual or entity, which may cause injury to another individual’s or entity’s person, property, or reputation, and which entitles the injured party to compensation. The objective of the Law of Tort includes but not limited to compensation, protection of interests, differences, retribution, vindication, loss of distribution, punishment for wrongful conduct, injunction and the rule of law.

The application of the law of Tort to health care is to enlighten individuals to their rights against unfair treatment by medical institutions and practitioners, and to seek for damages in regular courts in addition to complaints being lodged with the professional regulatory bodies. This will ensure that medical personnel are more careful while carrying out their duties.

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