HART AND HONORE ON CAUSATION IN THE LAW: IMPLICATIONS FOR MEDICAL NEGLIGENCE

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ABSTRACT

This paper on "Hart and Honore on Causation in Law: Implications for Medical Negligence", ascertains the extent proofs of medical negligence adduce to the demand of justice. With the qualitative method of research, the paper analyzes the idea of causation in law as expressed by Herbert Lionel Adolphus Hart and Tony Honore in their book, Causation in the Law, and also examines proofs of negligence available in medical practice, such as resp ipsa loquitur and contributory negligence, which adduce to the sin qua non test and the NESS test. It is deduced that for Hart and Honore, attribution of responsibility in law goes beyond proving the fact of the case to imply a metaphysical element, the intent behind the conduct for which responsibility or culpability is attributed, or mens rea. Hence they refute the minimalist position that the sine qua non test and the NESS test are sufficient for proving causation in law. Their argument is that these tests, premised on the distinction between proximate and remote causes, limit investigation into the chain of causation such that only those causes, probably, observable ones, are taken into cognizance in attribution of responsibility. This limitation, which, they argue springs from the difficulty in exhaustively investigating of all possible factors in the chain of causation, could impede providing sufficient account of cause in law. One of the implications of their position for medical negligence is that, limiting proof of negligence proximate causes, amounts to only arbitrary proof of negligence, which is inimical to the demand of justice. Another implication is that proofs of medical negligence could be improved if factors regarded as remote causes, which may include beliefs, are equally recognized in attribution of responsibility. Therefore, this paper recommends that law and medical practice should keep evolving measures that will make it feasible to examine all possible factors that could be causes to any event of negligence, for justice to be achieved.

KEYWORD: Hart, Honore, Causation, Law, Implications, Medical Negligence

INTRODUCTION

The concept of causation in law is one that has occupied scholars in jurisprudence over the years. In philosophy of law, the question is directed to the possibility of attributing responsibility based on the principle of causation in certain cases of breach of the duty of care, that is, negligence. Hart and Honore argue that cases of negligence in matters of over-determination, joint-determination and interpersonal relationships, proof to be difficult to determine using the different causal tests recognized in law. In this paper, attention is drawn to how Hart‟s and Honore‟s argument affect attribution of responsibility in medical negligence. The paper is divided into five with section one being the ongoing introduction. In section two, the concept of causation in law will be explained while section three will expose Hart‟s and Honore‟s position on it as they present it in their jointly authored book, Causation in the Law. Section for will explore the concept of medical negligence and section five will discuss the implications of Hart‟s and Honore‟s for it. The last section is the conclusion which will be followed by the work cited. This paper adopts the qualitative method of research as literary materials to be used are texts in the form of textbooks and case reports of decided cases from the court.

CAUSATION IN LAW

Causation in law has to do with the attribution of responsibility to an agent, especially, in cases of crime and tort. A distinction is usually drawn between what is referred to as „cause- in- fact‟ and „cause in law‟. Notwithstanding the distinction, both are seen to be employed in the causal determinations of

cases in law. Causation in fact is described as the way in which causal connections are made in everyday life. It is then taken to be the link between causal determination in law and causal determination in other fields. In the common sense notion of cause, a thing A, is said to be the cause of another thing B, if it is taken that without A, B would not have occurred. Thus, cause- in- fact is defined in terms of causally relevant conditions of an outcome. The causally relevant condition or conditions are referred to as the „causa sine quo non", meaning „cause without which the event could not have occurred". Hence, cause-in- fact is usually established through what is known as the „sine qua non" or „But For" test. The test essentially distinguishes causal connections from mere association of events. It is usually said to be free of the fallacy of false cause, especially, the fallacy of post hoc, ergo prompter hoc, (Nbete, 2011:160). That is, the fallacy that consists of the assumption that because something occurred after something else, it was caused by it. It should be noted that cause- in- fact implies the idea of necessary connection, which David Hume questions, (Hume, 1978:74-75). In causation in law, cause- in- fact signifies the importation of the element of causation in empirical science into the field of law. The sine qua non test would correspond to the observation of regularity and succession of events for predictive purposes in the natural sciences. However in law, the test serves to establish what Ernest Ojukwu and Chuka Ojukwu describe as „cause of action". According to the Ojukwus, cause of action means any fact or series of facts, which found a claim, that is, the basis of the claim, (Ojukwu and Ojukwu, 2009:103). It implies that an action pertaining to a case cannot be instituted in the court unless there is cause of action, or the case has passed the sine qua non test.

The argument of most legal theorists is that „cause- in- fact" cannot be the basis of attribution of responsibility to any agent accused of either crime or tort. As Vilhelm Aubert notes, "...it may be said that law is not unconcerned with causal relationships, but their delimitation and sometimes their interpretation are narrowly defined by normative considerations", (Aubert, 1983:85). What Aubert states is the reason that „cause- in- fact" is not taken to be conclusive of attribution of responsibility in law. The delimitation of the „sine qua non" test is said to feature mostly in those areas in which our intuitive judgements of responsibility are needed. Thus the „sine qua non' test is said not to be completely relevant in the attribution of responsibility in cases of over-determination, of join- determination, and of interpersonal relationships in which the agents are not acting in concert. Cases of over- determination involve the attribution of responsibility to two or more agents whose action if taken individually, can bring about the particular consequence. If, for instance, a woman is raped to death by three men, each of them is responsible for the woman"s death. Likewise the three of them will receive the same kind of punishment because one man can rape a woman to death. The sine qua non test cannot determine that the three men are responsible and that they should be punished equally. It can only see the combined actions of the men as what caused the death of the woman. In cases of joint-determination, two or more events combine to bring about another. An instance is when a person who intended to commit arson lights a match stick and drops it on a building he or she wants to raze down, and a second person pours petrol on the same house and it is razed down. The „sine qua non' test may employ either the notion of „proximate" cause, or the notion of „remote" cause to establish respectively, that either the person who poured petrol or the person who lit the match, was the cause of the arson. However in law both persons are to be held responsible for the arson. Cases of interpersonal relationships have to do with such issues as parent"s responsibility over child, trustee"s responsibility over a minor, guardian"s responsibility over ward, principal/ agent responsibility, employer/ employee responsibility, and others. If for instance a child or a minor commits a crime, and it is found out that his or her action was as a result of neglect, the parents of the child or the trustee of the minor may be held culpable. The „sine qua non" test, cannot establish that parents or guardians could be held responsible for the acts of their children or their wards, respectively.

An advanced notion of the „sin qua non" test, known as the „NESS" (necessary element of a sufficient set) test, is also advocated in law, (Kramer, et al, 2008:35-36). The NESS test is said to be adequate in causal analysis of cases of over-determination in that it allows for more than one sufficient conditions being regarded as the cause of an event. However, both the „sine qua non" test and the NESS

test, are said to be grossly inadequate when issues pertaining to the „incidence‟ of responsibility, the „grounds‟ of responsibility, and the „items‟ of responsibility, are considered in law. Incidence of responsibility has to do with the relevant cause of an event to which responsibility can be attributed. In law, relevant causes may be human or animal behaviours, or natural events or processes. However, legal responsibility is attributed to only natural persons (human beings) and juristic or artificial persons (states, corporations, and other institutions to which personality is ascribed in law). The „sine qua non‟ test and the NESS test cannot establish that while the activity of an animal can be the relevant cause of an event, responsibility for the occurrence of that same event would be attributed to human beings. Legal responsibility cannot, for instance, be attributed to a dangerous dog that has bitten somebody rather the owner of the dog bears the responsibility. The ground of responsibility in law is founded on the belief that a person causing harm or loss to another is neither the only necessary nor the only sufficient condition for him or her being legally responsible for that harm or loss. Thus,, based on the grounds of responsibility, cases of vicarious liability and negligence prove the „sine qua non‟ test and the NESS test inadequate.

The inadequacy of the „sine qua non‟ and the NESS tests as enumerated above, gives credence to what is referred to as „cause- in- law‟. It is also argued that causation in fact does not always mean there will be causation in law. A case that could be cited to explain this statement is that of Timbu v. R, () which involves a man accidentally killing his own child. The facts of the case arose in Papua and New Guinea where a man, Timbu, owing to his wife‟s act of berating him, attempted to strike her and because it was dark and he did not know that his wife was carrying their baby in her arms, struck in the direction of his wife. The light stick with which he meant to hit his wife landed on the baby‟s head and killed it. According to the „sine qua non‟ test, Timbu‟s act qualifies as the causally relevant condition of the outcome. This is because the stick he used, though light, was heavy enough for a baby and the force with which he struck was strong enough to kill the baby. However Timbu was legally exculpated for lack of intent. He never had the intention of either killing his wife or their baby. Cause- in- law is usually determined in terms of operative and substantial cause, as well as in terms of intervening event reasonably forseeable cause. In law, the concept of intervening event reasonably foreseeable is founded on the view that the causal chain can be broken by an intervening event if the event that started the chain was only a setting. That the event that started a causal chain may turn out to be a setting implies that the event, in the words of Gaddy Wells, "... is too remotely connected with the plaintiff‟s injury to constitute legal causation", (www.gaddywells.com). The phrase, „plaintiff‟s injury‟ refers to the effect that may result from the chain of causation. Again in terms of death caused by medical treatment, when the treatment is grossly inadequate, the chain of causation may be broken by some unforeseen circumstances, making it difficult to attribute to the health practitioner, the cause. Reasonably foreseeable events that constitute cause have to be based on either the „thin skull‟ rule also known as „egg shell skull‟ rule, self- neglect, or the incidence of double effect. Considerations of these issues are said to distinguish cause in- fact from cause- in- law. Cause in law or legal cause is also referred to as „proximate cause‟. Proximate cause is said to be constitutive of two components, namely, a factual element derived from the notion of cause- in- fact and which is provable using the „sine qua non‟ test or NESS test, and a non- factual component referred to as the legal element, mens rea or intent, which, none of these tests can adequately prove. Two positions, namely, the minimalist position and the maximalist position, can be identified concerning the role of proximate cause in the attribution of responsibility in law. The minimalists argue that the idea of proximate cause is a premature guide for the attribution of responsibility in law, therefore they advocate for a theory of causation that would be policy determinant in legal causation. The argument is that since determining the proximate cause of an event is not easy because examining all possible causes and establishing mens rea, to ascertain the proximate cause seems impossible, criteria for determining the extent of liability should be a matter of policy formulation. Thus, such tests as „sine qua non‟, NESS and others can, as a matter of policy, be adopted as proofs of liability in law. According to Lawrence Solum, "Legal cause" is the way that we adjust our ideas about legal responsibility to overcome the counter-intuitive results that would follow

from a simple reliance on but- for causation", (1964:52). This statement shows that the „sine qua non" test is superfluous for attribution of liability in law. Thus, in the case of Timbu v, R. discussed above, Timbu was not liable or was not found guilty for murder because mens rea was not proven by relying on the „sine qua non" test but by other measures, which could be regarded as „intuitive". Intuitive in the sense that mens rea could not be proven through formal logic of rationally deducing a conclusion from a set of facts but from considerations of practical circumstances of life. It is a practical circumstance of life that a man who may wish to kill his wife in the circumstance Timbu found himself, would have used a heavy stick to go after her. Coupled with this is the practical circumstance of life, that it is unusual for one to see clearly in the night, so Timbu could not see the wife carrying their baby as he could only hear her voice. It is also pertinent to note that practical circumstances of life can include the belief that killing of any sort attracts liability in which case, the law distinguishes between murder and manslaughter. In the African context, for instance, killing of any sort attracts the process of cleansing the land. Thus, Timbu may not be criminally liable, but he is still liable to some kind of punishment. Solum"s statement also defines the reason that proximate cause is usually identified in terms of criteria for determining the limit of legal responsibility for causing harm. The minimalist feels that such limit should be set by through policy considerations such as when through legislative acts or administrative law-making, standards are set for accounting for liability. Thus theories of causation in law are encouraged to gear towards establishing the principles or the criteria for determining the extent of liability based on already set standards. On the other hand, the maximalists see proximate cause as the sufficient ground for legal liability, and they propose theories of causation in law that attempt to show how the components of proximate cause function in the attribution of responsibility in law. The argument here is that only when the proximate cause has been proven by considering all possible causes to the event and establishing mens rea, should proper attribution of liability be achieved. In other words, since the „sine qua non" and NESS tests are yet to yield an exhaustive examination of all possible causes to an event and even establish mens rea, in other to establish the proximate cause, none of them could be regarded as a determinate criterion of cause in law.

HART AND HONORE ON THE PRINCIPLE OF CAUSATION IN LAW

Hart and Honore are of the view that the concept of causation in law has a lot to share with the notion of causation in history and in ordinary life. According to them, the lawyer, the historian, and the ordinary man, see the philosophical or the scientific account of causation as contributing little to the concept of causation in relation to human conduct. Hart and Honore see as the major challenge of the lawyer, the handling of singular causal statements rather than predictive capabilities. Unlike the nomological perspective in scientific conception of causality, Hart and Honore argue that in causation in law, there is the notion of flexibility which manifests in the fact that almost every particular case in law presents a different situation, (Inoka, 1995:67). This implies that for Hart and Honore, hardly any two cases in law are exactly alike. Their position is expressed by Hart in maintaining that even though the formulation of general rules as we have in constitutions, statutes, and precedents, tally with the predictive attitude present in causal explanations in the natural sciences, there is still „open texture" as regards legal rules, (Hart, 1961:120). According to Hart, the generalizations which feature in generally formulated rules are likely to be defeated by what he refers to as „hard cases". Hard cases for Hart refer to those cases that strict adherence to generally formulated rules cannot resolve. Cases concerning trespass and contracts, for instance, often refute the emphasis on general rules. Consequent on the above position, Hart and Honore present an ordinary model of causation in law. Their model is also built on the notion of proximate cause. Unlike the empiricists, they argue that causation in the sphere of human conduct is not subject to only factual connections. In addition, they observe that in some situations, a factor sine qua non may appear in the causal history of an effect but may not be assigned the cause of the effect. Their model of causal explanation in law is mostly geared towards solving the difficulties posed by those factors sine qua non that appear in the causal history of an effect but which are not ordinarily judged to be causes. In dealing with such sine qua non factors, they borrow Mill"s idea of

multiple -causation. They state that Mill, "... subscribes to the belief that every event has a cause and his doctrine of plurality of causes reproduces the common belief that an event of a given kind may have different independent kinds of cause though normally only one of these is present on any given occasion", (Hart and Honore, 1985:112). In line with the idea of an event having multiple causes, Hart and Honore divide conditions into „sufficient conditions", „necessary conditions", and „condition sine qua non". However, they do not see necessary conditions as synonymous with sine qua non conditions. The reason is that not all necessary conditions are sine qua non. Concerning condition sine qua non, Hart and Honore argue that the sine qua non test is geared towards identifying the causally relevant factors of a case. They note that even though the test is necessary for legal causation, it is inadequate for the attribution of responsibility in law. Hart and Honore have in mind, especially, the attribution of responsibility in legal cases of over-determination and joint -determination. On cases of over-determination, they write:

> Two sufficient causes of an event of a given kind are present and, however fine- grained or precise we make our description of the event, we can find nothing which shows that it was the outcome of the causal process initiated by one rather than the other", (Hart and Honore, 1985:124).

Thus, Hart and Honore maintain that other measures are needed to complement the sine quo non test on the issue of attribution of responsibility in law. Another criterion they consider is the NESS test. Using the NESS test which accounts for more than one sufficient condition being regarded as causes, Hart and Honore hope to resolve especially, the difficulties posed by cases of over- determination. In the case of over- determination, the NESS test enables broader description of events such that multiple sufficient causes.

Hart and Honore do not rest on the NESS test. According to them, both the sine qua non test and the NESS test serve explanatory purposes. They maintain that in terms of the attributive function of causal notions, instead of the attending factors of an event being explained only in terms of necessary and sufficient conditions, such factors are narrowed to the relevant proximate or responsible causes. Their position is that causation is commonly understood by analogy to situations where an active element directly intervenes to bring about some change in the normal process of events. Thus they argue that when we ask of the cause of an event we make reference to the fact that there has been an abnormal lapse from routine. Hart and Honore argue that the factors which appear as exceptions to the ordinary course of events are identified as cause and the last of such factors, as proximate cause. Here, they are also making reference to the notion of causal chain. They opine that, "if we find, on attempting to trace by stages a causal connection, that these factors include voluntary interference, or independent abnormal contingencies, this brings into question our right to designate the earlier factor as the cause:...", (Hart and Honore, 1985:49-50). Hart and Honore are arguing that in a situation in which there is a break in causal chain, the intervening occurrence becomes the cause while the initiating cause will assume the position of mere condition. However, for them not all intervening events are causes. Using our exemplary case of car accident, if the driver, though drunk and driving with a high speed, and as he was about to skid off the road, a tree fall on the car killing somebody or more than one person, the falling of the tree, becomes the cause of the accident, rather than the driver"s drunkenness. To cite another example, if for instance, a person administers poison to one who is suffering from asthma and before the poison could take effect, the asthmatic patient suffocates and dies of the disease the person who administered the poison is no longer the cause of the death of the patient, but the disease. A third example is, if a person sustained injury from another person and knowing well that seeking medical attention would heal the wound, but willfully rejected such attention and latter died, the wound can no longer be said to be the cause of his death, rather his act of negligence will be regarded as the cause. This example tallies perfectly with Hart and Honore"s idea of voluntary interference. Hence their argument that only those acts that are products of deliberate human agency and natural occurrences qualify as intervening causes. Thus for them, what the lawyer does in determining cases is to identify abnormalities, both in terms of an event disrupting the natural sequence of human behavior and causing harm, and in terms of

an event breaking the chain of events that would have otherwise resulted in harm. The lawyer according to them does this relying on the ordinary notion of causation, that is, that every event must have a cause.

MEDICAL NEGLIGENCE

Negligence is a civil wrong done to person by another who owes him the duty of care, when that duty is breached. Medical negligence is located within the area of law of negligence which is concerned with the attribution of responsibility in cases of breach of law in interpersonal relationships. Interpersonal relationship occur in the various areas of our lives that we think we owe one another the duty of care, that is, the duty to take reasonable care not to inflict harm on another person or other persons we are relating to. It involves what is referred to as „the neighbour principle" as culled out from the biblical parable of the Good Sameritan… In the case of Donogue v. Stevenson ([1932] AC 562), in which a manufactures is held liable for breach of the duty of care to a customer, who purchased its goods in a remote area, the neighbour principle is elaborated to imply any person who is proximately or remotely relating to one, and this could be anyone subscribing to ones goods or services of any kind. When health care providers are alleged to have failed to observe principles and standards concerning the care of patients, medical negligence occurs and civil litigation may result. Thus, where a health care provider administers treatment to a patient negligently and injury is caused to the patient, the patient may sue for negligence against the provider for the injury suffered. The rationale for liability for negligence of a health care provider is that, someone harmed by the actions of such a provider deserves to be compensated by the injuring party. Thus, the attribution of responsibility here is not intended for punishing the offender but for redressing the harm caused the sufferer. Hence, the requirement of mens rea is not primary in negligence.

In law, a plaintiff must establish three elements in order to succeed in an action for medical negligence. The elements include:

a. That the health care provider owed the plaintiff a legal duty of care;
b. That the provider was in breach of that duty;
c. That the plaintiff suffered injury/damage as a result of the breach (Enemo 2011/2012:117).

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, and this duty is the duty of care. However, a medical practitioner does not owe a duty of care to anyone who needs aid and who can be reasonably assisted (Okonkwo 1989:123). The term „duty" simply means that obligation recognized by law to take proper care to avoid causing injury to another in all circumstances of the case. In Hedley Byrne & Co Ltd v Helter & Partners Ltd ([1957] A. C. 555), Lore Morris notes that, "...it should now be regarded as settled that if someone possessed of a special skill undertakes quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise...". Again in R v. Bateman, the court explained that:

…if a person holds himself out as possessing special skill and knowledge and he is consulted, as possessing such skill and knowledge, by or on behalf of a patient or client, he owes a duty to the patient or client to use due caution, diligence, care, knowledge and skill in administering treatment... ([1935] 94 K. B. 79).

Therefore, where a patient relies on the skill and knowledge of a provider with respect to his/her health, a duty of care arises. Providers owe a duty to give adequate counseling to patients, to warn patients of the risks involved in the medical treatment being offered, to conduct a proper examination and to make proper diagnosis; duty to administer injections, anesthesia, x-rays, etc properly, to avoid wrongful treatment, to see their patients or clients, to inform patients adequately, and etcetera. Similarly, hospital authorities owe the same duty of care to patients accepted for treatment in their hospitals. In America and other jurisdictions where „Good Samaritan Laws" exist, if a nurse or doctor freely offers services to someone in an emergency situation, he would not be held liable if anything goes wrong. Thus, a nurse who hears a neighbour"s shout for help, because she is delivering her baby in the staircase, and offers her services, would not be subjected to civil liability if something goes wrong. It is the same in the case

of a doctor who renders help at a scene of a road accident. In Nigeria, for instance, where this „Good Samaritan Law" does not apply, the health care provider in such cases will be held liable to the degree of care of a reasonable health care provider in the circumstance. As long as a health care provider follows the approved procedure for the treatment offered, the occurrence of a mishap will not establish negligence on his part. Thus, there must be some form of standard against which the conduct of the health care provider has to be examined. This standard is that of a reasonable, skillful health care provider which informs the principle of foreseeableness. It is assumed that fulfilling certain standards established by the health care professional bodies, a health care provider must reasonably foresee the possibility of his or her conduct resulting to harm on the part of a care seeker, and therefore avoid such conduct. Not being able to foresee such circumstance and its occurrence, amounts to negligence. Though the standard of care may be relative, depending on each circumstance and could be judged by factors such as time, place and availability of facilities, but these factors may not exculpate a health care provider who has full knowledge of their limitations (Susu 1996:155). If, for instance, a health care provider is to function under emergency conditions, where he may act without the necessary equipment, the standard expected of him may be lower than that of one acting under normal conditions. There may the possibility of improving his services either by opting for treating the patient in a nearby hospital or medical centre with necessary facilities, or enabling the treatment of the patient by another personnel (expect in the relevant area of health care, if he is not), who can render more effective treatment at the possible time. If the health care provider neglects this possibilities and harm occurs in the course of his treating the patient, the fact of emergency cannot relieve him of liability.

Also, the standard of care expected from local providers in villages cannot be in accordance with current trends in some urban areas where there technological advancements. In the case of Warnock v Kraft, it was explained that:

…a doctor in a small community or village not having the same opportunity and resources or keeping abreast of the advances in his profession, should not be held to the same standard of care and skill as that employed by physicians and surgeons in large cities... ([1938] 85 p.2nd 505)

Similarly, a house officer is not expected to show the same standard of skill and care as a registrar or a consultant who is a specialist in a particular area. Notwithstanding, a doctor, nurse, anesthetist, or any other health care provider, who holds himself out to a patient as possessing special skill and knowledge in a particular area of health care, must exercise the same degree of care and skill as those who generally practice in that field. Thus, a nurse who undertakes a complicated In-Vitro Fertilization (IVF) surgery must conform to the standard of a qualified obstetrician, if not, she will be liable in negligence for undertaking such treatment with full knowledge that as a nurse, she does not have the special skill and knowledge and facilities required for that type of surgery. Hence, the skill and knowledge one holds oneself as possessing in profession, the more the standard of the professional with such skill one will be held to have. In the case of Kelly v. Carol ([1950] 219 p.2nd 79 A. L. R. 2nd 1174), a chemist who holds himself out to be a pharmacist will be judged as if he were a pharmacist. It is therefore apparent, that the test is the standard of the ordinary skilled man exercising and professing to have that special skill which is not; part of the ordinary equipment of the reasonable man. In Bolam v. Friern Hospital Management Committee, the court said that:

But where you get a situation, which involves the use of some special skill or competence, then the test as to 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; neither that of a specialist of perfection; nor that of one with Olympian reputation, but an average yardstick of reasonableness and objectivity. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art ([1957] 1 WLR 582 at 586).

The consequence of having professional standards is that, providers who fail to comply with them, may be held to be in breach of their duty. In Nigeria, for example, the Medical and Dental Practitioners Act,

which regulates the medical and dental professions, lists acts constituting professional negligence to include, making mistake in treatment, failure to advise or proffering wrong advise to a patient, making incorrect diagnosis, failure to attend to a patient, etc (2024:41). In the case of one Mrs. Olabisi Onigbanjo , decided by the Medical and Dental Practitioners Disciplinary Tribunal (M.D.P.D.T.), a doctor who was charged with negligently leaving a large surgical drape in the abdomen of the woman after surgery, was found guilty in accordance with Section 17 of the Medical and Dental

Practitioners Act (2004). He was suspended from practice for six months (Abati 2005:8). Apart from the disciplinary action which may be taken against the medical practitioner by the appropriate medical bodies, or by an employer, for negligently performing his duties below the practice standards, the courts can also use those standards to measure such a provider‟s duty of care. However, for the court, compliance with those standards does not necessarily mean that the legal standards have been satisfied. The court, at the end of the day, sets the standards, and "may find that the standard of practice the profession has set is unacceptable to the wider community (Cook et al 2003:130).

Interestingly, medical science is an area where changes do occur, and therefore, a health care provider must be in tune with current skill. He must keep abreast of new development and is expected to be familiar with his own specialist literature. In Roe v. Minister of Health ([1954] 2 QB 66), the anesthetist injected the two plaintiffs with contaminated anesthetic, which caused them paralysis from the waist downwards. The anesthetist was held not to be negligent because the risk of such contamination was not generally appreciated by competent anesthetists at that time. However, in 1957, a clear warning on the use of this anesthetic was issued to the effect that any provider who continues with the old system after this warning will not escape liability for negligence (Okonkwo in Umerah 1989:126). Before the warning the danger was unforeseeable.

There is need to maintain a balance between the skill and the due diligence required of a provider at a point in time. McNair explained as follows:

Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view. At the same time, that does not mean that a medical man can obstinately and pigheadedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion. Otherwise you might get men today saying: I do not believe in antiseptics. I am going to continue to do my surgery. That clearly would be wrong…(Bolam v. Friern Hospital Management Committee 587)

It is necessary to take the circumstances of each case into consideration. Where a provider recognizes the limits of his skill, it is advisable that he should make timely referral of his patient to other appropriate provider who will be able to offer the patient the care he or she needs. This is to avoid his being involved in any breach of duty.

A provider may not only be liable in negligence due to lack of skill or care in the performance of the procedure, but may also be liable where the injury is caused by defective disclosure of information, because, had relevant information been given, the patient would have chosen not to have the procedure, and therefore may not have been exposed to its risk. It is for the provider, in order to avoid negligence, to ensure that "appropriate information is provided. This is to assist the decision made by, or on behalf of the patient concerning what, if any treatment to receive" (Cook et al 238-242). For example, a provider may give assurance that a procedure will terminate a pregnancy, or that fertilization procedure will exclude the risk of pregnancy in the case of Eyre v. Measday ([1986] 1 ALL ER 488), the plaintiffs not wishing to have any more children, consulted the defendant, a surgeon , to see if the plaintiff could be sterilized by vasectomy. With the 1st plaintiff‟s consent, the surgeon performed the vasectomy operation, yet the 2nd plaintiff became pregnant, and by the time she recognized the symptoms, it was too late for abortion. In an action against the defendant, the plaintiff partly claimed that the defendant failed to warn them that here was a small risk that the 1st plaintiff might become fertile again. There was no evidence to show that that the defendant had performed the operation properly, and at the time of the operation it was known in medical circles that in rare cases, the act of the operation could be

reversed naturally. The court held that the failure by the defendant to give his usual warning that there was a slight risk that the 1st plaintiff might become fertile again amounted to a breach of duty of care which he owed to the plaintiffs because, the warning was necessary to alert the plaintiff to the risk that she might again become pregnant. Moreover, the risk of this 1st plaintiff failing to appreciate promptly that she had become pregnant ought to have been in the reasonable contemplation of the defendant.
In every case, the law requires that the health care provider‟s conduct must not fall below expectation or standard. Therefore he must always act like a reasonable, skilful and competent provider in order to avoid liability. Consequently, the court regards as standards of proof of medical negligence, the principle of reasonable foreseeable harm, the doctrine of „resp ipsa loquitur‟, and the principle of contributory negligence.

IMPLICATIONS OF HART AND HONORE'S POSITION FOR MEDICAL NEGLIGENCE

In an action for negligence, when a plaintiff has proved existence of duty of care and its breach by the health care provider, he must prove that he suffered damage as a result of the breach in order to succeed and be compensated. This remedy is recognized by law in order to assuage the feelings of the injured plaintiff. However, it must be shown that the health care provider‟s breach of duty, as a matter of fact, caused the damage or harm. That is to say, that the plaintiff must show a causal link between the damage he suffered and the provider‟s act. In the Nigerian case of Ajaegbu v. Etuk ([1962] 6 ENLR. 196), the plaintiff was unable to establish that the damage suffered was as a result of the breach of duty by the medical practitioner. Breach of duty by the medical practitioner fall within what Hart and Honore regard as case of interpersonal relationship, which according to them, cannot be effectively determined using the „sine qua non‟ test. Their position is that while the conduct of the health care provider may be regarded as the proximate cause, there may be several remote causes which the „sine qua non‟ test, cannot account for. They think that proper determination of liability should exhaust the contribution of all remote causes to an event. Therefore, if this is not done, it may be a hasty generalization to hold the health care provider solely liable for the injury caused. Also, exhausting the contribution of any remote cause or remote causes is necessary for establishing the extent of liability of the health care provider, anything short of this would result to unjustly punishing the health care provider.
The onus of proof of medical negligence lies with the plaintiff, and usually, if a provider does not admit negligence in a given case, then the plaintiff will have to call evidence to show negligence on the part of the provider, that is, to show that the conduct of the provider fell below the required standard in a particular case. Such evidence which assists a plaintiff and even the court in determining that a provider acted below the required standard of care is primarily the testimony of experts, which in turn relies on learned treatises, articles in medical journals, research reports, and others. Expert evidence is used because it is only a health care provider who can show that another health care provider in the same field acted below the required standard. The problem encountered here, however, is the reluctance of these providers to give the needed expert evidence, because they do not want to blame or expose a colleague. According to Okonkwo, this silence is sometimes referred to as the „conspiracy of silence‟ (Okonkwo 2003:127). In the English case of Hatcher v Black, Lord Denning stated that:
It would be wrong, and indeed, bad law, to say that simply because a misadventure or mishap occurred, the hospital and the doctors are thereby liable. It would be disastrous to the community if he were so. It would mean that a doctor examining a patient or a surgeon operating at a table, instead of getting on with his work, would be forever looking over his shoulder to see if someone was coming up with a dagger. His professional reputation is as dear to him as his body, perhaps more so, and an action in negligence can wound his reputation as severely as a dagger can, his body…
Lord Denning s view, shows that Hart‟s and Honore‟s position needs to be adequately understood in the medical field as a health care provider may be unjustly punished using the „sine qua non‟ test.
As true as the above statements are of doctors and probably of other health care providers, yet if a provider‟s mistake or error of judgment can be shown to be the result of a breach of duty, which has caused damage to a plaintiff, he should not be allowed to escape liability. In other words, if damage

would not have occurred but for a provider‟s act, then his act caused the damage and he should be liable. This is exactly what Hart and Honore mean by intervening causes being the basis of attribution of responsibility in law. However, they equally object to the NESS test being sufficient for determining liability in cases such as medical negligence. On the other hand, if the damage would have occurred despite the provider‟s act, then his act did not cause the damage and he „should escape liability. In Barnett v Chelsea and, Kensington Hospital Management Committee ([1969] 1 Q. B. 428), the claimant‟s husband and two of his fellow night watchmen went to hospital and complained that they had been vomiting for three for hours after, drinking tea. The nurse called the casualty doctor by telephone and told him of the complaint. Instead of going to see them, the doctor instructed the nurse to tell them to go home and consult their own doctors later. This was an error of judgment and breach of the doctor‟s duty of care. In any case, the men left and later that day the claimant‟s, husband died of arsenic poisoning, and the coroner‟s verdict, was that of murder by persons unknown (arsenic was introduced into the tea). The court, however, found the doctor/hospital in breach of duty, but the breach was not a cause of the death because, even if the deceased had been examined and treated with proper care, by the doctor, it would probably have not been possible to save his life. Thus, there was link between the negligent act of the doctor and the injury eventually suffered by the claimant‟s husband, yet, the claimant‟s case failed.

Assuming the doctor‟s act in the above case caused the injury suffered, the law would not also had held him liable for all the direct consequences of his act because he will be held liable only for those consequences of his act, which a reasonable man would foresee as the natural and probable consequences of his act. However, those consequences, which a reasonable man would not foresee, are regarded by the law as being „too remote‟ in the sense that they need not be considered. This would amount to a reliance on the NESS test. In such case, the defendant escapes liability. However, Hart and Honore point out that those causes which may be regarded as too remote and therefore are not considered for proximate cause, renders the NESS test insufficient for „cause-in-law. Their argument is collaborated by the fact that in medical negligence as at today, the health care giver is not expected to foresee the exact extent of the damage; suffered by the plaintiff or the precise sequence of its infliction. According to Lord Denning M. R., “it is not necessary that the precise concatenation of circumstances should be foreseen. However, it is enough if the damage that is foreseeable is of the same “kind” as the damage, which actually occurred (The Wagon Mound {No.2} [1967] A. C. 617). In that case the provider will be held liable for only for damage that is the same kind as the one foreseen. Hart and Honore would argue that this limiting the liability of a health care provider to only foreseeable damage undermines the fact that the causes designated as too remote could be responsible for the damage unforeseen. This implies that if all possible causes are to be examined, the so-called unforeseen damage may have equally been foreseen.

Hart‟s and Honore‟s position even proves abortive, the proof of negligence by the doctrine of Res Ipsa Loquitur. This principle is premised on the belief that justice would not be done if the plaintiff is allowed to go without a remedy because of the difficulties encountered in proving his case. Though the plaintiff may not be in a position to locate the exact act or omission that caused the injury, and the defendant alone may know, the plaintiff is assisted by the doctrine of res ipsa loquitur. This is a Latin expression, which means that „the thing speaks for itself‟. The entire doctrine was stated by Erie, C. J. in Scott v London and St. Kathrine Docks Co declares thus:

> …Where the thing is shown to be under the management of the defendant or his servant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of care... ([1865] 2 H. R. C. 596).

Once the plaintiff can show that the thing that caused the damage under the management or control of the defendant or his servants and the accident was such as would not ordinarily have happened if proper care was taken, the court will infer negligence to the defendant. The plaintiff will no longer be called upon to prove negligence on the defendant‟s part because the surrounding circumstances amply raise an

inference of negligence. The onus of proof then shifts to the defendant, which if not discharged, will lead to his liability.

In cases of res ipsa loquitur, the plaintiff is saying he does not know how the damage occurred. If he knows, the maxim will not apply. The doctrine therefore only applies when looking at a set of facts, which the plaintiff cannot explain, the natural and reasonable inference to be drawn from them is that what has happened was the result of some act of negligence on the part of the defendant. In the Nigerian case of Igbokwe & Ors v. University College board of Manaement ([1961] WNLR 173), a woman who just delivered her baby fell from the 4th floor of the hospital building. A doctor had specifically asked a nurse to keep an eye on her, but she was found fatally wounded after her fall. The court found the hospital negligent on the application of res ipsa loquitur.

The doctrine of res ipsa loquitur has been applied in the medical cases. In Mahone v. Osborne, it applied where after abdominal operation, swabs were left in the body of the patient the same was the case in Fish v Kapur ([1948] 2 All E. R. 176), where a dental extraction resulted in a jaw fracture. Again the maxim was applied in the case of Cassidy v Ministry of Health ([1951] 2 K. B. 343), where a plaintiff who entered a hospital to be cured of two stiff fingers ended up after the treatment with four stiff fingers, and as a result, lost the use of his left hand.

Reps ipsa loquitur could be located within what Hart and Honore recognize as the NESS test. This test too, for them, is not sufficient to account for attribution of responsibility. However, the defense available to health care providers is that of contributory negligence. If the plaintiff‟s own negligence leads to the damage he sustains, in whole or in part, it is known as contributory negligence. Contributory negligence is want of care from a plaintiff for his own safety, which contributes to the damage, while also the defendant‟s fault partly contributes to the damage. The court will reduce the damages recoverable, so that the plaintiff will not recover in full. Section 234 of Anambra State Torts Law 1986 provides as follows:

…Where any party suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim, in respect of that damage, shall not be defeated by reason of fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable, having regarded to the share of the claimant in the responsibility for the damage.

The onus is, therefore, on the defendant to raise the defense of contributory negligence. He does not have to show that the plaintiff owes him a duty of care, rather, he has to show that the plaintiff has failed to take reasonable care for his own safety in respect of the damage in question, and that by reason of this, the plaintiff contributed to his own injury (Enemo 2007:306). The standard of care expected of the plaintiff is the same as that in negligence itself, the same reasonable man‟s test is applicable to him. With respect to apportionment of damages, the judge in appropriate cases would reduce damages to such an extent as he thinks just and equitable, having regard to the share of the claimant in the responsibility for the damage (S. 234(1) Enugu State Tort Law). There is no mathematical formula for this measure. Contributory negligence seems in tandem with Hart‟s and Honore‟s position. However, their argument that our intuitive conception of causation is inextricably linked with the issue of facts, and not merely dependent on policy considerations, renders contributory negligence wanting in terms of fulfilling the requirement of legal cause. This is because, the health care giver, in pleading contributory negligence, also has to suppress causes regarded as too remote.

CONCLUSION

The various proofs of negligence recognized by the law are based on policy considerations which according to Hart and Honore, portray the minimalist position on the principle of causation. Both the „sine qua non‟ test and the NESS test are based on what are rationally established to account for attribution of responsibility. However, they do not defeat the fact that our intuitive conception of causation is inextricably linked with the issue of facts as Hart and Honore maintain. Their position that unless all possible causes of harm, proximate and remote, are exhaustively examined, attribution of

responsibility in law may occasion injustice is impactful in medical negligence. It directs our attention to the need for judicial activism with respect to evolving appropriate measures for accounting for proximate causes in medical negligence. Given the fact that proximate causes may include metaphysical elements, Hart‟s and Honore‟s position gives effect to a call for collaborative effort of the lawyer and other professionals, mostly, the philosopher, the religious adherent, in establishing the extent of liability in cases, not only of medical negligence, but in cases of negligence in general.

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