MEDIATION TEMPLATE FOR RESOLVING MEDICAL DISPUTES: COMPARATIVE ANALYSIS*

Abstract

Disputes are inevitable and cut across many sectors including health sector which is also marred with various disputes which ended in courts for litigation. The bottom line is how disputes in health sector should be resolved. The article looks into various jurisdiction disputes horizon in the health sector. It addressed this issue of how it can be resolved through mediation. Mediation is an alternative dispute mechanism to the conventional means known as litigation.The article discovers that mediation mechanism can be adopted as a template to the menace of medical disputes and found that the application of mediation will ensure peaceful resolution and sustain the relationship between parties.The article concludes that mediation will serve as best approach for resolving medical differences.The article recommends that the article should enact a legislation on mediation by which pre-dispute forms should be signed by the parties for any medical transactions signifying that parties intend to resolve their dispute through mediation.

Key words: *Dispute resolution, Mediation, Comparative Analysis, Medical Disputes Legal Framework*

1.0.Concept of Medical Dispute

Healthcare is a prime necessity of human life (among others). The delivery of health services occasionally ends with disparities and clashes amid medical experts and patients; an example of which is medical malpractice.[1] The top three causes of medical disputes have been considered as: diverse thoughts on obligation (for instance, patients would request that the health centers take the responsibility for the insufficient health result) (54%), the expertise of medical practitioner (27%) and displeasure with medications and care giving (7%). Whereas health mishaps (the unpredicted and unintentional medical harm, usually out of restricted health situations and expertise) accounted for 5% and health institutions challenges was 4%, the absence of informed consent which was 3% accounted for minor magnitudes of the issues.[2]

1.1.Causes of Medical Dispute

There are many causes of medical disputes across the globe. These include the following: first, the inability of a medical practitioner to attend to, and or give prompt care to a patient has been regarded as a cause of dispute in the health sector. Sometimes, patients are rushed into the hospitals or brought to the health care provider under emergency situation. In such

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[1] G Widjaja and Adumilah, 'Malpractice: Causes and Disputes Resolution Choices' (2015) 1 Journal of Indonesian Health Policy and Administration 1.

[2]M Wang et al, 'The Role of Mediation in solving Medical Disputes in China' (2020) 20 BMC Health Service Research 225.

circumstance, there is need for a prompt and immediate attention of the medical practitioner. In such a situation, a delay could give room to/generate rancor. Another instance is where a health care provider ought to have conducted a prompt examination on the patient, but the delay in doing such caused the patient some injury. In the case *of Olowo v Nigerian Navy,*[3] a medical expert who was in the employment of the Nigerian Navy was adjudged responsible for his inability to look at a patient who was checked into their hospital resulting in a forfeiture of her pregnancy and injury to her womb.[4]

A very popular cause of medical dispute in Nigeria is the retention of objects during surgical operations. Sometimes, swabs, towels, needles, just to mention a few are left behind in the body of patients, thereby leading to complications later in life. This depicts a clear picture of the level of negligence in the health sector. In considering the case of *Anderson v Chasney*,[5] the patient, a child, died after an operation conducted to remove his tonsils because a sponge had been left in the base of the child's nostril, causing the child to suffocate and die. The doctor and his team were held liable for such negligence. The act of giving incorrect diagnosis has resulted in medical disputes. In *University of Ilorin Teaching Hospital v Akilo*,[6] the court established that the medical practitioner would be deemed liable if in the absence of due care and skill causing in error of treatment he, for instance, describes fractures as dislocations and dislocations as fractures.[7]

A medical practitioner's failure to obtain the approval of the patient is another cause of medical dispute. Although rarely seen in practice, however, where a medical expert fails to acquire the approval of his patient prior to administering any atom of care, the practitioner will be liable in tort for negligence, battery and even professional misconduct. It should be noted that it does not matter whether the patient got healed from such treatment. As the court puts it, the consent of a patient is paramount . . . hence, the relationship between the patient and a doctor is founded on agreement, it follows that the selection of a sound adult patient to refuse informed consent to medical care, barring state involvement through judicial procedures, leaves the practitioner helpless to inflict a treatment on the patient.[8]

The researcher personally received a reliable and confidential information where a doctor, out of pity for a patient, who had had three caesarean section deliveries, tied her womb without informing her, let alone obtaining her consent. Furthermore, a patient's womb was ruptured by her doctor, during a cesarean section delivery, without a whisper to her as to what took place. Attempts made by this woman to conceive was delayed. Subsequently, she conceived eight years after her first delivery, but miscarried the baby. Upon admission at the hospital, she was informed that her womb had been ruptured by the doctor who carried out the cesarean section for her first and only delivery.

[3] (1940) 4 DLR 223.
[4] ibid.
[5] ibid.
[6] (2000) FWLR Part 28, 2286.
[7] ibid.
[8] See *MDPDT v Okonkwo* (2001) 7 NWLR part 711, 206.

Improper administration of injection and error in treating patients are two distinct but similar causes of medical disputes. Accordingly, error in treating a patient is another common form of medical dispute. This can be occasioned as a result of little or no skill on the part of the acclaimed practitioner,[9] lack of knowledge from the practitioner,[10] where the medical practitioner mishandles or causes a mistake in the use or application of a surgical instruments,[11] among others. On the other hand, the medical practitioner must take care when administering injections in order to administer the right drug, dosage and at the right place. Failure to do so will amount to liability as seen in the case of *Caldeira v Gray*.[12] Other forms or cause of medical dispute would include, incomplete assessment of the patient, failure to take full medical history, insufficient or failure of communication between doctor and patient.

2.0. Mediation and Medical Dispute

Sustaining confidentiality and a collective approach amid parties are significant standards that inspire facilitative mediation and make this mode of mediation predominantly appropriate for determining medical conflicts.[13] Apparently, health professionals and their institutes pay more attention to cooperate image and reputations. Similarly, patients shy away from social stigma associated with their ailment. In worst cases where parties are unable to reach a decision, neither party can apply any facts gotten in the course of the mediation for litigation, unless in some conditions. Further, in the facilitative mode of mediation, divergent parties can discuss, negotiate, and decide a resolution amid themselves with the backing of the mediator. Possibly, the doctor-patient relationship will greatly be conserved after health mediations.

Aside mediation process training, virtually all indorsed mediation training courses offer nearly training exercises in communication and negotiation skills. Many of such skills, for instance, vigorous listening, reframing, acknowledgement of feelings, among others, are germane to our day-to-day clinical exercise where divergent and/or challenging human relations is unavoidable. Medical experts who took part in communication training courses discover that the learning experience was productive, regardless of endorsement exercise.[14] Many do enjoy enriched communication and an improved relations with their patients, even in the lack of a disagreement.[15] Within 2013 - 2014, the Hospital management imbibed the idea to sponsor 120 and 600 medical experts to take part in recognized mediation courses and applied mediation skills training, respectively.[16] A couple of momentous studies have established that when

[9] *Jones v Manchester Corporation* (1952) 2 All ER 125.
[10] *Reynard v Carr* (1983) 30 CCLT 42.
[11] *Gonda v Kerbel*(1982) 24 CCLT 222.
[12] (1936) 1 All ER 540.
[13] N Alexander, *Mediation process and practice in Hong Kong* (LexisNexis Butterworths 2010); Danny and Paul (n 1).
[14] CB Liebman and CS Hyman, 'A Mediation Skills Model to manage disclosure of Errors and adverse events to Patients' (2004) 23 HA 22; Danny and Paul (n 1).
[15] SC Trumble et al, 'Communication skills training for Doctors increases Patient Satisfaction' (2006) 11 Clinical Governance 299.
[16] Danny and Paul (n 1).

patients laid complaints or recourse to legal process, it is probably connected to miscommunication amid the patients and the care giver.[17]

Often, the view on the lack of care administered by health experts is the cause for grievances, than unpretentious professional negligence in the supply of medical attention.[18] Communication amid the patient and the healthcare professional amid even more problematic when there are opposing or unforeseen results. Whereas patients and their relations rightfully anticipate candid clarifications and authentic apologies where applicable following contrary occasions, healthcare experts are, more often than not, either not ready or comfortable to communicate with them in the result.[19]Mediation boasts of 75% to 90% achievement in avoiding lawsuits, cost savings of $50,000 per claim, and 90% satisfaction rates among both plaintiffs and defendants.[20]

Mediation is an intentional and private conflict resolution process where an umpire, the mediator, supports the parties to find commonly pleasant resolutions to the crisis. The mediation proceeding takes care of a trustworthy stage for parties to clarify, interchange and illuminate information, reinstate relationship. These are components to a friendly settlement, or sets parties on the path to reach a maintainable and enforceable settlement. The mediators do not make any orders or decisions on the result.

2.1. Mediation and Medical Dispute in Nigeria

In Nigeria, the practice of mediation is not well established, legally. Although it is a form of ADR, yet there is no legal framework on the regulation and practice of mediation. It suffices to state explicitly that only two mechanism of ADR in Nigeria are legally provided for by the Arbitration and Conciliation Act, Cap 18, LFN 2004. Essentially, the Nigerian space has nothing, that is, no legal provision on mediation, and that suggests that the practice is not legally recognized. Nonetheless, it is important to underscore that the Arbitration and Conciliation (Amendment) Bill, 2019 makes provisions for the practice of mediation in Nigeria. This is not to say that mediation had not been in use in Nigeria prior to this time; however, this was used on a small scale. As far as medical disputes are concerned, mediation can be applied to resolve medical disputes by inviting a neutral third party to settle the disputes between the parties. The nature of medical services is confidential and require that such be resolved in a confidential way.

2.2.Mediation and Medical Dispute in South Africa

Mediation is also applied in many segments of the economy, viz. complex public disputes, civil, environmental cases, family, commercial, interpersonal, labour, community, and a wide

[17] AR Localio et al, 'Relation between Malpractice claims and adverse events due to Negligence: Results of the Harvard medical practice study III' (1991) 325 NEJM 245; HB Beckman et al, 'The Doctor-Patient relationship and Malpractice: Lessons from Plaintiff depositions' (1994) 154 AIM 1365; Danny and Paul (n 1).

[18] Beckman (ibid); Danny and Paul (n 1).

[19] TH Gallagher et al, 'US and Canadian Physicians' attitudes and experiences regarding disclosing errors to Patients' (2006) 166 AIM 1605; Danny and Paul (n 1).

[20] BBhajanjit and HS David, 'Medical Malpractice Reform: The Role of Alternative Dispute Resolution' (2011) 470 Clinical Orthopaedics and Related Research 1370.

range of other disputes. Mediation proceedings may only take place if the parties are in agreement and willing to assist in reaching a settlement.[21]

In South Africa, there is proposal for the introduction of a pre-mediation clause for the department of health, private and government owned, and health practitioners. This is because it is in the interest of that that health based disputes are resolved speedily and with less expenditures. To this extent, an experienced and autonomous medical negligence mediator well appointed by a Judge or retired Judge of the High Court of South Africa (or his or her nominee) will chair the aforesaid pre-mediation meeting. The purpose of the confidential and without prejudice meeting will be to inform all interested parties about mediation so that they can take informed decisions whether or not to make use of mediation before any other legal action.[22]

2.3.Mediation and Medical Dispute in United States of America

The use of mediation to resolve disputes swiftly offers an alternative that is fair, quicker, and significantly less expensive. Mediation also affords participants with the chance to admit error, express regret, gain information, and consider nonmonetary forms of compensation. Mediation is centered on three fundamental values which are informed decision-making, autonomy, and confidentiality.

The application of mediation in medical dispute has established that mediation can handle the aftermath of an adverse event or medical error and to resolve medical disputes. The best known program is the Medical Claim Mediation Program started by the Rush University Medical Center in Chicago in 1995 (the "Rush Model"). Johns Hopkins Health System in Baltimore and Drexel University College of Medicine in Philadelphia have programs similar to the Rush model. In 2004, New York City agreed to participate in a demonstration project in which medical dispute cases filed against health care facilities operated by the New York City Health and Hospitals Corporation are being referred to mediation. As of December 2004, the city had referred 29 cases. Five plaintiff's attorneys declined to mediate. Nineteen cases have been co-mediated and two-thirds of these have settled at mediation with some settlements including non-monetary as well as monetary remedies.[23]

Furthermore, mediation has statutory definition. In the United States, mediation is defined under Section 2(1) the Uniform Mediation Act 2004 as a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute. The Uniform Mediation Act was drafted by the National

[21] T Wilcocks and J Laubscher, 'Investigating Alternative Dispute Resolution Methods and the Implementation thereof by Architectural Professionals in South Africa' (2017) 24 ActaStructilia 146.

[22] 'Medical Malpractice Workshop: Panel 1 Discussion Framework Navigating our way around Medical Malpractice Litigation Mediation vs Litigation – Preventive Measures' <https://medicolegal.org.za/uploads/accredited_journals/journal-doh-constantia-hoganlovells-malpracticeworkshop-panel1-recommendations-final.pdf> accessed 16 October 2020.

[23] CB Liebman and CS Hyman, 'Medical Error Disclosure, Mediation Skills, and Malpractice Litigation: A Demonstration Project in Pennsylvania' <https://www.pewtrusts.org/en/research-and-analysis/reports/2005/03/02/medical-error-disclosure-mediation-skills-and-malpractice-litigation-a-demonstration-project-in-pennsylvania> accessed 17 October 2020.

Conference of Commissioners of Uniform State Laws and approved by it and recommended for enactment in all the states, August 10-17, 2001 and amended August 1-7, 2003.[24]

Many medical centers have successfully used mediation effectively to divert potential claims from litigation. The University of Michigan, Johns Hopkins, Rush-Presbyterian Medical Center, the University of Pittsburgh Medical Center, and Drexel have all implemented mediation programs with the assistance of pre-mediation agreements.[25] According to Jury Verdict Research, an average of $50,000 in legal expenses alone is saved in each case, which is mediated rather than taken to trial.[26]

2.4. Mediation and Medical Dispute in China

The upsurge in medical disputes in China occasioned against the backdrop of dramatic changes in China's legal and healthcare systems.[27] China's healthcare system has undergone dramatic changes during the reform era. Extensive literature analyzed these complex and multi-dimensional changes. Over the past thirty years, healthcare, like much of the Chinese economy, has undergone dramatic marketization.[28] The method of mediation as seen in the Chinese jurisdiction is subject to the supervision of the Judicial Administration department. The agreement after mediation carries legal effect but no power of law enforcement. To ensure that such agreement is legally binding on parties, stakeholder such as patients or hospitals must seek judicial confirmation. Where such confirmation is absent, and one of the parties falters in keeping its part of the agreement, mediators will advise them to choose other ways to deal with the dispute.

The Guangdong People's Mediation Committee (PMC) was established in 2010, and its service region has expanded to 16 out of 21 cities by 2015. Guangdong's PMC operates according to the principles of "fairness, impartiality, neutrality, timeliness, and convenience". It built a mechanism combining mediation, compensation and dispute prevention, which actively responses to Yinao and aims to settle medical disputes outside hospitals to maintain normal diagnosis and treatment order. To mediate disputes between health care facilities and patients, the mediators usually have educational backgrounds such as medicine, law, and psychology and they receive annual training to improve their mediation skills. The mediation process is also supported by both medical and legal experts and most of the medical experts have a job title of deputy director or above. Guangdong PMC has 46 branches in Guangdong Province and its expert group (including doctors, nurses and lawyers) has more than 2000 members.[29]

[24] V Quartarone et al, 'Mediation for Medical Malpractice Actions: An Efficient approach to the Law and Veterinary Care' (2011) 1 Open Journal of Animal Sciencesenly 1.
[25] JJ Fraser, 'Jr American Academy of Pediatrics: Technical Report: Alternative Dispute Resolution in Medical Malpractice' (2001) 107 Pediatrics602.
[26] ibid; TB Metzloff, 'Alternative Dispute Resolution strategies in Medical Malpractice' (1992) 9 Alaska Law Review 429; SJ Szmania, AM Johnson and M Mulligan, 'Alternative Dispute Resolution in Medical Malpractice: A Survey of emerging trends and Practices' (2008) 26 Conflict Resolution Quarterly 71.
[27] BL Liebman, 'Malpractice Mobs: Medical Dispute Resolution in China' (2012) 113 Columbia Law Review 181.
[28] ibid.
[29] M Wang, 'The Role of Mediation in solving Medical Disputes in China' (2020) 20 BMC Health Services Research 225.

3.0. Recommendation

This paper makes certain recommendation that could facilitate the practice of resolving medical disputes through mediation. These include:

1. There is a need to introduce a pre-dispute mediation form. The importance of this form cannot be overemphasized. First this form will serve as a prerequisite for patients who seek medical attention. Secondly, it will be an evidence of the intention of the parties to opt for mediation in the event that any dispute(s) arise in the course of the transaction.
2. There is a need for a Uniformed Mediation Law across the globe. Such law will ensure that necessary provisions are outlined to regulation the practice of mediation.
3. Nigeria, and other countries, should be forward thinking and proactive. Hence, such countries should enact contemporary and meaningful legislation that will ensure the development of the practice in Nigeria (and other countries affected).

4.0.Conclusion

Mediation is that method of dispute resolution that enables parties, via the aid of an independent and neutral third party, on a voluntary basis to develop a mutually beneficial solution. A notable difference between mediation, which makes it stand out, and the traditional settlement of disputes in court, is premised on the fact that a mediator does not rule on the dispute. Only conflicting parties are privy to reach a binding conclusion, with which the assistance of the mediator, produce and consider possible choices and choose the most suitable ones. Mediation is therefore the ability to reach a consensus in a dispute that is of great and equal interest to both parties.[30]

Mediation, as a dispute resolution mechanism, possesses numerous and advantageous benefits. In the resolution of medical disputes, mediation is the best mechanism to be applied in order to achieve meaningful and constructive progress between or among parties. This study also considers the practice of mediation in different countries such as Nigeria, South Africa, United Kingdom, China and the United State of America. It suffices to note that these different jurisdictions have diverse provisions available to encourage and facilitate the administration of mediation in the different regions. Whereas in some jurisdiction mediation is practiced on a lighter note, nonetheless, there are many jurisdictions with well-established system for mediation.

[30] NV Fedorenko et al, 'Comparative Legal Analysis of Mediation in Russia and the EU' (2017) XX European Research Studies 1.