

Ethico-Legal Issues in the Medical Profession: A Case Study of Nursing Profession in the World

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Abstract

The paper analyses the professional rules and regulations that guide the nurse in carryout her professional duties. The paper discusses that the nurse should carrying out her duties diligently and carefully along with the doctrine of Islamic law by the way of fearing Almighty Allah; this is because of her closeness to patients in the hospitals and clinics. This paper identifies some actions, omissions, carelessness, negligent that can lead the nurse to a case in court or Shari'ah court. Even if the affected patient can not afford litigation or remains silent over his right, some significant others like Human Rights Organizations, pressure groups can take up the case and make the affected Nurse to pay for such acts or omissions done against the victim. The paper elaborates some problem that may be caused by the nurse in the hospital due to her ignorant of law guiding her practice, pressure of work, or in a rare occasion, a lackadaisical attitude to others. The paper further explains the international/local/Islamic laws which regulate every aspect of communal life i.e the Nursing and Midwifery Regulation Acts that provide for the training, registration and discipline of Nurses and midwives as well as Shari'ah principles guiding their professional ethic. This is because what one does some years back, if done today may put a Nurse in jail or make her pay heavy damages because the right to enforce one's denied fundamental human right has become a global issue and, of course, has led to a new era in the act of caring for patient. In addition the finding in the paper will be a good guidance to medical officers, Islamic jurists, academicians scholars, researchers throughout the world as patient/medical officer relations in the hospital become a fundamental human right issue before the World Health Organization.

Keywords: Medical, Nursing, Laws, Human right, negligence.

1.0 Introduction

A nurse by training is expected to carry out her duties with diligence and care. By virtue of her closeness to patients in the hospital, she plays the first handy role in the hospital setting. There are, however, instances where her action or omission, leads to a consequence that may affect the patient negatively. Most of the time, the cause of that problem may be due to her ignorance of the law guiding her practice, pressure of work, or, in a rare occasion, a lackadaisical attitude to others. In more than half of the cases, a little knowledge of the law and the proactive use of nursing ethics might have saved the day.

Islamically, a nurse in performing her primary duties, she must fear the Almighty Allah because her relationship with the patients is so important like a religious duty as a covenant between herself and the Almighty Allah due to the covenants she took when accepting the offer. See Quran 5:1 "O ye who believe fulfill all your obligations", Q 17:34 "and fulfill (every) engagement for (every) engagement will be enquired into (on the day of judgment)." Q 16:91- "fulfill the covenant of Allah, when ye have entered into it, and break not your Oaths after you have confirmed them; indeed you have made Allah your surety: For Allah know all that you do. A said by a hadith by Prophet Muhammad, "No faith for whoever lacks trust and no religion for whoever keeps no covenant." He also said that "there should be neither harming nor reciprocating harm".

Since a nurse must definitely interact with the patient to carry out her care, it, *ipso facto* means that, in certain situations, what she ordinarily does as a routine may become a case. Today, patients are becoming very conscious and highly informed about their rights. In fact, the society is becoming complex so much that, even if a patient cannot afford litigation or remains silent over his right, some significant others like Human Rights Organizations, pressure groups, etc., can take up the case and make the affected nurse pay for such acts or omissions done against the victim i.e. the patient.

Nurses and Midwives have to undergo some training before their registration as stipulated by law. The question may, however, be asked on what really constitutes an act under the law? Foremost, a nurse is trained to do her work according to the standard of practice set down by her profession. If she does those acts wrongly (action), or refuses to do them at all (omission), it amounts to a legal act under the law. That is, if she does an action she is not expected to do, it is regarded as an action. If, on the other hand, she fails or refuses to do what is required of her by the profession at a point in time, it is called an omission.

Furthermore, it is a basic legal dictum that ignorance of the law is not an excuse (*ignorantia legis non excusat*). In a special case, if someone does an act, or omitted a fact, not in a way prescribed by the law, the law may excuse her, particularly if she has a genuine reason to do so. This is because the law says, 'ignorant of fact can be excused' (i.e. *ignorant facti excusat*). More so, for an act or omission to be regarded as fact, it is for the court to decide (particularly if there is contention over the issue). she is equally required to apply the knowledge of ethics to guide her in the day-to-day activities in clinical areas. Of course, while law is an extrinsic factor that enhances good practice, ethics is an intrinsic factor that perfects it even where there is no presence of police to exact compliance. It is the combination of these two factors (i.e. law and ethics), that puts a nurse in a better position to discharge her duty efficiently. With time, she will be free from unnecessary litigation, and, an era of hazard free care will improve the lives of patients too.

2.0. Basic Principles Of Professional Ethics In Nursing

2.1 What Is Nursing?

Ordinarily, ethics in nursing cannot be appreciated until we know what nursing means, and from there we can see the link between it and its ethics. To start with, Roy (1984) defines nursing as: *Science that observes, classifies and relates the processes by which persons positively affect their health status, and, the practice discipline that uses this particular scientific knowledge in providing a service to people.*

To explain these "processes" of providing service to people, Dorothea (1985) in her work, regarded nursing as a "deliberate action to bring about humanly desirable conditions in persons and their environment". Putting these processes into action presupposes that a nurse has a "unique function" to perform in the society, which Virginia Henderson, as cited by Kemp et al (1989), aptly defined as follows:

The unique function of the nurse is to assist individuals, sick or well, in the performance of those activities contributing to health or its recovery (or to a peaceful death) that he would to-perform unaided if he had the necessary strength, will, or knowledge and to do this in such way as to help him regain independence as soon as possible.

The performance of a "unique function" is not haphazardly done. Nursing is saddled with additional responsibilities which are goal-oriented. For emphasis sake, Martha (1986), while trying to define this goal writes that: "The goal of nursing is that individuals achieve their maximum health potential through maintenance and promotion of health, prevention of diseases, nursing diagnosis, intervention and rehabilitation."

3.0 Common Breach of Professional Duty in Clinical Practices.

In clinical setting, a nurse's action or omission leads to litigation if it breaches the law of land or the International standard of practice set by the Nursing and Midwifery Council. The breaches may be Negligence, and practices, professional misconduct and license.

3.1 Negligence

Legally, it means more than headless or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty breach & damage thereby suffered by the people to whom the duty owed.

What constitutes negligence? It can be divided into three points

- a. There is an act of omission
- b. No reasonable care was demonstrated while doing such act or omission and
- c. Injury was sustained as a result of the above situations

For a plaintiff to succeed in the court, the three elements must be present and proved. They are: -

- i. The defendant owed the plaintiff a duty of care.
- ii. That, that duty of care was breached; and
- iii. That the plaintiff suffered damage as a result of that breach

3.2 Malpractice

It derived from the Latin word ‘‘ Mala Praxis’’ which means from the words of Nchi means ‘‘ a dereliction of professional duty resulting in injury to another person giving rise to right of action for example as in when a medical practitioner is negligent’’. Malpractice is involved in a unique case, it arises when the standard of practice is breached a tortfeasor leading into injury to the patient/victim. A breach of standard of practice is a breach leads to malpractice. A breach of malpractice is a matter of fact and law. These are the ingredients that need to be proved before the tort of malpractice can be established. The International regulations that guide every registered nurse and midwife are:

- i. The Nursing & Midwifery council
- ii. The health care policy (ministry of Health)
- iii. Nursing standard of care
- iv. The Bill of Right (Fundamental Rights)
- v. Nursing job description formulated by the employer of a nurse.
- vi. Standard Book of Practice or manual/procedure book designed by Nursing service Dept in any hospital.

Meanwhile if a Nurse commits or omits an act that goes contrary to the above mentioned provisions it amounts to malpractice ordinarily, unless there is a reasonable reason to disprove it. To determine it must be determined by the court. Three elements must be presented and they are:

- i. The plaintiff is injured
- ii. That the injury was caused by the defendant
- iii. That, there is linkage between the act or omission committed by the defendant and the injury sustained by the plaintiff.

In law, the establishment of these three tort of malpractice should be done before the court of law.

For instance, a nurse will be liable for malpractice if a mature and obese patient is given injection with a tiny needle (24G) and later result in injection abscess. This is because she failed to follow the standard of practice.

3.3 Professional Misconduct

Hornby (2006) defines misconduct as an ‘‘ unacceptable behaviour especially by a professional person’’ while in legal terminology, it means (Nchi) ‘‘ any behaviours considered by reasonable members of a profession as unworthy of any member of that profession’’.

To explain it further; misconduct happens when a medical man or nurse in the pursuit of his/her profession has done something with regard to it which would be reasonably regarded as disgraceful or dishonorable by his/her professional brethren of good repute and competency. In other words, a nurse can be held liable for infamous conduct in a professional capacity. The liability can not be established except with these three elements

- i. That, certain behaviour or conduct was manifested by a member of a profession;
- ii. That, the conduct was unacceptable to any same or prudent member of that profession; and
- iii. That, the conduct brings disgrace or disrepute to other members of that profession. In addition to the above mentioned

The under mentioning can also lead to professional misconduct:

- a. Neglect or disregard of personal responsibilities to patients for their care and treatment.
- b. Abuse of privilege or skills.
- c. Personal behaviour which is derogatory to the reputation of the medical profession i.e drunkenness, drug abuse, smoking within the hospital premises.
- d. Adultery or fornication with a patient
- e. Self promotion, advertising & canvassing

Abusing, insulting patient, attempt to rape or sexually assault her, treating a critically ill patient in a private residence, stealing of patient’s properties etc.

3.4 Licensure

Black's law Dictionary 2008 defines licensure as a governmental body's process of issuing a license. It is internationally recognized that, each country is to set up the body by law to license, register and discipline any nurse or midwife; therefore they are expected to satisfy the provision of the law of the land. For instance: To obtain the certificate after the finishing of both the theoretical and practical training in the School of Nursing., Valid certificates of competence in Nursing issued by the council and Certificates of competency with Experience.

It is a fact that every nurse is required by law to possess necessary skills, experience and training as evident by the issuance of the certificate and license to practice and the license has to be renewed and if a nurse failed to register or renewed the license she is operating illegally.

4.0 Legal Consequences Of Breach Of Care

If a patient who is the plaintiff feels that the Nurse/defendant owes him a duty of care and such care was breached which led to his pain, physical or psychological injury and unnecessary suffering, he can pursue a legal action against the defendant for redress/breach of care.

On the part of the defendant, the law requires her to defend why judgment should not be made against her in a hospital setting, where a patient (now the plaintiff) asserts that the nurse (now the defendant) failed to give him the due Care, she must appear before the court to defend herself of the allegation. The court expects her to prove that she has lived up to the expectations of her training, skill, and experience, and is qualified to bring herself before the public that she can give the care. This position is well supported in the case of *R. v. Bateman* where the court held that:

If a person holds himself out as possessing special skill and knowledge and he is consulted as possessing such skill and knowledge by on behalf of a patient he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary, nor is it necessary that the service be rendered for reward...The law requires a fair and reasonable standard of competence...

Therefore, if the nurse did not live up to that expectation, or fails to provide such care required of her, then the law presumes a breach of care. When the case commences, he must first establish that there is an act or omission from the defendant, which causes personal injury to him, and that the injury emanates from nowhere but from the defendant.

4.1 Compensation/Diyah

In literal meaning, compensation, as defined by Hornby means, "something, especially money, that somebody gives you because they have hurt you, or damaged something that you own; the act of giving this to somebody; to claim/award/receive compensation." In legal parlance, Nchi describes it as: "payment for loss or injury sustained or for property compulsorily acquired, In the case of *Adeyemi v. T. Awobokun* its meaning was extended to include the "remuneration for work done or services rendered."

Generally, a patient who sustained loss of body function, or that of limb, if proven as a consequences of breach of care from a nurse, can sue for compensation. In suing for personal injury, two main factors are to be considered by the court to guide it in awarding damages to the affected victim. These factors are laid down in the case of *S.C.C (Nig) Ltd v. Igueriniovo* and include:

- i. The financial loss resulting from the injury, and
- ii. The personal injury involving not only pain and suffering, but also the loss of the pleasure of life

4.2 Restitution

This equitable doctrine can be raised against the party who is at advantage over the other. *In legal terminology, restitution implies the following meanings, as Nchi put it:*

- i. To restore something to the rightful owner
- ii. The writ by which a successful appellant recovers property he lost by the execution of judgment which the

appellate court reverses,

iii .The equitable doctrine of restitution refers to a situation where goods fraudulently acquired are restored to the owner.

iv. The payment in money or services by a criminal offender to the victim of his crime.

From the above definitions, we can deduce that the award of restitution can be in form of liability arising out of tort, contract and criminal act. Under tortious act (like false imprisonment), the patient can have the freedom of movement restored back to him. In contract case (like the failure of the nurse to give expected care to a patient), the patient (i.e. the plaintiff) can evoke the maxim *restitutio in integrum* (meaning, restoring the person to the original position). The purpose of doing this is to put the patient in the position he stood before the contract ! (i.e.in *status quo ante*). This is applicable where doing so is possible.

In criminal cases (like criminal breach of trust, or criminal assault, etc), the plaintiff injured by the defendant can sue the accused over this criminal act, and may be restored to his earlier position by the court upon the proof of the commission of that act. The court can order the defendant to pay a certain amount to the plaintiff as a form of restitution. He can, as well, be ordered to render certain services to the plaintiff to restore him to the original state or near that state as far as possible.

4.3 Damages

By damages, we mean, as *Nchi* put it, "the pecuniary compensation or satisfaction awarded by a court to indemnify a person for any loss or injury he suffered owing to a civil wrong or the breach of a statutory duty omitted by another person. Damages are aimed at putting the injured party at nearly the same position as possible before the loss. The process of ascertaining the amount of damages is called the measure of damage..."In a recent Supreme Court case of *lyere v. Bendel Feed and flour Mills Ltd*,¹⁵ a further definition of damages was given in these words:

A sum of money awarded to a person injured by the tort of another. It is in general a rule that pecuniary compensation which the law awards a person for the injury he has sustained by reason of the act or default of another, whether that act or default is a breach of contract or tort, be the plaintiff,

4.4 Fine

Fine is the sum of money ordered by the court or Shariah court to be paid to the victim on conviction for an offence .It can also be described as monetary payment or penalty ordered by the court or a statute as a punishment for an offence. This remedy can be awarded by the court only or sometimes, it goes with imprisonment.

4.5 Imprisonment

Aside all the above categories of means of rectifying elements of breach of care, it must be emphasized that there are some instances where certain action or omission that may cause injury or loss to the plaintiff, are regarded as criminal in nature.

As a rule, the law defines some of these crimes and specific punishments are prescribed for them. The punishments may include fine, forfeiture, canning (or flogging), imprisonment or death sentence. As regard to imprisonment, Rutherford and Bone define the word to mean; "***a punishment for criminal offences, it consists of the detention of the offender in a prison. It includes any restraint of a person's liberty by another.***

Imprisonment is, therefore, a kind of punishment that can be passed by the court upon an accused person in a criminal breach of care. Doherty (1999) writes that, "the court may pass a sentence of a term of imprisonment on conviction. The term of imprisonment may be with or without hard labour. Where no specific order is made, it is deemed to be with hard labour."

In clinical practice, a nurse who performs (commission) or fails to perform (omission) a duty imposed by the law, has committed an offence, and if convicted, may be punished by the law. Such officer, as a defendant, is arraigned before the court, put on trial and once convicted of that offence, may be sentenced accordingly.

5.0 Legal Defence In Litigious Cases.

As recognized internationally, an accused person or any body accused for any offence is presumed by law to be

innocent until proven guilty. Therefore the nurse has the right to defend herself before the court. Once she is able to discharge the burden of proof shifted to her, she is entitled to freedom from persecution, fine or imprisonment etc. if it is a case of unlawful prosecution by the plaintiff, she may equally claim damages before the court.

6.0 The Legal Defence For The Nurse.

6.1 Doctrine Of Necessity

By definition, necessity, as Nchi puts it, means, "the situation where a person is compelled to act in a particular way by circumstances outside or beyond his control and against his better judgment. Generally, necessity is a kind of defence that can be pleaded in a criminal or tortious case. A Latin maxim *necessitas non habet legem* (necessity know-"; no law), speaks much of the position this defence occupies in the history of application of law. Under criminal law, Garner writes that: *It is a justification defence for a person who acts In emergency that he or she did not create and who commits a harm that is less severe than the harm that would have occurred but for the person's actions.* In law, this defence is equally referred to as "choice of evils", "duress of circumstances", "lesser-evils defence", etc. However, it is only applicable in lesser harms than commission of murder.

6.2 Act Of God

This is equally referred to as act of providence, act of nature, superior force, irresistible superhuman force, etc. It is similar to or often grouped together with other defences like duress, inevitable accident, etc., as mentioned above. By definition it is, in the words of Nchi, a "fortuitous or inevitable event not anticipated; an extraordinary circumstance which could not be foreseen and which could not be guarded against."

6.3 Act Of Self-Defence

Self-defence or defence of self is a legal use of force employed by the defendant to stave off danger of bodily harm attempted by the assailant. In the words of Garner, in general circumstances,

"a person is justified in using a reasonable amount of force in self-defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to avoid this danger."

For example, a psychiatric nurse is taking care of one of her aggressive or violent patients, and then the patient suddenly stands up and starts pursuing her with knife. If, in the cause of this problem, the nurse succeeded in fending off the weapon and the patient sustains fracture of the hand, she can plead the defence of self-defence before the court.

6.4 Inevitable Accident

This is similar to the defence of act of God. The court, in the case of *Omotayo v. Arbuckle Smith and Co. Ltd*, defines this defence as:

a mishap which was neither foreseen nor anticipated and so could not be avoided by the exercise of reasonable care, caution or skill.

In a scenario, a nurse carefully carries a lightweight patient on a new wheel chair. The patient was on a transfer to another ward when the canvass of the wheel chair paves way. From there, he sustains peri-anal injury and sues the nurse and the hospital for negligence. In this type of scenario, the nurse as a defendant can plead the defence of inevitable accident. The fact is that, no reasonable care, caution or skill could have prevented that accident.

6.5 Novus Actus Intervenies:-

It literally mean, "a new act intervention" in this situation, another act was done by someone else that intervenes with that of the defendant therefore causing harm to the plaintiff. In clinical practice, a simple example that may be cited is that of a patient who had plaster of paris (P.O.P) applied on his leg and was later discharged from the hospital with it. But before the discharge, he was instructed by the Nurse on how to maintain the plaster of paris

cast. If the patient got home and engaged in playing table Tennis & from there sustained a crack on that plaster which fractured his bone his claim for damages in the court will not succeed. The reason is that, by playing that game an intervening act was set in motion that led to his lasted condition, and not the application of initial treatment.

6.6 Volenti Non-Fit Injuria

In law, this maxim means that whatever a man gives consent to, that cannot be considered as injury. In other words, no injury is done to one who consents to the doing of it. What this means is that where the plaintiff voluntarily waived or abandoned his right not to be harmed, he cannot come to challenge the defendant for inflicting harm on his person. Under the law, this happens practically in three ways:

6.7 Contributory Negligence

This is one of the principal types of defence mostly relied upon by the defendant in order to show that the wrong done on the plaintiff was with his own contribution and knowledge. In other words, what this implies, as the court held in the case of *Okin Biscuits Ltd v. Oshe*, is that, "the party charged is primarily liable but the party charging him has contributed by his negligence to what eventually happened." This means that the defendant is not the sole cause of the negligence but has contributed to the damages that resulted from the act.

Generally, the acceptance of this defence by the court is not to exonerate the defendant from his act of negligence but to see that he was not the sole originator of the tort that has emerged. And, if such position is successfully proven, then it will only reduce his liability in respect to the matter in contention. That is, although he may be liable personally, yet, the aim of the court is to reduce the recoverable amount of damages he is to pay.

6.8 Laches And Acquiescence

Under equity, there are maxims that frown against delay in asserting one's right. These, among many, include:

- a. Delay defeats equity
- b. Equity aids the vigilant and not the indolent.

6.9 Statute Of Limitation

As was mentioned above, it is trite in law that there must be an end to litigation. A case cannot therefore continue in perpetuity. To prevent this from happening, a statute was put in place to regulate the maximum time which certain cases can be heard in the court. This statute is known as **Statue of Limitation**. Action funded on tort shall be brought between 1 -6 years who has normal course of incision & drainage ((1 & D) performed on him 20 years ago a patient can not come to claim damages over the same injury

It implies that if someone has a right to enforce in the court and sleeps over that right, he cannot come after couple of years to enforce his claim. This is called *laches* or *acquiescence* under the law. In the case of *Ige v. Fagbohun*,²¹ the court explains that; "laches essentially consists of substantial lapse of time coupled with the existence of circumstances which makes it inequitable to enforce a claim."

Thus, for example, a patient who sustained injection abscess over ten years ago from a blunt needle used on him by a nurse, cannot come to the court ten years later to enforce his claim. The reason is that he has slept over his right for a long time. In other words, it has taken considerable length of time to wake up to his right, and perhaps healing could have taken place or other events could have over taken it.

7.0. Research Methodology

7.1 Research Concept

7.1.1 Observation and Defining Problem

The problems are able to be identified through the process of observing, critical reviewing and studying the area where the researchers are concentrated. Meanwhile, several questions will be answered. As Sekaran (2003) said; existing problem, areas that need improvement, theoretical issues need to be tightened up and empirical research answered. Our objective is to narrow down the problem and define the issues clearly. The intention of this research is to find out how to solve the problem, improve the condition and fasten the principles. In order to identify the problem, literature review process, being the major way of identifying problems, was conducted, as

well as reviewing of journals in various fields especially in medical/nursing profession. Some text books on the subject were read together and analyzed.

7.1.2 Theoretical Framework.

The Theoretical framework is the way and manner to make logical way/sense of the relationship among the factors that have been identified as important to the problem. For an instance, it can be easily identified in the documentation of the previous research of Arisara Seyanont (2007). In this research, theoretical framework has been developed in such manner that it will produce a better basis to hypothesis in developing the research. Furthermore, for developing theoretical and practical framework a lot of studies had been done to measure the effect of professional duty in clinical practice and legal consequences of the breach of care. Then, based on the findings in the numerous literature as well as the studies of this paper, meanwhile, the Shariah views that a nurse is to assist sick and well person who comes to her and to discharge her professional duty diligently by the way of fulfilling all the obligation as she will be asked for, on the day of judgment.

8.0 Expected Result/ Benefit

This paper will contribute to academic discipline and it will also be an instrument to medical officers and the whole world at large through a number of way:

- (1) The research/paper provided the *Shari'ah* principles to guide the nurse when discharging her duty.
- (2) It was observed in the previous researchers that there are many dimensions viewed on general professional misconduct on nursing profession while in this paper justice is done to Ethico-legal issues.
- (3) The paper also provided useful suggestions to the general public, Hospital Management (private or public) Medical Institutions, Health organizations, Ministry of Health and Investors by the way of explaining some common breach of professional conduct/duty and way out.
- 4) The legal defences in litigious case provided by the paper are so unique to the extend that equity aids vigilant.
- (5) The paper also suggested that all the nurses are trained and they should be allowed attend an International conference yearly for up dating their knowledge.
- (6) The paper suggested that World Health Organization and others should be increasing their effort in assisting some developing countries health-wise in term of human resource and other medical facilities.

9.0 Conclusion.

Discharging at most care services by the nurse to the patients is very important, it is a measure of maintaining the patients as a customer because they are the parties who will bring business to the hospital or clinic. Hospital management should improve their services and promote good service quality. The medical Doctor and other medical officers must provide adequate and effective service to the patient/customer and their relationship to the patient/ customer must be cordial because customers are always right. The government and some well to do people have to invest more in medical circle as all human being needs medical attention.

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