# MEDICAL NEGLIGENCE: APPRAISAL OF THE HEALTH PROFESSIONS ACT NO.24 OF 2009

BY

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# DECLARATION

**I MELODY NYENDWA MAYAKA, COMPUTER NUMBER: 26096749,** hereby declare that the contents of this Directed Research are entirely based on my own findings and that I have not in any manner used any persons' work without due acknowledgement of the same to be so.

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## ABSTRACT

It is an undisputed fact that nearly every individual in Zambia has experienced or been affected by an act or omission that may amount to medical negligence. In the normal case of negligence the court is fully competent to lay down what the reasonable man should do in everyday circumstances, because judges are aware of and understand everyday circumstances. But in the case of medical negligence the court may be called upon to measure the reasonableness of medical activity about which the judge has no great level of understanding. It is therefore not only imperative but also important that there should be a legal framework that deals with the issue of Medical Negligence in Zambia.

This work therefore seeks to explore and examine the law of medical negligence in Zambia. In this regard the essay will look at the law of medical negligence before the enactment of the Health Professions Act No. 24, of 2009. After the exposition of the above, the essay will proceed to review/appraise the Health Professions Act No. 24, of 2009 and conclude by considering whether the Act is the answer to the issue of medical negligence in Zambia and offer review or amendment of the Act if necessary.

## ACKNOWLEDGEMENTS

The preparation of this dissertation has been nothing short of an interesting journey. The issue of medical negligence is a topic that is close to my heart and I hope after reading this, it will speak to you too after all the best and most beautiful things in life cannot be seen or touched they must be felt with a heart.I would not however have been able to achieve this without extending my heart felt acknowledgments and gratitude to the following people. Firstly I would like to start with thanking my supervisor, Mr Mabvuto Sakala who not only supervised my work but rendered great advice and improved this essay greatly. I shall forever be indebted to him

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My thanks also go to the people who helped me in this research as well as those I may have forgotten to mention. Most importantly, I would like to thank the Almighty God; after all in him we are more than conquerors.

## DEDICATION

To my Mum and Dad:William Charles Mayaka and Norah Nyendwa Mayaka for always reminding me to keep my head up. To my cousin Edwin Nyendwa, for the support and always being there when I needed assistance. To my siblings, always remember that you can do and be anything you want to be just take the time to do your best and let God do the rest. Most importantly, to every person who has been a victim of or been affected by an act or omission resulting in medical negligence.

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## GLOSSARY OF ABBREVIATIONS

| | |
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| HPCZ | Health Professions Council of Zambia |
| MMC | Malaysian Medical Council |
| GMC | General Medical Council |

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## CHAPTER ONE

## MEDICAL NEGLIGENCE: APPRAISAL OF THE HEALTH PROFESSIONS ACT NO.24 OF 2009

### 1.0.INTRODUCTION

In many jurisdictions, people are legally entitled to receive a certain standard of medical care. In such cases, negligence generally arises when medical professionals do not adhere to those standards. Negligence is a specific tort[1] and in any given circumstance is the failure to exercise that care which the circumstances demand[2].

The accepted test used to determine the duty of care is the 'neighbour test' as set out by Lord Atkin in the leading case of Donogue v Stevenson; where 'you are to love your neighbour and must not injure your neighbour ...', and your neighbours are those who are 'so closely and directly affected by your act ...'[3]

what about the exception of the duty of care in professional negligence

Kenneth McK Norrie,[4]in his analysis of the law of medical negligence in England points out that in the normal case of negligence the court is fully competent to lay down what the reasonable man should do in everyday circumstances, because judges are aware of and understand everyday circumstances. But in the case of medical negligence the court may be called upon to measure the reasonableness of medical activity about which the judge has no great level of understanding. As a result what amounts to negligence depends on the facts of each particular case[5].

A high standard is thus set where a doctor is not negligent if he has acted with a practice accepted as proper by a responsible body of medical men skilled in that particular art. And further it is immaterial that there exists another body of opinion that would not have adopted the approach taken by the doctor in question. Thus the existence of the tort principle has clearly made it difficult for the Plaintiff to prove that the doctor had positively breached a standard of care owed in the circumstances.

This high standard set by the tort system seems impractical when it comes to developing countries like Zambia, which are plagued with various systematic problems such as power

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[1]Grant V Austrailian Mills Ltd ( 1936) AC 85 at 103
[2]Vaughan v Taff Vale Rly Co( 1960) 5 H&N 679 at 688
[3] (1932) AC 562
[4] Medical negligence: who sets the standard? Journal of medical ethics, 1985, 11, 135-137
[5]Fardon v Harcourt-Rivington( 1932) 146 LT 391 at 392

failure and water shortages. As a result having the same standard of care to be applied across the board without consideration of systematic problems, by implication, means that even where a contrary medical result is seemingly due to a systemic problem, the circumstances of the case may demand that the health professional be held liable for medical negligence. This is not only unfair but extreme

Consequently, with the ever increasing numbers of instances of medical negligence, the need to have a statute dealing with it cannot be overemphasized. Additionally, it has been wisely pointed out by IrehIyioha[6] on analysis of the Nigerian National Health Insurance Scheme, that lack of a definite law of medical negligence and the resultant relying on the tort system has failed to meet its objectives of fair compensation for injured patients and deterring negligent conduct or averting medical error on the part of healthcare providers.

It is against this back ground that this essay seeks to explore and examine the law of medical negligence in Zambia. In this regard the essay will look at the law of medical negligence before the enactment of the Health Professions Act No. 24, of 2009.

After the exposition of the above, the essay will proceed to review/appraise the Health Professions Act No. 24, of 2009 and consider whether it is indeed the answer to the issue of medical negligence in Zambia and offer review or amendment of the Act if necessary.

## 1.1.STATEMENT OF PROBLEM

Nearly every individual in Zambia has experienced or been affected by an act or omission that may amount to medical negligence. The daily news has as a matter of fact been bombarded with headlines of baffling instances of it. Under civil law, victims of medical negligence can get relief in the form of compensation from a civil court. Here, the applicant need only prove that an act took place that was wanting in due care and caution, and the victim consequently suffered damage[7].

Public view that the medical profession renders a noble service, hence must be shielded from frivolous or unjust prosecutions has led to most of the population shying away from bringing actions against medical practitioners in clear instance of medical negligence.

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[6] I. Iyioha, Medical Negligence and the Nigerian National Health Insurance Scheme African Journal of International and Comparative Law. (March 2010) 46-77

[7] Supreme Court judgement on criminal medical negligence: a challenge to the profession available on www.issuesinmedicalethicsectionorg/134ed110.html (accessed on 23/11/10)

It is important to note that there is a difference between civil and criminal negligence. Any person who in a manner so rash or negligent as to en-danger human life or to be likely to cause harm to any other person gives medical or surgical treatment to any person whom he has undertaken to treat; or dispenses, supplies, sells, administers, or gives away any medicine or poisonous or dangerous matter is guilty of a misdemeanour liable to imprisonment for six months[8]amounts to criminal liability.

The common law system of negligence is fundamentally flawed. Many of the problems encountered both by Plaintiffs and Defendants are a product of the adversarial system. It discourages the sort of interaction that would allow a frank explanation to be given as the adversarial procedures require the parties to act as hard-headed opponents who seek tactical advantages[9].

The heart of negligence is theelement of fault. However, it can be seen that fault is not a satisfactory criterion forliability due to difficulties of adjudicating on it. Litigation demanding proof of fault isnotoriously protracted and complex, particularly, where the behaviour being challenged isthat of a professional.

Considering the Plaintiff's view, the law of negligence does not serve injured patients well.The tort system, being adversarial in nature requires the litigating parties to determine thesubject matter of the controversy between them and supply the court with the evidence onwhich they wish the court to decide. The task of the court is to do justice based on theavailable evidence and the law.

A Plaintiff seeking to prove that medical negligence caused an adverse outcome faces a daunting task. In medical negligence cases, it is often hard to prove that damage was caused by the negligence of the health professional. The Harvard Medical Practice Study has found that only less than two percent of injuries caused by medical negligence lead to claims[10].For example, if a pharmacist negligently dispenses the wrong drug, the drug may already have broken down and excreted from the body before any test can be performed to determine the cause of the negligence[11].

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[8] The Penal Code Chapter 87 of the Laws of Zambia
[9] Available on http://www.Revofneg.treasury.gov.au/content/subs/072.pdf (accessed on 23/11/10)
[10]L. Wilson and M. Fulton, 'Risk management: how doctors, hospitals and MDOs can limit the cost of malpractice litigation' (2000) 172 MJA77-80.
[11]L. Wilson and M. Fulton, p77-80.

Additionally, it may be difficult to find out exactly what happened, difficult to obtain the services of a medical expert willing to testify against a colleague and bringing a claim can be expensive. For those who overcome the hurdles and bring an action, there is frequently a substantial delay between the incident and the hearing. Furthermore, only a small proportion of patients suffering medically related injuries obtain compensation.

The Harvard Medical Practice Study revealed that there are a substantial number of patients who have suffered harm as a result of negligent treatment who do not make a claim for damages[12]. The study found that slightly more than 7 patients suffered a negligent adverse event for every patient who filed a tort claim[13]. Further, when claims are made, the proportion that is successful is not high. In England it has been estimated that 'some payment' is made in 30 to 40 per cent of medical negligence claims[14].

The report by the Royal Commission on Civil Liability and Compensation for Personal Injury stated that "the proportion of successful claims for damages in tort is much lower for medical negligence than for all negligence cases[15].

Although comprehensive information is not available where Zambia is concerned, preventable medical errors kill and seriously injure hundreds of thousands of Zambians and the number of case law in the area of medical negligence suggests clear apathy.

All these factors combine to illustrate the system's deficiencies in meeting patients' needs. It would seem that negligence law provides a slow, cumbersome, uneconomic, haphazard mechanism for compensating the victims of medical misadventure.Preventing medical errors will dramatically lower health care costs, reduce doctors' insurance premiums, and protect the health and well-being of patients.

When the Defendants' perspective is considered, deficiencies in the system are equally apparent. Fear of litigation is now a factor in the lives of many-perhaps most doctors. Even when a claim is ultimately not pursued, the experience is a very upsetting one. Confidence can be undermined and the effect on morale can be severe.

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[12]P.C. Weiler, A Measure of Malpractice.(Cambridge: Mass, 1993) p69
[13]P.C. Weiler, A Measure of Malpractice. p69.
[14]Royal Commission on Civil Liability and Compensation for Personal Injury, Report, (1978) 1326
[15]Royal Commission on Civil Liability and Personal Injury, London: Report (1978) para1337.

There is evidence that fear of litigation leads to the practice of defensive medicine in the field of obstetrics in the United States and Canada[16].In White v Jordan[17], Lawton J. said that defensive medicine consists of;

> "Adopting procedures which are not for the benefit of the patient but safeguards against the possibility of the patient making a claim of negligence."

A 1985 study by the American College of Obstetricians and Gynaecologists found that 41 per cent of the obstetricians surveyed had altered the way they practised as a result of fear of litigation[18].If the injured patient files a complaint against the doctor, this already has a detrimental effect on the doctor'sreputation and practice even if the matter does not go to trial. This is due to the fact that thepublicity which a claim entails is sufficient to cause a loss of reputation which mightassaults the doctor's credibility,insinuating faulty judgment and treatment.

The answer to the question of medical negligence in Zambia was first thought to be The Medical and Allied Professions Act[19], which was an Act to provide for the regulation of medical, paramedical, dental and allied professions. The Medical and Allied Professions Act was later repealed by the Health Professions Act No. 24, of 2009. There is therefore a need to consider whether the Health Professions Act No. 24, of 2009, is the answer to the issue of medical negligence in Zambia. What is the main statement of the problem?

## 1.2.RESEARCH QUESTIONS

1. How does medical negligence arise at common law both for civil and criminal liability?
2. What is the attitude of the court in cases if medical negligence?
3. What is the role of the Health Professions Council of Zambia (HPCZ)?
4. How does one institute an action under the Disciplinary Committee of the Health Professions Council of Zambia?
5. What are the short comings of the Health Professions Council of Zambia?

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[16] Available on http://www.Revofneg.treasury.gov.au/content/subs/072.pdf (accessed on 23/11/10)
[17](1980) 1 All ER 650
[18]Committee to Study Medical Professional Liability and the Delivery of Obstetrical Care, Medical Professional Liability and the Delivery of Obstetrical Care(1989) p73-74.
[19] Chapter 297, the Laws of Zambia

6. Is the Health Professions Act No. 24 of 2009 the answer to the Question of medical Negligence in Zambia?

## 1.3.OBJECTIVES OF THIS RESEARCH

This paper is intended to highlight the law of medical negligence in Zambia and how liability arises against medical practitioners. Further, the paper will appraise the Health Professions Act No. 24, of 2009, and determine whether it is the answer to the question of medical negligence in Zambia. Essentially the objective of this paper is to analyse the tort system in the case of negligence and highlight the shortcomings of this system.

In addition, to bring to the fore the many advantages of having a specific Act dealing with the law of medical negligence and advocate for a change in the public policy which seems to consider that the health profession renders a noble service and must thus be shielded from frivolous or unjust prosecutions without any specific definition of what is considered frivolous and unjust prosecution.

## 1.4.DEFINITIONS

Medical Malpractice: The failure of a health professional to exercise due and prudent care in order to avoid causing injury to patients they have responsibility to care for[20].

Medical Practitioner: Courtesy title of a doctor. It is commonly applied to all registered medical practitioners except consulting surgeons, whether or not they hold the degree of doctor of medicine[21].

Professional Misconduct: Has the meaning assigned to it under section 61 of the Health Professions Act No. 24 of 2009.

Negligence: Carelessness amounting to the culpable breach of a duty: Failure to do something that a reasonable man would do, or doing something that a reasonable man would not do[22].

Res ipsaloquitor: The Latin phrase meaning "the thing speaks for itself", so that in certain cases it is sufficient for the Plaintiff to prove the accident and nothing more. In such cases the proof of accident is *prima facie* evidence of negligence[23].

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[20]Available on http://www.medicalmalpractice.com/casereview.cfm
[21]J. Mumba. 'The medical practitioner' The Medical Journal of Zambia, (January1980) 1
[22]E.A. Martin. Oxford Dictionary of law. 5th ed (Oxford, Oxford University Press, 2003) p327
[23]Dr. J.N. Pandey. Law of Torts with Consumer Protection Act 1986 and Motor Vehicle Act 1988.

Volenti non fit injuria: A Latin Maxim meaning "no wrong is done to one who consents". This is a defence that the claimant consented to the injury or (more usually) to the risk of being injured. Knowledge of the risk of injury is not sufficient; there must also be full and free consent to bear the risk[24].

The Act: Refers to The Health Professions Act No. 24, of 2009, which is an Act to continue the existence of the Medical Council of Zambia and rename it as the Health Professions Council of Zambia; provide for the registration of health practitioner and regulate their professional conduct; provide for the licensing of health facilities and the accreditation of health care services provided by health facilities, provide for the recognition and approval of training programs for health practitioners; repeal the Medical and Allied Professions Act.

Damages: The Compensation or indemnity for loss suffered by a person following a tort, breach of contract or breach of some statutory duty[25].

## 1.5.METHODOLOGY

This research will be a qualitative one which will include desk research and field investigations in the form of interviews with relevant officials from the Health Professions Council of Zambia. Furthermore, secondary data in the form of books, journals, scholarly articles as well as the internet will be consulted with a view of disseminating current information.

## 1.6.CONCLUSION

This chapter has brought to the fore the fact that people are legally entitled to receive a certain standard of medical care. In such cases, negligence generally arises when medical professionals do not adhere to those standards. Proceeding from this discussion, the next chapter will examine the law of medical negligence, evaluating how criminal and civil liability for medical negligence arises at common law, highlighting the strengths and weaknesses as well as the problems faced by persons bringing an action for medical negligence.

Incomplete. The conclusion is missing there are only 2 chapters in this work

(Allahabad;Central Law Publications107 Darbonga Colony, 2002) p251

[24]E.A. Martin. Oxford Dictionary of law. 5th ed (Oxford; Oxford University Press, 2003) p529

[25]M. Woodley. Osborne's Concise Law Dictionary.10th ed (London;Sweet& Maxwell. 2005) p129

## CHAPTER TWO

## THE LAW OF MEDICAL NEGLIGENCE

### 2.0.WHAT IS NEGLIGENCE?

In common law jurisdictions, the law falls into two categories: Statutory and common law[26]. Statutory law is legislative law passed by Parliament, while common law is based on previous judicial decisions (also known as case law) and the law of negligence was developed on this basis[27].

Negligence has been defined as carelessness amounting to the culpable breach of a duty[28] or the failure to do something that a reasonable man would do, or doing something that a reasonable man would not do[29]. How civil liability for negligence arises at common law was delved on by R.W.M. Dias[30], by putting forward the following questions as determining liability:

> "1) Is the careless infliction, by act or omission, of this kind of harm on this type of Plaintiff by this type of Defendant recognised by law as remediable? 2) Was the Defendant's conduct in the given situation careless, i.e. did it fall short of the standard, and come within the scope, set by law? 3) Was it reasonably foreseeable that the Defendant's carelessness would have inflicted on this Plaintiff the kind of harm of which he complains? 4) Was it the Defendants conduct that caused the Plaintiff's damage? If the answers are in the affirmative, the Defendant is liable in negligence."

An act of negligence may also constitute a nuisance where it occasions a dangerous state of affairs and satisfies the other requirement of that tort[31]. Equally it may also be a breach of the rule in Ryland v Fletcher[32], if it allows the escape of a dangerous thing which the Defendant has brought onto his land.

### 2.1. CIVIL LIABILITY FOR MEDICAL NEGLIGENCE

Civil liability gives a person rights to obtain redress from another person[33].For there to be an award of damages, the injured party has to have suffered an actual loss, be it personal injury,

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[26] Available on http://www.contactlaw.co.uk (accessed on 15/12/2010)
[27] Available on http://www.contactlaw.co.uk ( accessed on 15/12/2010)
[28] E.A. Martin. Oxford Dictionary of law. 5th ed (Oxford; Oxford University Press) p327
[29] Martin. Oxford Dictionary of law. p327
[30] B.A Hepple and M.H. MathewsectionTort:Cases and Materialsection 4th ed (London;Butterworths, 1991) p39
[31] Lord Hailsham of St Marylebone,Halsburys laws of England, 4th ed, vol 33 (London; Buttorworths,1997) p11
[32] (1868) LR 3 HL 330
[33] Available onwww.rsc.org/images/2_Difference_tcm18-17644.pdf (accessed on 16/12/10)

damage to property or financial loss[34]. Additionally, the burden of proof in a civil matter is the balance of probability[35].

Civil liability cases for medical negligence are different from normal negligence cases, especially when considering the standard of care to be demanded of medical personnel[36]. In Mohan v Osborne[37], the Court of Appeal held that the standard of care is to be measured by expert evidence. Lord Justice Goddard stated that:

> "I would not for a moment attempt to define in vacuo the extent of a surgeon's duty in an operation beyond saying that he must use reasonable care, nor can I imagine anything more disastrous to the community than to leave it to a jury or to a judge, if sitting alone, to lay down what is proper to do in any particular case without the guidance of witnesses who are qualified to speak on the subject....As it is the task of the surgeon to put swabs in, so it is his task to take them out, and in that task he must use that degree of care which is reasonable in the circumstances and that must depend on the evidence."

Further in **HUNTER V HANLEY**[38], Lord President Clyde stated that:

> "To succeed in an action based on negligence...where the conduct of a doctor, or indeed of any professional man, is concerned, the circumstances are not so precise and clear cut as in the normal case. In the realm of diagnosis and treatment...one man clearly is not negligent merely because his conclusion differs from that of other professional men, nor because he has displayed less skill or knowledge than others would have shown. The true test for establishing negligence...on the part of the doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of acting with ordinary care."

Subsequently, to prove that the doctor had positively breached a standard of care owed in the circumstances to the patient, the Plaintiff has the burden to prove that the Defendant had strayed from the recognized standard of care in the profession[39]. This imposes upon the Plaintiff the burden of establishing first what the professional standard of care is in any given case and then the fact that the Defendant has departed from it[40].

It follows from this that an action for negligence will lie for damages caused by the failure to exercise due care and skill by proving either that the Defendant did not possess the requisite

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[34] Available onwww.rsc.org/images/2_Difference_tcm18-17644.pdf (accessed on 16/12/10)
[35] S. E Kulusika,Text, Cases and Materials on Criminal Law in Zambia,(Lusaka: UNZA Press,2006) p31
[36] K.M. Norrie, Medical negligence: who sets the standard? Journal of medical ethics, 1985, 11, 135-137
[37] (1939) 2 KB 14
[38] (1955) SLT 213
[39] Medical Negligence In Malaysia:Current Trend and Proposals for Reform, Ahmad Ibrahim Kulliyyah of Laws, international islamic University Malaysia available on http://www.mdm.org.my/downloads/dr_puteri_nemie.pdf (accessed on 16/12/10)
[40] Medical Negligence In Malaysia:Current Trend and Proposals for Reform, Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia available on http://www.mdm.org.my/downloads/dr_puteri_nemie.pdf ( accessed on 16/12/10)

skill or by showing that, although he possessed it, he did not exercise it in the particular case[41].

## 2.2. CRIMINAL LIABILITY FOR MEDICAL NEGLIGENCE

Criminal proceedings have for their object the punishment of the person who has committed a crime[42]. There is no satisfactory definition which will embrace the many acts and omissions which are criminal, and which will at the same time exclude all those acts and omissions which are not[43].

In criminal matters, it is usually the state prosecuting the Defendant before a Magistrate, or a Judge in Court[44]. The basic assumption in criminal liability is that there is both a mental element and physical element to the offence[45]. What is or is not negligent involves a consideration of that which a reasonable man would or would not have done in the circumstances; this does not invariably rule out of consideration the subjective factors such as a person's knowledge, physical condition or age[46].

Under the Penal Code[47], criminal liability for negligent acts done by medical practitioners may be brought under the following sections, namely; section 237(e) (any person who in a manner so rash or negligent as to en-danger human life or to be likely to cause harm to any other person-(e) gives medical or surgical treatment to any person whom he has undertaken to treat; or (f) dispenses, supplies, sells, administers, or gives away any medicine or poisonous or dangerous matter; is guilty of a misdemeanour.) and section 200 (any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder).

Criminal liability for negligence was dealt with admirably in the case of R v Bateman[48] . In this case Lord Hewart was of the view that in the law of criminal liability, to convict one of manslaughter, the prosecution must prove that the accused's negligence amounted to a crime. Further, that in a civil action, if it is proved that the accused fell short of the standard of reasonable

[41] Cicuto v Davidson and Oliver (1968) ZR 149
[42] AG v Radloff (1854) 10 Exch 84
[43] Lord Hailsham of St Marylebone, Halsburys laws of England, 4th ed (London; Buttorworths, 1976) p11
[44] Lord Hailsham , Halsburys laws of England, p11
[45] Lord Hailsham, Halsburys laws of England. p11
[46] Lord Hailsham,Halsburys laws of England. paragraph17
[47] Chapter 87, the Laws of Zambia
[48] (1925) 19 Cr. App. R 8

care required by law, it matters not how far he fell short of that standard[49].The extent of his liability depends not on the degree of negligence but on the amount of damage done. In criminal courts on the contrary, the amount and the degree of negligence are the determining question[50].

In explaining the test which should be applied to determine whether the negligence, in a particular case, amounted or did not amount to a crime, judges have used many epithets, such as 'culpable', 'criminal', 'gross', 'wicked', 'clear', 'complete'[51]. But whatever epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond subjects and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment[52].

From the following it seems that the law requires gross (or extreme) negligence for medical negligence to become a subject of litigation where the result of the medical negligence either was death or grievous harm[53].

A similar view was taken in R v Adamako[54], where A, an anaesthetist, while in charge during an operation, the endotracheal tube which supplied oxygen to the patient became disconnected. Approximately nine minutes after the disconnection, the patient suffered a cardiac arrest from which he died. It was only at this point that A discovered the disconnection. The prosecution alleged that A, was guilty of gross negligence and hence convicted of manslaughter he appealed. His appeal was dismissed.

## 2.3. PROBLEMS FACED BY PERSON BRINGING ACTIONS FOR MEDICAL NEGLIGENCE

Presently, the common law principle of tort is used to regulate medical negligence litigation in Zambia. Generally, this system provides for compensation only when a doctor or any other medical personnel assisting in the treatment of a patient is negligent. The tort system is highly flawed and as a result persons bringing actions for medical negligence are faced with a lot of problems as highlighted below;

The adversarial system to which one can bring a tort action has been known to be lengthy and costly. The main contributor to the costliness of the tort system is the delay involved in the

[49] R v Bateman (1925) 19 Cr. App. R 8
[50] R v Bateman (1925) 19 Cr. App. R 8
[51] R v Bateman (1925) 19 Cr. App. R 8
[52] R v Bateman (1925)19 Cr. App. R 8
[53] S. E. Kulusika, Text, Cases and Materials on Criminal Law in Zambia, (Lusaka: UNZA Press, 2006) p474
[54] ( 1995) 1 AC 171

pursuit of a claim[55]. Delay may occur at different stages in the litigation process and for various reasons. In medical negligence cases, delay occurs for instance, before the Plaintiff seeks legal advice, while waiting for information from the opposing side, while the parties wait for experts to investigate and produce their reports, while the parties seek and exchange documentary evidence and while waiting for the trial date[56].

Secondly, the adversarial litigation system has been said to be unhelpful to the patients when it comes to compensation which has in most cases been unsatisfactory. As compensation depends upon a successful negligence action, the present system leaves many victims uncompensated for injuries. This is due to the fact that the present system is shaped in such a way that only those that are capable of demonstrating medical negligence can gain monetary compensation. The ones that cannot, will walk away empty-handed because as earlier alluded to, the true test for establishing negligence in diagnosis and treatment on the part of the doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of acting with ordinary care[57].

A report by the Royal Commission on Civil Liability and Compensation for Personal Injury stated that the proportion of successful claims for damages in tort is much lower for medical negligence than for all negligence cases[58]. Further, when claims are made, the proportion that is successful is not high. In England for instance, it has been estimated that 'some payment' is made in 30 to 40 per cent of medical negligence claims[59].

Thirdly, besides their need for compensation, injured victims have also other needs, which the tort system fails to cater. Most medically injured victims are also concerned about obtaining an explanation of why their injury occurred or an apology from the responsible doctor[60].A tort action, however, has a limited role as an official and publicforum in which the Defendant's conduct is examined.

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[55] Medical Negligence In Malaysia:Current Trend and Proposals for Reform, Ahmad Ibrahim Kulliyyah of Laws, international Islamic University Malaysia available on http://www.mdm.org.my/downloads/dr_puteri_nemie.pdf (accessed on 16/12/10)

[56] Medical Negligence In Malaysia:Current Trend and Proposals for Reform, Ahmad Ibrahim Kulliyyah of Laws, international Islamic University Malaysia available on http://www.mdm.org.my/downloads/dr_puteri_nemie.pdf ( accessed on 16/12/10)

[57] [1955] SLT 213, at p. 217.

[58] Royal Commission on Civil Liability and Compensation for Personal Injury, Report, 1978, 1, 1337

[59] Royal Commission on Civil Liability and Compensation for Personal Injury, Report , 1978, 1, 1326

[60] Medical Negligence In Malaysia:Current Trend and Proposals for Reform, Ahmad Ibrahim Kulliyyah of Laws, international Islamic University Malaysia available on http://www.mdm.org.my/downloads/dr_puteri_nemie.pdf (accessed on 16/12/10)

Moreover, the "real" Defendant in a tort action is usually an insurance company rather than the professional himself[61]. This is as a result of Professional indemnity assurance which is normally obtainable from insurers against consequences of professional negligence and breach of professional duty, denying the injured party the retribution from the liable doctor,thus provides for indemnity against loss from any claim or claims which may be made against the assured in respect of any negligent act, error or omission on the part of the assured in the conduct of the business of the assured as a professional person[62].

Furthermore, the concept of informed consent plays an important role when it comes to instance of medical negligence. As per the doctrine of informed consent, a patient must be supplied with all the necessary information about the nature of treatment, risks involved and the feasible alternatives, so as to enable him/her to make a rational and intelligent choice whether to proceed with treatment or surgery or not[63]. In case informed consent of the patient concerned is not obtained, then the physician would face tortuous liability[64].

This was the issue in the case of Chester v Afshar[65]. In this case, the Defendant, a neurosurgeon, advised the claimant to undergo lumbar surgery. She consented and after the operation she suffered partial paralysis. The trial judge found that although the Defendant had not performed the operation negligently, he had not warned the claimant of the small risk of partial paralysis inherent in the operation. It was also found at first instance that, had she been warned, the claimant would not have consented to the operation taking place at that time but would have sought further advice before arriving at a final decision. Consequently, where a patient has consented to a particular medical procedure gone wrong they might be unable to successfully institute an action for medical negligence.

## 2.4. ATTITUDE OF THE COURTS IN CASES OF MEDICAL NEGLIGENCE

There is very little Zambian case law when it comes to cases of medical negligence but the following cases shed light on the attitude of the Zambian courts to cases of medical negligence.

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[61] Medical Negligence In Malaysia:Current Trend and Proposals for Reform, Ahmad Ibrahim Kulliyyah of Laws, international Islamic University Malaysia available on http://www.mdm.org.my/downloads/dr_puteri_nemic.pdf (accessed on 16/12/10)

[62] Lord Hailsham of St Marylebone,Halsburys laws of England, 4th ed, vol 25 (London; Buttorworths,1997)

[63] Available on http://www.epartlaw.com/library/malpractice.html (accessed on 15/12/10)

[64] Available on http://www.epartlaw.com/library/malpractice.html (accessed on 15/12/10)

[65] (2004) UKHL 41

In the case of Rosemary Bwalya v Zambia Consolidated Copper Mines (Mufulira Division) &Malcom Watson[66], the Appellant's claim was for damages for professional negligence against the 1st, 2nd and 3rd Respondents, on the ground that Bilateral Tubal Ligation (BTL) operation performed by the Respondents had failed causing the Appellant to have a miscarriage.

Sakala CJ, on delivering the Judgment was of the view that the Defendants owed a duty of care to the Plaintiff when they undertook to perform the BTL operation and further that the Plaintiff approached the Defendants on the basis of their possessing special skill and knowledge and perhaps assured her that she would never get pregnant again if she underwent the BTL operation. Consequently, the standard that was required in the performance of the BTL operation was that of the ordinary skilled doctor professing to have that special skill. It was not a question of professing the highest expert skill.

The same view was held in the case of Cicuto v Davidson and Oliver[67], where Magnus J, as he then was stated as follows;

> "In the case of medical practitioners the standard of care and skill required is that of the ordinary competent medical practitioner, and it is a defence to show that the practitioner acted in accordance with general and approved practice that is approved at the date he is alleged to have been negligent"

Where criminal liability for medical negligence is concerned, the case of The People v Zulu[68], clearly highlights the courts' attitude. The facts of this case where that on or about 9thJanuary 1968, the deceased was sick, suffering from vomiting and diarrhoea. Having been given some medicine obtained from a chemist in Lusaka, her condition improved, but her parents decided to have her injected. The deceased's mother made arrangements with the accused's cousin to give the deceased some unspecified injection, presumably a drug of his choice. The accused injected the deceased within the order of 10 cubic centimetres of chloroquine.Within minutes of receiving the injection, the deceased died, the cause of death being cardiac arrest - acute heart failure - following an overdose of chloroquine.

Evans J, as he then was, was of the view that:

> "To determine whether the negligence in a case amounted to a crime was laid down by Hewart, L.C.J., in R. v Bateman. That test has been approved and applied in many cases...and I am content to apply it here when determining whether the accused's omission...amounted to "culpable negligence".

[66] SCZ Judgement No. 1 of 2005
[67] (1968) ZR 149
[68] (1968) ZR 88

## 2.5 DEFENCES FOR MEDICAL NEGLIGENCE

Medical negligence cases are always a hard fought and very emotional claim. The defence may claim that the treatment they provided was reasonable and no additional treatment was required, that the injury suffered was caused by something other than the health care providers' treatment, that different or additional treatment could not have been provided for some reason, that the claimant suffered no lasting effect from the treatment and contributed in some way to the injury, additionally, that the Plaintiff signed a waiver or were informed of the risks of the procedure[69].

At common law there are a number of defences that can be raised in instances where there is a breach of duty under ordinary negligence cases, the issue to be determined now is whether these defences can be raised in instance of medical negligence.

### 2.5.1. CONTRIBUTARY NEGLIGENCE

This could arise in a situation where the Plaintiff has not disclosed information and as a result of knowing this the doctor has prescribed treatment which damages the patient. The success of the defence would depend on requests made by the doctor, whether it was reasonable for the patient to know that the particular information was covered by the request[70].

The Canadian case of Robitaile v Vancouver Hockey Club Ltd[71],is a rare example of one of the successes of this defence in medical negligence. In this case a hockey player was found to have contributed to the damage caused by the negligent treatment by not seeking further medical advice when his symptoms became more serious.

### 2.5.2. CONSENT OR *VOLENTI NON FIT INJURIA*

Where a Plaintiff relies on the breach of duty to take care owed by the Defendant to him, it is a good defence that the Plaintiff consented to that breach of duty or knowing of it, voluntarily incurred the whole risk entailed by it.[72] In such cases the maxim *volenti non fit injuria* applies.

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[69] Available on http://www.wittnerpoger.com/medical_negligence_defense.html (accessed on 15/12/10)
[70] M. Stauch, K. Weat, J. Tingle, Source Book on Medical Law, 2nded,( London; Routledge-Cavendich,1954) p348
[71] (1979) 19 BCLR 158
[72] Lord Hailsham of St Marylebone,Halsburys Laws of England, 4thed, vol 33 (London; Buttorworths,1997) paragraph 17

In a Scottish medical negligence decision Sabri-Tabrizi v Lotian Health Board[73], it was said that such consent must normally have occurred prior to, and certainly cannot come after the Defendant's breach of duty. It has however been argued that the defence of *volenti non fit injuria* would never be satisfied in the context of medical negligence[74].

### 2.5.3. NECCESSITY

This can be a defence to treatment given without consent in an emergency. It may be arguable that it arises when a doctor is careless in giving treatment in demanding and difficult circumstances that is to say that he has not fallen below the applicable standard of care[75].

### 2.5.4. ILLEGALITY

The defence of illegality or *ex turpicausa* essentially applies when the background evidence relied on by the claimant in his negligence claim discloses criminal wrong doing on his part[76]. Since illegality provides a complete defence to a Defendant who is himself, by definition, a wrongdoer, the courts take a cautious approach when holding that it is applicable[77]. In the UK illegality has also succeeded in cases of discrete wrongs where the claimant has committed a serious criminal offence.

This was the issue in the case of Cluniss v Camden and Islington Health Authority[78], where the Claimant a mentally ill man gaoled for manslaughter, alleged that the Defendant Authority had negligently failed to detain him on time under the Mental Health Act 1983. It must be said that the usual negligence defences are rarely used in medical negligence cases and thus in most cases the Defendant denies being negligent.

## 2.6. CONCLUSION

This chapter has looked at how liability for negligence arises at common law in both criminal and civil matters. It has brought to the fore the attitudes of the courts in cases of medical negligence drawing a distinction between civil and criminal liability. This chapter has concluded by looking at the various defences available to the wrong doer and reaffirmed that the usual negligence defences are rarely used in medical negligence cases. Proceeding from

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[73] (1997) 43 BMLR 190
[74] M. Stauch, K. Weat, J. Tingle, Source Book on Medical Law, 2nd ed, (London; Routledge-Cavendich,1954) p348
[75] M. Stauch, K. Weat, J. Tingle p348
[76] Available on http://www.singaporelaw.sg/content/negligence/html (accessed on 15/12/2010)
[77] Available on http://www.singaporelaw.sg/content/negligence/html (accessed on 15/12/2010)
[78] (1998) QB 978

this discussion, the next chapter will look at the Health Professions Council of Zambia, zeroing in on its' roles, duties, obligations, challenges and shortcomings.

## CHAPTER THREE

## THE HEALTH PROFESSIONS COUNCIL OF ZAMBIA

### 3.0 INTRODUCTION

The Health Professions Council of Zambia (HPCZ) first came into existence in 1965. Its existence and functions were facilitated by the Medical and Allied Professions Act, Chapter 297 of the Laws of Zambia, under the name, the Medical Council[79].

It is a body corporate having perpetual succession and a common seal which is capable of suing and being sued and of purchasing or otherwise acquiring, holding and alienating movable or immovable property[80]. By virtue of the provisions of the Health Professions Act No 24, of 2009 ("The Act"), the Medical Council was renamed the Health Professions Council of Zambia[81].

The Chief Executive Officer and the Secretary of the Health Professions Council of Zambia is the Registrar who is appointed by the Council and is responsible for the day to day administration of its affairs[82].

During the course of the enactment of the Act, the report of the parliamentary committee on Health, Community Development and Social Welfare on the Health Professions Bill, pointed out that the structure of the Council and its composition needed to be well worked out in order to make it effective and yield the desired results[83].

To ensure the fulfilment of this and its objectives, the composition of the Health Professions Council, as provided for under the first schedule of the Act, as consisting of the President of the General Nursing Council of Zambia, the Permanent Secretary of the Ministry responsible for health, the Dean of the School of Medicine, the Director of the University Teaching Hospital, a representative of the Defence Forces Medical Services, a representative from the Ministry responsible for science and technology, two members of the public who have distinguished themselves in the service of the public,

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[79] Section 3
[80] Section 3
[81] Section 3(1)
[82] Section 5(1)
[83] Zambia, National Assembly, Debates (17th January 2009) N.A.B 26 of 2009

Additionally, it should consist of a representative of the Pharmaceutical Regulatory Authority, a representative of the Attorney General, a representative of the Zambia Medical Association, a representative of the Faculty of General Practitioners, a representative of the Churches Health Association of Zambia, a dental surgeon from the Dental Association of Zambia, a representative of the Pharmaceutical Society of Zambia and a representative of any four other health professions nominated by the chairperson of the health professional body of that health profession.

The person occupying the position of Chairperson and Vice-Chairperson of the Council is appointed by the Minister from amongst the members of the Council[84]. Furthermore, where a person is under any written law, adjudged or otherwise declared to be of unsound mind,is adjudged or declared bankrupt under any written law in Zambia or that person has been convicted of an offence under the Health Professions Act, the Pharmaceutical Act, 2004, or any other law relating to the practise of medicine, such person is not eligible to be a member of the Health Professions Council of Zambia[85].

With regards the tenure of a member of the Council, this is set at three years but such member may be reappointed for a further three year term[86]. The Council is obliged to meet at least twice in every three months in order to discuss the transactions of the business of the Council[87].

It cannot be vehemently stressed that, to successfully implement its objectives and better serve the needs of society when it comes to the issue of medical negligence, all the members of the Council despite their designated positions need to work together like a well-oiled machine.

The Health Professions Act, No. 24 of 2009, clearly indicates the instances when a member of the Health Professions Council may vacate office. The death of a member is the most obvious instance. Section 3 further provides that a member may vacate office if that member is adjudged bankrupt, is absent from the consecutive meetings of the Council, of which the member has had notice, upon the expiry of one month's notice of the member's intention to resign, given by the member in writing to the Minister, if the member becomes mentally or physically incapable of performing duties as a member and if the Minister is satisfied that the

[84] Section 1(3) of the First Schedule, Health Professions Act, No 24 of 2009
[85] Section 1(4) of the First Schedule, Health Professions Act, No 24 of 2009
[86] Section 3(1) of the First Schedule, Health Professions Act, No 24 of 2009
[87] Section 4(2) of the First Schedule, Health Professions Act, No 24 of 2009

continuation of that health practitioner as a member will be prejudicial to the interest of the health profession. In the case of members of the Council registered under the Act, if the member's registration is cancelled, if the member is removed by the Minister or if the member is convicted of an offence under the Act or any other law, that member should vacate office. It is however not clear whether these instances are exhaustive.

In light of the provisions of section 63(1) of the Health Professions Act No.24 of 2009, the Council is bound to establish a Disciplinary Committee whose members include a Chairperson, a Vice-Chairperson, the Chairperson of the Council, a peer of the health practitioner against whom a compliant of professional misconduct is made and a lay member of the Council.

The Act further stipulates that the Chairperson and vice chairperson of the Disciplinary Committee is to be a legal practitioners qualified to hold, or who have held, judicial office. Additionally, a member of the Disciplinary Committee shall hold office for a term of three years and not for more than two terms[88].

The mandate of the Disciplinary Committee is *inter alia* to hear and determine any disciplinary action initiated by the Council against a health practitioner who has contravened any provision of the Code of Ethics or any provision of the Act and any complaint or allegation made by any person against a health practitioner[89].

As can be deduced from the wording of the rules, the law is designed to address the lapses of a particular physician who has fallen below acceptable professional standards. It focuses on professional competence and input, and is specifically concerned with monitoring who should continue in the profession.

The case of Dr Wei Hong Ling is a good example of the Health Professions Council performing such an action. This was the case of a Livingstone-based Chinese doctor whom the Health Professions Council of Zambia recommended for deregistration for professional misconduct. Prior to Dr Wei Hong Ling being posted to Livingstone General Hospital, Dr Wei worked at Ndola Central Hospital where she was asked to leave on grounds of incompetence.

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[88] Section 63(4)(5)
[89] Section 64 (1)

The Health Professions Council court, which comprised of the Chairperson, Dr MushaukwaMukunyandela, Vice-Chairperson, Esther Nkandu, Legal Member, Joseph Jalasi and members Professor YakubMulla and Dr ItoneMuteba, felt it was unsafe to allow the Chinese doctor to practice in Zambia as they did not see how a practitioner who could not properly communicate, could practice medicine in a Government hospital[90].

In the last three years, the Council has dealt with a total of 14 cases in 2007, 26 cases in 2008 and 41 cases in 2009[91]. Only 28 of the cases dealt with where cases of professional negligence[92]. Of these 28, only 1 erasure was ordered by the Council and 3 cautions and an order to pay was made, the rest were found to be not guilty.

The gradual increase in the cases handled reflects an improvement in the functions of the Council. However, to only have handled a total of 81 cases in a period of three years clearly shows that a lot of the instances that amount to professional negligence by medical practitioners in Zambia are being left unchecked and unprosecuted.

## 3.1.FUNCTIONS OF THE HEALTH PROFESSIONS COUNCIL

The Health Professions Act, No.24 of 2009, designates the various functions to the Health Professions Council as; to register members of the health profession and regulate the professional conduct of health practitioners.

A person who wishes to be registered as a health practitioner needs to apply to the Council for registration and pay the necessary fee[93]. The Council is under statutory obligation to inform the applicant within thirty days of receipt of the application on whether such application has been accepted or rejected[94].

As of 8th April 2009, it was bemoaned by the Council that only only 34 percent of the health practitioners in Zambia are registered with the Council and further that out of a total of 8,770 health practitioners only 2,948 have renewed their practicing licenses[95].

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[90] Available on http://www.timesectionco.zm/sunday/news/viewnewsectioncgi?category=5&id (accessed on 22/12/10)

[91] Health Professions Council of Zambia 2007,2008,2009 Annual Reports(Health Professions Council of Zambia, Lusaka)

[92] Health Professions Council of Zambia 2007,2008,2009 Annual Reports(Health Professions Council of Zambia, Lusaka)

[93] Section 7(1)

[94] Section 7(3)

[95] Available on http://www.lusakatimesectioncomillegal-medical-practitioners-worry-medical-council-of-zambia (accessed of 2009/04/08)

Dr Mary Zulu, the Registrar of the Health Professions Council of Zambia, stressed thata large number of Health practitioners throughout the country have not come forward to renew their practicing licenses[96]. And further that the practitioners out there should be aware that it is their responsibility to register or renew their practicing licences on an annual basis and thus should not have to be reminded but should take it upon themselves to ensure that it is done[97].

If the Council has reasonable grounds to believe that the registration was obtained through fraud or misrepresentation or the registered health practitioner is found guilty of professional misconduct, or the period for which registration of the health practitioner was issued has lapsed, the Council is mandated to cancel the registration of a health practitioner[98].

Other functions of the Council include maintaining appropriate practice standards among health practitioner and insuring that they are consistent with the principle of self-regulation. And the promotion of high standards of public health, develop, promote, maintain and improve, appropriate standards of qualification in the health profession, promote the integrity, and enhance the status of the health profession including the declaration of any particular health practice to be undesirable for all are also functions of the Council.

Besides this the Council should also licence public and private health facilities, accredit health services and monitor quality control and assurance of health facilities and service, represent, coordinate and develop the health profession and promote its interest, develop, promote and enforce internationally comparable practice standards in Zambia, investigate allegations of professional misconduct and impose such sanctions as may be necessary, protect and assist the public in all matters relating to the practice of the health profession.

All in all, the Health Professions Council is a regulatory statutory body that acts in the interest of the public and in the performing of its functions; it licenses, sets, promotes, and enforces ethical and professional standards of the practice of health professionals and institutions to ensure provision of quality healthcare services to the public.

[96]Dr Mary Zulu, interview held in the Registrar's office at the Health Professions Council of Zambia on 22/12/10 , Interview No. 1

[97]Dr Mary Zulu, interview held in the Registrar's office at the Health Professions Council of Zambia on 22/12/10 , Interview No. 1

[98] Section 14(1)

## 3.2.CHALLENGES FACED BY THE HEALTH PROFESSIONS COUNCIL

The Health Professions Council of Zambia has been labelled as an organisation with no teeth.This could be due to the fact that despite the Act rightly providing for a right of appeal to the High Court within thirty days of receiving the decision where a person is aggrieved with a decision of the Disciplinary Committee[99], a decision of the Disciplinary Committee does not take effect until the expiration of the time for lodging an appeal against the decision or, if an appeal is lodged, until the time the appeal is disposed of, withdrawn or struck out for want of prosecution[100].

This operates as a disadvantage on the aggrieved party as litigation in Zambia is known to be lengthy. As a result the aggrieved party will probably have to wait a while before they can have recourse going against the well-settled principle of law that a successful litigant should not be denied the fruits of its judgement and further that an appeal may not operate as an automatic stay[101]. Additionally, since the appeal to the High Court automatically operates as a stay, if the medical practitioner is in error such a practitioner can continue practicing their trade at the peril of other likely victims.

It was argued by Mr Joseph Jalasi, assistant to the President of Zambia (legal), who served on the Council as Legal Member for six years, that the fact that the medical practitioners are tried by their peers increases the likelihood of obtaining a balanced decision[102]. However, the composition of the Health Professions Council of Zambia suggeststhat the viewpoints of medical practitioners and their interests have an important influence and this would clearly lead to possibilities of prejudice and biasness.

Additionally, it was stressed by Dr Mary Zulu that the various fees that the medical practitioners pay such as registration fees, fees to finance the activities of the Council, fees payable for an inspection conducted by the Council, fees for accreditation of local and foreign training institutions and qualifications are very low and need to be increased to help increase the funding of the HPCZ[103].

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[99] Section 68(1)
[100] Section 68(3)
[101] Sonny Mulenga &Vismer Mulenga (both personally and practicing as SP Mulenga international) and Chainama Hotels Limited v Investrust Merchant Bank Limited, SCZ Judgement No. 15 of 1999
[102]Mr Joseph Jalasi, interview held in his office at State House on 16/12/10 , Interview No. 2
[103]Dr Mary Zulu, interview held in the Registrar's office at the Health Professions Council of Zambia on 22/12/10 , Interview No. 1

Furthermore, that there is a genuine shortage of staff. This shortage affects the operations of the inspectorate. The inspectorate of Medical Council of Zambia is the inspector and regulator of all healthcare facilities (Consulting Rooms) and training institutions offering or intending to offer training in the health professions in Zambia[104]. According to Mr Joseph Jalasi, it is poorly staffed and therefore is unable to carry out the necessary warranted inspections in all the four corners of Zambia[105].

To effectively carry out its functions, it seems that the biggest challenge for the Health Professions Council is to ensure that members of the public are vigilant and report individual health practitioners and institutions offering poor health care services and unprofessional conduct to the authorities.

### 3.3.THE GENERAL MEDICAL COUNCIL

What is the equivalent to the Health Professions Council of Zambia, in the United Kingdom, is the General Medical Council which was first established under the name "The General Council of Medical Education and Registration of the United Kingdom"[106]. Its name was changed to the General Medical Council pursuant to the Medical Council Act 1950. The Council is now established under the Medical Act 1983, and is a body corporate which has the capacity to do such things as enter into transactions as are in its opinion incidental to the performance of its functions under the Medical Act 1983 including borrowing of money[107].

The Council consists of 54 elected members and 35 appointed member whose tenure of office is for a period not exceeding five years[108]. It is from these members that the Council may elect a person to be president[109], chairman and a treasurer or treasurers[110] and a registrar[111].

Control over professional conduct in the medical profession and questions relating to the fitness of a medical practitioner to practice on grounds of physical or mental ill health are

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[104] Available on Http://www.medicalcouncilofzambia.org.zm/inspectorate.html (accessed on)16/12/10
[105] Mr Joseph Jalasi, interview held in his office at State House on 16/12/10 , Interview No. 2
[106] Section 3 of The Medical Act (1858) (repealed),Lord Halisham of St Marylebone, vol 30 (London:Butterworth's, 1992) page 98
[107] The Medical Act 1983, Schedule 1 (1)(2), Lord Halisham of St Marylebone, Halsbury's Laws of England vol 30: (London:Butterworth's, 1992) page 98
[108] Lord Halisham of St Marylebone, Halsbury's Laws of England vol 30 (London:Butterworth's, 1992) page 116
[109] Lord Halisham, Halsbury's Laws of England page 102
[110] Lord Halisham, Halsbury's Laws of England page 102
[111] Lord Halisham, Halsbury's Laws of England page 102

entrusted to three committees, namely; the Professional Conduct Committee, the Health Committee and the Preliminary Proceedings Committee[112].

The principal functions of Preliminary Proceedings Committee, is to decide whether cases ought to be referred for inquiry by the Professional Conduct Committee or the Health Committee[113]. Once referred to the Professional Conduct Committee, its functions are to inquire into charges that practitioners have been convicted of criminal offences or are guilty of serious professional misconduct and in appropriate cases to make directions for erasure, suspension or conditional registration[114] and to consider applications for the restoration to the register of practitioners whose names have been erased[115]. On the other hand the functions of the Health Committee are to inquire into charges that the fitness to practice of a medical practitioner is significantly impaired by reason of his physical or mental condition[116].

It is important to note that as per the provision of the Medical Act 1983, in all proceedings before the Professional Conduct Committee, the Health Committee or the Preliminary Proceedings Committee of the General Medical Council, there must be assessors to the committee for the purpose of advising it on questions of law arising in the proceedings[117].

When it comes to the question of what constitutes serious professional misconduct, it is the role of the Professional Conduct Committee to decide whether the facts alleged are proved and secondly whether in relation to those facts, the practitioner was guilty of serious professional misconduct[118]. The committee must also decide what the appropriate standard to which each practitioner must adhere[119].

A party may appeal to the Privy Council from a decision of the Profession Conduct Committee giving direction for erasure or from the decision of the Health Committee giving a direction a for suspension or for conditional registration extending a period of suspension or of conditional registration or varying of the conditions imposed by a direction for conditional

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[112] The Medical Act 1983, Section 36
[113] The Medical Act 1983, Section 42
[114] The Medical Act 1983, Section 41
[115] The Medical Act 1983, Section 41 of St Marylebone, Halsbury's Laws of England vol 30 (London:Butterworth's, 1992) p 107
[116] The Medical Act 1983, Section 41, 37
[117] Lord Halisham of St Marylebone, Halsbury's Laws of England p114
[118] Lord Halisham of St Marylebone, Halsbury's Laws of England p 117
[119] Lord Halisham of St Marylebone, Halsbury's Laws of Englandp 117

registration. It is important however to note that no appeal lies from a decision of the Profession Conduct Committee except on a question of law[120].

## 3.4.THE MALAYSIAN MEDICAL COUNCIL

The Malaysian Medical Council is the core regulatory body of the Malaysian medical profession and is established under the provisions of section 3 of the Medical Act 1971. The members who are to hold office for a term of three years are drawn from three main sources, namely, nomination by universities, election by registered medical practitioners from East and West Malaysia, and appointed members from the public services[121].

Just like the objectives of the Health professions Council of Zambia, the functions of the Malaysian Medical Council are to maintain a register of medical practitioners in Malaysia, to promote and maintain standards of practice of medical practitioners and to investigate complaints made against practitioners and administration of disciplinary provisions.

The Malaysian Medical Council is empowered to exercise disciplinary jurisdiction over medical practitioners who are convicted of a punishable offence with imprisonment, found guilty of infamous conduct in any professional respect, obtained registration through fraudulent means and has breached the code of professional conduct. The punishments that the Council may impose on the medical practitioners found guilty are striking them off the register, suspension for a certain period they deem fit or reprimand[122].

## 3.5.SIMILARITIES AND DIFFERENCES BETWEEN THE HPCZ, MMC, GMC

There are clear similarity between the Health Professions Council of Zambia (HPCZ), the Malaysian Medical Council (MMC) and the General Medical Council (GMC) in that they are all body corporates which have the capacity to do such things as enter into transactions or other actions permised by their governing law. Furthermore, the members of the distinct Councils cannot hold office for a term longer than three years in the case of the MMC and the HPCZ, and five years for the GMC. Additionally, they are all regulatory bodies of the various medical institutions in their respective jurisdiction. Moreover, they all allow for appeals to a higher court if a party is not satisfied with the decision of the respective Councils.

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[120] Lord Halisham of St Marylebone,Halsbury's Laws of England,p 121
[121] The Medical Act 197,1 Section 3 (1) and 3(6)
[122]The Medical Act 1971, Section 30

The distinction that can be drawn between the Malaysian Medical Council (MMC) and the Health Professions Council of Zambia is the limitation of the punishment that the MMC can impose on medical practitioners found guilty which are striking them off the register or suspension for a certain period they deem fit[123].

In the case of the General Medical Council of the United Kingdom, it is required that there be assessors to the committee for the purpose of advising it on questions of law arising in the proceedings[124]. There is no such requirement in the case of the HPCZ. Additionally, the members in the General Medical Council are divided into two, which are, appointed members and the elected members. In the HPCZ, the members are appointed by the Minister in charge of health in Zambia and not in any way elected.

According to the Health Professions Act the members of the Council are part-time Members[125], no such provision exists in the case of the General Medical Council. Additionally, under the General Medical Council, three committees, namely; the Professional Conduct Committee, the Health Committee and the Preliminary Proceedings Committee[126] work together in tackling issues of professional conduct in the medical profession and questions relating to the fitness of a medical practitioner to practice on grounds of physical or mental ill health. Under the HPCZ, the Disciplinary Committee is the only organ tasked with this function[127].

Another important distinction that can be seen between the GMC and the HPCZ is the fact that in the GMC no appeal lies from a decision of the Profession Conduct Committee except on a question of law[128]. On the contrary section 29 of the Act has no such limitation as its provisions state that a person aggrieved with a decision of the Council may, within thirty days of receiving the decision, appeal to the Minister and then if aggrieved with a decision of the Minister may, within thirty days of receiving the decision, appeal to the High Court.

It is important to note however, that by virtue of the principal of common law, which has been defined as "The collective judicial wisdom of the past as the primary source of rules applicable to the problems of the present[129]" and the provisions of The English Law (extent

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[123] The Medical Act 1971, Section 30
[124] Lord Halisham of St Marylebone, Halsbury's Laws of England vol 30 (London:Butterworth's, 1992) p 114
[125] The Health Profession Act No. 24 of 2009 1st Schedule 1(1)
[126] The Medical Act 1983, section 36,
[127] The Health Professions Act No.24 of 2009, section 63(1)
[128] Lord Halisham of St Marylebone, Halsbury's Laws of England vol 30 (London:Butterworth's, 1992) p 121
[129] M. Ndulo, Law in Zambia. (Nairobi: East African Publishing House, 1984) p1

of Application) Act[130], which is an Act to declare the extent to which the law of England applies in Zambia, the law laid down in England as well as Malaysia where the Malaysian Medical Council and The General Medical Council are concerned will be applicable to Zambia where there is a *Lacuna* be it only for persuasive value[131].

## 3.6.CONCLUSION

This chapter has looked at the composition, functions and disciplinary actions of the Health Professions Council of Zambia. In so doing it has brought to the fore the various inadequacies of the Council. The chapter has proceeded to give a brief account of the Malaysian Medical Council and the General Medical Council of the United Kingdom and has highlighted the various similarities and significant difference of these two organisations in comparison to the Health Professions Council of Zambia. It has been argued that the civil justice system is the only effective means for holding them accountable and that other disciplinary mechanisms are woefully inadequate. In the United States of America for example, it has been lamented that the State medicalboards, for instance, are supposed to discipline doctors who consistently violatestandards of care[132]. Yet two-thirds of doctors who make 10 or more medicalnegligence payments are never disciplined at all[133]. Further that, hospitals are on the front lines ofpatient safety, yet nearly half of all U.S. hospitals have *never* reported a disciplinaryaction against one of their doctors[134].

Proceeding from this, the next chapter will look at the initiation of of disciplinary hearing for professional misconduct under the Health Professions Act No 24 of 2009, appeals to the High Court under the Health Professions Act No. 24 of 2009 and concluded by addressing the question of whether the Health Professions Act No. 24 of 2009, does provide for actions of medical negligence against medical practitioners in Zambia.

[130] Chapter 11, the Laws of Zambia
[131] Times Newspaper Zambia Limited v Kapwepwe (1973) Z.R. 292
[132] Available on http://www.epartlaw.com/library/malpractice.html (accessed on 15/12/10)
[133] Available on http://www.epartlaw.com/library/malpractice.html (accessed on 15/12/10)
[134] Available on http://www.epartlaw.com/library/malpractice.html (accessed on 15/12/10)

## CHAPTER FOUR

## DISCIPLINARY PROCEEDINGS UNDER THE HEALTH PROFESSIONS ACT NO. 24 0F 2009

### 4.0 INITIATION OF DISCIPLINARY PROCEEDINGS

It has been highlighted in the previous chapters that, prior to the enactment of the Health Professions Act No. 24 of 2009, the health profession in Zambia was governed by the Medical and Allied Professions Act[135]. Under the Medical and Allied Professions Act, the law governing actions for disciplinary hearings by the Disciplinary Committee was provided for under part VII.

The process of initiation of disciplinary hearing under the Medial and Allied Professions Act was further supplemented by the provisions of the Medical and Allied Professions (Infamous Conduct) Rules, Statutory Instrument No. 68 of 1998, which is still applicable under the Health Professions Act No 24 of 2009, by virtue of the Interpretation and General Provisions Act[136] which provides under section 15 that;

> "Where any Act, Applied Act or Ordinance or part thereof is repealed, any statutory instrument issued under or made in virtue thereof shall remain in force, so far as it is not inconsistent with the repealing written law, until it has been repealed by a statutory instrument issued or made under the provisions of such repealing written law, and shall be deemed for all purposes to have been made thereunder"

The Medical and Allied Workers Act was repealed by the Health Professions Act No. 24 of 2009. The Health Professions Act No 24 of 2009 provides for the establishment of the Disciplinary Committee which is to consist of a Chairperson, a Vice-Chairperson, the Chairperson of the Council, a peer of the health practitioner against whom a compliant of professional misconduct is made and a lay member of the Council. Furthermore, the Chairperson and Vice Chairperson of the Disciplinary Committee are to be legal practitioners qualified to hold, or who have held, judicial office[137]. One would assume that this is to ensure that there are persons conversant with the law during the proceedings and thus keeping them in line with the law.

Under the provisions of the Health Professions Act No. 24 of 2009, a person may lodge a complaint with the Disciplinary Committee against a health practitioner where the person

[135] Chapter 297, the Laws of Zambia (repealed)
[136] Chapter 2, the Laws of Zambia
[137] Section63 (1)

alleges that the health practitioner has contravened the Code of Ethics or any of the provisions of the Act[138]. However in the case of acts committed outside Zambia, a court of competent jurisdiction shall have jurisdiction over any such acts which, which if it had committed in Zambia would have been an offence for professional misconduct[139].

The Act in its wording does not limit the right to initiate disciplinary action to the aggrieved person only. It provides under section 62(2), that the Council may initiate an action where it has reasonable grounds to believe that a health practitioner has contravened the Code of Ethics of the provisions of the Health Professions Act No. 24 of 2009.

What amounts to professional misconduct upon which a person can bring an action against a health practitioner is laid down in section 61 of the Act, as; where a health practitioner, unlawfully discloses or uses to the health practitioner's advantage any information acquired in the health practitioner's practise, engages in conduct that is dishonest, is fraudulent or deceitful.

It also includes where a health professional commits an offence under any other law, engages in any conduct that is prejudicial to the health profession or is likely to bring it into disrepute or breaches the Code of Ethics or encourages another health practitioner to breach or disregard the principles of the Code of Ethics. All these amount to what is called infamous conduct.

It was pointed out in the case of Allison v The General Council of Medical Education Registration[140], that if a medical man in the pursuit of his profession has done something with regard to it which will be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to say that he has been guilty of infamous conduct in a professional respect.

The procedure laid down for a party wishing to initiate an action against a health practitioner, is that, a complaint or allegation needs to be made to the Registrar of the Health Professions Council in the prescribed manner or form[141]. The complaint is then brought before the Disciplinary Committee where it is heard in camera. What this simply means is that the

[138] Section62(1)
[139] Section71 (1)
[140] ( 1894) 1 QB 750
[141] Section 62(3)

public is barred from the hearing[142]. Furthermore, the Disciplinary Committee entitles any person to the right to legal representation, alternatively by any other person or by themselves if the party so wish[143].

It is important to note that hearings before the Disciplinary Committee, for all purposes are deemed to be judicial proceedings[144] of which it is mandatory for a record of the proceedings to be kept[145]. And further that the decision of the Disciplinary Committee shall be in the form of reasoned judgments of which a copy should be supplied to each party to the proceedings and every person affected by the decision[146].

The Act addresses the issue of a possible conflict of interest and biased decision by the Disciplinary Committee by providing that if a person is present at a meeting of the Disciplinary Committee in which matter the person or that person's spouse is directly or indirectly interested in a private capacity, in any matter which is the subject of consideration, that person is under an obligation to disclose the interest, and shall not, unless the Disciplinary Committee otherwise directs, take part in any consideration or discussion of, or vote on, any question relating to that matter[147].

One might add that this duty to disclose puts the members in a fiduciary relationship with the Disciplinary Committee. This means they have a duty to act in good faith. It is important to note that the Act further requires that a disclosure of interest made should be recorded in the minutes of the meeting at which it is made[148].

When it comes to the issue of evidence, the Act, under section 66(1) stipulates that the Chairperson of the Disciplinary Committee or the Registrar can summon witnesses and require the production of any book, record, document, electric record, for the purpose of hearing evidence[149]. Further, that through the Chairperson or Vice Chairperson of the Disciplinary Committee an oath may be administered to a witness[150].

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[142] E.A. Martin. Oxford Dictionary of law, 5th ed (Oxford: Oxford University Press p245
[143] Section 65(5)
[144] Section 66(4)
[145] Section 65(4)
[146] Section 65(6)
[147] Section 65(7)
[148] Section 65 (8)
[149] Section 66(1)
[150] Section 66 (2)

If a person has been summoned before the Disciplinary Committee and that person refuses or fails to attend at the time and place specified, refuses to sworn in or affirm, refuses without lawful excuse, to answer fully and satisfactory to the best of that persons knowledge and belief, any question lawfully put to that person or refuses to produce any book, record, document or thing which that person has been required by summons to produce, that person commits an offence and is liable upon conviction for every such refusal or failure, to a fine[151].

In the case of documentary evidence, the Disciplinary Committee is prohibited from compelling any person to produce any book, document or record which that person would not be compelled to produce in the High Court[152]. All in all, the Act gives permission to the Chief Justice, by Statutory Instrument on the recommendation of the Council to make rules relating to the Disciplinary Proceedings[153].

Additionally, the wording of section 70 allows the Chief Justice by Statutory Instrument on the recommendation of the Council, to make rules relating to; the manner and form for lodging of complaints, the mode of summoning persons before the Disciplinary Committee, the form and manner of service of a summons requiring the attendance of a witness before the Disciplinary Committee, the production of any books, record document or thing, the procedure to be followed, the rules of evidence to be observed in proceedings before the Disciplinary Committee and the functions of the assessors to the Disciplinary Committee.

The scope of application of the rules that can be made by the Chief Justice is wide but can, for example, provide that before any matters are referred to the Disciplinary Committee they shall, in such manner as may be provided by the rules, have been brought before and investigated by the Council in this respect or for securing notices for the proceedings and specifying the time and manner of the proceedings and for securing that any party to the proceedings shall, if that person requires, be entitled to be heard by the Disciplinary Committee[154].

Once a matter has been heard it is put to a vote, and is to be determined by majority vote[155]. The Disciplinary Committee then has to prescribe the necessary punitive measures. These range from an order for the cancellation of the health practitioners practising certificate or

[151] Section 66(2)
[152] Section 66(3)
[153] Section 70
[154]Section70 (2)
[155]Section65 (2)

certificate of registration, censure of the health practitioner, caution the health practitioner, impose a fine to be paid to the Council, order the health practitioner to pay to the Council or to any other party to the hearing any cost of, or incidental to the proceedings, order the health practitioner or other person, as restitution, the amount of loss caused by the person's negligence or impose any reasonable period of suspension for a period not exceeding one year[156].

Furthermore, the Disciplinary Committee shall, where after due inquiry, it finds a health practitioner not guilty of professional misconduct, record a finding that the health practitioner is not guilty of such conduct in respect of matters of which the charge relates[157]. Finally it is mandatory for the Disciplinary Committee, as soon as practicable after the completion of each hearing, to submit to the Council a report of the proceedings together with a copy of the record[158].

## 4.1.APPEALS FROM THE DISCIPLINARY COMMITTEE TO THE HIGH COURT

The Constitution of the Republic of Zambia provides for the existence of the High Court, which, except as to the proceedings in which the Industrial Relations Court has exclusive jurisdiction under the Industrial and Labour Relations Act, unlimited and original jurisdiction to hear and determine any civil or criminal proceedings under any law[159].

As a result, if a person is aggrieved with the decision of the Disciplinary Committee, that person may appeal to the High Court for Zambia, within thirty days of receiving that decision[160]. It is important to note that proceedings of the Disciplinary Committee shall not be set aside by reason only of some irregularity in those proceedings if such irregularity did not occasion a substantial miscarriage of justice[161]. In the case of an appeal the Council shall be the Respondent[162].

The Act further provides that a decision of the Disciplinary Committee shall not take effect until the expiration of the time for lodging an appeal against the decision or, if an appeal is lodged, until the time the appeal is disposed of, withdrawn or struck out for want of

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[156]Section66 (5)
[157]Section66 (9)
[158]Section 67
[159] Chapter 1 of the Laws of Zambia, Article 94
[160] Section 68(1)
[161] Section 68(5)
[162] Section 68(2)

prosecution, as the case may be[163]. In this instance as well, the Chief Justice may, by statutory instrument, make rules regulating appeals to the High Court[164].

Where a matter is brought on appeal to the High Court, the High Court, if it deems it fit may confirm, vary or set aside any finding made, penalty imposed or direction given by the Disciplinary Committee[165].

Additionally, the High Court may remit the matter to the Disciplinary Committee for further consideration in accordance with such directions as the High Court may give or make such other order as to costs or otherwise as it considers appropriate[166].

However, on the authority of the Newplast Industries v Commissioner of Lands and Another[167] ; judicial review proceedings cannot be instituted against a decision of Disciplinary Committee. In this case the court pronounced thus, where any matter is brought to the High Court by means of Judicial Review when it should have been brought by way of an appeal, the court has no jurisdiction to grant the remedies sought.

Consequently, the Health Professions Act No. 24 of 2009, seems to provide a comprehensive disciplinary procedure to be conducted by the Disciplinary Committee of the Health Professions Council of Zambia. The Act lays down the procedure of initiating the said proceedings, appealing to the High Court where a party is not satisfied with the decision of the Committee as well as the remedies that can be granted to the aggrieved party.

## 4.2.CONCLUSION

The focus of this chapter has been an in-depth look at the Disciplinary Committee and a discussion on the procedure of initiating disciplinary proceedings against a health practitioner as well as the right to appeal to the High Court for Zambia.

In the past chapters this essay has highlighted what negligence is and what elements need to be established in order to successfully bring an action for negligence at common law. In so doing, negligence has been defined as carelessness amounting to the culpable breach of a

[163] Section 68
[164] Section 69
[165] Section 68(4)
[166] Section 68(4)
[167] (SCZ Judgment No. 8 of 2001)

duty: failure to do something that a reasonable man would do, or doing something that a reasonable man would not do[168].

With regard to what aspects need to be proved in cases of civil liability for negligence, it has been pointed out thatfor there to be an award of damages, the injured party has to have suffered an actual loss, be it personal injury, damage to property or financial loss[169]. In the case of criminal liability the negligence must amount to a crime.

Whether it is civil or criminal suits, the fact remains that these are actions brought before a court of law. In this regard, the Disciplinary Committee of the Health Professions Council offers a forum for alternative dispute resolution.

Alternative Dispute Resolution ("ADR") offers a means to resolve cases more expeditiously and more economically. Consequently, the question to be answered in conclusion of this chapter is whether the Health Professions Act No 24 of 2009, does provide for civil action for medical negligence against health practitioners in Zambia.

Having in our contemplation that civil liability gives a person rights to obtain redress from another person[170] and further an award of damages, to the injured party who has to have suffered an actual loss, be it personal injury, damage to property or financial loss[171].

It has been seen in this chapter that the Disciplinary Committee prescribes the necessary punitive measures once a matter has been determined. These range from an order for the cancellation of the Health Practitioners practising certificate or certificate of registration, censure of the health practitioner to an order to the erring Health practitioner to pay to the Council or to any other party to the hearing any cost of, or incidental to the proceedings, or order the health practitioner or other person, as restitution, the amount of loss caused by the person's negligence[172].

This can be distinguished from the disciplinary tribunal of the Medical and Dental Council of Nigeria and civil litigation under the court system, it was pointed out that that the objective of the trial before a disciplinary tribunal is to punish the erring medical practitioner and not to

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[168] E.A. Martin. Oxford Dictionary of law. 5th ed (Oxford, Oxford University Press) p327
[169] Available onwww.rsc.org/images/2_Difference_tcm18-17644.pdf(accessed on 16/12/10)
[170] Available onwww.rsc.org/images/2_Difference_tcm18-17644.pdf(accessed on 16/12/10)
[171] Available onwww.rsc.org/images/2_Difference_tcm18-17644.pdf(accessed on 16/12/10)
[172]Section66(5)

compensate a victim as is the case where an action for medical negligence is instituted in the civil court[173].

In light of this, the conclusion to be arrived at is in the affirmative. The Health Professions Act No. 24 of 2009 does provide for civil action against a health practitioner in Zambia for medical negligence as an alternative dispute resolution body. Proceeding from this discussion, the next chapter is to draw some conclusions from the findings of the research and based on those conclusions come up with some relevant recommendations on the topic at hand with the aim of changing the situation prevailing currently.

[173] H.A. Olaniyan, 'Liability for Negligence in Nigeria', 4 Nigerian Journal of Health and Biomedical Sciences (July--December 2005) 2: 169

## CHAPTER FIVE

## GENERAL CONCLUSION AND RECOMMENDATIONS

### 5.0.GENERAL CONCLUSION

This essay has through its past chapter discussed the various aspects that are core to the objectives of this research paper. In chapter one, the various problems that face the medical profession today where brought to the fore and it was stressed that it is preventable medical errors that kill and cause injury to a large number of the Zambian population.

Chapter two proceeded to highlight the law of negligence zeroing in on how both criminal and civil liability arises at common law. It went on to look at the various problems that both the erring medical practitioner and the would-be litigants face in the case of medical negligence.

Under chapter three this essay introduced the Health Professions Act No. 24 of 2009, which repealed the Medical and Allied Professions Act. The focus of this chapter was to introduce the Health Professions Council, its works, objectives as well as the various problems faced by it. Chapter three concluded by drawing a clear distinction between the Health Professions Council of Zambia, the Malaysian Medical Council and the General Medical Council of the United Kingdom.

Chapter Four had as its focus the Disciplinary Committee of the Health Professions Council. It underlined the mode of initiation of disciplinary proceedings, stressed the right to appeal to the High Court for Zambia, when a party is not happy with the decision of the Disciplinary Committee and concluded by answering the question of whether the Health Professions Act No. 24 of 2009, does provide for civil actions for medical negligence against a health practitioner in Zambia in the affirmative. Consequently, having arrived at this conclusion, the aim of this chapter is to come up with some relevant recommendations with the purpose of changing the situation prevailing currently.

### 5.1.RECOMMENDATIONS

The law of medical negligence is filled with many short comings which if left unattended to will lead to a large portion of the Zambia population being the victims of medical negligence resulting from profession misconduct of health practitioners. In order to have a satisfactory system, all of the needs of parties involved in medical negligence must be taken into account.

This will ensure that neither patients nor doctors suffer as a result of the reform. The problem must be looked at from all angles.

The discussion in this section is focused on various recommendations that should be taken into consideration and if possible implemented to effect positive changes in the health profession. These recommendations will be tackled in two-folds, one with regards the law of medical negligence at common law and then recommendations with regards the Health Professions Act No. 24 of 2009, with great emphasis being made on the disciplinary procedure under the Disciplinary Committee of the Health Professions Council of Zambia,.

## 5.2.RECOMMENDATIONS: COMMON LAW

### 5.2.1. LEGISLATING THE PRINCIPLES OF MEDICAL NEGLIGENCE LAW

It is highly admirable that the civil justice system holds doctors, hospitals and insurance companiesaccountable. It is this accountability that drives the development of patient safetysystems that help prevent negligence before it occurs. Hospitals, health systemsand even entire medical fields have reformed dangerous practices because of thecivil justice system. Without the accountability the civil justice system enforces,patient safety will suffer and health care costs will go up for everyone.

However, it has been highlight in this research paper that one of the many problems faced by anyone trying to prove medical negligence against a medical practitioner, is successfully proving the requisite standard of negligence. It has been stressed that for a medical practitioner to be held liable in the realm of medical negligence, the standard of care that is needed to be proved as lacking is way beyond that of ordinary cases of negligence such that one man clearly is not negligent merely because his conclusion differs from that of other professional men, nor because he has displayed less skill or knowledge than others would have shown[174]. By implication, even where acontrary medical result is seemingly due to a systemic problem, the circumstances of the case may demand that the health professional be held liable for medical negligence. This is not only unfair but extreme.

In Zambia for instance where the healthcare institution is faced with financial problems and with shortages in human and technological resources, it is expected that there would be a number of injuries that have resulted from the limited resources that doctors have to work

[174] Hunter v Hunley ( 1955) SLT 213, at p. 217

with in healthcare provision. It is not unusual to find clinics short on drugs, medical supplies and equipment, and electric power supply. The success of a medical procedure may be affected by any of these factors. A surgical procedure may be affected by electric power outage, which might lead to an adverse medical result.

Consequently, by reason of Zambia's poor socio-economic condition, medical practitioners in Zambia are expected to exhibit a higher degree of care than is expected of their contemporaries in advanced countries. While, for instance, power cut may be improbable in some countries of the world, it is a perpetual and seemingly normal occurrence in Zambia. It is thus necessary that the relevant standard of care that is required be put into legislation taking into account the various mitigating systematic problems.

By doing so, it will not be for the court to beat about the bush speculating on the relevant standard to be applied when there is a specific statute providing for it. This will provide doctors with greater certainty as to what is expected of them by law, particularly, on the difference in the standard of care demanded by them in relation to duty to disclose risks and duty to treat and diagnose. Another important part which legislation can play a vital role in is to put a limit on the amount that could be awarded in medical negligence suits depending on the misconduct by the health practitioner.

### 5.2.2.NO FAULT PRINCIPLE

Fundamentally, the tort of negligence sets out three major formulae for the establishment of a claim of negligence. These well-known criteria are whether there was an existing duty of care owed to the Plaintiff by the Defendant, whether the duty of care was breached, and whether the breach resulted in the particular injury alleged by the Plaintiff. As a result the tort of negligence is tied to the existence of fault or the breach of an existing standard. This is in most cases hard to prove. A radical solution to the problem is to move away from the current tort or fault-based system towards a "no-fault" based system of liability for medical negligence.

This system provides awards to injured patients irrespective of the requirement of proving fault on the part of the medical personnel. This system has been employed in New Zealand. The features of the system as it operates in New Zealand are nothing short of appealing. New Zealand barred malpractice litigation in 1974[175]. The no fault system, which operates in place

[175]M. Vennell, 'Medical Misfortune in a No Fault Society,' in R.D. Mann and J. Havard (eds), No Fault

of malpractice litigation and covers only treatment of injuries caters for the country's four million people for less than $30 million dollars per year.[176].

This is definitely a clearly attractive solution to the existing tort system in the case of medical negligence in Zambia. The system would enable victims of medical negligence to be compensated quickly and at little administrative cost. Legal fees are eliminated, claimants do not have to find a skilled lawyer to act on their behalf and the adversarial features of the tort system are avoided. As a consequence, it is possible to provide compensation to a larger number of people than under tort law. Thus, the bulk of the expenditure involved goes directly to the claimants.

### 5.2.3.AN APOLOGY WORKS

Throughout the centuries, it has been pointed out that "sorry" does more than what money or flowers can do. As a result it would be a step in the right direction to encourage doctors and their insurers to openly disclose medical errors and offer apologies. Clearlyanger and not greed is what motives most people to file medical malpractice lawsuits. Most injured patients just want to know what went wrong in the course of their treatment and the only way they can do this is through the discovery process of litigation.

The workings of the apology program are such that if a medical error occurs, hospital staff are to personally disclose the medical error to the patient and apologize. The hospital then offers the patient compensation for their injuries. If the patient accepts the apology and the compensation offered, the patient is barred from filing a lawsuit against the doctor or the hospital to recover for the injuries they suffered as a result of the medical error.

The apology program has been tried out in the United States of America, where the Kentucky Veterans Administration Hospital in Lexington, Kentucky, launched its apology system in 1987 and showed significant results in a relatively short period of time[177]. By 2000, that hospital had settled 170 malpractice claims and gone to trial just three times. During this period, the hospital's average pay-out, across all claims, was $15,000: less than 20 percent of the average of $98,000.62 that was prevailing[178].

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Compensation in Medicine, Royal Society of Medicine (1989).24-5

[176] M. Vennell, 'Medical Misfortune in a No Fault Society, p24-5

[177] Hillary Rodham Clinton and Barack Obama, Making Patient Safety the Centerpiece of Medical Liability Reform, New England Journal of Medicine, (May 2006) 2205-2208

[178] Hillary Rodham Clinton and Barack Obama, p2205-2208

If this program was tried in the Zambian health sector it would cater for both the medical practitioner and the patient in that the patient would finally put their demons to rest and the doctor would not have to be dragged through unnecessarily lengthy litigation with the side effect of tarnishing his name. After all to some patients, monetary compensation alone may not be the answer to their grievances. Most of the time, they want to know what actually happened, why it happened and be assured that it will not happen again in the future.

### 5.2.4.SENSITISATION OF THE PUBLIC ON THE AVAILABILITY OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

There is need for clear sensitisation of the availability of the alternative dispute resolution mechanism (ADR). Alternative dispute resolution methods have the advantage of preserving doctor-patient relationship and offer an alternative for those who lack the endurance to see through the litigation process.

Mediation, for example offers a costless process of integrative bargaining. It does not emphasize on who should win or lose, who is right or wrong. Rather, it focuses on goals of reconciliation and personal transformation. In mediation, parties participate directly in what is thought to be an informal and voluntary dispute resolution process that may offer a novel and promising approach in resolving claims.

Alternatively, arbitration is available in Zambia and is governed by the Arbitration Act No. 19 of 2000.There are many advantages in arbitration proceedings compared to court proceedings. The procedure involved in arbitration proceedings is less formal and simpler. For instance, arbitration proceedings require less discovery and strict rules of evidence are relaxed. This means that arbitration proceedings would solve many problems created by complex medical negligence cases such as difficulty in finding expert medical witness. Coincidentally, the costs of litigation would be less to pursue and resolution can be reached faster. Additionally, there is no time constraint on the parties as the proceedings can take place at any time according to the availability of the parties. Furthermore, arbitration forums are private and not for public viewing. This would mean that none of the parties run the risk of publicity that may be damaging to their reputations. Thus, by arbitrating, the possibility of maintaining a positive relationship between doctor and patient is favourable compared to the tense relationship they have to bear in court proceedings.

Sensitising and encouraging the Zambian public to utilize the alternative dispute resolution bodies would be a further step in the right direction. It is important to discourage litigation, persuade parties to a dispute to compromise whenever they can. After all in most cases the nominal winner is often a loser in fees, expenses and cost of time.

## 5.3.RECOMMENDATIONS: THE HEALTH PROFESSIONS ACT NO. 24 OF 2009

### 5.3.1.APPEALS TO THE HIGH COURT

The Health Professions Act No. 24 of 2009 provides for a right of appeal to the High Court where a party is not satisfied with the decision of the Disciplinary Committee of the Health Professions Council. However, under the wording of section 68 (3), a decision of the Disciplinary Committee shall not take effect until the expiration of the time for lodging an appeal against the decision or, if an appeal is lodged, until the time the appeal is disposed of, withdrawn or struck out for want of prosecution.

It was pointed out in the case of Sonny Mulenga and Vismer Mulenga(both personally and practicing as SP Mulenga international)and Chainama Hotels V Investrust Merchant Bank Limited[179], that an appeal does not in any way act as an automatic stay of execution. Further, in the same case, the well-known principle that a successful litigant should not be denied the fruits of its judgement was reiterated with approval. Consequently, it would be well advised that the provisions of section 68(3) of the Health Professions Act No. 24 of 2009 be amended to reflect the true spirit of the law epitomised in the authority alluded to. After since the Disciplinary Committee of the Health Professions Council is operating as a judicial body for intents and purposes, then it is only logical that they be bound by the important rule of procedure upheld by other judicial tribunals.

### 5.3.2.EXPANSION OF COUNCIL OFFICES

The Health Professions Council has among its many functions registering and regulating the professional conduct of health practitioners, licencing public and private health facilities,investigating allegations of professional misconduct and imposing such sanctions as may be necessary. These and many other functions are to be implemented and effected throughout the Republic of Zambia at the provincial, district and ward levels. As at 18th April

[179] SCZ Judgement No. 15 of 1999

2009, there where a total of 8,770 health practitioners all over Zambia[180] and it is the role of the Health Professions Council to ensure that these health practitioners are not only register but are functioning in a manner that will not result in malpractice.

Among the many things lamented by the registrar of the Health Professions Council, Dr. Mary Zulu, was the size as well as lack of man power of the Health Professions Council. There is thus a dire need to not only increase the available man power but ensure that measure are undertaken whose end it will be to establish at least one branch of the Health Professions Council in each province.

This will improve on the standard of delivery of health care which has been frowned upon by not only the indigenous Zambian but the international community as well. Consequently, the Act should be amended to expressly provide for the existence of a branch of the HPCZ in at least in five of the provinces in Zambia.

### 5.3.3.ACTS COMMITTED OUTSIDE ZAMBIA.

One of the provisions of the Health Professions Act, No. 24 of 2009, is that a court of competent jurisdiction shall have jurisdiction over health practitioners for any act committed outside Zambia which, as if it had been committed in Zambia, would have been an offence or professional misconduct[181]. This provision ousts the competency of the Disciplinary Committee of the Health Professions Council, to hear and make a determination on matters that fall within this category despite its competence.

It has been highlighted that the advantages of the Disciplinary Committee over court process includes the fact that, claimants do not have to find a skilled lawyer to act on their behalf and thus legal fees are eliminated and further that the adversarial features of the tort system are avoided. Consequently, this enables the victims of medical negligence to be compensated quickly and at little administrative cost.

Thus it would be prudent that this particular provision be amended to reflect the spirit of the provisions part VII of the Health Professions Act No. 24 of 2009, and subsequently awarding both the health practitioner and the patient the opportunity to access a fast, effective, adversarial free dispute resolution body which, if they are dissatisfied with its decisions, can

[180] Available on http://www.lusakatimesectioncom2009/04/08illegal-medical-practitioners-worry-medical-council-of-zambia-

[181] Section 71

appeal to the High Court. This will enable both parties avoid the many pains that plague the civil justice court system.

### 5.3.4 REMEDIES

The Disciplinary Committee of the Health Professions Council of Zambia can after hearing a matter determine what remedies to award to the injured party. These are provided for under section 62 of the Health Professions Act No 24 of 2009, as includingan order for the cancellation of the health practitioners practising certificate or certificate of registration, censure of the health practitioner, caution the health practitioner, impose a fine to be paid to the Council, order the health practitioner to pay to the Council or to any other party to the hearing any cost of, or incidental to the proceedings, order the health practitioner or other person, as restitution, the amount of loss caused by the person's negligence or impose any reasonable period of suspension for a period not exceeding one year.

This provision does not set out categorically the fine to be paid to the Council orany cost of hearing the matter. It would be prudent to put a limit on the amount that could be awarded in medical negligence suits depending on the misconduct by the health practitioner and the resultant injury and by so doing avoid speculation and biasness in the award of compensation to the injured party.

## 5.4. CONCLUSION

Medical negligence is a common term. Many Zambian may not be aware of this particular legal term but numerous of them have either fallen prey to it or know someone who has.The structure of the law of negligence is centred on interpersonal liability for injury, which is essentially built on the presence of fault on the part of the Defendant.

The laws governing medical negligence in Zambia are not contained in any uniform body of laws. They include a medley of the common law of negligence, constitutional provisions, the penal code, and now the Health Professions Act No. 24 of 2009.

Since the reception of English law into the country's legal system, injured patients have had a right of claim under negligence law based on principles developed in England as part of the country's inherited English common law tradition. This common law governing medical negligence has been criticized and termed as fundamentally flawed in that a Plaintiff seeking to prove that medical negligence caused an adverse outcome faces a daunting task. It may be

difficult to find out exactly what happened, it may be difficult to obtain the services of a medical expert willing to testify against a colleague and bringing a claim can be expensive. In addition, the current tort system is ineffective as a deterrent against medical incompetence or malpractice. The reason for this ineffectiveness is because an actionin negligence focuses on a single incident. As a result, a competent surgeon in a high-riskspecialty who makes an unlucky error may be penalised whereas a much less competentdoctor in a lower risk specialty will continue to practise unchecked by the courts[182]

For those who overcome the hurdles and bring an action, there is frequently a substantial delay between the incident and the hearing. Only a small proportion of patients suffering medically related injuries obtain compensation. Likewise, civil litigation has a disastrous effect on the repute of the erring health profession. It is for this reason that this essay has endeavoured to highlight various reforms and amendments that can be given effect to.

It is important to note however that these recommendations should only be interpreted as a starting point in the continuous search for more effective methods for regulating medical negligence in Zambia. It is not enough to have these initiatives provided for by law. The government must introduce a mechanism that must ensure that the Zambian population is aware of its rights and are provided with information regarding the nature of the medical injuries they have suffered. Without knowledge of their right to be informed about what went wrong in the course of medical treatment, the recommendations will have little impact.

[182]Brazier, M., "Compensation, Competence and Culpability: The Case for a No-Fault Scheme. Journal of Medical Defence Union (August 1998) p 9

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