

Medical Negligence in The Context of The Ghanaian Criminal Jurisprudence

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Abstract

This article dealt with the criminal jurisprudential questions of: 1) whether multiple/concurrent action in medical negligence are actionable in the Ghanaian Criminal Jurisprudence? 2) whether vicarious liability lie for the employer of the medical or surgical practitioners who commit negligence in medical or surgical treatment? The legal analysis found that the Ghanaian Criminal Jurisprudence accommodate the concurrent or multiple actions in crime and tort for the same act of the defendant. Even though the double jeopardy principle explicitly expounded in the criminal jurisprudence and the Constitution of Ghana bars action on the same offence. The position of the criminal law indicated that while the same defendant cannot be punished twice for the same offence it is actionable in law for the same act to be punished with multiple or concurrent actions. The analysis further found that the criminal law imputed intent for both juristic person/body corporate and natural person and thus both can be found liable in crimes such as manslaughter and tort act of gross negligence at law. It is concluded that the Ghanaian Criminal Jurisprudence allows the same act to be met with concurrent actions and thus employers of health facilities are not absolved from the gross negligent treatment in medical or surgical procedures of their medical employees. The employer shall be held vicariously liable while multiple suits could be filed against the medical or surgical practitioners for the same act of gross or general negligence in medical or surgical treatments.

Keywords: Gross Medical Negligence, General Medical Negligence, Double Jeopardy, Ghanaian Criminal Jurisprudence, Medical Assault, Concurrent Actions, Vicarious Liability, Criminal Law, Tort.

1.0 Introduction and Jurisprudential Questions

Medical negligence as a field of law in recent years has become a tenuous area of the civil law that much attention has been focused especially on the aspect of negligence tort law. However, the criminal law dimensions of the field had been less elucidated by academics and jurists. Legal literature in this area of medical negligence in the context of the criminal jurisprudence's elsewhere and particularly in the common law jurisdictions including Ghana are yet to be provided extensive review. Therefore, it is sound consideration to be given a space in the Ghanaian Criminal Law context to trigger academics and jurists from other jurisdictions to do same to establish a benchmark for this unexplored area in medical negligence. This article addressed two legal questions in the Ghanaian Criminal Jurisprudence that had received less attention in the academic and legal literature. These questions are: 1) Whether concurrent civil and criminal actions are actionable in the Ghanaian criminal jurisprudence? 2) What implications lie

in vicarious liability in medical negligence in the Ghanaian Criminal Jurisprudence? These criminal jurisprudential questions in the context of Ghanaian law are worth an exposition and to contribute to the contemporary legal literature in the medical negligence field in specific. The jurisprudential questions posed were addressed succinctly in the context of the Ghanaian Criminal and Other Offences Act¹; Criminal Offences (Procedure) Act²; the Ghanaian Constitution³ and selected case laws from Ghana and other common law jurisdictions.

2.0 Foundational issues of Medical Negligence in the context of the Ghanaian Criminal Jurisprudence

2.1 Gross medical negligence

Gross medical negligence is considered as a negligence in medical or surgical treatment that completely disregard life and limb. The Ghanaian Criminal and Other Offences Act⁴ section 82 succinctly put it thus: “Where any person in good faith, for the purposes of medical or surgical treatment, intentionally causes harm to another person which, in the exercise of reasonable skill and care according to the circumstances of the case, he ought to have known to be plainly improper, he shall be liable to punishment as if he had caused the harm negligently, within the meaning of this Ghanaian Criminal and Other Offences Act⁵, and not otherwise.” This is illustrated: “A surgeon, through gross negligence, amputates a limb which there is no necessity to amputate. The surgeon is not liable to be convicted of having intentionally and unlawfully caused harm, but he is liable to be convicted of having negligently and unlawfully caused harm.”⁶

2.2 Medical or Surgical Manslaughter

Contextually, on the basis of the Ghanaian Criminal and Other Offences Act, it is construed that a medical or surgical treatment that leads to death of the victim is considered as a “medical or surgical manslaughter.” Section 51 of Ghanaian Criminal and Other Offences Act⁷ provides: “Whoever causes the death of another person by any unlawful harm shall be guilty of manslaughter. Provided that if the harm causing death is caused by negligence he shall not be guilty of manslaughter unless the negligence amounts to a reckless disregard for human life.” Moreover, section 64 (d)(e) of the Ghanaian Criminal and Other Offences Act⁸ provides: “64 (d) death shall be held to have been caused by harm if the death is caused by the medical or surgical treatment of the harm, unless such treatment is grossly negligent or unless the death could not have been foreseen as a likely consequence of the treatment; and 64 (e) death shall not be held to have been caused by harm unless the death takes place within a year and a day of the harm being caused.” Hence, if death ensued as a result of the gross medically negligence treatment and that death actually did not immediately ensued but within a year and a day, then the death of the victim of this gross medical or surgical negligence shall be attributed to the gross negligence of the medical or surgical treatment.

Of course, such death as a result of gross negligence of a medical or surgical treatment shall be deemed to have committed or contributed to manslaughter. The section 50 of the Ghanaian Criminal and Other Offences Act⁹ put it that: “Whoever commits manslaughter shall be guilty of first degree felony.” And the procedure code, Criminal Offences (Procedure) Act, section 296(1) provides that: “Where a criminal offence is declared by an enactment to be a first degree felony and the punishment for that offence is not specified, a person convicted of that offence is liable to imprisonment for life or any lesser term.”¹⁰

2.3 General Medical Negligence

From above discourse, it has been noted of the Ghanaian Criminal and Other Offences Act¹¹ and Criminal Offences (Procedure) Act¹² distinguishes gross negligence from negligence in general in medical or

surgical treatment and assigned certain weights to them. While the gross medical negligence is presumed or deemed to have occurred when a medical or surgical treatment or procedure is undertaken without regard to human life, that of medical negligence is deemed to have occurred without the medical practitioner's intending to cause such event or a voluntary act undertaken without recourse to such skill and as reasonably to be observed in such circumstances that required such skill or reasonableness. This is rightly provided by section 12 of the Ghanaian Criminal and Other Offences Act: "A person causes an event negligently if, without intending to cause the event, he causes it by voluntary act, done without such skill and care as are reasonably necessary under the circumstances."¹³ This is illustrated as in sections: "12(b) A chemist sells poison so made up as to be liable to be mistaken for a harmless medicine. This is evidence of negligence. 12(c) If the law directs poisons to be sold only in bottles of a particular kind, and the chemist sells poison in a common bottle, this is evidence of negligence, even though the common bottle be labelled 'Poison'."¹⁴

Notwithstanding, subsection 86(2)(a) illustration describes medical or surgical assault and battery under the Ghanaian Criminal and Other Offences Act as if: "[Medical practitioner] under false pretence of surgical treatment induces [patient] to consent to harm or pain. The [medical practitioner] is guilty of an assault and battery."¹⁵

The section 86 (1) clarifies that: "A person makes an assault and battery upon another person, if without the other person's consent, and with the intention of causing harm, pain, or fear, or annoyance to the other person, or of exciting him to anger, he forcibly touches the other person."¹⁶

Subject to the provision in subsection 1, in subsection 2 (a) of section 86 provides that: "Where the consent of the other person to be forcibly touched has been obtained by deceit, it suffices with respect to intention that the touch is intended to be such as to cause harm or pain, or is intended to be such as, but for the consent obtained by the deceit, would have been likely to cause fear or annoyance or to excite anger."¹⁷

Then there is a presumption under subsection 2(e) "for the purpose of this section 86, with respect to intention to cause harm, pain, fear or annoyance, it is immaterial whether the intention be to cause the harm, pain, fear, or annoyance by the force or manner of the touch itself or to forcibly expose the person, or cause him to be exposed, to harm, pain, fear, or annoyance from any other cause."¹⁸ Therefore, if a person in charge of dangerous things; for instance Surgeon, etc., negligently causing harm or danger, section 73 of the Ghanaian Criminal and Other Offences Act buttresses: "Whoever—(b) having undertaken or being engaged in medical or surgical treatment of any person; or (c) having undertaken or being engaged in the dispensing, supplying, selling, administering, or giving away of any medicine or any poisonous or dangerous matter, negligently endangers the life of any person, shall be guilty of a misdemeanour."¹⁹

This presumption to negligently causing harm in the context of section 72 of the Ghanaian Criminal and Other Offences Act is reinforced by section 72 that: "Whoever negligently and unlawfully causes harm to any person shall be guilty of a misdemeanour"²⁰ and that has been paralleled with causing of assault in Section 84 of the Ghanaian Criminal and Other Offences Act: "Whoever unlawfully assaults any person is guilty of a misdemeanour."²¹ The penal sanction had been explicitly put in the Section 296(4) of Criminal Offences (Procedure) Act that: "Where a criminal offence which is not an offence mentioned in subsection (5), is declared by an enactment to be a misdemeanour and the punishment for that offence is not specified, a person convicted of that offence is liable to a term of imprisonment not exceeding three years."²²

Therefore, while the penalty for gross medical or surgical negligence attracts a maximum sentence of life imprisonment that of medical or surgical negligence attracts a maximum of three years. This penal

allotment by the Criminal Offences (Procedure) Act²³ indicates clearly the weight assigned to these offence category.

2.4 Exceptions under the Ghanaian Criminal law

Irrespective of the fact that gross negligence and negligence may be considered unique category of offence under the Ghanaian Criminal and Other Offences Act²⁴. Provisions had been made to exempt some medical or surgical practice from this general rules. There are legal excuses that can be proffered by medical practitioners in the cause of their practice. Section 42 provides: “The use of force against a person may be justified on the ground of his consent, but— 42(e) if a person is intoxicated or insensible, or is from any cause unable to give or withhold consent, any force is justifiable which is used, in good faith and without negligence, for the purposes of medical or surgical treatment or otherwise for his benefit, unless some person authorised by him or by law to give or refuse consent on his behalf dissents from the use of that force;”²⁵ Section 42 (d) “consent to the use of force against a person for purposes of medical or surgical treatment, or otherwise for his benefit may be given against his will by his father or mother or guardian or a person acting as his guardian, if he is under eighteen years of age, or by any person lawfully having the custody of him if he is insane or is a prisoner in any prison or reformatory, and, when so given on his behalf, cannot be revoked by him.”²⁶ However, consent for medical or surgical treatment shall be presumed to have been vitiated as stated in section 42(c): “consent to the use of force for the purposes of medical or surgical treatment does not extend to any improper or negligent treatment.”²⁷

Even in the cause of medical treatment or surgical treatment under the Ghanaian Criminal and Other Offences Act that may lead to deaths and abortion of pregnancy the sections 67(1) and 67(2) provides: “Section 67 (1) Where any person does an act in good faith, for the purposes of medical or surgical treatment, an intent to cause death shall not be presumed from the fact that the act was or appeared likely to cause death.”²⁸

Section 67(2) “Any act which is done, in good faith and without negligence, for the purposes of medical or surgical treatment of a pregnant woman is justifiable, although it causes or is intended to cause abortion or miscarriage, or premature delivery, or the death of the child.”²⁹

In the cause of medical experiments, testing and research involving cruelty to animals, section 304 provides that: “No prosecution shall be instituted under section 303 (Ghanaian Criminal and Other Offences Act) without the consent of the Attorney-General against— (a) any registered medical practitioner or any duly qualified veterinary surgeon or any person acting under the direction of any such medical practitioner or veterinary surgeon in respect of the commission or omission of any act in the course of any operation, experiment, or test performed on any animal for the purposes for scientific research or medical or veterinary treatment; or (b) any veterinary authority (as defined in section 2 of the Diseases of Animals Ordinance) or any person acting under the direction of that authority in respect of the commission or omission of any act in the course of the seizure, detention, or destruction of any animal purporting to be effected for the purposes of the Diseases of Animals Ordinance.”³⁰

The Criminal Offences (Procedure) Act³¹ and the Ghanaian Criminal and Other Offences Act³² provided the remedies for both gross negligence and negligence in general in the medical or surgical practice as well as drug administration by chemist and pharmacist.

3.0 Medical Negligence and the Principle of Double Jeopardy in the Ghanaian Criminal Jurisprudence

In *Sambasivam v. Public Prosecutor*, Lord Mac Dermot asserted: “The effect of verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the jurisdiction.”³³

In *R v Carroll*, (Gaudron & Gummow JJ) stated that: “The interests at stake ... touch upon matters fundamental to the structure and operation of the legal system and to the nature of judicial power. First, there is the public interest in concluding litigation through judicial determinations which are final, binding and conclusive. Secondly, there is the need for orders and other solemn acts of the courts (unless set aside or quashed) to be treated as incontrovertibly correct. This reduces the scope for conflicting judicial decisions, which would tend to bring the administration of justice into disrepute.”³⁴

3.1 Constitutional provisions on Double Jeopardy

In Ghana, the double jeopardy principle was legislated in 1960 under the Ghanaian Criminal Offences (Procedure) Act³⁵ sections 113,117 and 237 and that of section 9 of the Ghanaian Criminal and Other Offences Act³⁶. It has also been restated in article 19(7) of the Ghanaian Constitution³⁷ which provides as follows:

“No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted, shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for the offence, except on the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal”.³⁸ Section 113 of the Ghanaian Criminal Offences (Procedure) Act³⁹ was just a restatement of the law in article 19(7) of the Constitution.⁴⁰ Section 237 of Criminal Offences (Procedure) Act⁴¹ provides:

“237 (1) An accused may, upon indictment plead— (a) that he has been previously convicted or acquitted, as the case may be, of the same offence; or (b) that he has obtained the President's Pardon for his offence.”⁴²

As reaffirmed in section 9(1) of the Ghanaian Criminal and Other Offences Act⁴³. Section 9(1) provides as follows: “Where an act constitutes an offence under two or more enactments the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence.”⁴⁴

In *Connelly v DPP*⁴⁵, the majority of the House of Lords, applied a narrower test of what would amount to "the same offence" for the plea of double jeopardy in trial. Lord Devlin said: "The word 'offence' embraces both the facts which constitute the crime and the legal characteristics which make it an offence. For the doctrine to apply it must be the same offence both in fact and in law. Robbery is not in law the same offence as murder (or as manslaughter, of which the accused could also have been convicted on the first indictment) and so the doctrine does not apply in the present case.”⁴⁶

As Blackstone (1769) puts it at p. 329, "no man is to be brought into jeopardy of his life more than once for the same offence.”⁴⁷ Notwithstanding, in *Republic v. General Court Martial; Ex Parte Mensah*⁴⁸, the appellant could not rely on his destoolment for not attending traditional council meeting when he was subsequently tried for the same act under Chieftaincy (Amendment) Decree 1966

(N.L.C.D. 112), paragraph 5A which made the appellant's act an offence. This decision is in consonant with Section 9 (2) of the Ghanaian Criminal and Other Offences Act.⁴⁹ Section 9(2) states as follows: "This section shall not affect a right conferred by an enactment on any person to take disciplinary measures against the offender in respect of the act constituting the offence."⁵⁰

The position of the law in double jeopardy was put down in the *R v Thomas* case. In *R. v. Thomas*: "It is not the law that a person shall not be liable to be punished twice for the same act."⁵¹ This was reiterated in *Essien v. The State*, where Djabanor J. posited that: "It is not the law that a person shall not be punished twice for the same act. The law is that a person shall not be punished twice for the same offence."⁵² Therefore, where the same act of the accused constituted separate offences under separate enactments, the counts were not bad in law.⁵³ It must also be noted that the double jeopardy principle does not bar multiple prosecution in personal injuries if the natural consequences of the defendant act affects multiple victims. This was supported by the decision in *R v Prince*. In *R. v. Prince*, Dickson C.J. asserted that: "...at least in so far as crimes of personal violence are concerned, the rule against multiple convictions is inapplicable when the convictions relate to different victims."⁵⁴

From above it clearly shows that the position of the law in terms of double jeopardy is tenuous and though there are constitutional backing in article 19(7)⁵⁵ and Criminal Offences (Procedure) Act⁵⁶ sections 113, 237 and the Ghanaian Criminal and Other Offences Act⁵⁷ section 9 (1), there had been exceptions to the principle (section 9(2) of the Ghanaian Criminal and Other Offences Act⁵⁸. This renders concurrent civil and criminal actions to be taken against a medical practitioner or surgeon in the event of gross negligence or negligence in general in medical or surgical procedures in their course of practice.

3.2 Concurrent Actions in Medical Negligence

The elucidations above on the double jeopardy principle and medical negligence in practice, it showed that concurrent civil and criminal actions are actionable in the Ghanaian Criminal jurisprudence. As shown in section 82⁵⁹ on the special provision as to medical surgical treatment it provides that: "Where any person in good faith, for the purposes of medical or surgical treatment, intentionally causes harm to another person which, in the exercise of reasonable skill and care according to the circumstances of the case, he ought to have known to be plainly improper, he shall be liable to punishment as if he had caused the harm negligently, within the meaning of this Ghanaian Criminal and Other Offences Act, and not otherwise."⁶⁰ For instance, "A surgeon, through gross negligence, amputates a limb which there is no necessity to amputate. The surgeon is not liable to be convicted of having intentionally and unlawfully caused harm, but he is liable to be convicted of having negligently and unlawfully caused harm."⁶¹ Therefore, it can be deduced from the illustration that such practice undertaken in good faith is presumed to have precluded intentional acts that can be imputed on the practitioner to render him guilty of murder. Hence, such good faith acts are to be construed to benefit the medical practitioner and make him liable for manslaughter if the act was a gross negligence or misdemeanour for general medical negligence.

Furthermore as provided in section 67(1)⁶² and 67(2)⁶³ to presume that medical or surgical procedure undertaken in good faith does not renders the initial operative cause of any event as part of history; "67(1) Where any person does an act in good faith, for the purposes of medical or surgical treatment, an intent to cause death shall not be presumed from the fact that the act was or appeared likely to cause death. 67(2) Any act which is done, in good faith and without negligence, for the purposes of medical or surgical

treatment of a pregnant woman is justifiable, although it causes or is intended to cause abortion or miscarriage, or premature delivery, or the death of the child.”⁶⁴

As shown above on good faith practice in medical or surgical treatments section 64(d)(e)⁶⁵ presumed that the treatment rendered if it was the operative cause then the practitioner then will be considered to be cause or materially contributed to the causing of that such gross or general negligence treatment leading to death of a patient.

Section 64 (d) (e) of the Ghanaian Criminal and Other Offences Act⁶⁶ provides: “64 (d) death shall be held to have been caused by harm if the death is caused by the medical or surgical treatment of the harm, unless such treatment is grossly negligent or unless the death could not have been foreseen as a likely consequence of the treatment; and, 64 (e) death shall not be held to have been caused by harm unless the death takes place within a year and a day of the harm being caused.”⁶⁷

Since the position of the law is clear on double jeopardy principle that the same offence may not be punishable twice under the same fact and law but the act of the defendant renders itself to multiple or concurrent suits in both civil and criminal actions. It is worth noting that double jeopardy principle is not applicable in fact and law concerning that of the act of the offender and thus the offender is not barred under the Ghanaian laws to be civilly and criminally sued in medical negligence.

4.0 Vicarious Liability, Medical Negligence and the Ghanaian Criminal Jurisprudence

In this respect the criminal law is more stringent than the civil law which would relieve a master of liability if the servant exceeded the scope of his employment^{68,69,70}.

The above rule notwithstanding, a master or employer is not liable for the wrongful acts of his or her servant if those acts were completely unauthorised, or if a lawful act was done in an unlawful manner⁷¹.

The section 11(3) of the Ghanaian Criminal and Other Offences Act⁷² provides a rebuttable presumption in the imputation of intent to either natural person or legal person/body corporate. Thus, both natural and body corporate can be found guilty of offences with requirement of mens rea or intent/negligence. Section 11(3)⁷³ provides: “If a person [natural or legal person] does an act of such a kind or in such a manner as that, if he [natural or legal person] used reasonable caution and observation, it would appear to him [natural or legal person] that the act would probably cause or contribute to cause an event, or that there would be great risk of the act causing or contributing to cause an event, he [natural or legal person] shall be presumed to have intended to cause that event until it is shown that he [natural or legal person] believed that the act would probably not cause or contribute to cause the event, or that he [natural or legal person] did not intend to cause or contribute to it.”⁷⁴

The surgical or medical practitioner will also be liable criminally in the context of section 82 of the Ghanaian Criminal and Other Offences Act⁷⁵ provides: “Where any person in good faith, for the purposes of medical or surgical treatment, intentionally causes harm to another person which, in the exercise of reasonable skill and care according to the circumstances of the case, he ought to have known to be plainly improper, he shall be liable to punishment as if he had caused the harm negligently, within the meaning of this Ghanaian Criminal and Other Offences Act, and not otherwise.”⁷⁶ Notwithstanding, a body corporate or legal person may be guilty of offence involving mens rea^{77,78}. In *R v Coroner for Eash Kent, ex parte Spooner*⁷⁹, the court was prepared to accept that a corporate body could be guilty of manslaughter. Also in *R v P & O European Ferries (Dover) Ltd*⁸¹ Turner J held that a company could incur liability for manslaughter. Moreso, the Ghanaian case, *Nyamekye v 37 Military Hospital*⁸² the employer, 37 Military

hospital, was held to be vicariously and jointly liable to the negligence of medical practitioners that caused death of the patient.

Therefore, the body corporate or health facility where the medical treatment or surgical procedure was undertaken and as well as the practitioner may be liable severally and jointly both in crime and negligence in tort law in Ghana.

5.0 Conclusions

The Ghanaian Criminal jurisprudence categorises medical negligence into gross negligence and general negligence in practice thus distinguishing the severity of the acts from each other. The penalty on gross negligence as first degree felony that attracts maximum of life imprisonment or lesser term while that of general negligence in practice as misdemeanour with term not more than three years imprisonment.

The Ghanaian Criminal jurisprudence does not bar the act of the defendant from multiple suits or concurrent suits against him but the law explicitly precludes the offence to be twice punished on the same fact and law. Therefore, medical negligence act in practice may be sued in both negligence in tort law and crime under Ghanaian Criminal Law.

Medical facilities are not absolved from the medical or surgical negligence of their medical or surgical practitioners and that they both shall be held liable for such act. While the facility may be held vicariously liable for the practitioner's act, the practitioner may incur other multiple suits as well under the same act of negligence in Ghanaian laws.

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