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AN EVALUATION OF THE LEGAL EFFECTS OF THE DOCTRINE OF DUTY OF CARE IN MEDICAL PRACTICE IN NIGERIA

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Abstract
Medical negligence has been a subject of intense concern in the developing countries for decades. In Nigeria, several laws are enacted and institutions are also created to regulate medical practices. However, the efficacy of the regulatory system is still under serious scrutiny. This article therefore sought to unfold the problems causing ineffectiveness of the current legal regime.

Keywords: Duty of Care, Medical Care, Negligence, Laws, Nigeria.

1. Introduction

In the everyday lives of individuals, properties get damaged and these individuals get injured through the acts and omissions of others. The State in performing its duty to maintain law and order may prosecute the wrong doer under the Criminal Law but the person who has suffered loss is left with no compensation or remedy. The Law of Torts thus evolved to deter individuals from doing wrong to others and where a wrong is done, the injured party has a legal right in civil law to seek redress.

Duty of care connotes an implied or express obligation on a person to exercise reasonable care so that his acts and omissions do not injure other persons. The concept of duty of care applies to individuals across all occupations[3] particularly professionals, because these individuals are members of a professional body, who follow a prescribed code of conduct and are deemed to possess some special skill, ability or qualification acquired from training or experience. Where any person professes to have the qualifications required as regards the status, he ascribes himself, then there exists a duty of care imposed on him by Law to not act below what is required of a professional of his status. A medical practitioner falls within such group of professionals in this respect.[4] The doctor - patient relationship is fiduciary in nature, meaning it is based on the patient's trust in the doctor, thus creating certain rights and obligations

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[3] Esperanza Bohabonay, 'The Duty of Care' *Information Government Alliance* [2015] https://www.academia.edu/resource/work/34007442 accessed 20 June 2024.
[4] John Ademola Yakubu, *Medical Law in Nigeria* (Demyaxs Press Limited, 2002)

between the parties.[5] The expectations of a patient is that doctors and hospitals should provide medical treatment with all the knowledge and skill at their command and not do anything to harm them in any manner either due of their negligence, carelessness, or reckless attitude of their staff.[6] Medical negligence or malpractice is a growing concern in Nigeria; even though many victims do not know how to go about seeking redress, neither do medical practitioners understand the legal implications of their actions. This article aims to discuss the Scope of Duty of Care as it pertains and applies to the Medical Profession in Nigeria, inform individuals of their rights as patients, the duties of medical practitioners, the legal consequences of breaching the duty of care, remedies available for victims, and defences for medical practitioners where applicable.

2. Conceptual Framework

2.1 Duty of Care

The duty of care is the first element that must be established to proceed with an action in negligence. Where the duty of care is not owed to others, then there can be no breach and consequently too, there can be no negligence. *Lord Esher MR* explains that a person who owes no one a duty of care is free to be as negligent as he pleases,[7] but where such person owes a duty of care to another, he exercises sub-standard care at his peril. *The Black's Law Dictionary,*[8] defines duty of care as *'a legal relationship arising from a standard of care, the violation of which subjects the actor to liability'*.

Duty of Care is the duty a person owes in law to be careful so that his conduct will not injure another person.[9] The concept of duty of care, when it is owed and when liability will attach for its breach was established in the case of *Donoghue v Stevenson.*[10] According to *Lord Aktin* in the aforementioned case, *'…you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.* Furthermore, in *Kabo Air Ltd. v Mohammed*[11] the court held that, *'Under the law of negligence, the duty of care means the conduct demanded of a person in a given situation and that typically, it involves a person giving attention both to possible dangers, mistakes and pitfalls and to ways of minimizing those risks'*.

[5] Donald A. Kroll, 'Adverse Outcomes: Withheld Information or Misinformation' *Complications in Anesthesia* (Second Edition) [2006] https://www.sciencedirect.com/topics/nursing-and-health-professions/doctor-patient-elation#:~:text=The%20doctor%2Dpatient%20relationship%20is,the%20doctor%20owes%20the%20patient. accessed 20 June 2024.

[6] M.S. Pindit and Shoba Pindit, 'Medical Negligence: Coverage of the profession, duties, ethics, case laws and enlightened defense - A Legal Perspective' *Indian J Urol.* [2009] 25(3) 372 - 378. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2779963/ accessed 20 June 2024.

[7] *Le Lievre v Gould* (1893) 1 QB 491 at 497

[8] B.A Garner, Black's Law Dictionary, 8th Edition (Minnesota West Publishing Co., 2004) pg. 1536

[9] Ese Malemi, *Law of Tort* (Revised edition Princeton Publishing Co 2013)

[10] *Donoghue v Stevenson* (1932) AC 562 HL

[11] *Kabo Air Ltd. v Mohammed* (2015) 5 NWLR (Pt. 1451) 38

2.2 Medical Negligence

Negligence is the breach of a legal duty to take care, which results to damage to another person[12]. According to the Black's Law Dictionary, Negligence is - the failure to exercise the standard that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly or willfully disregarded of others' right'.[13] Anderson B defines Negligence as 'the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do'.[14] In U.T.B (Nig) v Ozoemena,[15] negligence was defined as 'lack of proper care and attention or conduct; a state of mind which is opposed to intention; the breach of duty of care imposed by common law and statute resulting in damage to the complainant'.

Negligence is culpable carelessness and it can arise in a plethora of situations. *Lord Macmillan*[16] described the situation, stating that *'The categories of negligence are never closed'*. Examples of situations where the tort of negligence may arise includes; employ-employee relationship, doctor-patient relationship, product liability, negligent misstatement, among others. As modernization goes on and new products are invented, and new relationships developed, a new duty of care may be recognized by law and its breach appropriately sanctioned.

Medical negligence on the other hand is a complex legal concept that involves medical practitioners failing to provide the established standard of care and acting in breach of the duty of care, which in turn causes harm or injury to a patient. This concept is significant within the fields of medicine and law, as it holds medical practitioners accountable for their actions and offers patients a means of seeking compensation for harm caused by substandard care. On the specific aspects of medical negligence, diverse forms of acts or omission by a medical practitioner may properly amount to medical negligence, and the court over time has taken note of the following as constituting medical negligence;[17]

- Failure to Remove Foreign Objects Inserted into a Patient.[18]
- Wrong Treatment.[19]
- Failure to attend to a patient promptly.[20]

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[12] Ese Malemi, *Law of Tort* (Revised edition Princeton Publishing Co 2013).
[13] B.A Garner, Black's Law Dictionary, 8th Edition (Minnesota West Publishing Co., 2004) pg. 3282-3283
[14] *Blyth Birmingham Water Co* (1856) 11 Ex Ch 781, 156 ER 1047
[15] *U.T.B (Nig) v Ozoemena* (2007) SC (Pt.) 211
[16] *Donoghue v Stevenson* (1932) AC 562 at 619
[17] B.Ogundare, 'Medical Negligence in Negeria: A Quick Guide on Liabilities and Remedies' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3476524> accessed 24 September 2024
[18] *Ojo v Gharoro and Ors* [2006] 10 (Pt. 98) SC 173
[19] *University of Ngeria Teaching Hospital Management Board and Others v Hope Nnoli* [1994] 8 NWLR (Pt. 363) at 407-408
[20] *Ibokwe v Uch Board of Management* [1961] WNLR 173

- Inaccurate Diagnosis.[21]
- Failure to Take Full Medical History.[22]
- Failure to Get Consent of the Patient.[23]

There is controversy as to whether negligence is a state of mind or a course of conduct. This controversy brought about the subjective and objective theories of negligence.

3. Theories of Negligence

3.1 Subjective Theory of Negligence

The Subjective theory of negligence was propounded by Sir John Salmond. This theory was also supported by various other theorists such as Professor Winfield and Austin. It is based on *mens rea*, that is, the criminal intent, literally translated to mean 'Guilty mind'. Salmond defines Negligence as 'Culpable carelessness'. According to his subjective theory, negligence is a mental state that involves an attitude of indifference towards one's actions and their consequences. Negligence is not equivalent to thoughtlessness or inadvertence, but rather it is characterized by an underlying indifference. The essence of negligence lies in carelessness, which may or may not lead to inadvertence. Negligence is about the lack of care, regardless of whether it was intentional or unintentional. According to Winfield, in tort law, negligence is when someone fails to fulfil their legal duty to exercise care, causing harm to the plaintiff without the defendant intending it.

According to Austin, negligence in tort liability generally refers to the defendant's unintentional disregard for their actions and their consequences, which he believes is fundamentally characterized by an attitude of indifference. In rare cases, the defendant may be fully aware of both their actions and the consequences, but there is still no desire for those consequences. This is what distinguishes negligence from intention. To him, negligence can be either inadvertent or willful. Inadvertent negligence happens when harm is caused unintentionally, often due to thoughtlessness or a mistaken belief that no harm would result. This is the most common type of negligence. The subjective theory recognizes that in certain situations, determining negligence depends on a person's state of mind. In criminal law, intentional harm and negligent harm are distinguished, considering factors like knowledge and motives. Cases that initially appear as negligence may, upon examination of someone's state of mind, reveal intentional wrongdoing. For example, leaving poison unlabeled with the intention that someone drinks it by mistake. A ship's captain intentionally causing a shipwreck by neglecting proper seamanship rules is another example. Neglecting to provide medicine for a sick child can be considered willful murder rather than mere negligence. Differentiating between intentional and negligent wrongdoing requires understanding the offender's subjective attitude towards their actions and consequences. The subjective theory highlights the distinction between intention and negligence. Willful wrongdoers desire harmful consequences, while negligent wrongdoers do not desire harm but fail to adequately avoid it.

[21] *University of Ilorin Teaching Hospital v Akilo* [2002] FWLR (Pt.28) 2286
[22] *Chin Keow v Government of Malaysia* [1984] 1 WLR 634
[23] *Okekearu v Tanko* [2002] 15 NWLR (Pt. 971) 657 SC

3.2 Objective Theory of Negligence

The Objective theory of negligence asserts that negligence is conduct that fails to meet the legal standard for protecting others from unreasonable harm. Some jurists argue that negligence is not a state of mind, but rather a specific type of behavior. According to this perspective, negligence occurs when reasonable precautions are not taken. The main supporter of the Objective theory of negligence is Sir Fredrick Pollock. Other supporters include Clark and Lindsell. According Pollock, negligence is the opposite of diligence and no one describes diligence as a state of mind. Clark and Lindsell further states that negligence consists of the omission to take such care as required under the circumstance.

The Objective theory asserts that negligence is not a state of mind but a type of behavior. Negligence occurs when someone fails to take care, which involves precautions against harm. Negligence is defined by pursuing conduct that a reasonable person would not engage in. For example, driving without lights at night is considered negligence because a prudent person would have lights. Taking care is not merely a mental attitude. The Objective theory is supported by the law of torts, which establishes that negligence is the failure to meet the objective standard of conduct expected from a reasonable person. Salmond however criticized the objective theory on the following grounds:

- Total identification of negligence with failure to take care is the product of incomplete analysis.
- Failure to take care need not always be due to negligence. Failure to take precautions may be accidental or willful.
- By merely looking at the conduct of a man, it is not possible to assert whether the lack of care is negligent, intentional or accidental.
- One can identify of the negligent act only by looking into the mental attitude of the man that produced the conduct in question.

The Objective and Subjective theories are different methods of determining the standard of care in medical negligence cases and may be used in different jurisdictions and circumstances. The choice of theory can affect how a case is presented

4. The Elements of Medical Negligence

The Duty of Care is the first element that must be established to proceed with an action in Negligence. In general, a duty of care will be owed wherever in the circumstances it is foreseeable that if the defendant does not exercise due care, the plaintiff will be harmed. This forseeability test was laid down by *Lord Atkin* in *Donoghue v Stevenson,*[24] and is known as *'the neighbour principle'*.[25]

It is the duty to use care towards others that would be exercised by an ordinarily reasonable and prudent person. In *R v Bateman*[26] *Lord Hewart, C.J*, observed:

[24] *Donoghue v Stevenson* [1932] AC 562 at p. 597
[25] Kodilinye and Aluko, *'The Nigerian Law of Torts'* (Second Editon, Spectrum Law Publishing Ibadan 2010)
[26] *R v* Bateman [1927] 19 Cr App R 8.

'If a person holds himself out as possessing special skill and knowledge, and he is consulted, as possessing such skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in understanding the treatment'.This implies that when a medical practitioner agrees to treat a patient, they are expected to demonstrate a certain level of care and competence. If they fail to meet this standard, they could be held liable in breach of the duty of care. The paramount legal case addressing the concept of duty of care and the proximity principle is the case of *Barnett v Chelsea & Kensington Memorial Hospital Management Committee.*[27] In this case, three-night watchmen fell ill after drinking tea and went to the hospital but were not seen by a doctor. One of them died later from arsenic poisoning in the contaminated tea. It was determined that the doctor had a duty of care but failed to fulfill it. However, it was concluded that the patient could not have been saved even if admitted to the ward. The patient died from arsenic poisoning, not due to the doctor's negligence. Therefore, there was no negligence case. To establish medical negligence, a Doctor-patient relationship must exist wherein a healthcare professional voluntarily provides medical assistance or treatment. The Doctor-patient relationship is a *'Fiduciary relationship'* involving fiduciary duties, bearing alongside the duty of care, trust, and confidence. In the case of *Abatan v Awudu,*[28] It was held that- *'The relationship between a Doctor and his patient is one of trust and confidence. A relationship where one has the power and duty to treat and restore the other to mental and physical well-being'*.

It's worth noting that the fiduciary relationship between a Doctor and patient can arise from a contract, a tort, or equity. The 'Standard of Care' is important in the duty of care between a Doctor and patient. It determines if the Doctor's actions breach the duty of care. In negligence law, the standard of care is the level of care a reasonable person would use in similar circumstances. If the defendant's actions fall below this standard, they can be held responsible for any damages. This raises the question of what defines the reasonable person's standard. In *Kabo Air Ltd. v Mohammed,*[29] It was held that *'reasonable care is that degree of care which a person of ordinary prudence would exercise in the same or similar circumstances'*.

In cases of medical negligence, The locus classicus case on the standard of care expected of Medical Practitioners is the case of *Bolam v Friern Hospital Management Committee.*[30] It implies that in situations requiring specialized skills, the negligence test is not based on the average person's knowledge. Instead, it is based on the standard of an ordinary skilled individual with that expertise. For medical professionals, negligence refers to not acting in accordance with the reasonable standards of competent medical practitioners at the time. This test has been the basis for the decisions in several cases including the Nigerian case of *M.D.P.D.T v Okonkwo*[31] where the Court held that- 'The Doctor was not guilty of negligence when he refused to treat a patient who had expressly refused to grant the Doctor consent to conduct a blood transfusion on her. The Court further stated that the Doctor acted as any

[27] *Barnett v Chelsea & Kensington Memorial Hospital Management Committee* [1968] 3 All ER 1068.
[28] *Abatan v Awudu* [2004] 7 NWLR (Pt 902) 430
[29] *Kabo Air Ltd v Mohammed* [2015] 5 NWLR (Pt 1451) 38.
[30] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
[31] *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo* [2001] 7 NWLR (Pt 711) 206

reasonable Doctor in his circumstance would act.' The Bolam's test, which relied on expert opinions to determine the reasonableness of a Doctor's actions, had the potential for abuse. In response, the Courts have made changes to the test. In the case of *Bolitho v City & Hackney Health Authority,*[32] Lord Wilkinson stated that-

> 'The court is not obligated to find a doctor not liable for negligent treatment or diagnosis simply because they provide evidence from medical experts who genuinely believe that their actions aligned with sound medical practice, the judge must ensure that the experts have considered comparative risks and benefits and have reached a defensible conclusion before accepting their opinions as responsible, reasonable, and respectable'.

This position was reaffirmed in the case of *Thake v Maurice,*[33] where the Court held that-

> 'In considering the liability of a medical practitioner at any point in time, the Court must consider whether he acted with due diligence having regard to the facts and circumstances of the case and whether the appropriate method or technique dictated by the current medical knowledge had been used.'

The standard of care for qualified medical practitioners is the same as that for unqualified individuals and quacks. Unqualified practitioners are held to the standard of care expected of a reasonable member of their claimed skilled group. If someone falsely represents their knowledge and skill, they will be judged based on the skill they profess. Quacks and unqualified practitioners can face criminal prosecution under the Criminal Code or Penal Code for medical negligence, in addition to any civil claims against them. In the case of *Wilsher v Essex Area Health Authority,* [34] *Glidewell L.J* stated- The law requires that the trainee or learner be judged by the same standard as his more experienced colleagues. If it did not, Inexperience would frequently be urged as a defence to an action for professional medical negligence'. In *Jones v Manchester Corporation,*[35] A trainee anesthetist used a nitrogenous oxide mask on a patient with facial burns, resulting in skin damage. The trainee then administered two doses of barbiturate, causing the patient's death. The court did not accept the trainee's inexperience as a valid defense.

5. Breach of the Duty of Care

To prove medical negligence, the plaintiff must establish both the existence of a duty of care and a breach of that duty by the medical practitioner. When a medical practitioner fails to fulfill their duty of care as mandated by the law, it constitutes a breach of that duty. In the case of *Nsima v Nigerian Bottling Co.,*[36] the *Court of Appeal* borrowed the dictum of the *Supreme Court* in the case of *Anya v Imo Concorde Hotel Ltd,*[37] when it held that-

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[32] *Bolitho v City & Hackney Health Authority* [1998] AC 232
[33] *Thake v Maurice* [1986] 644 (QB)
[34] *Wilsher v Essex Area Health Authority* [1988] AC 1074
[35] *Jones v Manchester Corporation* [1952] 2 QB 852
[36] *Nsima v Nigerian Bottling Co* [2014] LPELR – 22542 (CA)
[37] *Anya v Imo Concorde Hotel Ltd* [2002] LPELR- 512 (SC)

> 'The most fundamental ingredient of the tort of negligence is the breach of the duty of care, which must be actionable in law and not a moral liability and until a plaintiff can prove by evidence the actual breach of the duty of care against the defendant, the action must fail'.

The plaintiff must thus demonstrate that the healthcare professional breached the duty of care owed to the patient. This means that the healthcare professional failed to meet the standard of care expected from a reasonably competent and skilled professional in similar circumstances. The test for deciding whether there has been a breach of duty was laid down in the dictum of *Alderson B*, in the case of *Blyth v Birmingham Waterworks Co.*[38] A relevant test developed by the court to determine whether in fact there has been a breach of duty is the *'Bolam Test',*[39] which applied in cases involving medical negligence. It assesses whether the defendant doctor acted in accordance with the standards of a responsible body of professionals in the same field. The court assesses a medical practitioner's conduct based on the expected skill and care of an average practitioner, not the most experienced one. However, specialists are held to a higher standard due to their expertise.

5.1 Causation and Remoteness of Damage

Factual causation links the defendant's fault, breach of duty, and the plaintiff's harm. It focuses on the physical connection between the defendant's negligence and the plaintiff's damage. Therefore, there must be a causal link between the defendant's breach of duty and the damage sustained by the plaintiff.[40] In determining causation, the Court focuses on the hypothetical scenario where the defendant's breach of duty is removed and replaced with non-negligent conduct. The plaintiff must prove on a balance of probabilities that the injury would have been avoided without the defendant's breach of duty. In a bid to understand and simplify some of the complexities surrounding the question of causation, the court introduced *'but for'* test. It is the general standard for causation, requiring the plaintiff to demonstrate that the injury would not have occurred without the defendant's negligence. *Lord Denning, MR*, in the case of *Cork v Kirby MacLean Ltd*[41] explained the *'but for'* test, stating- *'*One can say that the damage would not have happened but for a particular fault, then that fault is in fact a cause of the damage; but if you can say that the damage would have happened just the same, fault or no fault, then the fault is not a cause of the damage'.

The 'but for' test is used in medical negligence cases to determine if there is a causal link between a breach of the standard of care and the plaintiff's damages. It helps assess whether the alleged breach directly caused the plaintiff's harm. In the case of *Barnett v Chelsea and Kensington Hospital Management Committee,*[42] the action of the plaintiff failed. The Court held that-

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[38] *Blyth v Birmingham Waterworks Co* [1856] 11 Ex Ch 781
[39] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
[40] *A.N.T.S v Moloye* [1993] 6 NWLR (Pt 278) 233
[41] *Cork v Kirby MacLean Ltd* [1952] 2 All ER 402
s[42] *Barnett v Chelsea and Kensington Hospital Management Committee* (Supra)

'The evidence did not demonstrate that the Doctor's negligence would have saved the deceased. Medical evidence indicated that even with prompt treatment, it would not have been possible to diagnose the condition and administer an antidote in time to save the patient. Therefore, the negligence did not cause the death'.

The burden of proving causation lies solely with the plaintiff and remains with them throughout the case. They must prove it with a balance of probability. If the plaintiff cannot demonstrate that the defendant's negligence significantly contributed to the damage, their lawsuit fails. However, it's crucial to note that the plaintiff must first prove the defendant's duty of care and its breach before addressing causation. The court in the English case of *Mulholland v Medway NHS Foundation Trust,*[43] hesitated to proceed to consider the issue of causation in the case on the grounds that the plaintiff failed to prove the breach of the duty of care owed by the defendant. The Court held it was not obligated to address the issue of causation unless the plaintiff had adequately proven the defendant's duty of care and its breach.

5.2 Remedies for Breach of Duty

The Plaintiff must show that they suffered actual harm or damage as a result of the healthcare professional's breach of duty. This can include physical pain, emotional distress, additional medical expenses, loss of income or other negative consequences directly resulting from the negligence. A particular principle enunciated by the court in determining the extent of damage is the *'Remoteness of Damage'* test. The test helps determine the scope of the defendant's liability by assessing whether the damage suffered by the plaintiff was foreseeable at the time of the negligent act. Another relevant principle is the *'eggshell skull'* rule, which in the context of medical negligence underscores that healthcare providers are responsible for the full extent of harm caused by their negligence, even if the patient has pre-existing conditions or susceptibilities that make them more vulnerable to injury.

A related case is that of *Smith v Leech Brain & Co. Ltd,*[44] while not a medical negligence case, is a notable example of the 'egg shell rule'. The case involved an employee who had a pre-existing cancerous condition. A metal splinter caused by the defendant's negligence exacerbated the employee's condition, leading to his death. The court held that the defendant was liable for the full consequences of their negligent act, even though the severity of the harm was due to the plaintiff's pre-existing condition. In the medical context, one might consider a scenario where a patient with a known heart condition undergoes a procedure, and due to medical negligence, a complication arises that leads to more severe consequences than expected. The healthcare provider would likely be held liable for the exacerbated harm, as the *'eggshell skull'* rule emphasizes accountability for the full extent of the harm caused by negligence, regardless of the patient's existing vulnerabilities.

[43] *Mulholland v Medway NHS Foundation Trust* [2015] EWHC 268 (QB)
[44] *Smith v Leech Brain & Co. Ltd* [1962] 2 QB 405

6. The State of Duty of Care in Medical Practices in Nigeria

'Ethics' comes from the Greek word 'Ethos', meaning customs and habits. It is the study of moral obligations and distinguishing right from wrong. The Medical and Dental Council of Nigeria (MDCN) has codified the rules of professional conduct for Medical and Dental Practitioners in the' Code of Medical Ethics in Nigeria'. This code outlines the duties of medical practitioners towards their colleagues and patients, defines professional medical negligence, and establishes other rules. The code sets the standards for acceptable medical and dental practice in Nigeria. These principles of good practice includes-

- The duty to take care of patients receiving medical treatment.
- The duty to treat every patient politely and considerably. The medical practitioner retains the right to choose his patients except in emergencies all treatment must be conducted without discrimination the dignity and privacy of the patient and do not force treatment on an unwilling conscious patient. The duty to give patients information on fees and charges for treatment. When involved in biomedical research on patients, the medical practitioner has the duty to – Seek patient's informed consent. Not withhold effective treatment. To obtain approval of research protocol from the Ethical Committee.

Patient's rights were established in 1948 with the formalization of the Universal Declaration of Human Rights. This declaration acknowledges the fundamental rights and dignity of all individuals worldwide. It serves as the basis for the development of patients' rights. The specific rights of patients differ across countries and jurisdictions. In Nigeria, the National Health Act of 2014 guarantees the rights of patients under Part 3. These rights includes-

- The Right to Emergency Treatment
- Regardless of their personal circumstances, patients have the right to receive emergency medical treatment without discrimination. Medical practitioners are prohibited from refusing emergency treatment to anyone, regardless of the reason. A violation of this right is punishable by a fine of #100,000 or imprisonment of up to six (6) months.
- The Right to Confidentiality of Medical Records
- Only a patient or his guardian (in the case of a minor) has access to his medical records. Exception to this provision is a staff of the medical institution where the patient is receiving medical treatment next of kin/ family member. Giving improper access to a patient's medical records has consequences which is been liable for a fine of #250,000 or imprisonment for two (2) years. However, access may be granted where-
  a) The patient's consents in writing to the disclosure.
  b) The court order requires the disclosure.
  c) In the case of a minor with the consent of parent or guardian.
  d) Where the person is unable to consent due to incapacitation, the guardian or representative must consent.
  e) The Right to Refuse Treatment
  f) A patient has the right to refuse treatment orally or in writing, as long as he is of sound mind.
  g) The Right to Obtain Your Medical Records
  h) Patients have a right to obtain their medical records, notes, medical test results and any other documentation related to their care.
  i) The Right to Informed Consent

It is the duty of every medical practitioner or institution to obtain consent from the patient. No reputable medical practitioner or institution would perform tests, procedures or treatments without asking the patient or his guardian to sign a form giving consent. This right is called 'informed consent' and patients have a right to it. This informed consent vests in the medical practitioner the duty to provide clear explanations of the risks and benefits prior to the patient's participation.

7. The Regulatory Regime of Duty of Care in Nigeria

In Nigeria, different laws exist to govern issues touching on achievement of excellence in the medical profession.

7.1 The Constitution of the Federal Republic of Nigeria, 1999 (As Amended)

The constitution of a nation is the *fons et origo*, not only of jurisprudence but also of the legal system of a nation.[45] The constitution is the grund norm, it is supreme and ranks over and above all other law.[46] Thus, any law which is inconsistent with the provisions of the constitution is declared null and void.[47] The Constitution of the Federal Republic of Nigeria, 1999 (as amended) is the basic law of Nigeria, every law other law flows from it directly or by implication, including the law on medical negligence. *Chapter Four (4), CFRN* 1999 (as amended) guarantees certain rights, known as *'fundamental human rights'* which every citizen of the country is inherently entitled to. The right to health can be extracted from the right to life contained in *Section 33 of the 1999 constitution*, which provides that 'every person has a right to life, and no one shall be deprived intentionally of his life, except in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria'. Furthermore, despite that every individual is entitled to respect for dignity of his person, and accordingly no person shall be subject to torture or inhuman or degrading treatment,[48] cases involving medical negligence sometimes involve disfigurement, permanent loss, or in the most unfortunate case, death of the victim. In such situation, it is right and fitting to posit that the medical doctor via his negligent act or omission has infringed on the patient's right to human dignity or life.

In *Chapter Two (2) of the 1999 Constitution*, the right to healthcare exists as a socioeconomic right under the Directive Principles of State Policy. Thus, *Section 17(3)(c) and (d) of the 1999 Constitution* provides that- *'The state shall direct its policy towards that the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused; and that there are adequate medical and health facilities for all'*

The Constitution creates a health care policy, and the delivery of healthcare are shared responsibilities among the federal, state and local governments. Unlike the right to life, as

[45] *A.G Abia v A.G Federation* (2002) 6 NWLR (Pt. 763) 204
[46] *A.P.M V INEC* (2023) 9 NWLR (Pt. 763) 204
[47] *Abacha v Fawehinmi* (2000) 4 SC 9 (Pt. 11)
[48] Constitution of the Federal Republic of Nigeria (Third Alteration)Act, 2010 (Act No 3), Section 34(1)(a)

outlined in Chapter 4 of the constitution, citizens do not have a legal right to enforce compliance by the government in health matters.[49]

7.2 Criminal Code Act of Nigeria, 2004

Criminal law obviously applies to health care providers and the aim of criminal prosecution is to punish offenders.[50] The primary law regulating criminal investigation, trial, and punishment in Nigerian is the Criminal Code Act[51] which is applicable in the Southern States and the Penal Code applicable in the Northern States.

The Criminal Code, provides that it is the duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any other person, or to do any other lawful act which is or may be dangerous to human life or health to have reasonable skill and to use reasonable care in doing such act and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to observe or perform that duty.[52] Furthermore, the provision in *Section 304 of the Criminal Code* makes an importation of the concept of duty of care and the omission to perform such duty especially in relation to people handling dangerous objects, of which medical doctors can also be said to fall within in its interpretation. The section provides that it is the duty of every person who has in his charge or under his control anything, whether living or inanimate, or whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life safety, or health, of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger; and he is held to have caused any consequences which result to the life or health of any person by reason of omission to perform that duty.

7.3 The Medical and Dental Practitioners Act 2004

The primary legislation governing healthcare providers and the medical profession in Nigeria is the Medical and Dental Practitioners Act.[53] The purpose of this Act is to regulate and govern medical ethics and rules of professional conduct for medical and dental practitioners in the country. Medical Practitioners in Nigeria owe adherence to the Medical and Dental Council of Nigeria and the Nigeria Medical Association. The Act provides the necessary framework for the establishment of the *Medical and Dental Council of Nigeria,*[54] vesting in the council the duty of registration of medical practitioners and setting the standards and rules of professional conduct which are to be reviewed from time to time. Medical practitioners who fail to comply with the set standard of professional conduct may be held to be in breach of their duty and will face the penalty for professional misconduct.[55] The Medical and Dental

[49] O.D Micheal, 'Understanding the Theoretical and Legal Foundations of Medical Negligence Law in Nigeria' *SSRN Electronic Journal* [2024] 10.2139/ssrn.4777626 http://www.researchgate.net accessed 14 May 2024.

[50] *Caparo v Dickman* (1990) 2 AC, 605

[51] Nigeria Criminal Code Act, CAP C38, Laws of the Federation, 2004.

[52] Criminal Code Act, CAP C38, Laws of Federation of Nigeria, 2004, Section 303

[53] Medical and Dental Practitioners Act CAP M8, Laws of Federation of Nigeria 2004, Section 5

[54] Medical and Dental Practitioners Act, CAP M8, Laws of Federation of Nigeria, 2004, Section 1(1)

[55] Medical and Dental Practitioners Act, CAP M8, Laws of Federation of Nigeria, 2004, Section 16(1)

Council of Nigeria in furtherance to its statutory functions,[56] codified the *Code of Medical Ethics in Nigeria 2008*, which lays down the standards of acceptable medical and dental practice in Nigeria. The Act also lists acts that constitute professional negligence.[57] The Medical and Dental Practitioner Investigating Panel is established by virtue of the Medical and Dental Practitioners Act, and is saddled with the responsibility of investigating allegations of an infamous conduct in a professional respect made against practicing health care practitioners. Acts like procuring abortion, euthanasia, indulging in the use of hard drugs, attending to patients under influence among others fall under the infamous conduct in a professional respect.

If the allegations are meritious, the panel forwards the case to the *Medical and Dental Practitioners Disciplinary Tribunal* for trial.[58] The Tribunal is charged with the duty of considering and determining any case referred to it by the Panel and any other case of which the Disciplinary Tribunal has cognizance under the provisions of the Medical and Dental Practitioners Act.

7.4 National Health Act 2014 (Act No. 8 of 2014)

The National Health Act, 2014 provides the legal framework for the regulation, development, management and advancement of Nigeria's health system.[59] The Act sets standards for rendering health services in the Federation and other related matters. It also establishes a national health system applicable to both public and private providers of health care services[60] and is set to achieve the Universal Health Coverage and meet the Millennium Development Goal (MDGs) - Now Sustainable Development Goals target.

The Act in *Part III*[61] provides for the Rights and Obligations of Patients and of Healthcare Personnel. A patient by virtue of this Act is entitled to emergency treatment,[62] The right to have full knowledge and be given relevant information pertaining to his/her state of health and necessary treatment required for his betterment,[63] The right to access health records[64] and the protection of such records by medical institutions[65] and medical practitioners who are obliged to keep records of patient's discreetly and can only disclose information of the patient when necessary and for a legitimate purpose done in the interest of the patient. The Act also provides that patients have a right to lay complaints[66] and the Minister, Commissioner or any other appropriate authority are required to establish a procedure or mechanism through which users may channel complaints on the services

[56] Medical and Dental Practitioners Act, CAP M8, Laws of Federation of Nigeria 2004, Section 1(2)(C)
[57] Medical and Dental Practitioners Act, CAP M8, Laws of Federation of Nigeria, 2004, Section 17(1)
[58] Ogundare Bisola, 'Medical Negligence in Nigeria: A Quick Guide on Liabilities and Remedies' (2019) http://deliverypdf.ssrn.com accessed 21 September 2024.
[59] National Health Act, 2014, Section 1(1)
[60] National Health Act, 2014, Section 1(1)(a)
[61] National Health Act, 2014, Section 20-30
[62] National Health Act, 2014, Section 20(1)
[63] National Health Act, 2014, Section 23(1)
[64] National Health Act, 2014, Section 27(1)
[65] National Health Act, 2014, Section 29(1)
[66] National Health Act, 2014, Section 30(1)

rendered.[67] Finally, the Act provides punitive measures for any breach. A health care provider who refuses to attend to a patient in emergency situations commits an offence and shall be liable on conviction to a fine of #10,000.00 (Ten thousand naira only), or to imprisonment for a period not exceeding six months or to both.[68]

7.5 The Patient's Bill of Rights 2018

The Patient's Bill of Rights outlines a patient's rights and responsibilities in medical care to safeguard their rights, ensure safety, and provide high-quality care. In Nigeria, it was launched in *July 2018* by the former Vice President of the Federal Republic of Nigeria, *Yemi Osibanjo*. The bill was developed by the defunct Consumer Protection Council (CPC), now FCCPC, in collaboration with stakeholders including the Federal Ministry of Health. It consolidates existing patient rights from various regulations in Nigeria. The Patient Bill of Rights (PBoR) includes: the right to access information, to know about service interruptions, about costs of treatment plans, and to privacy unless public health risks demand disclosure by law. Patients also have a right to a safe healthcare environment regardless of gender, religion, race, and socio-economic status. They can receive emergency care, have visitors, and refuse care upon understanding the consequences. However, Patient Bill of Right is not statutory, it aligns with existing legal structures, and can only be enforced as per related extant laws.

7.6 African Charter[69]

The African Charter on Human and Peoples' Rights, also known as the *Banjul Charter*, is an international human rights instrument that aims to protect and promote human rights and basic freedom in Africa. The Banjul Charter is often seen as the African equivalent of the European Convention on Human Rights. It guarantees fundamental civil, political, economic, social, and cultural rights which includes; freedom from discrimination, equality, life, dignity, freedom from slavery and inhuman treatment, due process, fair trial, freedom of religion and culture, freedom of association and assembly, and freedom in political participation. The African Charter recognizes the right to health by providing that individuals have the right to the best possible physical and psychological health and that State parties are obligated to protect the health of their people and provide medical care when needed.[70]

Nigeria has incorporated the African Charter on Human and People's Right into its domestic law, with the result that all rights contained therein can be invoked in the court of competent jurisdiction. The African Charter on Human and People's expressly guarantees both civil and political rights and socio-economic rights as enforceable rights, precisely recognizing the right to health[71]. A patient who has suffered injury under medical negligence can initiate proceedings under the African Charter of Human and People's Right, either under the domestic statutory laws of Nigeria or under the Charter itself.

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[67] National Health Act, 2014, Section 30(2)
[68] National Health Act, 2014, Section 20(2)
[69] African Charter on Human and People's Right (Ratification and Enforcement) Act LFN 1990.
[70] African Charter on Human and Peoples' Rights (Banjul Charter) 1981, Article 16
[71] Article 14 of the African Charter on Human and People's Right (Ratification and Enforcement Act) LFN 1990

8. Liability for Breach of Duty of Care in Nigeria

Where a medical practitioner breaches their fiduciary duties towards a patient, they can face criminal and civil liability, including contractual and tortious liability, as well as vicarious liability. The liability can be incurred individually or jointly.

8.1 Civil Liability

Doctor-patient breaches often lead to civil claims for damages. These claims can involve breach of contract or a tortious claim. It's important to note that the level of negligence required for a civil action is lower than for a criminal one. Ordinary negligence suffices for a civil action, while gross negligence is necessary for a criminal one.

8.2 Contractual Liability

A duty of care can stem from a contracted agreement. If a patient was privately treated, and a contract exists, they may question if their success chances are higher in tort or contract. Theoretically, contract chances could be higher if it was a rare case where the medical practitioner guaranteed successful treatment. But such guarantees are seldom made by medical practitioners. If made, courts are often reluctant to imply such a term. In the case of *La Fleur v Cornelis,*[72] A plastic surgeon was held bound to an express contractual warranty he made to his patient. The warranty was said to arise when he imprudently said to the patient- '*There will be no problem, you will be very happy'*.

8.3 Tortious Liability

A medical practitioner can be liable in tort for several reasons, primarily medical negligence. This occurs when care falls below the standard a prudent person would exercise in the same situation, creating unreasonable risk of harm. For medical negligence liability in tort, the elements of negligence must be proved.[73] Other ways a medical practitioner can be liable in tort include Assault, Battery and False Imprisonment. In medical practice, *'Assault'* is defined by *Winfield and Jolowicz* as an act causing the patient to reasonably fear being physically harmed, such as a threat to administer an injection against the patient's will. This is essentially a threat to commit *'Battery'. C. Nwoke,* defined *'Battery'* as the intentional and direct application of any physical force to the person of another. Battery involves intentionally committing an act. In medical terms, it can involve any unauthorized contact, however minor. Battery can happen in instances such as conducting a medical exam without consent, executing surgery without approval, or forcibly administering drugs. In the case of *Okekearu v Tanko,*[74] The medical practitioner was found guilty of battery. He amputated a patient's finger without consent after a domestic accident brought the patient to the hospital.

'False imprisonment' occurs when a person's liberty is fully restricted without legal justification. Any action that limits a patient's movement, at home or in a hospital, can be considered false imprisonment if it violates their right to freedom of movement. Medical practitioners can be guilty of false imprisonment if they detain patients who can't pay their bills upon discharge. However, the patient must prove that the restraint was total and complete.

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[72] *La Fleur v Cornelis* [1979] 28 NBR (2d) 569 (NBSC)
[73] *First Bank Plc v Banjo* [2015] 5 NWLR (Pt 1452) 253 (CA); *Ojo v Gharoro* (Supra)
[74] *Okekearu v Tanko* [2002] 15 NWLR (Pt 791) 657 (SC)

8.4 Criminal Liability

Besides civil negligence, a medical practitioner can also face criminal liability for negligent acts. In extreme cases where the practitioner's duty breach leads to a patient's death or serious injury, criminal law could be applied. This has been a traditional method to handle such negligent behavior by medical professionals. The legal position was well articulated in the case of *R. v Bateman,*[75] where it was held that- *'If a medical practitioner's negligence is not just about compensation but also shows a complete disregard for others' safety and life, it can be considered a state crime. Such conduct may warrant punishment and make the practitioner criminally liable'*. Also, in the case of *Denloye v Medical Practitioners Disciplinary Committee,*[76] the court stated that, *'where the nature of the act or omission of a medical practitioner amount to a crime, the regular law court must determine the criminal aspect of it before liability is determined under the Medical and Dental Practitioners Act with respect to misconduct or infamous conduct'*. Both the Penal Code and Criminal Code provide sanctions for medical practitioners and other health caregivers found criminally liable for medical negligence.

Section 303 of the Nigerian Criminal Code Act,[77] states that-

> 'It is the duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any other person, or to do any other lawful act which is or may be dangerous to human life or health to have reasonable skill and to use reasonable care in doing such act and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to observe or perform that duty'.

Section 343(1) of the Nigerian Criminal Code Act[78] also provides thus; "'Any person who in the manner so rash and negligent as to endanger human life or to be likely to cause harm to any other person giving medical or surgical treatment to any person whom he has undertaken to treat is guilty of misdemeanour and is liable to imprisonment for one year. "

8.5 Vicarious Liability

Not only is a person liable for his own wrongful acts, but under certain conditions, he's also liable for wrongs committed by others representing him. Instances where one person is held accountable for another's wrongdoing usually emerge when a master-servant relationship exists. Medical practitioners are employed by medical institutions or authorities. If a medical practitioner's negligence harms a patient, the doctor and the employer can be sued together. Alternatively, the patient can sue either one of them. In the case of *Cassidy v Ministry of Health,*[79] It was held that- *'If a patient gets hurt during a procedure performed by one or several hospital staff members, and cannot identify the staff member in charge, the hospital*

[75] *R v Bateman* (Supra)
[76] *Denloye v Medical Practitioners Discplinary Committee* [1968] All NLR 308
[77] Cap C38 Laws of the Federation of Nigeria, 2004
[78] Cap C38 Laws of the Federation of Nigeria, 2004
[79] *Cassidy v Ministry of Health* [1951] 2 KB 343

may be held responsible. This stands if all other factors of the "res ipsa loquitur" rule are met. The hospital can only avoid this liability if it proves none of its staff were negligent'.

Typically, employers are named as defendants due to their larger financial resources compared to employees. In the *Nigerian Agip Oil Co. Ltd. v Nwaketi,*[80] the *Court of Appeal* restated the authority in the case of *Ifeanyi Chukwu (Osondu) Ltd. v Soleh Boneh Ltd.,*[81], stating that for an employer to be liable, the plaintiff must-

- Establish the liability of the wrong doer.
- Prove that the wrong doer is the servant of the master, and
- The wrong doer acted in the course of his employment with the master.

If a medical institution is found liable due to an employee's negligence, they can seek compensation from that employee. This is based on the employee's contractual obligation to exercise reasonable care. However, the institution may not receive full payment.[82] An exception to vicarious liability occurs when the doctor is an independent contractor, meaning they are not on a regular salary from the hospital and may have their own private practice or be chosen directly by the patient. In *Garfield Park Community v Vitacco*[83], the Court stated that:*'A doctor hired temporarily in an emergency room is an independent contractor, not an employee. That's because there aren't any tax deductions or welfare benefits. Hence, the hospital can't be held responsible for the doctor's negligent actions'.*

9. Remedies For Breach of Duty of Care In Nigeria

Remedies are a means at which a court enforces a right, gives orders and imposes penalties. In cases of medical negligence, remedies exist in favor of the patient both statutorily and under case law. These remedies are; an injunction, specific restitution, damages, dismissal or withdrawal of certificate and prohibition. However, before the claimant can be entitled to these remedies he/she must do the following;

a) State the ingredients of the negligent and back same with evidence.
b) Prove the medical practitioner owed a duty of care, and the duty of care was breached which resulted in the damage.[84]

9.1 Damages

Damages are awarded for the injury itself and consequence of the injury such as pain and suffering. Before a patient can succeed in a claim in negligence, he must lastly prove that damage which arose from the action or omission of the medical Practitioners' Act. A patient cannot successfully institute an action of negligence against a medical practitioner if he did not suffer any damage. It must be proved that the medical practitioner has made the patient suffer

[80] *Nigerian Agip Oil Co. Ltd. v Nwaketi* (CA/PH/89/2013, Federal Court of Appeal, Port Harcourt Judicial Division , 6 December 2013)
[81] *Ifeanyi Chukwu (Osondu) v Soleh Boneh Ltd.* (2000) JELR 44103 (SC)
[82] *Lister v Romford Ice and Cold Storage Co Ltd* [1956] UKHL 6.
[83] *Garfield Park Community v Vitacco* [1975] AC 408
[84] Tolulope Ibitoye, 'An Applicability of the doctrine of Res Ipsa Louitor in Medical Negligence in Nigeria', *NAU JILJ* 9(1) 2018 P 169

damages as a result of the breach of the duty to care by the medical practitioner. Damages are either special, compensatory, aggravated or exemplary.[85]

9.2 Injunction

An injunction is a court order requiring a person to do or refrain from doing a thing. An application to the court for an order of injunction, restraining a medical practitioner from assisting in the death of a patient (mercy killing) is an example of an injunction apply as a remedy to medical negligence. An injunction is only granted when a patient shows that there is no adequate remedy in law and that irreparable damage will occur if the order is not made. In cases of medical negligence in Nigeria, there are no records of injunctive remedies been used, nevertheless, this does not mean an injunctive relief cannot be granted.

9.3 Termination of Appointment and Withdrawal of Certificate

This type is usually resorted to by the court and regulatory body of medical practitioners where the act of the medical practitioner is of gross negligence. *Section 16(2)(B) of the Medical and Dental Practitioners Act* permits the disciplinary tribunal to suspend a medical practitioner's license for a period not exceeding six months if he/she is guilty of infamous conduct. Furthermore, *Section 16(2)(A) MDPA* allows the disciplinary tribunal to strikeout the medical practitioner's name off the relevant register if he/she has been found guilty of infamous conduct.

10. Defences For Breach of Duty of Care in Nigeria

Black's Law Dictionary,[86] defines *'Defence'* as that which is alleged by a party proceeded against in an action or suit as a reason why the plaintiff should not recover or establish that which he seeks by his complaint or petition that is, a defendant's answer, denial or plea. Apart from the denial of the actual occurrence of Negligence even where the fact of damage is proved, other defences which may avail the defendant in a suit on Professional Medical Negligence includes:

10.1 Contributory Negligence

In cases of Contributory Negligence, the defendant denies complete liability and claims the plaintiff's actions contributed to their injury. If the defence is successful, it can help mitigate the defendant's liability[87]. If both the plaintiff and defendant share responsibility for the damage, the plaintiff is considered guilty of contributory negligence and will not receive full damages. Where this occurs, the contributory negligence provisions as stated in *Section 11* of the *Civil Liability (Miscellaneous Provisions) Act* provides that: "Where any person suffers damage partly as a result of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the share of the claimant in the responsibility for the damage."

[85] Okojie Eric, 'Professional Medical Negligence in Nigeria', <https://www.nigerianlawguru.com/articles/torts/PROFESSIONAL%20MEDICAL%20NEGLIGENCE%20IN%20NIGERIA.pdf> accessed 24 September 2024

[86] B.A Garner, Black's Law Dictionary, 7th Edition (Minnesota: West publishing Co., 1999)

[87] *Ashiru Baker v Alfred Jelkh* [1968] 1 All NLR

In the case of *Crossman v Steward,*[88] The plaintiff was found partially responsible for the defendant's negligence. The defendant prescribed a drug for the plaintiff's skin disorder but failed to warn about the risks of prolonged use. Despite the defendant's discontinuation of the prescription, the plaintiff continued using the drug for an extended period. When determining damages, the court considers how much the plaintiff's conduct deviated from the standard of a reasonable person and the extent to which it caused the damage.

10.2 Defence of Consent

'Volenti Non Fit Injuria', is a defence which may avail a defendant in a case of professional medical negligence. Literally, it means- '*No injury is done to a person who consents'*. In the case of *Ndubuisi & Ors v Olowoake,*[89] the court held that: "Volenti non fit injuria represents the axiom that anyone that consents to injury cannot be heard to complain of it thereafter. Thereafter means where a grievous harm or any damages has been done to the plaintiff if he consent to the doing of such act, he has no remedy in tort…"

For *volenti non fit injuria* in a negligence case, the defendant must prove two things. First, that the plaintiff agreed, either explicitly or implicitly, to the physical risk. Second, that the risk is legal and cannot be addressed through legal means. This is the only condition that can release the defendant from liability. If the plaintiff consents to an injury, it means they have agreed to release the defendant from their duty of care.[90] *Volenti non fit injuria* is established in three (3) ways: (a) Where it is proven that the plaintiff explicitly agreed to relieve the defendant from legal responsibility; (b) Where in the absence of an explicit contract, it is shown that the plaintiff explicitly agreed to the risk;[91] (c) When an explicit contract or consent is missing, evidence suggests that the plaintiff implicitly agreed to take the risk.[92]

The defence of *volenti non fit injuria* has limitations and exceptions. It doesn't apply when consent is obtained through unlawful means like fraud or compulsion. If the consent is obtained illegally, the defendant cannot use this defence to escape liability. The defendant's actions must align with the consent given.[93] In the case of *Lakshmi Rajan v Malar Hospital Ltd.,*[94] A 40-year-old woman developed a breast tumor. She agreed to its surgical removal at a hospital. Her consent was solely for the tumor removal, not related to her uterus. Unexpectedly, during surgery, the doctor unjustifiably removed her uterus. Since the action wasn't what she agreed to, the hospital was held accountable.

10.3 Defence of Accident

The defence of accident applies when a defendant unintentionally causes damage, without negligence. Despite expertly delivered medical treatments, there's often high risk involved. Therefore, this defense is mostly used in cases of Medical Negligence. In the case of *White v*

[88] *Crossman v Steward* 162 [1977] 5 CCLJ 45
[89] *Ndubuisi & Ors v Olowoake* [1997] 1 NWLR (Pt 479) 62
[90] *Buckpitt v Oates* [1968] 1 All ER 1145
[91] *Birch v Thomas* (1972) 1 WLR 294
[92] *Ashton v Rowley* [1980] 3 All ER 870
[93] *Bourater v Rowley Reigs Corp* [1944] KB 476
[94] *Lakshmi Rajan v Malar Hospital Ltd* [1998] 3 CPJ 586

Board Of Governors Of H.W,[95] While performing an eye surgery, a surgeon unintentionally cut the patient's retina. Considering the close proximity of the operation site and the surgeon's demonstration of necessary skill and care, the court ruled that he was not negligent, hence not liable.

11. Lessons from Selected Jurisdictions

Each country has its unique healthcare system, laws, policies, and strategic plans in place to achieve long-term goals. These tools play a crucial role in standardizing healthcare systems and improving the overall health of the population. This overview aims to examine the healthcare delivery systems of healthcare system in other jurisdictions.

11.1 Iran

Iran is an ancient Islamic country in the Middle East among Asia, Europe and Africa. It is ranked the *17th* largest country in the world and its counterpart Nigeria is ranked *31st*. The Iran's healthcare system is guided by several legislation enacted to promote health and wellness in the country. *The Constitution of the Islamic Republic of Iran* was adopted in *1979* after the Iranian Revolution. As regards to health, the Constitution through its government exclusively guarantees the right to health and aims to promote healthcare with the objective of providing basic necessities for all citizens for medical treatment.[96] The government has the duty to provide standard health facilities for the public and abolishes all forms of deprivation or discrimination on healthcare.[97]

The Constitution provides for the expansion and strengthening of Islamic brotherhood and public cooperation among all the people.[98] This can be likened to the *'Duty of Care'* which a reasonable man is expected to exhibit when relating with others. It clearly prohibits the infliction of harm and loss upon others and other illegitimate and evil practices.[99] Where the right of a person has been violated, such person has the indisputable right to to seek justice by recourse to competent courts. All citizens have right of access to such courts, and no one can be barred from courts to which he has a legal right of recourse.[100] The *National Health Policy of the Republic of Iran* is a health legislation enacted to serve as a road map for the country's health development between *2014-2023*.

Despite the provision in the Nigerian Constitution[101] for the State to direct it's policy towards health, safety and adequate medical and healthcare facilities for all persons, Nigeria has a predominantly out-of-pocket payment system for healthcare, with a limited insurance coverage whereas in Iran, the government operates a social health insurance system that provides coverage to citizens and residents.[102] Nigeria experiences a shortage of healthcare professionals, including doctors, nurses, and other specialized personnel. Iran has a more

[95] *White v Board of Governors of H.W* [1965] AC 656
[96] Constitution of the Islamic Republic of Iran 1979, Article 43(1)
[97] Constitution of the Islamic Republic of Iran 1979, Article 3(12)
[98] Constitution of the Islamic Republic of Iran 1979, Article 3(15)
[99] Constitution of the Islamic Republic of Iran 1979, Article 43(5)
[100] Constitution of the Islamic Republic of Iran 1979, Article 34
[101] Constitution of the Federal Republic of Nigeria 1999, Section 17(3)(c) and (d)
[102] Constitution of the Islamic Republic of Iran 1979, Article 4(12)

adequate supply of healthcare workers but faces challenges in retaining skilled professionals due to factors like conflict and instability. Nigeria's healthcare system has faced challenges in terms of governance, regulation, and enforcement of standards. Iran has made efforts to strengthen health governance and regulation to ensure quality and safety in healthcare services.[103]

11.2 Bangladesh

Just like the Nigerian Constitution, the Constitution of Bangladesh does not expressly recognize the right to health and medical care as a fundamental right, rather it recognizes as part of Fundamental Principles of State Policy which are not judicially enforceable.[104] However, constitutional remedies for protection of life and health are contained in *Article 15 and 18,* Constitution of Bangladesh. *Article 18* provides inter alia that *'It shall be a fundamental responsibility of the state to attain, through a planned economic growth, a constant increase of productive forces and a steady improvement in the material and cultural standard of living of the people, with a view to securing to its citizens (a) the provision of the basic necessities of life, including food, clothing, shelter, education and medical care'*. Furthermore, *Article 18* provides that. *'The State shall regard the raising of the level of nutrition and the improvement of public health as among its primary duties…'*

Article 40 entitles a right to profession, occupation, trade or business which is also relevant in dealing with medical negligence cases so as to establish accountability for adequate remedy or redress of grievances relating to medical negligence. Flowing from the above provisions, it can be concluded that there exist a constitutional obligation to protect and ensure right to health and medical care through preventing medical negligence since right to life as fundamental right includes right to health and medical care for the patients. In *Mohiuddin Farooque v Bangladesh and ors,*[105] it was asserted that the right to life includes right to protection of health and normal longevity as well as livelihood, health and appropriate medical care.

Furthermore, as contained in the Nigerian's Criminal Code, a person can incur criminal liability for medical negligence under couples of the sections of the Penal Code 1860, relating to causing death to a patient by negligence,[106] for causing injury to the unborn children[107] and for likely to spread infection of diseases dangerous to a patient's life.[108] Unfortunately, the penalties given under the Penal Code of Bangladesh, 1860 for these medical negligence offences are much more insufficient and inadequate in proportion to the loss incurred to the victims. While it is found that the maximum punishment for most of these alleged offences is up to ten years imprisonment (exception in case of causing miscarriage without a woman's

[103] Ibiwari Briggs, *'A Review of Professional Medical Negligence in Nigeria'* (LLB Project Rivers State University 2023)
[104] Constitution of Bangladesh 1860, Article8(2)
[105] *Dr. Mohiuddin Farooque v Bangladesh and ors* 48 DLR, (1996) HCD 438
[106] Constitution of the Bangladesh 1860, Section 304A
[107] Constitution of the Bangladesh 1860, Section 312 - 316
[108] Constitution of the Bangladesh 1860, Section 269 - 270

consent[109]) even if death caused by negligent act of the alleged professionals[110] and minimum punishment is imprisonment for six months in the case of negligent act likely to spread infection disease dangerous to life.[111]

The Penal Code of Bangladesh 1860 absolves the offender by giving one kind of immunity which narrows down the scope of criminal action against concerned professionals, based on the doctrine of good faith and the benefit which suggests that if any medical practitioner or any person in service does any act for the benefit of the patients which causes injury to the person not be considered an offence.[112] The absence of a specific standard to prove good faith (how far the act undertaken by the concerned medical practitioner would be beneficial to the patients), often leads to the difficulties to proving a medical negligence case.[113]

12. Summary of Findings

This summary presents the key findings of the article 'Duty of Care: It's Implication to the Medical Profession in Nigeria', which aims to educate medical practitioners about their duties and the standard of care they owe to their patients, ensure strict liability for medical practitioners who act negligently or fail to fulfill their duties towards their patients, raise awareness among individuals about their rights as patients and emphasize the importance of seeking redress when their rights have been violated, with various redress methods available and analyzing the defences available to medical practitioners accused of breaching the duty of care.

In course of this research, the writer finds understaffed, poorly equipped hospitals and a shortage of essential medications as a significant cause in the amplified risk of negligent practices. While efforts were made to establish regulatory bodies like the Medical Practitioners Disciplinary Board, the Nigerian Medical Association among other, the impact is not across the country. Regulatory reach and effectiveness, especially in remote regions, remained limited, leading to continuing challenges in ensuring medical standards and safety. Despite multiple healthcare reforms and policies across from then till now, Nigeria continues to face similar fundamental issues in healthcare, such as inadequate funding, uneven distribution of health professionals, and infrastructure limitations especially in rural areas.

Furthermore, the writer found that the penalties prescribed within the Medical and Dental Practitioners Act, specifically those concerning offenses by medical practitioners, is considered

[109] Constitution of the Bangladesh 1860, Section 315, Section 313 suggests that whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall be also liable to fine.

[110] Constitution of the Bangladesh 1860, Section 314, prescribes punishment up to 10 years imprisonment in cases of causing death of a woman with intent to cause the miscarriage. But if it is done without the consent of the woman, then punishment will be up to imprisonment for life.

[111] Constitution of the Bangladesh 1860, Section 269

[112] Constitution of the Bangladesh 1860, Section 88 - 92

[113] A.B.M. Abu Noman & Faisal Bin Monir Jony, 'Understanding Medical Negligence under the Legal Regimes in Bangladesh: Gaps and Way Forward' *IJHSS* (2021) 9(11) https://www.internationaljornalcorner.com/index.php/theijhss/article/view/167247/114646 accessed 24 September 2024.

too lenient or insufficient to deter and address more severe cases of medical negligence that result in serious harm or fatalities. While the National Health Act outlines various patient rights and responsibilities, the lack of detailed mechanisms or procedures for enforcement present a gap in ensuring compliance and accountability among healthcare providers.

Finally, the research finds the evident difference between the high frequency of medical negligence occurrences in Nigeria and the low number of filed legal actions a significant paradox. Despite the prevalence of medical malpractice, there's a substantial under representation of these cases in the legal system. This disparity implies that numerous victims of medical negligence in Nigeria might not be seeking or receiving proper legal redress.

13. Recommendations

Several measures and strategies can be put together to limit the occurrence of Professional Medical Negligence in Nigeria. Firstly, an enhancement of the capacity and effectiveness of regulatory bodies such as the Medical and Dental Council of Nigeria (MDCN) and other medical associations is highly recommended. Also, measures such as ensuring the strict enforcement of professional standards, conducting regular inspections and audits, and implementing disciplinary actions against healthcare professionals found guilty of negligence should be taken seriously.

With the implementation of mandatory and regular continuing education programs for healthcare professionals in Nigeria to update their knowledge and skills and stay abreast of the best practices to enhance competence in their respective fields, the issue of professional medical negligence in Nigeria will be minimized. Also, the curriculum of medical and healthcare professional training programs should include topics such as medical ethics, patient safety, communication skills, and error prevention strategies.

Conducting public awareness campaigns to educate the general public and citizens of Nigeria about their rights as patients, the importance of reporting medical negligence, and how to access reporting mechanisms is a strategy that can be implemented to curb professional medical negligence in Nigeria. Improving the efficiency and effectiveness of the Nigerian judicial system to ensure timely resolution of medical negligence cases can also encourage reporting of cases of professional medical negligence. Finally, streamlining legal processes, providing support for victims seeking legal recourse, and ensuring fair and swift judgment in cases of negligence is highly recommended.

13. Conclusion

Medical Negligence in Nigeria is a serious issue that necessitates attention in the field of healthcare. Addressing medical negligence requires a comprehensive approach involving healthcare professionals, regulatory bodies, policymakers, and society as a whole. Healthcare professionals must prioritize the provision of safe and effective care through continuous education, training, and adherence to evidence-based guidelines. Fostering a culture of open communication and accountability is crucial, where professionals can report errors without fear of repercussions, facilitating ongoing learning and improvement. Regulatory bodies play a vital role in ensuring patient safety and holding healthcare professionals accountable. They should enforce robust regulations, licensing requirements, and standards of practice. Policymakers

have a responsibility to enact legislation that protects patient rights and supports the delivery of safe care. This includes clear guidelines for reporting and investigating medical negligence, as well as mechanisms for compensation and legal recourse. Adequate resources and funding are needed to implement patient safety initiatives, including improved staffing, technology, and infrastructure. Ultimately, the goal is to create a healthcare system that prioritizes patient safety and accountability