

**EXAMINATION OF DUTY OF MEDICAL CARE TO PATIENTS BY MEDICAL
PRACTITIONERS IN LINE WITH THE EXTANT LAWS IN NIGERIA**

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2020/LW/14442

**FACULTY OF LAW
ALEX EKWUEME FEDERAL UNIVERSITY NDUFU
ALIKE IKWO, EBONYI STATE**

SEPTEMBER, 2025

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SUBMITTED

BY

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2020/LW/14442**

TO

**THE DEPARTMENT OF LAW, FACULTY OF LAW,
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SEPTEMBER, 2025

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**BEING A PROJECT SUBMITTED TO THE FACULTY OF LAW, ALEX
EKWUEME FEDERAL UNIVERSITY, NDUFU ALIKE IKWO, IN PARTIAL
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OF BACHELOR OF LAWS (LL. B)**

SEPTEMBER, 2025

DECLARATION

I, **ILOCHI ONYINYE VIVIAN**, a student of the Faculty of Law Alex Ekwueme Federal University, Ebonyi State, do hereby declare that this work is a product of my own research efforts, undertaking under the supervision of **Barr. Emmanuel Nnaemeka Nwambam** and has not been presented elsewhere for the award of a degree or certificate. All sources have been duly distinguished and appropriately acknowledged.

Signed _____

ILOCHI ONYINYE VIVIAN

(2020/LW/14442)

CERTIFICATION

This is to certify that this long essay titled “Examination of the Duty of Medical Care to Patients by Medical Practitioners in line with the Extant Laws in Nigeria” has been assessed and approved by the Undergraduate Studies Community of the Faculty of Law, Alex Ekwueme Federal University, Ndufu Alike Ikwo” as an original work carried out by Ilochi Onyinye Vivian, with registration number: 2020/LW/14442 in the Faculty of Law, Alex Ekwueme Federal University, Ndufu Alike Ikwo, under the guidance and supervision of Barr. Emmanuel Nnaemeka Nwambam.

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DEDICATION

This research work is dedicated to God Almighty for His love, mercies and grace all throughout my undergraduate days and to my family, especially my father, Dr. Stephen Ilochi, for their support and encouragement throughout the period of my LL.B journey.

Finally, I dedicate this work to all researchers who have gone before me and those that will come after me.

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LIST OF ABBREVIATIONS

Cap-	Chapter
Pt-	Part
P-	Page
LFN-	Laws of the Federation of Nigeria
NCLR-	Nigeria Constitutional Law Report
NWLR –	Nigeria Weekly Law Report
SCJN-	Supreme Court of Nigeria Judgment
All FWLR –	All Federation Weekly Law Report
All NLR-	All Nigeria Law Report
CHR-	Chancery Report
SACLR-	South Africa Constitutional Law Report
SC-	Supreme Court
AC-	Appeal Cases
MDPC-	Medical and Dental Practitioners Committee.
MDCN-	Medical and Dental Council of Nigeria
PBoR-	Patient’s Bill of Rights

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ABSTRACT

It is an established law that physicians owe a medical duty of care to their patients. This duty is sacrosanct and must be discharged with such degree of skill and competence the average practitioner of the profession under similar circumstances would use. It is a truism that a healthy nation is a wealthy nation. Medical law being the legal regime that regulates the health sector, the prerogatives and responsibilities of medical professionals as well as the rights of patients; is very significant in protecting patients' rights. The main objective of this study is to examine the duty of medical care to patients by medical practitioners in line with the extant laws in Nigeria. In the course of carrying out this research, doctrinal research methodology was adopted, wherein case laws and statutes constitutes primary sources of data while textbooks, journal articles, internet sources, seminar and conference materials constitute secondary data. It was found out, among others, that rights of Nigerians relating to health are under the Fundamental Objectives and Directive Principle of State Policy in the Nigerian constitution and so, generally unenforceable. Thus, the citizens are ignorant of their rights to seek remedies for injuries resulting from a physician's breach of duty of care. The work recommended among others that the Nigerian medical law has to be overhauled, rights of Nigerians relating to health must be removed from the Fundamental Objectives and Directive Principle of State Policy under the Nigerian constitution. The study concluded that a medical practitioner is expected to care for his patient in every professional relationship. Where he fails to exercise the skill or act with the degree of care expected of his experience and status, he is liable for professional negligence.

CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

All over the world, people may at one time suffer damage from the careless acts of other persons. A careless or negligent act may be done intentionally, unintentionally, or accidentally. As a general rule, there is negligence whenever there is a duty of care and there is a breach of the duty. The purpose of the tort of negligence is to identify breach of duty of care, and offer remedy to a person who has suffered harm. In other words, the purpose of the law of negligence is to offer remedy to a person who has suffered, because of a breach of duty of care. Negligence is from the latin word '*negligentia*', from '*neglegre*' which means to neglect.¹

A medical injury may have been caused to the plaintiff by anyone or more of the medical professional who has attended to the patient. In determining whether there has been negligence in the treatment of a patient, the court will ascertain the standard of skill expected from the practitioner in the medical context against the customary practice. The court has addressed the standard of doctors in a number of decisions. In hospitals, there is often a slogan pasted on the wall which says "WE CARE, BUT GOD HEALS". This sign can be translated to be a warning and at the same time, a cause for relief. Warning in the sense that total treatment of a disease, which can lead to recovery is not always verifiable and at the same time, it means, one can get relief from such sickness. We will focus on the WE CARE part. This means that a medical practitioner is mandated to care for patients until there is no further remedy. But can we say that all medical practitioners follow this rule? Too many people have died before treatment starts,

¹ Albert Theodore Danny, *Medical Negligence: Coverage of the Profession, Duties, Ethics, Case Law, and enlightened Defense*, (ATP Publishers, 2007) 12.

during the course of treatment and after the treatment is complete.² It is widely known that doctors and other medical professionals can make serious errors due to negligence. What is less known is how those errors permanently impact the victims of negligence. These victims are forced to deal with the emotional and physical consequences of the injuries that medical practitioners or workers' cause. Those effects commonly impact the rest of their lives. A patient approaching a doctor expects medical solution. The relationship takes a shape of a contract retaining the essential elements of tort. A doctor owes certain duties to his patient and a breach of any of these duties gives a cause of action for negligence against the doctor or any other health practitioner.

A doctor and every other health practitioner have a duty to obtain prior informed consent from the patient before carrying out diagnostic tests and therapeutic management. The standard of care required of a medical practitioner is an objective one. It is the standard of the ordinary reasonable medical practitioner in the shoes of the defendant. The factors which commonly affect the standard of care expected of a medical practitioner in any society as compared to another society depends on a number of factors, which include;

- i. The locality or society being considered
- ii. The availability of relevant medical facilities
- iii. The specialist skill of the medical practitioner concerned
- iv. Accepted medical practice; and
- v. Whether there was an emergency, or not These are relevant factors that may be considered, as the case may be, in determining whether a particular medical practitioner

² Theophilus Byron Ogiemien, *Medical Practice and Negligence* (OAU Publishers, 2010) 17.

has exercised the standard of care expected of an ordinary reasonable medical practitioner in his shoes.³

Explaining the standard of care expected of a medical practitioner in the case of *Whitehouse v Jordan*,⁴ Lord Edmund-Davies in the House of Lords explained it thus: “The test [of negligence] is the standard of the ordinary skilled man exercising and professing to have the special skill. A surgeon fails to measure up to that standard in any respect, (clinical judgment or otherwise) he has been negligent.”

1.2 Statement of the Problem

Medical practitioners have often been accused of not working up to par as they should, being that they are in charge of making sure whosoever comes for treatment receives maximum and proper treatment. In the instance of the job done not up to that standard, what should the patient do? It is only recent that people are coming to the knowledge that they can actually demand accountability concerning their treatments and not just subject it to “God’s Will”. Anyone who is called to be a professional, must act accordingly. Failure to do such demands accountability for such actions.

Failure of a medical professional in his course of duty of means Negligence. In medical practice, the standard of care is usually contained in the rules of professional ethics for medical practitioners in different regions. In Nigeria, the standard of care is set by the Medical and Dental Council of Nigeria. Other medical bodies including the Nigerian Medical Association, the Medical and Dental Consultants Association of Nigeria also have principles of ethics guiding their members with disciplinary measures in place to ensure compliance. The problem this

³ *Ibid*, (n 2) 18.

⁴ [1981] 1 WLR 246 at 256.

project seeks to address is the avenue to demand accountability from the medical professionals on the treatment rendered carelessly and accountability from the patient in doing their possible best to follow through with the instructions given and the personal decisions they make with or without the medical professional. The project also seeks to examine the questions that confront the Nigerian courts on Medical Negligence. This project at the end seeks to suggest ways in which Nigerian Courts can apply the rules of the developed countries in which in citizens of the country can seek redress and damages from medical negligence.

1.3 Research Questions

From the background and statement of problem already discussed above, the researcher finds the following questions imperative to drive the compass of this research study and to solve the problems of medical negligence and procedures of enforcing it in Nigeria:

- (a) What constitutes medical negligence?
- (b) To what extent can duty of medical care to patients be said to have been breached?
- (c) What roles have Nigerian laws played in promoting medical expertise against negligence by health professionals?
- (d) What are the roles of judiciary and other institutional framework in discarding quackery and negligence in Nigerian health institutions?
- (e) What are the ways of enforcing medical negligence in Nigeria?

1.4 Aim and Objectives of the Study

The main objective of this study is to critically examine the duty of medical care to patients by medical practitioners in line with extant laws in Nigeria. The study also specifically seeks to:

- (a) To know what constitutes medical negligence.

- (b) To ascertain the extent of the duties of care owed to patients by health practitioners and to determine when the duties have been breached.
- (c) To critical appraise the provisions of Nigerian laws on medical negligence.
- (d) To discuss holistically the roles of Judiciary and other existing institutional framework in stamping out medical negligence and quackery in Nigerian health institutions.
- (e) To discuss step by step ways of enforcing medical negligence by victims in Nigeria.

1.5 Scope and Limitations of the Study

The area of coverage of this research work is on the tort of medical negligence, its causes and effects to human health with special reference to Nigerian laws and institutions. This research work looks critically on the legislations curbing the high rate of medical negligence, the role of institutions in preventing it and the possible ways of enforcing the tort of medical negligence in Nigeria.

Limitation of the Study

The task of researching and writing on this was educating, inspiring especially the fact that it involves a new area of law, but the research work is yet demanding.

The following are some of the major challenges that were encountered in the course of the research:

- (1) Financial constraint: The major challenge the researcher experienced in the course of carrying out of this study was lack of finance to type this work.
- (2) Lack of power supply: This research study witnessed much fluctuation with power supply and this made the researcher tarry in coming up with the work as against my set date.

(3) Time constraint: There was no sufficient time to carry out of this research, coupled by the fact that the researcher had to combine the course of this research work with his studies.

(4) Dearth of materials on the topic: Aside the fact that there was no sufficient time, dearth of materials was another severe challenge the researcher encountered in the process of carrying out this study.

1.6 Significance of the Study

This research work will be of great help to lawyers especially those who specialize in medical law. This study can also be of great assistance to law lecturers in their course of researches and publication of articles on medical law and law of tort.

It will also be of help to judges and justices of the court in the course of adjudicating disputes on matters involving medical negligence. Law students will also benefit from this research work as this research work will form part of body of literature in their further research on medical law and tort of negligence in general.

This research work will also be of great assistance to policy makers (law makers) because it will form precedence to their proposed bills on the best procedures in enforcing medical negligence.

Generally, this research work will be of great assistance to the public as it will educate them on the effects of medical negligence especially as it poses hazards to human health and abuse of fundamental human rights.

1.7 Research Methodology

In this research work, the researcher adopted a doctrinal method of research. The researcher based her research work on the analysis of primary and secondary materials relevant to the area of discourse. Some of the materials include but not limited to the following:

- (a) Relevant textbooks on medical law
- (b) Journals or articles on the area of discourse
- (c) Legislations
- (d) Case laws/ judicial authorities
- (e) Internet sources.

1.7 Chapters Analysis

This research work is divided into five distinct chapters comprising of other sub-chapters for the purpose of properly discussing medical negligence in Nigeria. Chapter one introduced the work wherein background of the topic under discourse was given, research questions and objectives of the study were clearly itemized among other things. Chapter two is the literature review wherein essential concepts were discussed and positions of scholars on the topic under discourse is reviewed.

Chapter three examined the legal and institutional frameworks on medical negligence in Nigeria while chapter four examined the implications and procedures of enforcing medical negligence in Nigeria.

While Chapter five summarized the work with necessary recommendations that should be followed in order to curb the menace of medical negligence in health care delivery in Nigeria.

CHAPTER TWO

CONCEPTUAL FRAMEWORK, THEORETICAL FOUNDATION AND LITERATURE

REVIEW

2.1 Conceptual Framework

2.1.1 Medical Negligence

Medical negligence means the failure, on the part of a medical practitioner or any certified health care provider to exercise a reasonable degree of skill and care in the treatment of a patient, such that if a doctor treats a patient in a negligent manner causing harm or worsening the existing health condition, the patient can bring an action on negligence against the doctor claiming damages for the harm suffered. This arises only in the event of negligence especially on the part of the medical professional, who does not take sufficient care in treating his patient.⁵

For there to be an event of medical negligence, there are some ingredients and they are:

1. The existence of a duty of care
2. Failure to exercise such duty of care by the medical practitioner
3. Resultant injury to the patient as a result of the breach of duty

This means that the doctor owes the patient a reasonable standard of care to make sure that the right treatment is given. If the medical practitioner, then defaults in this mode of duty of care, he is still not liable to medical negligence claim except when such patient that is treated has an adverse effect to the treatment given to him by the medical practitioner. In determining whether, there has been negligence in the treatment, the court will ascertain the standard of skill expected from the practitioner in the medical context against the customary practice.

⁵ Theodore Byron Ogiemien, *Medical Practice and Negligence* (OAU Publishers, 2010) 19.

Negligence is the breach of duty of care to a person and such breach leads to injury to the person to whom the duty was owed. Medical negligence can be defined as improper, unskilled, or negligent treatment of a patient by a physician, dentist, nurse, pharmacist or other health care professional. It is important to note that whilst medical negligence is generally used in reference to doctors, other health care providers such as nurses, pharmacists, laboratory attendants and any other health care provider can be liable for medical negligence.⁶

One of the earlier statements on the professional standard of doctors was delivered by Lord President- Clyde in the retrial of the medical negligence claim in the Scottish case of *Hunter v Hanley*,⁷ The plaintiff who had suffered injury as a result of the breaking of a hypodermic needle while she was receiving an injection alleged that the accident had been caused by the standard of care and competence which it was its duty to display in giving the injection. Where, the court established a 3-fold test to establish deviation from the customary practice and it stated that:

1. It must be proved that there is a usual and normal practice
2. It must be proved that the defendant has not adopted the practice
3. It must be established that the course which the doctor adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care.

Medical negligence constitutes an act or omission by a medical practitioner which falls below the accepted standard of care resulting to injury or death of the patient. The case established general duty to take reasonable care to avoid foreseeable injury to another. A duty of care is necessarily implied when a patient is registered and being treated in a hospital. The view has been expressed that, care of medical practitioners ought not to be limited only to the patients under their direct

⁶ Anthony Okonkwo, *Compendium of Medical Law under the Commonwealth & United States Legal System*, (Maiyati Chambers, 2006) 32.

⁷ [1955] S.C 20

management but to be extended to any patient whom they come across in their professional environment and as such, a medical practitioner owes the duty to care for every patient found within the hospital premises whether or not he is on the management team of such patient.

There is no doubt that a doctor owes a patient a duty of care in negligence if the health care professional has accepted a patient to treat and not cause injury on the course of examination. A duty will also arise on the case of a private patient by virtue of his contractual relationship with his/her doctor. Duties of care in law can be assumed or imposed. The obvious example of an assumed obligation is that of contract, where parties voluntarily agree to be bound to each other. The over-reaching legal and policy consideration in respect of all duties of care in tort is to ask whether it would be fair, just and reasonable to impose such a duty on the given circumstance. Historically, there has been reluctance on the part of the judiciary to hold doctors guilty in negligence, probably because doctors and lawyers belong to two of the oldest professions and just like lawyers, doctors should be accorded some degree of protection from threat of negligence arising in the course of the discharge of their duties, as illustrated by Lord Denning in the case of *Hatcher v Black*,⁸ Lord Denning in the case held that:

It would be wrong, and indeed, bad law to say that simply because a misadventure or mishap occurred, the hospital and the doctors are liable. It would be disastrous to the community if it were so. It would mean that a doctor examining a patient, or a surgeon operating at a table, would be forever looking over his shoulder to see if someone was coming up with a dagger...His professional reputation is as dear to him as his body, perhaps more so.

The duties of a medical practitioner may be summarized as:

1. Duty to provide Adequate Counseling
2. Duty to Warn the Patient of Inherent Risks: A medical practitioner has a duty to warn a patient on the risks of the method or treatment chosen, side effect, and so forth, especially,

⁸ [1999] 2 NWLR (Pt 23) 455.

where alternative medical procedures are available so that the patient may make a reliable and rational choice. The non-disclosure of the risks of the chosen course of treatment might render the medical practitioner liable in negligence for failure to adequately warn the patient, to enable the patient make an informed choice in view of the patient's needs

3. Duty to Carry Out a Proper Diagnosis: With the exception of cases of emergencies, a doctor has a duty to carry out a proper diagnosis of his patient, before embarking on treatment. Therefore, where x-ray tests, blood test, urine test or other similar tests are required to determine the ailment and treatment, they ought to be carried out.
4. Duty to administer proper treatment: A medical practitioner has a duty to give proper treatment to a patient. Failure to do this may render the medical practitioner liable.⁹

It is established where a doctor's practice has failed to meet an appropriate standard, the standard of the 'reasonable man' or the famous 'man on the Clapham omnibus' who is said to be an ordinary person placed in the same circumstances is usually applied for most tort cases. However, where there has been a potential breach of professional duty.¹⁰

2.1.2 Enforcement

According to Oxford Advanced Learner's Dictionary,¹¹ to enforce means to make sure that people obey a particular law or rule. In this context, enforcement entails a victim of medical negligence commencing either civil or criminal actions against the medical practitioner for his careless acts in the course of discharging his caregiving duties in a doctor-patient relationship.

⁹ Chinedu Okonkwo, *Medical Negligence and the Legal Implications* (Longman Nigeria Ltd., 2016) 123.

¹⁰ *Ibid*, (n 9) 125.

¹¹ 8th Edition (Oxford University Press, 2010) 485.

2.1.3 Causation

Causation is a formidable hurdle for plaintiffs in medical negligence litigation as there are great uncertainties in the medical world regarding the causes of many adverse conditions. This means in trying to proving the negligence, causation is not easy to prove as nothing in the medical is certain for sure. In the Nigerian context, injured patients find it very difficult to obtain expert witnesses. If the doctor or hospital can raise question as to causation, the patient often is in no position effectively to challenge them. The basic principles in negligence litigation is that the plaintiff must establish not merely that the defendant owed and breached a duty of care to the plaintiff but also that such breach “materially contributed to” or increased the risk of the injury of which of the plaintiff complains. This, in that broad sense, a causal connection must be established between the tortuous act of the defendant and damage which the plaintiff suffered. The importance of causation in negligence cases has been captured by the Court in the case of *A.N.T.S v. Moloje*,¹² in the following words: “Causation as a fault-finding or fault placing mechanism whether in criminal law or in the law of torts has an element of fluidity in practical application to a given situation as it lacks specific fixation. It does not therefore serve useful purpose to seek a precise test. The most acceptable criterion is to identify first the factor or factors but for which the damage complained of should not have occurred and then select what appears to be the most responsible cause. By and large, the selection process is not a matter of law but one of common sense borne out from the rich experience of human interaction in society, tailored to the facts and circumstance of the case with a view to arriving at what is essentially a value judgement. The causal requirement of factual causation is generally determined by a reference to a conventional “But for” test principle. If the injuries that the plaintiff sustained

¹² [1993] 6 NWLR (Pt. 278) 233

would not have occurred but for the defendant's tortuous act, the causal requirement would be fulfilled."

For a defendant to be held liable, it must be shown that the particular acts or omission was the cause of the loss or damage sustained. Although, the notion sounds simple, the causa between one's breach of duty and the harm that results to another can at times be very complicated. The basic test is to ask whether the injury would have occurred before, or without, the defendant's breach of the duty owed to the injured party. The courts must first examine that the breach of duty must be the factual cause of the damage. The general test used by the courts to determine factual causation is commonly known as the "but-for" test. If the claimant's injury would have occurred irrespective of the defendant's negligence, the negligence is not causative of the claimant's loss. However, satisfying the "but for" test may itself be insufficient to establish causation of a number of factual causes satisfying that test.¹³

The task of proving liability of a medical practitioner is not complete even after showing that he or she was in fact negligent. This is because the negligence notwithstanding, the doctor may still not be responsible for the injury suffered by the patient. In other words, it still has to be shown that the negligent act or omission of the doctor was in fact what caused harm to the patient and not some other likely explanation. Some cases are indeed glaring such as where a patient with a disease-ridden right foot woke up from surgery to discover that his doctor had amputated his left foot or where a surgeon removed the wrong breast of a cancer patient. In such cases, the principle of '*res ipsa loquitur*' ('the thing speaks for itself') springs into action as there can be no doubt as to 'harm and causation.

There are therefore two ways that causation can be established in a medical negligence case:

¹³ *Ibokwe v UCH Board of Management* [1961] WNLR 173

1. To prove that the Claimant would not have suffered the injury but for the negligence of the medical professional on the balance of probabilities.

2. To prove that the negligence made a material contribution to the injury on the balance of probabilities. It is a commonly held misconception that in order to succeed with a medical negligence compensation claim, it is enough if the defendant admits that there was a breach of duty of care, but there is much more to a medical negligence claim than this. All three elements must be proven for a claim to succeed – duty, breach and causation. It is fair to say that the causation element of a claim in medical negligence claim is often the more difficult to prove. Causation in medical negligence claims is complex as there can be instances where injury, loss or damage can take place even if negligent treatment had not occurred. When making a claim a specialist and experienced legal team is vital to thoroughly understand the issues and determine whether causation can be established.¹⁴

2.1.4 Scope of Medical Negligence

Medical negligence can be said to be the failure of the medical practitioner to exercise a reasonable duty of care in the course of his duty as a professional in that field.¹⁵ Thus, a registered practitioner who fails to exercise the skill or act with the degree of care expected of his experience and status in the process of attending to a patient may be liable for professional negligence. The following among others constitute professional negligence under the Code of Medical Ethics in Nigeria:

1. Failure to Remove Foreign Objects Inserted into a Patient: It is very common in Nigeria, that medical practitioners forget swabs, surgical gloves, sponge and operational

¹⁴ *UNTH Management Board & Others v Hope Nnoli* [1994] 8 NWLR (Pt. 36) 407

¹⁵ Joseph Bayero, “Physicians and Wrong Diagnosis of Patients: An Assessment of Legal Duties and Liabilities in Nigeria”, *Journal of International Law and Jurisprudence*, [2016] 7 (1) 125.

equipment in the body of their patients during medical operations. This can cause additional injury or an infection later on. In circumstances like this, the medical practitioner who performed the surgery will be liable for medical negligence. In the case of *Ojo v. Gharoro and ors*,¹⁶ the plaintiff/ appellant was told by the defendant/respondent that she had a growth in her fallopian tube, to this effect, she needed surgical operations in removing the growth which she consented to.

After the operation, she complained of abdominal pain, and an x-ray was carried out. It was discovered that there was a broken needle in her abdomen. The appellant sued the defendant/respondents for special and general damages for negligence.

2. Wrong Treatment: The medical practitioner has a duty to take precautions while carrying out treatment on the patient. There are numerous types of wrong treatment. Some more common cases include: administering the patient with the wrong medication, administering incorrect injections, and prescribing excessive dosage, etc. Any patient who suffers harm because of a medical professional's error has the right to file a lawsuit to recover damages. In the Nigerian Supreme Court decision of *University of Nigeria Teaching Hospital Management Board and Others v. Hope Nnoli*,¹⁷ Mr. Hope Nnoli, was the only qualified chemist working with the U.N.T.H., an unqualified pupil chemist Nwuzor, was undergoing internship with Hope Nnoli. On 20th February, 1989, Mr. Nwuzor compounded chloroquine syrup, which caused the death of children aged between one and four years. A post mortem examination conducted on the bodies of the children confirmed that the cause of death was the chloroquine syrup. There was a public outcry and the Management Board of Teaching Hospital conducted an investigation to

¹⁶ [2006]10 NWLR (PT 98) SC 17

¹⁷ [1994] 8 NWLR (Pt. 363) at 407-408

ascertain the person or persons involved or responsible for the overdose. It was Mr. Nnoli and Mr. Nwuzor who were found liable in negligence.

3. Failure to Attend Promptly to a Patient: A medical practitioner owes a duty to attend to the patient promptly and adequately. Where he/she fails to attend promptly to a patient he/she would be liable for medical negligence.
4. Inaccurate Diagnosis: It is the duty of the medical practitioner to apply reasonable skill and care in examining a patient and giving a correct diagnosis. When a medical practitioner incorrectly diagnoses a patient, he/she will be liable for medical negligence. In *University of Ilorin Teaching Hospital v. Akilo*,¹⁸ it was held that a Medical Practitioner in the Appellant's employment would be liable in negligence if without due care and skill resulting in error of treatment, he, for example, describes fractures as dislocations and dislocations as fractures.
5. Failure to Take Full Medical History: For a medical practitioner to properly treat or diagnose a patient, he/she needs to take a full medical history of the patient. If a health care provider fails to take such history, he/she will be liable in negligence. It is important to note that the duty to take medical history is an ongoing process. A medical practitioner should always inquire as to the progress of medical history of the patient.
6. Failure to Get Consent of the Patient: Generally, there exists a duty on the hospital and doctor to obtain prior consent (permission) for the purpose of treatment, organ transplant, disclosure of medical records, and diagnostic. The superior form of consent is called the 'informed consent.' This is the consent obtained after explaining all possible risks and side effects to the patient. A patient must be given sufficient information about the proposed treatment to enable him to give an informed consent. Consent is given as

¹⁸ [2002] FWLR (Pt.28) 23.

follows; expressed in oral or in writing; implied consent by patient's conduct; tacit consent, which means implied consent understood without being stated; surrogate consent given by family members; advance consent given by the patient in advance; and proxy consent by an authorized person.

2.1.5 Legal Implications of Breach of Medical Ethics in Nigeria

The legal implication of any ethical breach depends on the circumstances of each case. While some ethical breach would amount to commission of crime, other amount to civil wrong, while again, others are neither here nor there. Where ethical breach constitutes a known crime, the culprit either get acquitted or convicted in the regular court of law. Where the ethical breach constitutes a civil wrong the aggrieved gets compensatory damages for the injury suffered. Legal implication of ethical breach has been further analyzed under the following heads.¹⁹

Negligence is a question of fact and each case depend upon its own peculiar particular facts or circumstances. The test of negligence is foreseeability of the injury or damage caused. Medical negligence is a branch of negligence which has it root in medical law. Medical negligence law covers the consequences for medical practitioner's non-exercise of appropriate care and rights of patients when a medical practitioner makes an error or fails to provide an acceptable level of care in the execution of his duty.²⁰

A good illustration is provided by the case of *Dickson Igbokwe v University College Hospital Board of Management*,²¹ In this case, the deceased was an inpatient in one of the maternity wards in the defendant's hospital where she jumped to death from the fourth floor of the defendant's hospital. She had just given birth to a child following which her case was diagnosed as a

¹⁹ Albert Olopade, "Consent and Informed Consent to Medical Treatment", *Igbinedion University Law Journal*, [2003] 3(1) 55 -67

²⁰ Wilson Rogers, *Law of Tort* (Sweet & Maxwell, 1989) 72.

²¹ [1961] W.N.L.R (pt 24) 50.

suspected psychosis. She had been given sedative treatment, and the doctor on duty that day instructed a staff nurse to keep an eye on her. The nurse who was instructed to keep watch over her failed to do so. The patient jumped-down from the fourth floor of the hospital and died. The court upheld the plea of *res-ipsa-loquitor* (meaning the fact speak for itself) and awarded a heavy damage against the defendant.

2.1.6 Legal Position on Informed Consent to Medical Treatment

This is also an ethic-legal issue. It centers on both the common law and constitutional right of a patient to object to a form of treatment. Sometimes, doctors in treating certain patients tend to override their objection to certain form of treatment on the basis of medical ethics. A doctor who disregards the opinion of the patient would be liable to the tort of assault and battery as well as infringement of the fundamental right of the patient as preserved under Sections 37 and 38 of 1999 Constitution of Nigeria (as amended). Therefore, a Jehovah Witness has a right to refuse blood transfusion under any circumstances even if the decision entail risk as serious as death. In *Malette v Shulman*,²² the Court dismissed an emergency situation which requires an urgent lifesaving need for blood. The right of the patient to be informed of the risk of the surgical treatment has been developed in some jurisdiction in the United State and has found favour in the Supreme Court of Canada in the doctrine of informed consent. The above foreign case on informed consent have been approved by the Supreme Court of Nigeria in *Medical & Dental Practitioners Disciplinary Tribunal (MDPDT) v Okonkwo*,²³ where that Court held:

“I am completely satisfied that under normal circumstances no medical doctor can forcibly proceed to apply treatment to a patient of full age and sane faculty without the patient's consent, particularly where the treatment is of a radical nature such as surgery or blood transfusion. So, doctor must ensure that there is a valid consent and he does nothing that

²² [1990] 47 NLR 23.

²³ *Supra*

will amount to a trespass to the patient. Secondly, he must exercise a duty of care, advise and inform the patient of the risk involved in the contemplated treatment and the consequence of his refusal to give consent”

Hence, patient's objection to medical treatment is founded on fundamental rights. In *Okekearo v Tanko*,²⁴ a medical doctor amputated the left centre finger of a 14-year-old boy without his consent. The boy's action for exemplary damages succeeded. The doctor's appeal to the court of appeal failed and his further appeal to the Supreme court was dismissed. Consent by its own nature is an act of giving approval or acceptance of something done or proposed to be done. It could be express or implied. Thus, an incompetent adult who is mentally ill cannot give a valid consent, rather court may authorize the treatment and nothing stops his family as next of kin from making such decision rather than court. In the case of a minor, the parents and guardian are usually the ones to give the consent.

Also, in *Rivers v Katz*,²⁵ the court held that the state interest in maintaining the ethical integrity of the medical profession though important, cannot outweigh the fundamental individual rights. From the foregoing it will be apt to conclude that the issue of patient's informed consent to treatment is sacrosanct.

2.1.7 Legal Implication of Breach of Duty of Confidentiality

The law establishes that physicians owe a duty of confidentiality to their client. All information generated in the course of a medical relationship must be kept confidential. This duty is recognized at common law.

The duty of confidentiality is even constitutionally guaranteed in Section 37 of the Constitution of the Federal Republic of Nigeria 1999 (as amended). Patients must be encouraged to seek

²⁴ [2000] 1 NWLR (pt 23) 71.

²⁵ [2002] 15 NWLR (pt 791) 10.

treatment without fear that their ailment, condition or treatment will be disclosed. This is in the public interest ultimately. In Canada, this privacy right is protected by legislation, so also in South Africa, particularly in relation to HIV status of an individual. A physician may disclose patient information with the informed consent of the patient or where legislation specifically requires that confidentiality can be breached to protect a third party. Partner notification is required or authorized by some Public Health Acts hence giving room to necessity.

In *Hay v University of Alberta Hospital*,²⁶ the status of the right of confidentiality was described by Picard J as the cornerstone of the Doctor- Patient relationship and this is recognized in a number of international ethical codes such as the Hippocratic Oath and Declaration of Geneva domesticated in the Nigerian Code of Medical Ethics among others. The Hippocratic Oath states inter-alia: “all that may come to my knowledge in the exercise of my profession or outside my profession or in daily commerce with me which ought not to be spread abroad, I will keep secret and will never reveal”. Also, Declaration of Geneva specificizes the following oath: “I will respect the secrets which are confided in me even after the patient had died”.

2.1.8 Legal Position to Caution in Administering Treatment to a Patient

In health care provisions, the relationship could be defined as a consensual relationship in which the patient knowingly seeks the physician’s assistance and in which the physician knowingly accepts the person as a patient. Once a doctor agrees to treat a patient, regardless of non-existence of a written contract, there is an implied duty of care. Therefore, any omission to use

²⁶ [1990] 69 DLR 45

reasonable care and diligence in the treatment of a patient or to discover the patient's problem will lead to misdiagnosis and its end result is that the physician will be liable.²⁷

It is a well-known principle of law that medical practitioners owe a broad duty of care to patients. The duty encompasses all aspects of their role and requires practitioners to take reasonable care in the provision of diagnosis, treatment, information and advice. It is therefore required of physicians to take all reasonable care in diagnosis and treatment of patients, meaning that an uncompromising obligation is imposed upon medical practitioners to disclose all material risks to a patient as regards his health.²⁸

The golden thread that runs through the relationship between a patient and medical personnel is the peremptory duty to treat the patient with reasonable care and skill while under the Law of Contract, the peremptory duty of care and skill forms an implied term of every doctor/patient relationship. A contract of medical service may contain express terms which may include an undertaking to achieve a specific result.

To succeed in an action for breach of contract unlike in negligence cases, it suffices for the patient to prove the existence of a doctor-patient relationship; breach of the implied /express term of the contract- to treat, and injury arising from or in the course of treatment.

In *Abatan v. Awudu*,²⁹ the Court of Appeal per Aderemi JCA, held that, the relationship between a doctor and his patient is one of trust and confidence; a relationship where one has the power and the duty to treat and restore the other to mental and physical well-being.”

In defining who a medical practitioner is, *Section 8* of the Medical and Dental Practitioners Act provides that he is one who has attended an approved course of training, the course was

²⁷ *R v Bateman* [1925] LKKB 791 at 794

²⁸ Emeka Cara, “Physicians’ Legal Duty of Care and Legal Right to Refuse to work during a Pandemic”, *Canadian Medical Association Journal*, [2010] 9(1) 18.

²⁹ [2003] 10 NWLR (Pt. 829) 451 C.A

conducted at an institution so approved, or partly at one of such institution and partly at another or others, he holds a qualification so approved; and he holds a certificate of experience issued in pursuance of the Act.

2.1.9 Legal Implications of Negligent Abandonment of a Patient

Medical negligence is, therefore, a breach of a duty of care by a person in the medical profession, to a patient, which results in damage to the patient. Criminal or civil proceedings may be instituted against health care providers for negligence in the performance of their duties. These health care providers could be said to be those who are qualified and appropriately registered (where necessary), to practice any of the health-related professions within the medical field. They include doctors, nurses, ophthalmologists, physiologists, physiotherapists, dentists, pharmacists, laboratory scientists, radiologists, and a host of others.³⁰

These people have held themselves out to serve members of the public, and their patients rely on their skills and knowledge. The existence of this relationship between the provider and his patient gives rise to duty of care, the breach of which makes the provider liable where the breach is unjustifiable. Thus, any individual who has been injured by the wrongful act of such a health care provider has the right to institute civil action against him or her in order to be compensated for the injury suffered. On the other hand, the State can institute criminal proceedings against such health care provider, in order to push him for the offence he committed. A medical doctor who has performed an operation and negligently left scissors in the patient's abdomen, thereby causing the death of the patient, may be sued in a civil action for damages, and he may also be prosecuted and convicted for committing the crime of manslaughter. Therefore, both civil and

³⁰ Ifeanyi Pius Enemo, *Medical Negligence: Liability of Health Care Providers and Hospitals* (Bookwood Publishers, 2009) 43.

criminal proceedings may be taken out against such negligent health care provider for the same wrongful act.

Criminal law obviously applies to health care providers, and the purpose of criminal prosecution is to punish the offender. In Nigeria, criminal law codes apply, that is, the Criminal Code which applies in the Southern States, and the Penal Code, which applies in the Northern States. If health care providers in their practices become grossly negligent causing bodily harm, or reckless in the care of others, they will be liable in criminal proceedings.³¹

It follows, therefore, that if a health care provider does not use reasonable care, or his conduct falls below the standard of care required by law, he is said to be negligent. This means that, if he does not use reasonable care or he negligently performs his duties and thereby causes the death of a patient, he is guilty of manslaughter. However, his negligence or incompetence must be so great as to show a disregard for life and safety and to amount to a crime against the state, and conduct deserving punishment.³²

Another implication is that when health care providers are alleged to have failed to observe the legal principles and standards concerning the care of patients, civil litigation may result. The most common and potent basis of civil liability for medical malpractice cases is negligence. Thus, where a health care provider administers treatment to a patient negligently and injury is caused to the patient, he may sue for negligence against the provider for the injury suffered. The rationale for liability for negligence of a health care provider is that, someone harmed by the actions of such a provider deserves to be compensated by the injuring party.

³¹ Section 303 of the Criminal Code Act Cap 38 LFN 2004.

³² Boniface Chinedu Umerah, *Medical Practice and the Law in Nigeria* (Longman Nigeria Ltd, 1989), 123

2.1.10 Nature of Professional Responsibility

In the medical field, the job of health personnel is to offer professional care to sick persons. This is a sacrosanct job in view of the fact that such sick person submits himself to the medical person and place full reliance on the supposition that he would be provided all reasonable care and that the health official will act in his best interest all along.³³

However, this does not always turn out to be the case as experience has shown that patients sometimes do not receive such care as commensurate with the seriousness of their condition. There was already recognition of the fact that there was a loosening of the old-time relationship of mutual confidence between patient and doctor, upon which so much of the satisfactory practice of medicine in the past had depended. Cases ranging from medical staff's rudeness, negative attitude to patients, lack of care and compassion such as staff not doing enough to ensure patients are comfortable, inadequate response to requests, to wrong diagnoses, administering wrong treatment, surgical accidents like leaving surgical instruments in the body cavity, accidentally severing vital blood vessels or nerves, operating on the wrong part of the body or removal of healthy tissues or organs, and handling of patients by unqualified health personnel.³⁴

There has been an increase in cases of unqualified medical personnel as noted by the Medical and Dental Council of Nigeria (MDCN) with quacks and unlicensed medical persons boldly operating in public and private hospitals unnoticed.³⁵ There are also several cases of pharmacists, nurses, medical laboratory scientists and technicians as well as other health personnel parading as doctors and rendering medical services which doctors are licensed to render to unsuspecting

³³ *Abi v CBN & Ors* [2011] LPELR-4192(CA)

³⁴ Albert Sunday Ogwuche, *Compendium of Medical Law* (Espee Printing & Advertising, 2006) 34.

³⁵ Joseph Bayero, "Physicians and Wrong Diagnosis of Patients: An Assessment of Legal Duties and Liabilities in Nigeria", *Journal of International Law and Jurisprudence*, [2016] 7 (1) 126.

members of the public thereby leading to considerable harm to the patient. The patient only gets to see the qualified doctor after the harm has been done.

The consequence of insufficiency or outright lack of adequate medical care could be catastrophic and such catastrophe is suffered by no other than the ordinary man who innocently placed his life in the hands of the medical personnel with the belief that he will be a better and healthier man afterward. Case law has come to recognize many duty relationships like one highway user to another, employer to employee, manufacturer to those affected by his product, doctor to patient. This work seeks to focus on the medical duty of care from a medico-legal perspective with a view to determining the extent of liabilities.³⁶

If a doctor 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 undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his discretion and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary, nor is it necessary that the service be rendered for reward.³⁷

Thus, a doctor or any other health professional is required by law to exercise the care and skill of a reasonable professional. The standard of a reasonable professional in the medical context is the same in principle as it is for other professionals.

2.1.11 Nigeria Medical Jurisprudence; Drawing it down to Medical Negligence

A registered medical practitioner is liable for professional negligence when he fails to exercise the skill or act with the degree of care expected of his experience and status in the process of attending to a patient.

³⁶ Micheal Davies, *Textbook on Medical Law*, (2nd Ed., Hants Publication, 1998) 29.

³⁷ See *R v Bateman* [1925] 94 KB 791 (CA)

This can occur when he fails to attend promptly to a patient requiring emergency care when he was in a position to do so. When harm results from delay in management when such delays could have ordinarily been avoided, the practitioner is liable. He is also deemed liable for medical negligence if he clearly manifests incompetence in the assessment of the patient such as making wrong diagnosis when the clinical features were so glaring that no reasonable skillful practitioner could have failed to notice them. In *Donoghue v Stevenson*³⁸, Lord Atkin articulated the "neighbour principle":

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? ... Persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation..."

In the medical context, this principle translates into a clear legal duty: healthcare professionals owe a duty of care to their patients because patients are in a close, direct, and foreseeable relationship with doctors, nurses, hospitals, and other medical providers.

Medical errors such as prescribing the wrong medicines, prescribing the wrong doses of the medicines, amputation of the wrong limb, operating on the wrong side, or carelessness that results in the termination of a pregnancy all constitute negligence.³⁹ Also, failure to refer or transfer a patient in good time when such a referral or transfer was necessary, or failure to do anything that ought reasonably to have been done under any circumstance for the good of the patient all constitute negligence. Failure to obtain informed consent of the patient before proceeding on any surgical procedure or course of treatment when such consent was necessary also constitute professional negligence.

Thus, Medical negligence is said to have occurred where a person in the medical profession is in breach of his duty of care to a patient which results in actual injury to the patient. It is an act or omission by a medical practitioner in the course of a patient's treatment that deviates from such accepted norms of medical practice in the medical community. Medical negligence does not

³⁸ [1932] AC 562 (HL)

³⁹ *Ojo v UBTH Board* [2006] 10 NWLR (Pt. 987) 173

always result in injury thereby grounding a negligence case. Where a healthcare professional deviates from the appropriate medical standard but the patient is not harmed, a negligence case will not succeed. It is necessary to show that the negligence resulted in injury against the patient. A medical doctor cannot be concluded to be negligent simply because something goes wrong⁴⁰. To establish a case of medical negligence requires that these three criteria are met: firstly, there must be evidence that the doctor owed the complainant duty of care. Secondly, that this duty was breached by the doctor not providing the required standard of medical care and thirdly that this breach led to injury or death for which compensation is payable and which was both foreseeable and reasonably avoidable.

2.2 Theoretical Foundation

2.2.1 Positivist Theory of Law

Scholars in Positivist School postulate that law is as made by the sovereign or his agents acting on the sovereign authorities. The agent in this perspective is the parliament which is primarily empowered to make laws or a delegated legislator with delegated powers to make delegated legislations or judges who in the course of deciding cases may establish case law or judicial precedents especially when there is lacuna in the existing laws made by the legislators. In other words, law is as made by the law maker and it remains the law until it is reformed by amendment or abolished. The existence of law is one thing; its merit or demerit is another. A law which eventually exists is a law, though people may dislike it.⁴¹ John Austin believes that positive law is a command set by a political superior for a political inferior and which the inferior has to obey

⁴⁰ Paul Moffet, and Gideon Moore, “The Standard of Care: Legal History and Definition: The Bad and Good News” *Western Journal of Emergency Medicine*, [2011] 12(1) 1

⁴¹ John Austin, *The Province of Jurisprudence Determined* (HLA Hart Publishers, 1832) 184

or suffer sanction. That law is a command made by a sovereign for an inferior and which the inferior has a duty to obey or suffer penalty.

The postulation of the positivist theorists is that man-made laws such as the constitution, Criminal Code, Medical and Dental Practitioners Act, Code of Ethics for Medical Practitioners among others have made provisions for the protection of the rights of every human against liabilities as a result of medical negligence.

The argument of the positivist is that law is as made by man to regulate the actions of the people in the society. They believe that laws are not imposed on men by nature, rather they are as made by humans putting into consideration those factors affecting the people in the society and aim at putting an end to them.

2.2.2 Utilitarian Theory

Jeremy Bentham propounded this effective and result-oriented utilitarian theory of law. He was of the belief that life is full of pain, liabilities arising from the unguarded actions of people in the society and pleasure and that law should be used as a veritable tool of social engineering or means to increase human happiness and minimize pain in the society.⁴² He believes that the essence of law as a veritable instrument of societal transformation lies on its productivity in the society in making the society a better place for livelihood.

Every law should be enacted to secure or ensure the happiness of the greatest possible number of people. The aim of law should be to maximize human happiness by securing the greatest happiness of the greatest number of people. Every person in the view of utilitarian theorists should be allowed freedom to pursue his or her own happiness, advantage, and actualize himself,

⁴² Byron Appadorai, *The Substance of Politics* (Oxford University Press, 2003) 23

and to seek self fulfillment without interference by the state. This is a support of a free market economy.

All existing laws and consequently the institutions established by such laws should be reformed to ensure protection of human rights and stamp out the menace of medical negligence, and when this is done, the greatest happiness possible for the populace would be secured. A law could be seen as good or bad after assessing or evaluating its utility to individuals and society at large.

To ensure the efficacy of any existing legal framework, every law should seek to promote security, equality, and liberty, when these things are promoted, democracy can be fostered.⁴³

This essence of medical law according to this theory is to swamp out quackery in medical practice, prevent the loss of lives and properties as a result of medical negligence and to guarantee sanity in medical practice in Nigeria.

2.2.3 Sociological Theory

To Roscoe Pound and other sociological theorists, Law is social engineering which means a balance between the competing interests in society,” in which applied science is used for resolving individual and social problems.

Balancing the conflicting interest of Individual and the state with the help of law is what social engineering entails according to the sociological theorists. With the help of law as a body of knowledge and a veritable instrument of social transformation, a large part of social engineering is carried on. Law is used to solve conflicting interests and problems in society. Pound postulated that everybody has their own individual interest and considered it supreme over all other interests. The objective of the law is to create a balance between the interests of the people. Law is used as a veritable instrument to bring changes in the environment and ensure that society confirms to

⁴³ John Jegede, “The Rule of Law in Military Government- An Appraisal”, *Nigeria Law and Practice Journals*, [1999] 3 (2) 12

the technological advancement. Roscoe Pound in his interest theory mentioned the three kinds of interest. To avoid the overlapping of interests, he put boundaries and divides the kinds of interests.⁴⁴

a. Individual Interest:

These are claims or demands involved from the standpoint of the individual life which consists of interest of personality, interest in domestic relations and interest of substance.

b. Public Interest:

These are the claims or desires asserted by the individual from the standpoint of political life which means every individual in a society has a responsibility towards each other and to make use of things which are open to public use. Interest in the preservation of state.

c. Social Interest:

These are the claims or demands in terms of social life, which means to fulfill all the needs of society as a whole for the proper functioning and maintenance of it. Interest in the preservation of general peace, health, security of transactions, preserving social institutions like religion, politics, economics. In early times, rules and laws originated from the only custom to govern society which had only a social sanction. The main subject matter of sociological theory is Society and impacts of law. The theory puts into consideration the society, human behavior, and social changes brought by law.

It advocates that the Law and society are related to each other and that the law is a social phenomenon because it has major impacts on society. It lays more emphasis on the legal perspective of every problem and every change that takes place in society. Law is a social

⁴⁴ Albert Sachdeva, & Cordelia Gupta, *A Simple Study of Political Science Theory* (Ajanta Publishers, 1980) 18

phenomenon and law has some direct or indirect relation to society. In the words of Ehrlich,⁴⁵ “At the present as well as at any their time, the centre of gravity of legal development lies not in legislation, nor in the juristic decision, but in society itself.

In line with sociological theory and especially Roscoe Pound’s postulation of law being a veritable instrument for societal changes, the Constitution of Nigeria 1999 (as amended) and other laws are veritable instruments in ensuring that human rights of the citizens are respected, observed and protected against medical negligence and in protecting these rights of the citizens, the law makes quackery in medical practice an offence considering the roles health practitioners play in human existence.

2.3 Literature Review

Many scholars have distinctly discussed some vitals issues on medical negligence amongst health practitioners in Nigeria. These scholars include the following:

A.T Danny,⁴⁶ posits that there is negligence whenever there is a duty of care and there is a breach of the duty. The purpose of the tort of negligence is to identify breach of duty of care, and offer remedy to a person who has suffered harm. In other words, the purpose of the law of negligence is to offer remedy to a person who has suffered, because of a breach of duty of care.

According to T.B.E Ogiamien,⁴⁷ Negligence is the breach of duty of care to a person and such breach leads to injury to the person to whom the duty was owed. Medical negligence can be defined as improper, unskilled, or negligent treatment of a patient by a physician, dentist, nurse, pharmacist or other health care professional. It is important to note that whilst medical negligence is generally used in reference to doctors, other health care providers such as nurses,

⁴⁵ Boniface Mani, *Jurisprudence Legal Theory*, (16th Ed., Allahabad Book Agency, 1999) 23

⁴⁶ Albert Theodore Danny, *Medical Negligence: Coverage of the Profession, Duties, Ethics, Case Law, and enlightened Defense*, (ATP Publishers, 2007) 12

⁴⁷ Theophilus Ogiamien, *Medical Practice and Negligence*, (OAU Publishers, 2010) 17.

pharmacists, laboratory attendants and any other health care provider can be liable for medical negligence. Medical negligence means the failure, on the part of a medical practitioner or any certified health care provider to exercise a reasonable degree of skill and care in the treatment of a patient, such that if a doctor treats a patient in a negligent manner causing harm or worsening the existing health condition, the patient can bring an action on negligence against the doctor claiming damages for the harm suffered.

Ali,⁴⁸ refers medical negligence as a tortious act that is found to arise from the fiduciary relationship existing between the doctor or care giver and a patient. This fiduciary relationship stems from the duty of care and confidence that the medical profession like most other professions, is built on. A breach of the duty arising from this relationship by the doctor who is the fiduciary, exposes the doctor to liability for criminal breach of duty of care, a civil action either in tort or contract, and finally, exposes him to liability for professional misconduct by the Medical and Dental Practitioners Disciplinary Tribunal.

I P Enemo,⁴⁹ is of the view that in recent times, there has been an increase in reports of medical negligence in Nigeria, principally attributed to a lack of sufficient medical practitioners and infrastructure in the health sector. However, despite the alarming number of victims, there has been a low level of formal complaints or even lawsuits for compensation, due to ignorance, poverty and in some cases, reluctance to seek redress against the offending medical practitioner. It has been observed in other countries, that the quality of medical practice and care for patients is higher where there is a sense of accountability required from medical practitioners, as such,

⁴⁸ Yalny Ali, *Damages for Medical Practice: Nigeria as a Case Study*-
<http://www.yusufali.net/articles/damages_for_medical_practice_nigeria_as_a_case_study.pdf> assessed on 5 June, 2025.

⁴⁹ Iruka Paulinus Enemo, *Medical Negligence: Liability of Health Care Providers and Hospitals*, (Unilag Press, 2010) 51.

it will be useful to consider the legal position in Nigeria concerning actions for negligence against medical practitioners in the discharge of their duties.

According to A.S Ogwuche,⁵⁰ if a doctor 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 undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his discretion and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary that the service be rendered for reward.

D Lord,⁵¹ postulates that a medical man should not be found guilty of negligence unless he has done something of which his colleagues would say; “he really did make a mistake there, he ought not to have done it”. According to him, in a hospital, when a person who is ill goes in for treatment, there is always some risk, no matter what care is used. Every surgical operation involves risks. It would be wrong and indeed bad law, to say that simply because a misadventure or mishap occurred, the hospital and the doctors are thereby liable. You should only find him guilty of negligence when he falls short of the standard of a reasonably skillful medical man, in short, when he is deserving of censure-for negligence in medical is deserving of censure.

⁵⁰ Andrew Sunday Ogwuche, *Compendium of Medical Law* (Espee Printing & Advertising, 2006) 21.

⁵¹ Daniel Lord, *The Discipline of Law*, (Butterworth & Co., 1979) 237.

2.3.1 Summary of Review/ Gap in Knowledge

The aforementioned scholars have extensively discussed the essential ingredients of the concept of medical negligence and the nitty-gritty in the practice of health care in Nigeria.

However, the stated scholars failed to superfluously look at the provisions of Nigerian laws against the menace of medical negligence and bring it in line with the topic under discourse. This is the gap in knowledge this long essay seeks to fill by extensively discussing the provisions of the law in respect to medical negligence in Nigeria.

CHAPTER THREE

LEGAL AND INSTITUTIONAL FRAMEWORKS ON MEDICAL NEGLIGENCE IN NIGERIA

3.1 Legal Framework

3.1.1 Constitution of Nigeria 1999 (as amended)

The citizens of Nigeria have the fundamental right to life as clearly stipulated in the constitution of Nigeria 1999 as amended. By section 33 of the 1999 Constitution, the citizens have right to live and live healthy. The said section clearly provides that:

No one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which the person has been found guilty in Nigeria.

The citizens' right to life is contingent to their right to qualitative health care from health practitioners, so much that life cannot exist where medical negligence and careless health care delivery thrive.⁵² In line with this, section 17(3)(d) of the 1999 Constitution of the Federal Republic of Nigeria as Amended) is to the effect that the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused.

To achieve safety of the Nigerian citizens, the supreme law of the land (the constitution) creates a health care policy for the nation, and makes all-important provisions that aide quality care delivery in Nigeria in that health care delivery is a concurrent responsibility of both the federal government and the state and split the responsibility into three sectors; tertiary, secondary and primary, which remains the functions of the three tiers of government; federal, state and local.⁵³

⁵² Chapter 2 of the 1999 Constitution of Federal Republic of Nigeria (as amended).

⁵³ Part II of the Second Schedule of the 1999 Constitution of Federal Republic of Nigeria (as amended).

All these are geared towards ensuring that there is total overhaul in the health care delivery in Nigeria that will make the health of the citizens a top priority of the health practitioners and the government.

3.1.2 African Charter on Human and People’s Right (Ratification and Enforcement) Act

Nigeria has incorporated the African Charter on Human and Peoples’ 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 Peoples’ Rights expressly guarantees both civil and political rights and socio-economic rights as enforceable rights. The African Charter precisely recognize the right to health. In Article 14 of the African Charter on Human and Peoples’ Right (Ratification and Enforcement) Act, states that:

“Every individual shall have the right to enjoy the best attainable state of physical and psychological health; State parties to the present Charter shall take the necessary actions to safeguard the health of their people and to ensure that they receive medical care when they are sick”.

A patient who has suffered injury under medical negligence can initiate proceedings under the African Charter of Human and Peoples’ Right, either under the domestic statutory laws of Nigeria or under the charter itself.

3.1.3 The National Health Act 2014.

This Act provides a legal framework for the regulation, growth, and administration of Nigeria’s health system. The NHA contains vital provisions which, if efficiently applied will have a remarkable impact on health-care access, universal health coverage, healthcare cost, quality and standards, practice by healthcare providers, as well as patient care and health outcomes. The Act applies to both public and private health care providers.

Section 1 Part 3 of the National Health Act contains several Rights and Obligations of Users and Healthcare Personnel. For instance, a healthcare provider cannot refuse a patient emergency health treatment,⁵⁴ and the health establishment shall implement measures to minimize injury to person and property.⁵⁵ In addition, a healthcare provider should disclose to patient diagnostic procedures, risks, costs, and benefits.⁵⁶ Also the patient has the right to be made aware of any important information involving his/her health status except such disclosure will be contrary to the best interest of the patient.⁵⁷ Furthermore, all information pertaining to a patient relating to his/her health status and treatment is confidential and shall not be revealed to anyone except in circumstances allowed by the Act. The act also provides that a patient can lay a complaint to the proper authority with regards to how he/she has been treated by the health care provider.⁵⁸

Section 1 Part 3 of the Act also provides punitive measures for any breach. For instance, under Section 20(2), 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 N10,000.00 (Ten thousand Naira Only), or to imprisonment for a period not exceeding six months or to both.

3.1.4 The Criminal Code Cap C38 LFN 2004

Criminal law can be used to address alleged negligence in the medical practice. A victim can seek redress for medical negligence under criminal law in the gravest of circumstances. A doctor is not criminally responsible for a patient's death unless his negligence shows such disregard for life and safety of others as to amount to a crime against the State. Also, the degree of the negligence must be above ordinary tortious negligence. Thus, the degree of negligence must be

⁵⁴ Section 20 of the National Health Act, 2014

⁵⁵ *Ibid*, Section 21

⁵⁶ *Ibid*, Section 23

⁵⁷ *Ibid*, Section 26

⁵⁸ *Ibid*, Section 30

one of gross negligence. For a patient to institute a criminal action against a medical practitioner a report of the negligence must be made to the police. Then the medical practitioner will be charged to court.⁵⁹ In *Denloye v. Medical Practitioners Disciplinary Committee*,⁶⁰ 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.

In Nigeria, there is no specific criminal law relating to the doctor and his patient though there are, however provisions in the Criminal Code of Nigeria addresses the issue of doctor and patient relationship. Section 303 of the Criminal Code posits thus:

“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) (e) of the Criminal Code also provides thus:

“Any person who in the manner so rash or 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 misdemeanor and is liable to imprisonment for one year”.

If there is a breach of duty of care that results to the death of a patient, a medical practitioner can be liable for murder under Section 319 of The Criminal Code. The penalty for murder is a death sentence. For a person to be liable for murder, it must be proved that by his act or omission, he

⁵⁹ Temitayo Olofinlua, *Medical Negligence in Nigeria* (OAU Press, 2015) 15.

⁶⁰ [1968] ALL N.L.R 12.

intended to cause death or grievous bodily harm. Furthermore, a medical practitioner can also be liable for manslaughter.

According to Section 317 of the Criminal Code, any unlawful killing is manslaughter. Other offenses which could make a Medical Practitioner liable during his course of duty once the elements of the offenses are proved are abortion, adultery (in the north), and rape. A victim can seek redress for medical negligence under criminal law in the gravest of circumstances. Where the extent of the negligence had been such that it resulted in permanent disability or death of the patient, then the practitioner will be guilty of gross negligence which can amount to a crime against the State. And where such breach of duty of care results in the death of a patient, a medical practitioner can be liable for manslaughter. Furthermore, there are other offenses a medical practitioner can also be liable for during his course of duty depending on the nature of his/her actions.

Criminal Code has made elaborate provisions against offenses in Nigeria. The Code in sections 305 of the Criminal Code provide thus: “When a person undertakes to do any act, the omission to do which is or may be dangerous to human life or health, it is his duty to do that act; and he is held to have caused any consequence which result to the life or health of any person by reason of any omission to perform that duty.”⁶¹

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

⁶¹ Section 305 of the Criminal Code.

person by reason of any omission to observe or perform that duty.⁶² It is clear from the above provision that the criminal liability of a medical practitioner for the negligent treatment of a patient is based on a breach of duty which the medical practitioner owes the patient.

3.1.5 The Medical and Dental Practitioners Act Cap M8 LFN 2004

The main law regulating health care providers in Nigeria is the Medical and Dental Practitioners Act. The Medical and Dental Practitioners Act,⁶³ provides for the establishment of the Medical and Dental Council of Nigeria hereinafter called the Council. Section 1(2) (c) of the said Act provides for the statutory functions of the Council principally among which is; “reviewing and preparing from time to time a statement as to the code of conduct which the Council considers desirable for the practice of the medical profession in Nigeria”. Section 2 (d)(e) of the Medical and Dental Practitioners Act empowers the Medical and Dental Council of Nigeria to supervise and control the practice of traditional medicine, homeopathy and other forms of alternative medicine in Nigeria. Pursuant to the enabling law, the Medical and Dental Council of Nigeria has been constituted in accordance with the provision of the law. The statement as to the Code of Conduct which the Council considers desirable for the practice of medical profession in Nigeria has been prepared and reviewed from time to time.

It was first titled “Rules of Professional Conduct for Medical and Dental Practitioners in Nigeria” but later titled “CODE” in consonance with its legal status. The Council desires that every Medical and Dental Practitioner should familiarize himself or herself with the provisions of the code so that he or she would practice the medical profession with conscience, dignity, and within the provisions of the code, thus bringing the incidence of ethical breaches or violations to

⁶² *Ibid* Section 34

⁶³ Cap M8 LFN 2004

the barest minimum, as ignorance of law admits no excuse. Section 5 of the Medical and Dental Practitioners Act states that the Medical and Dental Practitioners Act is the principal law that regulates the medical profession in Nigeria. Medical Practitioners in Nigeria owe adherence to the Medical and Dental Council of Nigeria and the Nigeria Medical Association.

This Act provides all the necessary framework for the establishment of the Medical and Dental Council of Nigeria for the purpose of registration of medical practitioners and Dental Surgeons and to provide for a disciplinary tribunal for the discipline of members.⁶⁴

Section 1 of the Act provides for the establishment of the Medical and Dental Council of Nigeria; it also states its functions. The body so created is a body corporate with perpetual succession and a common seal. It can sue and be sued in its corporate name. The Medical and Dental Practitioners Investigating Panel investigates allegations of an infamous conduct in a professional respect made against practicing health care practitioners. If the allegations have merit, the panel forwards the case to the Medical and Dental Practitioners Disciplinary Tribunal for trial.

By section 16 of the Act, the Medical and Dental Council of Nigeria is empowered as a way of ameliorating quackery and negligence in medical care in Nigeria, to discipline any erring medical practitioner or dental surgeon. There are three broad instances in which the Council can invoke its disciplinary powers. These instances include the following:

- (a) Where a registered practitioner is adjudged by the disciplinary tribunal to be guilty of infamous conduct in a professional respect
- (b) Where a registered person is convicted by a court of law or tribunal in Nigeria or elsewhere

⁶⁴ Section 5 of the Medical and Dental Practitioners Act 2004.

(c) Where a person has been fraudulently registered.

Section 17 of the Medical and Dental Practitioners Act covers an extensive list of offenses. For instance, it is an offence to impersonate or make false representation as to status, name and identity. It is also an offence to administer, supply or recommend the use of dangerous drugs within the meaning of the law. A person guilty of an offence under Section 17 shall be summarily convicted to a fine of N5,000.00. On a conviction or indictment, to a fine not exceeding N10,000.00 or imprisonment, for a term not exceeding five years or both such fine and imprisonment.

3.1.6 Code of Medical Ethics in Nigeria

The Medical and Dental Council of Nigeria (MDCN) in furtherance of its statutory functions as provided for in Section 1 (2)(C) of the Medical and Dental Practitioners Act (MDPA), codified the rules of professional conduct for Medical and Dental Practitioners in its Code of Medical Ethics in Nigeria (2008). The code lays down the standards of acceptable medical and dental practice in Nigeria. Rules 26-70 of the Code consist of the acts that fall under the infamous conduct in a professional respect and the list is not exhaustive. These acts are improperly procuring or attempts to procure abortion, euthanasia or mercy killing, indulge in the use of alcohol, dangerous drugs, or attend to patients under the influence, committing adultery, maintaining improper association with patients, and so on.

In circumstances where the medical practitioner fails to perform his duty as required, the issue of liability would arise. The victims of medical negligence can make a complaint under criminal law, or institute an action for a civil wrong or follow the complaint procedure provided by the Act.

3.1.7 Patients Bill of Rights

The Patients Bill of Rights (PBoR), launched in 2018 by the Federal Competition and Consumer Protection Commission (FCCPC), serves as a foundational legal framework for addressing medical negligence in Nigeria⁶⁵. While not an independent Act of the National Assembly, it is a powerful compendium that consolidates and clarifies patient rights derived from a range of primary legal sources, including the Constitution of the Federal Republic of Nigeria 1999, the National Health Act 2014, the Federal Competition and Consumer Protection Act 2018, and the common law of negligence. Its primary function is to transform the abstract legal duties of care owed by medical practitioners into a concrete, enumerated charter of twelve explicit rights, thereby empowering patients and providing clear benchmarks for accountability.

Under the Patient's bill of rights, the health provider owes the following responsibility:

- (a) Provide information on treatment in areas such as services, treatment, records, etc.
- (b) Conspicuously display the scope of practice and all available services.
- (c) Provide immediate and sufficient attention in an emergency.
- (d) Respect and maintain the confidentiality of patients' records.
- (e) Maintain records of the provider's current certificate and license to practice.
- (f) Treat Patients with dignity irrespective of their status, among others.⁶⁶

The legal authority of the PBoR is firmly anchored in existing Nigerian law. The National Health Act provides its core statutory backbone, particularly in its provisions for the right to information, consent to treatment, confidentiality, and access to emergency care. The Constitution further underpins these rights through the fundamental guarantees of the right to life and the right to

⁶⁵ Federal Competition and Consumer Protection Commission (FCCPC), Patients' Bill of Rights (Abuja, 2018).

⁶⁶ [<<https://www.bimakassociates.com/consumer-protection-an-analysis-of-the-patient-bill-of-rights-pbor-in-nigeria/>> accessed on 2nd September, 2025.]

dignity of the human person, which are implicitly violated by negligent or substandard medical treatment. By defining healthcare as a service and the patient as a consumer, the Federal Competition and Consumer Protection Act provides a robust regulatory mechanism, empowering the FCCPC to investigate complaints and enforce compliance, thus giving the PBoR administrative teeth.

Crucially, the PBoR operationalizes the traditional tort of medical negligence by providing specific, actionable content for its most contentious elements: duty and breach. In a negligence claim, the PBoR makes it straightforward to establish the existence and scope of the duty of care, as these duties are explicitly listed as patient rights. More significantly, it provides clear standards for determining when that duty has been breached. For instance, a violation of the "Right to Information" through a doctor's failure to disclose the material risks of a procedure directly constitutes a breach of the standard of care, forming the basis for a claim of lack of informed consent. Similarly, a breach of the "Right to Quality and Safe Care" can be demonstrated where a hospital uses unsterilized equipment, a practitioner misdiagnoses a condition due to failure to conduct standard tests, or a patient is denied life-saving treatment in an emergency due to an upfront demand for payment, which violates the "Right to Emergency Care."

This framework is further strengthened by its creation of a dual-track system for redress, which enhances access to justice for victims. A patient aggrieved by a violation of their rights can pursue the traditional judicial track by filing a civil suit for negligence in court, using the PBoR as an evidentiary tool to prove a breach of duty. Alternatively, they can utilize the administrative track by lodging a complaint with regulatory bodies. A complaint to the FCCPC can trigger an investigation into the matter as a consumer rights violation, potentially leading to mediation,

compensation, or sanctions. A parallel complaint to the Medical and Dental Council of Nigeria (MDCN) can initiate a disciplinary process against the practitioner for professional misconduct. This multi-faceted approach provides victims with flexible, and often faster and less costly, alternatives to protracted litigation.

3.2 Institutional Frameworks

3.2.1 Ministry of Health

The primary mandate of the Federal Ministry of Health and Social Welfare is to ensure high-quality healthcare to Nigerian citizens and provide important services for a healthy Nigeria. In the course of discharging health care service delivery in Nigeria, the ministry strenuously upholds global standards of excellence, striving for a prosperous nation through effective programs and assistance.⁶⁷

In order to stamp out quackery in health practice and prevent negligence, the ministry of health has the mandate to develop and implement policies and programs as well as undertake other necessary actions that will strengthen the national health system in Nigeria and to be able to deliver effective, efficient and affordable health services that foster improved health status of Nigerians, to serve as the engine for the pursuit of accelerated economic growth and sustained development. It is the duty of the ministry of health to effectively work against medical negligence in the practice of medicine in Nigeria. To this end, the ministry has the vision of reducing the morbidity and mortality due communicable diseases to the barest minimum, having minimal prevalence of non-communicable diseases, meet global target on the elimination and

⁶⁷ Section 2(1) of National Health Act 2014

eradication of diseases, and significantly increase the life expectancy and quality of life of Nigerians.⁶⁸

3.2.2 Medical and Dental Council of Nigeria

Section 1(1) of the Medical and Dental Practitioners Act established the Medical and Dental Council of Nigeria to play vital roles in health care delivery to the members of the public in Nigeria.

Section 1(2) (c) of the said Act provides for the statutory functions of the Council principally among which is; “reviewing and preparing from time to time a statement as to the code of conduct which the Council considers desirable for the practice of the medical profession in Nigeria.

Other functions of the Council include:

- (a) Determining the standards of knowledge and skill to be attained by persons seeking to become members of the medical or dental profession and reviewing those standards from time to time as circumstances may permit.
- (b) Securing in accordance with the provisions of the Act, the establishment and maintenance of registers of persons entitled to practice as members of the medical or dental profession and the publication from time to time of lists of those persons.
- (c) Supervising and controlling the practice of homeopathy and other forms of alternative medicine.

⁶⁸ Yalny Ali, *Damages for Medical Practice: Nigeria as a Case Study*
<http://www.yusufali.net/articles/damages_for_medical_practice_nigeria_as_a_case_study> assessed on 5th June, 2025.

(d) Making regulations for the operation of clinical laboratory practical in the field of pathology which includes histopathology, forensic pathology, among others.

(e) Performing the other functions conferred on the Council by the Act.

All these functions are geared towards regulating the practice of Medicine, Dentistry and Alternative Medicine in the most efficient manner that safeguards best healthcare delivery for Nigerians.

3.2.3 The Judiciary

The principal role of the judiciary is to interpret the constitution and other legislations enacted by the Legislature and apply such existing laws to individual cases, to settle disputes between private persons or between private persons and the government.⁶⁹ The judiciary remains the cornerstone and an indispensable stakeholder in the Nigerian justice system which extends to but is not limited to resolving disputes relating to victims of medical negligence/malpractice. There is a cliché that says that the Judiciary is the last hope of the common man. This simply means that the judiciary should uphold the rule of law in its dispensation of justice. Rule of law is a legal principle which states that “all entities, including the government, must adhere to the supremacy of the law. In other words, nobody is above the law, both the citizen and the government are under the law.

In Nigeria, the courts have in several cases handled many incidences of medical negligence. For instance, in *Okezie v Chairman Medical & Dental Practitioners Disciplinary Tribunal (MDPDT)*,⁷⁰ Dr. Okezie, a registered Specialist Obstetrician and gynecologist and a lecturer at University of Nigeria Teaching Hospital, Enugu was found guilty of infamous conduct and gross

⁶⁹ Section 6 of 1999 Constitution of Nigeria (as amended)

⁷⁰ [2010] 26 WRN 12

professional negligence in 2001. He was suspended from practices for six months for losing his patient (Mrs. Obiekwu) after a caesarian operation. The charges against him include negligent failure to secure the professional services of an anesthetist and also of qualified registered nurses to provide necessary professional care as required before, during and after the caesarian operation; failure to provide crossmatched bloods and oxygen which would have been used to resuscitate the patient at the time of impending respiratory failure which eventually set in post operatively; operating at an unregistered institution known as Christian Miracle Hospital.

Another striking example where the judiciary dealt with medical negligence is *Dickson Igbokwe v University College Hospital Board of Management*,⁷¹ In this case, the deceased was an inpatient in one of the maternity wards in the defendant's hospital where she jumped to death from the fourth floor of the defendant's hospital. She had just given birth to a child following which her case was diagnosed as a suspected psychosis. She had been given sedative treatment, and the doctor on duty that day instructed a staff nurse to keep an eye on her. The nurse who was instructed to keep watch over her failed to do so. Patient jumped-down from the fourth floor of the hospital and died. The court upheld the plea of *res-ipsa-loquitor* (meaning the fact speak for itself) and awarded a heavy damage against the defendant.

⁷¹ [1961] WNLR 173

CHAPTER FOUR
ANALYSIS OF THE LEGAL ISSUES IN THE ENFORCEMENT OF DUTY OF
MEDICAL CARE IN NIGERIA

4.1 Enforcement of Medical Negligence in Nigeria

Generally, in Nigeria, as in other areas of law, it is a patient who is aggrieved by medical negligence that can initiate legal processes for redress or sanctioning of offending doctor. However, where the patient is a minor, the proxy or surrogate of the child, such as parent or legal guardian, can initiate complaint processes on the minor's behalf as next friend.

In circumstances where the medical practitioner fails to perform his duty as required, the issue of liability would arise. The victims of medical negligence can make a complaint under criminal law, or institute an action for a civil wrong or follow the complaint procedure provided by the Act. Criminal Liability in Medical Negligence Criminal law can be used to address alleged negligence in the medical practice. A victim can seek redress for medical negligence under criminal law in the gravest of circumstances. A doctor is not criminally responsible for a patient's death unless his negligence shows such disregard for life and safety of others as to amount to a crime against the State. Also, the degree of the negligence must be above ordinary tortious negligence. Thus, the degree of negligence must be one of gross negligence. For a patient to institute a criminal action against a medical practitioner, a report of the negligence must be made to the police and the medical practitioner will be charged to court. In *Denloye v. Medical Practitioners Disciplinary Committee*,⁷² 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. In Nigeria, there is no specific criminal law

⁷² [1968] ALL NLR 308.

relating to the doctor and his patient though there are, however provisions in the Criminal Code of Nigeria address the issue of doctor and patient relationship. Section 303 of the Criminal Code posits thus:

“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. Any person who in the manner so rash or 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 misdemeanor and is liable to imprisonment for one year”.

If there is a breach of duty of care that results to the death of a patient, a medical practitioner can be liable for murder under Section 319 of The Criminal Code and Section 220 of The Penal Code. The penalty for murder is a death sentence. For a person to be liable for murder, it must be proved that by his act or omission, he intended to cause death or grievous bodily harm. Furthermore, a medical practitioner can also be liable for manslaughter. According to Section 317 of the Criminal Code, any unlawful killing is manslaughter. Other offenses which could make a Medical Practitioner liable during his course of duty once the elements of the offenses are proved are abortion, adultery (in the north), and rape. A victim can seek redress for medical negligence under criminal law in the gravest of circumstances. Where the extent of the negligence had been such that it resulted in permanent disability or death of the patient, then the practitioner will be guilty of gross negligence which can amount to a crime against the State. And where such breach of duty of care results in the death of a patient, a medical practitioner can be liable for manslaughter. Furthermore, there are other offenses a medical practitioner can also be liable for during his course of duty depending on the nature of his/her actions. Section 343 (1) (e) of the Criminal Code provides that: "Any person who in the manner so rash or negligence 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 misdemeanor and is liable to imprisonment for one year".

Civil Liability of Medical Negligence: The degree of negligence, which gives rise to civil action must be that of ordinary tortious negligence. This can be proved where all elements of the three tests exist, which are: That the medical practitioner owed a duty of care to the patient; the duty of care was breached; and as a direct consequence of the breach, the patient suffered damages. Also, the onus of proof lies with the claimant who must call evidence to show negligence on the part of the medical practitioner. Commencing a civil action for negligence may give rise to vicarious liability. In circumstances where hospital staff is negligent in the performance of their duties, the hospital may be held to be vicariously liable. This is based on the general principle that an employer is liable for the act of its employee in the course of his employment. This principle was recognized in the case of *Ibokwe v UCH Board of Management*,⁷³ where Irwin J held that hospital authority is responsible for the acts or omission of the whole of its staff, whether they were physicians, doctors, nurses or other employees.

4.2 Procedure for Enforcement of Medical Negligence in Nigeria

Medical negligence is generally a personal action. Consequently, it is the patient who actually suffered the injury that possesses the requisite locus to file an action against the negligent medical professional and his employer.²³ This general rule is without prejudice to the right of persons under legal disability to maintain an action through their parents/guardians pursuant to the various rules of courts. In maintaining this action, the person ensure that he has reasonable

⁷³ *supra*

cause of action against the negligent medical practitioner. This entails that he or she has the duty to prove the essential ingredients or elements of medical negligence.

These elements include:

1. The existence of a duty of care
2. Failure to exercise such duty of care by the medical practitioner
3. Resultant injury to the patient as a result of the breach of duty

This means that the doctor owes the patient a reasonable standard of care to make sure that the right treatment is given. If the medical practitioner, then defaults in this mode of duty of care, he is still not liable to medical negligence claim except when such patient that is treated has an adverse effect to the treatment given to him by the medical practitioner.⁷⁴

The crux of these steps is that medical negligence comes with both civil and criminal liabilities.

When these elements exist, the claimant give pre-action to the hospital and subsequently, file and serve the originating processes containing the claims and evidences to be attached.

If the victim of such negligence wants to commence an action for criminal liability, he or she can petition the practitioner and get him or her prosecuted for medical negligence. A victim can seek redress for medical negligence under criminal law in the gravest of circumstances. A doctor is not criminally responsible for a patient's death unless his negligence shows such disregard for life and safety of others as to amount to a crime against the State. Also, the degree of the negligence must be above ordinary tortuous negligence. In this case, the standard of proof changes to proof beyond reasonable doubt⁷⁵.

⁷⁴ Micheal Davies, *Textbook on Medical Law*, (2nd Ed., Hants Publishers, 1998) 29.

⁷⁵Section 135 of The Evidence Act (as amended in 2023)

4.3 Challenges for the Enforcement of Medical Negligence in Nigeria

In Nigeria, medical negligence has been on the rapid increase and needs to be addressed in terms of the attitude of law towards medical practice for the protection of the patients, so as to make the physician liable as well as to secure punishment for any medical practitioner who through carelessness causes harm to a patient. Moreover, there is the need to caution medical practitioners who have sent many patients to their untimely graves in the course of their professional duties. It would in addition aid to restore people's confidence in the medical profession. Increasingly, there is the need for patients to be protected from medical practitioners who no longer see their professional calling principally as that of saving lives but as that of making money. The need for the protection of patients is not new. In advanced countries, precaution has been taken through legislation and through increased reliance on court action both of which ensure that negligent medical practitioners are made to pay damages to affected patients. Nigeria has risen to alleviate this menace by enacting several laws and empowering some institutions both within the medical practitioners themselves and external institutions that help to put the actions of health workers in check and fight against quackery in the profession.⁷⁶

To this therefore, legislations such as: Criminal Code which criminalizes the death of a patient through negligence of medical practitioners, Constitution of Nigeria 1999 (as amended) which is the foundation for every other law in Nigeria and which guarantees right to life, African Charter on Human and People's Right (Ratification and Enforcement) Act which is ratified and domesticated in Nigeria, the National Health Act 2014, the Medical and Dental Practitioners Act, Ethics of Medical Practice in Nigeria, among others. All these legal frameworks strenuously provide against medical negligence.

⁷⁶ Iruka Paulinus Enemo, *Medical Negligence: Liability of Health Care Providers and Hospitals* (Bookwood Publishers, 2009) 43.

The judiciary is an integral part of the institution waging war against medical negligence and helps in great measures to eradicate same.⁷⁷

However, despite the beautiful provisions of the law and the roles institutions play, enforcement of medical negligence in Nigeria is a bit difficult. These challenges include but not limited to the following:

- (a) Poverty: Lack of resources to engage the services of legal practitioners to represent victims of medical negligence in court has been the greatest challenge to the enforcement of citizen's right against medical negligence.
- (b) Enforcement of court's decision: In Nigeria, one is to get judgment, another thing is to reap the fruits of that judgment. Right to appeal and stay of execution have been the greatest delay tactics that lawyers use these days against the judgment creditors especially when it involves government institution. This has made victims of medical negligence easily throw in the towel and leave everything to God.
- (c) Ignorance: The belief that everything happens exactly the way God desires it, is a deep cankerworm that has eaten deep into people's sense of reasoning. Most victims of medical negligence believe that they should leave their fate to God and he is the one that should judge medical practitioners who negligently caused their ordeal. In some parts of the country, taking someone to court is still seen as inheriting eternal enmity. This has made people leave every plight they find themselves to God.
- (d) Time-frame of Litigation: Pursuing a course of justice in Nigerian courts lingers for centuries. This has immensely discouraged some victims of medical negligence from

⁷⁷ Boniface Chima Umerah, *Medical Practice and the Law in Nigeria* (Longman Nigeria Ltd., 1989), 123

enforcing their rights as it will take age long for such matter to be fully adjudicated and judgment passed.

- (e) Perversion of Justice: Presently in Nigeria and other corrupt countries, obtaining judgment over a matter is dependent on the bargaining power of the parties. This has made it too difficult for a poor victim of medical negligence to obtain judgment in his favour as the medical doctor and the health institution can easily buy their ways at the court especially if the matter is before a corrupt judge.
- (f) The difficulty of proving the physician's fault in Court actions is another challenge of enforcing citizen's right against medical negligence in Nigeria.⁷⁸ This is because it is a cardinal and settled principle of law that he who alleges must prove. Considering the peculiarity involved in medical care delivery, it will not be that easy to get substantial evidence to prove that the medical practitioner/worker was negligent in the course of delivering medical services to the patient.

4.4 Misdiagnosis and Wrong Diagnosis in Medical Negligence

Diagnostic errors are one of the most common grounds for medical negligence claims. A correct and timely diagnosis is the cornerstone of effective medical treatment; a failure in this initial step can lead to a cascade of negative consequences, including improper treatment, disease progression, and avoidable harm to the patient.

The foundation of any medical negligence claim rests on four elements:

- a) Duty of Care: A medical professional owed a duty of care to the patient.

⁷⁸ Elizabeth Cara, "Physicians' Legal Duty of Care and Legal Right to Refuse to work during a Pandemic", *Canadian Medical Association Journal*, [2010] 9(1) 18.

- b) Breach of Duty: The professional breached that duty by failing to meet the required standard of care.
- c) Causation: This breach directly caused the patient's injury or harm.
- d) Damages: The patient suffered actual harm (physical, emotional, or financial)

Both misdiagnosis and wrong diagnosis fall under the "Breach of Duty" element, but they describe different types of diagnostic failures.

While closely related, the terms refer to different aspects of a diagnostic error. "Misdiagnosis" is often used as a broad, umbrella term that encompasses several types of errors, including a wrong diagnosis [While the terms are often used interchangeably in layman's language, the legal distinction rests on the nature of the breach and the resulting harm.].

4.4.1 Misdiagnosis

Misdiagnosis is a broad term for any diagnostic error. It most commonly refers to a situation where a doctor correctly identifies that the patient is ill but makes a mistake in identifying the specific disease or condition. This often leads to a delay in correct treatment. The core feature of a typical misdiagnosis is the incorrect labeling of an illness, which can manifest as an incorrect condition, a delayed diagnosis, or a missed diagnosis entirely. In a classic misdiagnosis scenario, the harm often stems from the delay, as the real condition progresses untreated⁷⁹ where a failure to act in a timely manner contributed to the patient's injury.

⁷⁹ (2006) 10 NWLR (Pt 987) 173 (SC)

4.4.2 Wrong Diagnosis (or Incorrect Diagnosis)

A wrong diagnosis is a more specific and definitive type of misdiagnosis. It occurs when a medical professional diagnoses a patient with a specific condition that they do not have at all. The key feature of a wrong diagnosis is the application of unnecessary or harmful treatment for a non-existent condition. Here, the breach of duty leads to harm from two directions: the patient suffers the side effects of incorrect treatment while the actual, underlying condition remains completely unaddressed [This constitutes a clear breach of the duty to exercise reasonable skill and care, as the resulting treatment is wholly without medical justification.].

When Does a Diagnostic Error Become Negligence?

It is crucial to understand that a misdiagnosis or a wrong diagnosis is not automatically medical negligence [*Arigbabu v Ojo*, where it was held that a medical practitioner is not necessarily negligent simply because a diagnosis turns out to be wrong. The standard is whether the practitioner acted in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular art.]. Medicine is an art as well as a science, and some conditions are notoriously difficult to diagnose. The law does not demand perfection from doctors but rather a standard of care expected of a reasonably competent practitioner in that field. To prove negligence, a patient must establish that the doctor's diagnostic process fell below the accepted standard of care. This is judged by the "reasonable doctor" test, famously established in the case of *Bolam v Friern Hospital Management Committee*⁸⁰ and adopted into Nigerian law. This test has been consistently applied by Nigerian courts, see *Ojo v Gharoro* and *Ibekwe v Nwosu*⁸¹

⁸⁰ [1957] 1 WLR 582 (QB)

⁸¹ (2011) 9 NWLR (Pt 1251) 1 (SC)

CHAPTER FIVE

SUMMARY, RECOMMENDATIONS AND CONCLUSION

5.1 Summary of Findings

Medical negligence is a tortuous act that is found to arise from the fiduciary relationship existing between the doctor or care giver and a patient. This fiduciary relationship stems from the duty of care and confidence that the medical profession like most other professions, is built on. A breach of the duty arising from this relationship by the doctor who is the fiduciary, exposes the doctor to liability for criminal breach of duty of care, a civil action either in tort or contract, and finally, exposes him to liability for professional misconduct by the medical and dental practitioners.

In a civil action for medical negligence, it was also found that the hospital or the doctor is the proper defendant and the patient or his representative is the proper plaintiff. Various acts of a doctor may give rise to an action in medical negligence. This work considered a number of such acts that have been held to have amounted to medical negligence by both Nigerian and foreign Courts. These acts include inter alia, the retention of objects in operation sites; failure to attend and or give prompt attention; incorrect diagnosis; failure of communication; incompetent assessment of a patient; failure to take full medical history; errors in treating patients; improper administration of injection; and failure to get the consent of the patient. The list of the acts that may amount to medical negligence as discussed in this work, is not exhaustive; all that the law requires is that whatever act is complained against, the act must meet the criteria of the law on the necessary ingredients of the tort of negligence.

Also, it was established that a plaintiff in an action for medical negligence must prove three necessary ingredients of the tort to it; that the defendant owed him a duty of care, that the defendant breached this duty of care, and that the breach occasioned the injury suffered by the

plaintiff. These ingredients must be established concurrently and failure to proof any of the ingredients leads to the failure of the case of the plaintiff. On the duty of care, it was found that by the nature of the relationship between the doctor and the patient, and also arising from the “neighbour” principle, the doctor owes the patient a duty of care which duty he must not breach. The standard of care required of the doctor is generally that degree of care which a reasonable person should exercise in same or similar circumstances. A doctor will be said to have acted within the scope of this duty if he acts towards the patient, as any reasonable doctor in his position and within the same circumstance will act. The next ingredient of medical negligence as seen in this work is that it must be shown that the doctor breached his duty of care. This breach occurs where the doctor or the hospital fails in its duty of care owed to the patient, as required by law. It was found to be trite law, that for a doctor to held liable for breach of duty of care, he must be found to have acted below the standard of care expected of him in the particular circumstance, and the test for determining whether or not there is a breach of duty is an objective test of what the reasonable doctor in that circumstance will do. The final ingredient which must be proved is that the breach of duty of the doctor or health care giver was the cause of the injury of the patient. In order to succeed in proving this ingredient, the plaintiff must also show that the breach of the doctor was the direct cause of the injury and that the breach was not too remote the cause of the doctor’s breach.

The principle of causation and remoteness of damage best explains this rule and they were held to be applicable under Nigerian law. The distinction has to be made between medical mistake which is excusable in law and mistake which will constitute negligence. In medical mistake, the law regards as excusable this is because the court accepts that ordinary human fallibility preclude liability, while in mistake that constitutes negligence, the conduct of the defendant is considered

to have gone beyond the bounds of what is expected of the reasonably skillful or competent doctor. The true position is that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by reasonably competent professional man professing to have the standard and type of skill that the defendant holds himself out as having, and acting with ordinary care, then it is negligence. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligent. It should be noted that gross mistake is always treated as medical negligence.

5.2 Recommendations

In order to eliminate or minimize this ugly situation of negligence in medical care in Nigeria, the following recommendations are pertinent:

- (a) We recommend that Hospitals should employ only qualified health practitioners in order to improve healthcare delivery in Nigeria.
- (b) To enhance the deterrent effect of the law and restore public faith in the regulatory system, it is recommended that the Medical and Dental Practitioners Act be amended to achieve the following:
 - i. Introduce strict statutory timelines for the conclusion of investigations and hearings by the Medical and Dental Practitioners Investigation Panel and Tribunal, thereby curbing inordinate delays.
 - ii. Enhance the punitive and remedial powers of the Tribunal, including increased fines and the power to order retraining or payment of compensation to victims.
 - iii. Mandate the maintenance of an easily accessible, online public register of practitioners, detailing their license status and any disciplinary sanctions. The law should provide stiffer punishment in general for gross negligence so as to deter quacks from toying with lives of

the vulnerable who consult them for medical treatment. Such a step would promote a better and safer health care delivery system in Nigeria.

- (c) The duty to obtain informed consent is a cornerstone of the practitioner-patient relationship. It is recommended that the National Health Act be amended to statutorily define the elements of informed consent, mandating a documented process that includes disclosure of diagnosis, proposed treatment, material risks, alternatives, and the patient's right of refusal. The development and mandated use of standardized, multilingual consent forms for specific procedures would create an incontrovertible evidentiary basis for establishing whether this fundamental duty of care was fulfilled or breached. We also recommend that the health care stakeholders and policy makers should put in place legal and legislative measures to curb this menace while clinicians for the sake of obligation should ensure that they maintain the highest standard of patients care in their practice.
- (d) We recommend that there is a need to emphasize early medical ethics training for health care professional at the undergraduate level as well as promoting and organizing workshops to constantly keep them well-informed.
- (e) We recommend that the public from time-to-time should be encouraged to report any case of suspected negligence and medical errors in order to have documented evidence on the rate of occurrence. This in turn will help the health policy makers and medical regulatory body (NMDC) to understand the extent of the health problem and finding out the best method to reduce the rate of occurrence in the health care sector.
- (f) The complexity of medical negligence claims often leads to protracted litigation. It is recommended that the National Judicial Council (NJC) issue Practice Directions for the establishment of a dedicated Medical Negligence and Malpractice Track within the High

Courts of each State and the FCT. Judges assigned to this track should undergo continuous specialized training in medical jurisprudence. This would foster judicial expertise, ensure consistency in adjudication, and expedite the resolution of claims.

(g) Nigeria should, like the United States of America, adopt a no-fault system in medical negligence cases as this will reduce the enormous burden of proof on the plaintiff. This is in the light of the established difficulty of proving the physician's fault in Court actions. In the alternative, the burden of proof in medical negligence cases can be shifted to the defendant to show that he was not negligent in treating the patient. This will go a long way in solving the problems attached to the proof of medical negligence.

5.3 Contributions to Knowledge

Existing literature on duty of medical care tends to treat the duty of care piecemeal (medical ethics texts, scattered case reports, regulatory guidance), this study consolidates these sources into an integrated legal framework specific to the Nigerian context, and provides a clear, systematically organized statement of what the duty of medical care requires under current Nigerian law, synthesizing statutes, regulations, professional codes and leading case law expressed in operational terms for medical practitioners, lawyers and policymakers.

5.4 Areas of Further Studies

In line with the topic under discourse, the following topics would be important for further studies;

- (a) The scope and enforceability of informed consent in Nigeria: balancing cultural norms, literacy levels, and legal standards.
- (b) The adequacy of existing negligence laws in protecting patients in Nigeria.
- (c) Liability in the use of Artificial Intelligence (AI) for diagnosis and treatment.

(d) Data protection and confidentiality of electronic medical records under the Nigeria Data Protection Act (NDPA) 2023.

(e) The role of continuing professional development (CPD) in reducing medical malpractice.

5.5 Conclusion

While there has been some progress in the health care system in Nigeria over the years, there is still a long way to go before the health care system is set to achieve the required world standards. The health care system in Nigeria is still below the standard and medical practitioners are still not performing their duties as required by law. It has been established in legislations and case laws that medical practitioners are obliged to act reasonably in the performance of their duties and if they fail to do so, they are liable for medical negligence. A patient can institute an action in court where his/her right to health care guaranteed under the Constitution has been breached and remedy may also arise from such breach. To conclude, private and public hospitals must be effectively monitored to the effect that medical certifying bodies must provide or show that the recipient of such certification have proven or demonstrated integrity, competence, and professionalism in the medical profession. Effective monitoring must be in place to routinely and consistently observe medical inventories of public and private hospitals. Human right advocacy groups should be more proactive in this case, in helping patients with the litigation process which is usually expensive, time and resource consuming.

It will be necessary to encourage managers of the health care delivery system in African countries to increase education by organizing public lectures and workshops on the role that families, caregivers, custodians and the general public, need to play to reduce this escapable, needless and preventable occurrence.

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