Ethical and legal Consequences of Medical Negligence in Nigeria's Healthcare system

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Dedication

This research work is dedicated to the glory of God Almighty, the God of all dreams and visions, who in his mercies and grace enabled me to have life and live up to this moment to see this dream come to pass. He alone is worthy of praise.

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Even though the above-mentioned institutions and persons have assisted in the process of this research work, I alone stand responsible for the errors, if any, found in the work.

Abstract

Health is a crucial asset for human existence. The relationship between health care providers and patients is one built on trust, with an inherent expectation that medical practitioners will act in the best interest of their patients. However, this delicate balance can be disrupted when a patient suffers harm as a result of medical negligence which may in turn trigger questions of legal liability. The study critically appraised Ethical and legal Consequences of Medical Negligence in Nigeria's Healthcare system.

This study will use a doctrinal approach to analyze legal rules in primary source, including the Constitution of Nigeria, Medical and Dental Practitioners Act, Rules of Professional Conduct, The Nigerian Criminal Code, The Nigerian Penal Code, and Evidence Act, as well as secondary source which including textbook, articles in journals and relevant internet material.

This research discovered that despite 80% of medical practitioners having some education related to medical ethics, the incidence of medical negligence and unprofessional conduct in the Nigerian health care sector does not reflect the knowledge base of a system of accountability.

In conclusion, the health workforce should undergo routine re-orientation, including training in Interpersonal Communication skills and work ethics, to enhance client satisfaction and improve care quality. Recognition, reward, and sanctions will be implemented, and mechanisms for performance monitoring will be established.

Keywords: Medical negligence, ethics, legal consequences, health care system, medical practitioners, re-orientation, interpersonal communication skill, mechanism, monitoring.

Word Count: 215

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

A legal duty of care requires people to refrain from hurting other people in a civilised setting. When doing something that might injure someone else, you have a legal duty to take reasonable care. If someone doesn't follow this obligation, there is a breach that can result in financial, emotional, or bodily harm that can be repaired by legal means. The relationship between health care providers and patients is one built on trust, with an inherent expectation that medical practitioners will act in the best interest of their patients. However, this delicate balance can be disrupted when a patient suffers harm as a result of medical negligence which may in turn trigger questions of legal liability. Health is a crucial asset for human existence, ensuring wealth generation and productive lives. Ill health can hinder productivity and reduce economic power. A healthier life is essential for human existence, and raising health concerns is a matter of immense concern as good health is essential.

Medical injuries can be caused by medical professionals who have attended to the patient. The court determines negligence by assessing the standard of skill expected from the practitioner in the medical context against customary practice. The slogan "WE CARE, BUT GOD HEALS" in hospitals serves as a warning and a cause for relief. However, not all medical practitioners follow this rule and ethics of the medical profession, as many patients die before, during, and after treatment which are result of their negligent act. Negligence can lead to serious errors, permanently impacting victims with emotional and physical consequences. A doctor owes certain duties to their patient, and a breach of these duties can lead to a cause of action for

negligence. The standard of care required by a medical practitioner is an objective one, based on the standard of an ordinary reasonable medical practitioner in the defendant's shoes. Factors affecting this standard include the locality or society, availability of relevant medical facilities, specialist skill of the practitioner, accepted medical practice, and whether there was an emergency.

Medical ethics is an essential field of study for healthcare professionals globally, emphasising moral principles and assessments in the medical field. It is still important today, having originated in ancient civilisation. Ethics, with its Greek roots, is the science of understanding and analyzing what is wrong and right, good and bad, admirable and deplorable, acceptable and unacceptable. It is the application of values and moral rules to human activities, including healthcare. In healthcare, it encompasses respect for autonomy, privacy, freedom of choice, control, not causing harm to others, beneficence, nonmaleficence, promotion of welfare, and justice, especially equity in benefits and access to healthcare delivery.

The legal concept of medical negligence originated with the Donoghue V. Stevenson decision in 1932, which established a broad responsibility to use reasonable care to prevent foreseeable harm to another person. It must be demonstrated that a duty of care was due, the duty was broken, and that the harm or damage was the direct result of the break in order to prove carelessness. Physicians have a responsibility to provide treatment for all patients, including those who are not directly under their supervision. In many places, such as Nigeria, the Medical and Dental Council of Nigeria, professional ethics regulations establish the standard of care for medical practitioners. The Nigerian Medical Association and the Medical and Dental Consultants Association of Nigeria are two more medical organisations that have ethics principles and disciplinary measures in place to ensure compliance.

In Nigeria, healthcare systems suffer from a lack of manpower and infrastructure, leading to 80 percent of incidents resulting in death or serious injury. Medical litigation is a process where a client files a lawsuit against a physician over perceived wrong treatment. In Nigeria, patients suspected of negligence have the right to petition the Nigerian Medical and Dental Council and report a case of negligence. The goals of malpractice litigation include deterring unsafe practices, compensating injured individuals, and ensuring corrective justice. However, in Nigeria, medical negligence is a global health problem, and legal action against erring health workers and institutions is not available.

1.2 Statement of the Problem

This study aims to address the standard of care expected of medical practitioners, particularly the ethical implication of negligent practice by healthcare professional and how the Nigerian legal system addresses issues of compensation, liability and practical measures for victims of medical negligence. Despite 80% of medical practitioners having some education related to medical ethics, the incidence of medical negligence and unprofessional conduct in the Nigerian health care sector does not reflect the knowledge base of a system of accountability. This is a significant problem, as the knowledge of medical ethics by Nigerian doctors is inadequate. Legal obligations are not well marshaled to ensure that unethical behavior can lead to career loss or criminal action. Furthermore, adequate research has not been conducted to reveal the challenges and opportunities that underlie the interplay between medical ethics and legal obligation in the administration of health care. The study also questions whether a cursory look at decided cases could shed light on future occurrences or help interpret the relationship between medical ethics and the legal obligation of key stakeholders in the Nigerian health care sector.

1.3 Aim and Objectives of Study

The aim of the study is to analyze the intersection of medical ethics and legal obligations in Nigeria while the specific objectives of the research are to:

1. Discuss the medical ethics available in health care.
2. Evaluate the predominant problems encountered by litigants in the pursuit of remedy for acts of medical negligence.
3. Examine the body of laws and regulations available in the medical issues in Nigeria.

1.4 Research Questions

1. What are the medical ethics available in health care?
2. What are the predominant problems encountered by litigants in the pursuit of remedy for medical negligent acts?
3. How does the body of laws regulate medical ethics in Nigeria?

1.5 Significance of the Study

The popular adage is that health is wealth and that all round health consist of soundness of mind, body, soul, and spirit. It is because of this selfsame importance of health that its administration must be done ethically not negligently. The law creates a duty of care and a duty if confidentiality often described as Doctor - Patient privilege to guide the way and manner in which the parties relate with them. In the medical profession the basic qualifications necessary are generally the possession of degrees from an accredited university with well recognized and well-rounded curriculum. The guiding principles around ethics are honesty, dedication, and

commitment among other values.[1] Members of the medical profession are governed by standards which emerge from the ethics of the profession. The relationship between the physician and patient is not a simple one but one undergirded with morality and law and inherent conflict. This research is significant in that it identifies those intersections between medical ethics and law or legal obligations. Many instances abound where law and morality collide in healthcare. A very ready example is a situation where the physician is to either remove a life threatening fetus in order to save the life of the mother or taking chances by leaving the fetus to grow to term. The issue if euthanasia or mercy killing is a still hotly debated and unsettling area where the reality of conflict between law and morality meets head on. The issue of legalizing abortions is a major area of conflict between morality and law but this seems to be confined to the West at the moment especially for life preserving reasons, with some western nations, already taking the lead constitute some of the areas of clear interplay of law and morality in health care. In Nigeria, we have instances where patients are left to die for not buying a card at the hospital or making certain payments for treatment to commence. All these issues considered together make the research quite timely. In identifying or attempting to identify the intersections or overlap between medical ethics and law especially Nigerian law side by side the attendant challenges and opportunities would offer up a novel perspective to the discussion opening the way for practical recommendations to be made herein.

1.6 Scope of the Study

The study keenly focuses on Medical and Health law covering particularly the issues of proper physician-patient relationship and consequences for medical negligence accountability and

[1] Justus Sokefun, 'Medical Ethics, Law, and the Right to Health in Nigeria' (2018) 4 *Human Rights and Jurisprudence Journal* (HRJJ), 8-33.

development. The legal framework consisting of laws and regulations regulating medical ethics and legal obligations of medical persons also form central focus in this work. Consequently, with this focus the work can be a tool for explaining the lacklustre development of medical law sub-Saharan Africa particularly Nigeria. The purpose of this research is limited to what is obtainable in Nigeria specifically, although reference is made to international health standards and legal framework for other jurisdictions would be referenced occasionally. The time period of the research is focused on the current dispensation of health care development and treatment in Nigeria even though in several parts of the research foundation is laid by making reference to historical antecedents and international law position on the subject of research.

1.7 Methodology

This study shall utilize a doctrinal approach towards achieving the research objectives. Descriptive and detailed analysis of legal rules found in primary sources, such as, cases, statutes, or regulations, will be made reference to. This will then involve the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the Medical and Dental Practitioners Act, Rules of Professional Conduct for Medical and Dental Practitioners, The Nigerian Criminal Code, The Nigerian Penal Code and the Evidence Act While secondary authorities, which comprises relevant information from leading authorities, textbooks on the subject matter of the research, online sources, journal articles, opinions of specialists and practitioners on aspect of law relating thereto.

1.8 Synopsis of Chapters

Chapter One: this chapter deals with the foundation of the research by laying the groundwork for the preceding chapters. Hence, it includes the Background to the study, Statement of the

problem, Aim and objectives, Research questions, Significance of the Study, Scope of the Study, and Methodology.

Chapter Two: this chapter reviews previously published works exposing the lacuna and area necessitating further research for the future. It will further appraise different concepts of law in relation to the subject matter.

1.9 Definition of Terms

The following terms wherever used throughout the research shall carry the meaning herein expressed in this part.

Health

Health is a state of complete physical, mental and social wellbeing and not merely the absence of infirmity[2]. In fact, the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, belief, economic or social condition[3].

Ethics

Ethics refer to rules and principles that ensure right conduct and it touches every facet of life.[4] Ethics also refer to moral standards whether documented or not but which should be obeyed to ensure sanity and probity in the health care sector.

Medical Ethics

Medical Ethics refer to rules, Principles, medical oaths and codes that prescribe a physician's character, prices, duties, etc which are expected to produce a right conduct and this is ideally

[2] World Health Organization, Basic Documents (49th edn, World Health Organization, 2020).
[3] Declaration of Alma-Ata International Conference on Primary Health Care, Alma-Ata, USSR, 6-12 September 1978
[4] Clement Osime 'Understanding Medical Ethics in a Contemporary Society' (2008) 10(2) *Benin Journal of Postgraduate Medicine*, 2

designed to guide members of the medical profession in their patients and with their states.[5] The Hippocratic Oath is the most prominent encapsulation of medical ethics because it mandates the Oath takers would be physicians to strive to help their patients and do no harm. Medical Ethics focuses on ensuring a healthy balance between the physician and the patient.

Legal

Legal simply means founded in law, conforming to the law, created by law, or recognized by law[6]. The description of any phenomenon as legal means it is relating to law; falling within the province of law[7].

Obligation

A generic word derived from the Latin substantive '*obligatio*' meaning that which a person is bound to do or forbear. An obligation is also a moral or legal duty which renders a person liable to coercion or punishment for neglecting it[8].

Negligence

Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do[9]. It is the breach of duty to take care; imposed by common law or statute.

> *You must take care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neigbour. Who, then in law, is my neigbour? The answer seems to be a person who is so closely and directly affected*

[5] Ibid at 2
[6] Henry Campbell, *Black's Law Dictionary* (4th edn, West Publishing 1968) 1038
[7] Bryan A. Garner, *Black's Law Dictionary* (8th edn, West Publishing 2004) 2844
[8] Ibid at 1223
[9] *Blyths v. Birmigham Waterworks Company* [1856] II Ex. CH 781

> *by my act that I ought reasonably to have them in contemplation as being so affected when I was directing my mind to the acts or omission which are called in question.*[10]

The dictum above constitutes the basis of the doctrine of negligence in the law of tort. Also, in the case of *Kabo Air Ltd v. Mohammed*,[11] the Supreme Court of Nigeria held that negligence is the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation. It is also any conduct that falls below the legal standard established to protect others against unreasonable risk of harm.

Thus, the dictum suggests the existence of a general duty of care towards anyone who is likely to suffer injury through the defendant's careless conduct. Even though the rule was propounded in the context of a manufacturer/consumer relationship, it is applied as a general principle beyond the initial context in which it was propounded. This dictum has proved the foundation upon which countless cases of alleged negligence have been tried and still continue to be judged. If a duty of care exists then the next inquiry is whether the defendant's conduct was in breach of such duty[12]. The mere occurrence of some misfortune does not as a rule make someone automatically liable. The judge must look at the evidence and decide whether or not the defendant did something he ought not to have done or failed to do that which he ought to have done. The judge is then guided in deciding whether a 22defendant is liable by applying the test stated in *Hazel v. British Transport Commission*[13] where Pearce J said:

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[10] (As decided by Lord Atkin in the landmark case) *Donoghue v Stevenson* [1932] AC 562.

[11] [2015] 5 NWLR (PTt. 1451) 38

[12] Hubart Community Legal Services 2018 'Negligence and Duty of Care' <https://www.hubartlegal.org.au/handbook/accidents-and assurance/negligence-and-duty-of-care> assessed 18, December, 2023

[13] [1958] 1 WLR 169; see also *UNILORIN Teaching Hospital v. Abegunde* [2015] 3 NWLR (Pt. 1447) 421 CA. at 440, Paras D-F**;** *Abubakar v. Joseph* [2011] 13 NWLR (Pt. 1104) 307.

> *The basic rule is that negligence consists in doing something which a reasonable man would not have done in that situation or omitting to do something which a reasonable man would have done in that situation.*

After it is established that the defendant owed a duty of care, which he has breached; of which such damage could be a physical one, for instance a broken leg. The first thing to do is to determine as a matter of fact whether indeed the defendant's breach of duty led to the damage and this is referred to as causation of the facts[14]. Generally, tort law offers compensation for personal injury under intentional torts like assault and battery and the tort of negligence as well as strict liability torts like compensation for hazardous activities under the rule in *Rylands v Fletcher* and liability for keeping dangerous animals. Within the negligence principle, there are many heads of claims which encompass occupier's liability, professional or medical negligence, road and other commuting accidents, employers' liability and product liability *inter alia*. Thus, Medical negligence as a specie of negligence is a type of professional negligence in which a medical doctor or practitioner is liable to his patient for professional misconduct[15]. It is against this background that this study sets out to examine the prospects and challenges of medical negligence under the Nigerian statutes.

Neighbour

This means a person who is so closely and directly affected by one's act that one ought reasonably to have them in contemplation as being so affected when one was directing his mind to the acts or omission which are called in question[16].

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[14] William Vaughan Horton Rogers, *Law of Tort,* (11th ed, London, Sweet & Maxwell, 1979), 234.

[15] Oluwakemi Adekile, 'Compensating victims of personal injury in tort: The Nigerian Experience so far'. [2013] *AUDJ* 9, 144–158

[16] *Donoghue v. Stevenson* (1932) AC 562.

Causation

This refers to the acts that constitute the breach of duty. The consideration here is for the claimant to establish that the breach of duty caused or was responsible for the injury occasioned to him. There are two aspects to the causation requirement, namely, causation in fact and causation in law, otherwise known as the remoteness of damage.

Health

According to the world health organization, Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity[17]. The international labor organization equally defines health as the promotion and maintenance of the highest degree of physical, mental and social well-being of workers in all occupations by preventing departures from health, controlling risks and the adaptation of work to people and people to their jobs. Living a healthy life is a fundamental requirement to long life. Healthy living is not always about not being sick or feeling sick for that matter. It is also about mental health and social well-being. Maintaining a healthy life at the workplace is very important as this reflects in the output of an individual. (Nigerian laws on health).

Safety

Safety is described as the condition of feeling safe from injury, risk and danger. In other words, when one is safe, it means that one is protected from potential harm. Safety at the workplace is very necessary because when employees feel safe in their working environment, productivity is affected positively. Also, enforcing safety protocols mean that not only are employees safe but the entire environment is safe. The international labour organization has set out more than 40

[17] Ibid.

standards aimed at improving occupational safety and health. It also has about 40 codes of practice and these include, safety in health and mines convention, safety and health in agricultural convention, radiation protection convention, chemicals convention among others[18]. (Nigerian laws on safety)

Health and safety are a general term used to refer to laws, rules, regulations[19] and efforts put in place to protect the safety and health of employees and the public as well as the environment from workplace associated hazards. This also means that it is what organizations must do in order not to harm anyone. The National Policy on Labour is based on the provisions of Section 17 of the 1999 Constitution of the Federal Republic of Nigeria[20] which provides that "the State social order is founded on the ideals of Freedom, Equality and Justice".

[18]International Labour Organization on Occupational Safety and Health <https://www.ilo.org/international-labour-standards/subjects-covered-international-labour-standards/international-labour-standards-occupational-safety-and-health> accessed 24th October, 2023.

[19] Digital Learning Techniques for Effective EHS Training < https://blog.commlabindia.com/training-solutions/elearning-to-create-engaging-ehs-training > accessed 20, December,2023
2023.

[20] Constitution of the Federal Republic of Nigeria, 1999.

CHAPTER TWO

LITERATURE REVIEW

2.1 Conceptual Framework

2.1.1 Fundamental Concepts under Tort of Negligence in Nigeria

Negligence as a tort is a breach of legal duty to take care of one's neighbor, which results in damages undesired by the defendant to the plaintiff. This suggests that there is a sort of duty with other surrounding factors which the claimant must assert to have been found in law before the court will consider him meritorious to be awarded a remedy in law. In domesticating this common law concept, section 217 of the *Torts Law of Anambra State*[21] defines negligence as

> *civil wrong shall consist of breach of a legal duty to take care which results in damage, which may not have been desired or even contemplated by the person committing the breach, to the person to whom the duty is owing.*

This whole concept of what the claimant must do in a claim on negligence was summarized by Oguntade JSC in *U.T.B. v. Ozoemena*[22] as follows:

> *…to maintain an action for negligence it must be shown (a) that there was a duty on the part of the defendant towards the person injured (b) that the defendant negligently performed or omitted to perform his duty (c) that such negligence was the effective causes of injury of damage to the plaintiff. See Mc Dowall v. G. W. Ry (1903) 2 K.B. at page 338. The onus of proving that the result of the negligence was the effective cause of the injury is upon the plaintiff. See Ruoff v. Long (1916) 1 K.B. 152. The defendant is responsible for all the consequences he could foresee or reasonably be expected to foresee as the*

[21] *1986 Cap 135*

[22] (2007) 3 NWLR (Pt.1022) 448; *Abubakar v Joseph* (2008) 13 NWLR (Pt 1104) 307, *Iyere V Bendel Feeds and Flour Mills Ltd* (2008) 18 NWLR (Pt 1119) 300, *GKF Investment Nigeria Ltd V Nigerian Telecommunications Plc* (2009) 15 NWLR (Pt 1164) 344 and *Diamond Bank Plc V Partnership Investment Co Ltd.*

> *natural result of his negligent act or his negligent act or omission See Clark v. Chambers (1878) 3 Q.B.D. 327. The defendant is also liable for all the direct physical consequences even though they could not have been foreseen.* See *Ire Polemis and Rurness Withy (1921) 3K.B. 560. The statement of claim 'ought to state the facts upon which the supposed duty is founded and the duty to the plaintiff with the breach of which the defendant is charged'. Particulars must be given in the pleading showing in which respect the defendant was negligent, and the details of the damage sustained…*[23]

The above suggests that the claimant in a claim predicated on negligence has to establish certain ingredients which are as follows:

i. a legal duty on the part of A toward B to exercise care in such conduct of A as falls within the scope of the duty
ii. breach of that duty
iii. consequential damages to B.[24]

The necessary objective attitude of the court to this tort is made clear in what Alderson, B said in *Blyth v. Birmingham Waterworks*[25]

> *Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do*[26].

Thus the doctrine of negligence have therefore, evolved three basic elements which are preconditions for the success of any case on negligence.[27] These requirements are discussed *ad seriatim.*

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[23] Section *218, Torts Law of Anambra State*

[24] *Lufthansa German Airlines v Ballanye* (2013) 1 NWLR (Pt. 1336) 527, *Nigerian Airways Ltd. V Abe* (1988) 4 NWLR (Pt. 90) 524; *Anyah V. Imo Concorde Hotels Ltd* (2002) 18 NWLR (Pt. 799) 377; *Agbonmagbe Bank Ltd. V. CFAO* (1966) 1 All NLR 140 at 145

[25] *Blyth v. Birmingham Waterworks* (1856) II Ex. CH 781

[26] Daniel Akhabue, 'Negligence in Nigeria- Not at claimant's beck and call' (2012) 1 (6), *International Journal of Law and Legal Jurisprudence Studies*, 2

[27] Benedicta Susu, *Law of Torts*, (Lagos: CJC Nig. Ltd. 1996) p. 89

2.1.2 The Concept of Duty of Care

It is not for every careless act that a man may be held liable in law. It is important to examine what a plaintiff who alleges negligence would have to prove.[28] The most accepted expression of the duty principle is the one made by Lord Atkin in the leading case of *Donoghue v Stevenson*.[29] The plaintiff's friends bought her a ginger beer in a café, she drank some of it and as she was helping herself to a second glass, the remains of a decomposed snail floated to the top of her glass. The nauseating sight of this and the impurities she already drank resulted in a shock and severe gastroenteritis. The case went all the way to the House of Lords on the preliminary issue as to whether a duty of care existed. The question for the House of Lords to decide was: if a company produced a drink and sold it to a distributor, was it under any legal duty to the ultimate purchaser or consumer to ensure reasonable care that the article was free from defect likely to cause injury to health? Lord Atkin stated that the English law states that there must be and is, some general conception of relations given rise to a duty of which the particular cause found in the books are but instances. He went on to lay down the basis of the present law in the "neighbour" principle in this much–quoted passage:

> *The rule that you are to "love your neighbour" and the lawyer's question saying 'who is my neighbour' receives a restricted reply. You must take 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? The answer seems to be a person who is so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I was directing my mind to the acts or*

[28] *Donohue v. Stevenson* (1932) A.C. 562, 580.

[29] Ori Herstein 'Responsibility in Negligence: Why the Duty of Care is not a Duty to try' (2010) 23 (02) *University of Western Ontario Law Review* 402-428

omission which are called in question[30].

This statement suggests the existence of a general duty of care towards anyone who is likely to suffer injury through the defendant's careless conduct. Even though the rule was propounded in the context of a manufacturer/consumer relationship, it is applied as a general principle beyond the initial context in which it was propounded[31]. This text has proved the foundation upon which countless cases of alleged negligence have been tried and still continue to be judged. If a duty of care exists then the next inquiry is whether the defendant's conduct was in breach of such duty.[32] The mere occurrence of some misfortune does not as a rule make someone automatically liable. The judge must look at the evidence and decide whether or not the defendant did something he ought not to have done or failed to do that which he ought to have done. How then is the judge to decide whether a defendant is liable? What test can the judge then apply? In *Hazel v. British Transport Commission*[33] Pearce J said:

> *The basic rule is that negligence consists in doing something which a reasonable man would not have done in that situation or omitting to do something which a reasonable man would have done in that situation.*

The first constituent element of negligence, which is one of the bases of establishing culpability in respect of product defect, is the existence of a duty of care. The duty in question must be a legal and not a moral one. What does a duty of care connote and when does it arise? To Dias,

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[30] Ibid.

[31] The principle now applies to many kinds of contractual relationships which did not leave out the aspects of negligent misstatement as shall soon be seen. *Hedley Byrne & co. Ltd v. Heller & partners Ltd* (1964) AC 465

[32] Komolafe Akinlabi Obafemi, *Medical Negligence Litigation in Nigeria: Identifying the Challenges and Proposing a Model Law Reform Act,* (unpublished) Ph.D Thesis submitted to the Trinity College, Dublin, 2017, P. 107.

[33] [1963] 2 ALL ER at 864.

'duty is seen as a notional pattern of behaviour,[34] while to Winfield, duty means a restriction of the defendant's freedom of conduct; and the particular restriction here is that of behaving as a reasonably careful man behave in similar circumstances'[35].

Onyemenam, J.C.A. in *P.W. (NIG.) LTD v Mansel Motors LTD & anor*[36] has the following to say about duty of care;

> *A duty of care arises whenever a person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger...*[37]

Meanwhile, the existence of a duty of care depends on the facts of each case as it is not a fixed situation[38]. Describing what a duty relation connotes, Morrison[39] observed as follows:

> *By duty situation is meant a situation described by reference to the particular characters and relations of the parties involved in it recognized by the courts as giving rise to a legal duty to take care. Such, for example, are the duty situations of occupiers and invitee, manufacturer or repairer of chattels and the user of the chattels. It is a short method of referring with some particularity and correctness to the specific set of concrete circumstances*

[34] Reginald Dias, '*The Duty Problem in Negligence Cases*' (1928), 13 (2) *Cambridge Law Journal* 98-214
[35] Ibid.
[36] Gbade Akinrinmade, 'The Jurisprudence of Product Liability in Nigeria: A Need to Complement the Existing Fault Theory', (2016) 7 (2), *Afe Babalola University Journal Of Sust. Dev. Law & Policy*, 194.
[37] Ibid, P. 11, Paras. F-A; *Anyah V. Imo Concorde Hotels LTD*. (2002) 18 NWLR (PT.799) 377.
[38] This position of the law is inevitable because what amounts to negligence is not law but a question of fact which must be decided according to the facts and circumstances of a particular case. See *Kallza v. Jamakani Transport Ltd*. (1961) ALL NLR 747; *Ngilari v. Mothercat Limited* (1999) LPELR SC; (1999) 13 NWLR (PT. 636) 626
[39] W.L Morrison '*A Re-examination of the duty of care'* 1948, 11 Mod. LR 9

giving rise to the duty of care in the individual case[40].

Brett, M. R., in his own contribution to this issue in the case of *Heaven v. Pender*,[41] observed as follows:

> *Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.*

Thus a doctor owes his patient a duty of care. The law on Medical negligence provides the injured patient, the right to a cause of action for negligence on every occasion he or she suffers any harm from the negligent act of a medial practitioner[42]. The rationale behind this is that doctors owe duty of care to take care of their clients. Suffice to say that a patient can maintain medical negligence against a doctor who is not careful in his or her treatment. Such doctor could be held liable for damages in a civil court or criminally liable. In order to determine whether or not a doctor owes his patient a duty of care, the case of *Caparo Industries Plc v Dickman*[43] lays down the following standards:

i. Was the injury reasonable foreseeable?

ii. Was the relationship proximate?

iii. Is it fair and reasonable to impose a duty of care?

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[40] Ibid; also, it is not enough for a plaintiff to make a blanket allegation of negligence; he must state the particulars of duty of care owed to him by the defendant. See *Diamond Bank Ltd. v. Partnership Investment Co. Ltd. & Anor* (2009) 18 NWLR (PT. 1172) 67; *MTN Nigeria Communications Ltd v. Mr. Ganiyu Sadiku* (2013) LPELR 27705 CA

[41] (1883) 11QBD 503

[42] Yinka Olomojobi, *Medical and Health Law, The Right to Health* (Lagos: Princeton & Associates Publishing Co. Ltd, 2019) p. 143

[43] (1990) 2 AC 605

If the above questions are answered in the affirmative, then it is probable that doctors owed his/her a duty of care. It must also be noted that where a person attempts to practice medicine has a case of negligence alleged against them, they are judged with the same standards as qualified doctors.[44] International Code of Medical Ethics also states that,[45] "a physician shall owe his/her patients complete loyalty and all the scientific resources available to him/or her. This position is also buttressed by the Declaration of Geneva[46] which states among others that the health of my patient will be my first consideration.

From the foregoing, it is evident that a doctor owes his patient a duty and a shortfall in the delivery of such could amount to extreme complications, the worse and the most frequent of which is death. It is also interesting to state that the relationship between a doctor and his patient is fiduciary in nature. This type of this relationship is described as follows[47]:

> *A doctor passing by an accident on the road is under no duty to stop and render first aid, but if he undertakes to do so, he has to exercise some degree of care. However, he could not be expected to achieve the same standard in the emergency as would be expected of him were the victims brought to him in a properly equipped hospital.*

Also, Black's Law Dictionary[48] also described fiduciary relationship as a relationship which one person is under a duty to act for the benefit of another on matters within the scope of the relationship.

After it is established that the defendant owed a duty of care, which he has breached; of which

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[44] i. e. native doctors who practice as qualified medical doctors
[45] Adopted by the 3rd General Assembly of the World Medical Association, London, England, by October, 1949
[46] As Adopted by the Second Assembly of the World Medical Association , Geneva, Switzerland, September 1948
[47] Eunice Uzodike and Enosakhare Akpata, *The Doctor and The Law: Professional Negligence and Medical Ethics* (Lagos: Lagos State University Press, 1983) p. 56
[48] B.A Garner op. cit. p. 1402

such damage could be a physical one, for instance forgetting a needle in the abdomen of the patient. The first thing to do is to determine as a matter of fact whether indeed the defendant's breach of duty led to the damage and this is referred to as causation of the facts .The second stage is to determine as a matter of law whether the injury was not remote. This is referred to as remoteness of damage in law.

2.1.3 The Concept of Breach of Duty of Care

The second constituent element necessary to establishing liability is for the claimant to establish that the defendant breached the duty owed. The idea behind breaching a duty presupposes that the defendant is handling a particular object or doing something which, if not properly managed, would lead to discomfort of certain persons. This illustration was summed up by the following passage culled from *Baker V. Longhurst & Sons Ltd.*[49] where Lord Scrutton L.J observed thus:

> *If a person rides in the dark he must ride at such pace that he can pull up within the limit of his vision and if, in those circumstances, he strikes something, either he is going too fast or he has not been keeping a proper look out.*

Alderson[50] describing what negligent act entails posited as follows:

> *Negligence is the omission to do something which a reasonable man, guided by upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do*.[51]

Breach of duty to take care occurs where the defendant conducts himself in a way that falls below the legal standard established to protect others against unreasonable risk of harm. To

[49] (1933) 2KB 461 at 468
[50] In Donoghue's case (supra)
[51] *Blyth v Birmingham Waterworks Co* (1856)

determine what a reasonable person would have done in the circumstances and to assess the standard of care expected of him, the court customarily takes into consideration or account what may be called the risk factors, which comprised of the following four elements:

i. The likelihood of harm;

ii. Knowledge;

iii. Skill;

iv. Damages.[52]

For instance, the greater the likelihood of the defendant's conduct causing harm, the greater the amount of caution required of him. In the case of *Northwestern Utilities Ltd* v *London Guarantee & Accident Co Ltd*,[53] Lord Wright opined thus: 'The degree of care which the duty involves must be proportioned to the degree of risk involved of the duty of care should not be fulfilled.' In *Osemobor* v *Niger Biscuit Co Ltd*[54] the court arrived at the conclusion that duty of care owed to the claimant was breached, given that she had no opportunity of intermediate examination of the biscuit in which she found a decayed tooth. For instance, the court in *P.W. (NIG.) LTD v. Mansel Motors LTD & anor* held that a driver driving at night must show that he paid particular attention to his driving, ensuring his speed is such that he can stop within a short range of vicinity visibility.[55]

[52] Gbade Akinrinmade, The Jurisprudence of Product Liability in Nigeria: A Need to Complement the Existing Fault Theory, (2016) 7 (2) *Afe Babalola University Journal of Sust. Dev. Law & Policy,* p. 194
[53] (1935) 53 Lloyds Rep. 67
[54] Ibid
[55] Basil Varkey 'Principles of Clinical Ethics and their Application to Practice' (2021) 30 (1) Medical Principles and Practice' 17

2.1.4 The Concept of Damage

It behooves on the plaintiff to prove that the defendant's breach of duty of care caused the damage complained of. Since the focus of this study is restricted to the province of tort, it must be stated from the outset that the scope of recoverable damages to be discussed will be those permitted under tort law. Once a claimant in a product liability claim can establish that he was owed a duty, which had been breached, consequent upon which he suffered an injury, such claimant is entitled to compensation in the form of damages paid to him[56]. Damages recoverable in a product liability claim can conveniently be grouped as follows: damage to person or property caused by the defective product along with financial losses arising as a result of such damage, cost of effecting repairs in anticipation that a defect in the property may cause damage and consequential loss from such, damage to the defective product itself, cost of remedying a defect inherent in the product which in itself pose threat to person and loss of profit or financial loss caused as a result of the defective nature of the product despite the fact that it does not pose threat of damage to person or the property in question[57].

In deciding this last element of negligence as a tort, there are essentially two main issues involved namely; the issue of causation and remoteness of damage[58].

2.1.5 The Concept of Causation

The consideration here is for the claimant to establish that the breach of duty caused or was

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[56] Mytal Gilboa 'Multiple Reasonable Behaviours Cases: The Problem of Casual Underdetermination in Tort Law' (2019) 25 (2) *Legal Theory* 77-104

[57] *Junior Books v The Veitch Co* [1983]1 A.C.520, *Muirhead v. Industrial Tank Specialities* [1986] QB507, *D.F. Estates v Church Comrs for England* [1988] 2 W.L.R.368, *Murphy v Brentwood District Council*. [1991] AC 398. See also the decision in *Bellefield Computers Services Ltd v E.Turner and Sons Ltd* [2000] BLR 97, *Anns v Merton London Borough* [1978] *AC 728 and Spartan Steel v Martin & Co. Contractors Ltd* [1972] 3 ALL E.R. 705

[58] Gilbert Kodinlinye: *The Nigerian Law of Torts* (Ibadan: Spectrum Law Publishing; 1997) p. 68

responsible for the injury occasioned to him.[59] There are two aspects to the causation requirement, namely, causation in fact and causation in law, otherwise known as the remoteness of damage.

2.1.6 The Concept of Causation in Fact

The first step of the causation enquiry is whether the defendant's breach of duty, in fact, caused the damage.[60] If this question is answered in the affirmative, then the defendant may be held liable if other conditions are fulfilled. In ascertaining whether the defendant's act was, in fact, the cause of the injury sustained by the plaintiff, the 'but for test' test is used.[61] This was adopted in the case of *Barnett* v *Chelsea and Kessington Hospital Management Committee*,[62] the facts of which can be summarized as follows:

> *"The plaintiff's husband, after drinking some tea, experienced persistent vomiting for three hours. He went later that night to the casualty department of the defendant's hospital along with another man who drank tea with him. A nurse contacted the casualty officer, Dr. B by telephone and she informed him of the man's symptoms. Dr. B., who was himself, tired and unwell, sent a message to the men through the nurse to the effect that they should go home to bed and consult their own doctors the following morning. Some hours later, the plaintiff's husband died of arsenical poisoning, and the coroner's verdict was one of murder by a person or persons unknown. In a subsequent action for negligence brought by the plaintiff against the hospital authority as employers of Dr. B., it was held that, in failing to examine the deceased, Dr. B., was guilty of a*

[59] Herbert Hart and Tony Honore, '*Causation in the Law'*, (2nd ed. Oxford: Clarendon Press, 1959), 324
[60] Ilias Plakokefalos, Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity, (2015) 26 (2) *European Journal of International Law,* 471
[61] Wex Malone, Ruminations on Cause-in-Fact, (1956) 9 (1) *Stanford Law Review* 60
[62] [1968] 1 All E.R.1068. See also the cases of *Overseas Tankship (U.K) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound No 1)* 1961 A.C. 388

> *breach of his duty of care, but this breach could not be said to have been the cause of the deceased death because even if he had been examined and treated with proper care, he would in all probability have died. It could not, therefore, be said that 'but for the doctor's negligence' the deceased would have lived*."

The 'but for' act test was also adopted by the court when it dismissed the plaintiff's/claimant's claim in the case of *Nigerian Bottling Company Plc v Okwejiminor & Anor*[63]. In this case, the first respondent claimed against the second respondent and the appellant jointly and severally the sum of (N2,000,000.00) being special and general damages for injuries suffered by him arising from a Fanta drink, which he drank. The first respondent case was that on or about 13 February 1991 at Ughelli, he bought a crate of Coca-Cola mineral drink from the second respondent, an agent of the appellant the manufacturers of Coca-Cola range of mineral drinks. From the crate of drinks, he opened a bottle, took some of its content during which process he felt some sediment down his throat. On examination, he discovered that another bottle of Fanta drink in the same create contained some foreign bodies. He felt uncomfortable and went to sleep without food. The following morning, he developed stomach pain and was rushed to a nearby hospital where he was confirmed to be suffering from food poisoning which could have been caused by the Fanta orange drink which he consumed. He was subjected to some laboratory tests and later discharged. Despite copious evidence in his favour by witnesses, including a medical doctor and a laboratory scientist report, it was held that there was no nexus between his injury and the Fanta drink, which he allegedly consumed. It follows that if there is no nexus between the injury and the breach of duty the defendant would not be held culpable for the resulting damage. If however, the reverse is the case, then the issue of the remoteness of damage comes up for consideration.

[63] *Edward Okwejiminor v Nigerian Bottling Company Plc* (2008) S.C. 67/2002

2.1.7 The Concept of Remoteness of Damage or Causation in Law

Bearing in mind that the consequences of an act of carelessness on the part of a defendant may be far reaching, the concept of the remoteness of the damage came into play to determine the extent of a tortfeasor's liability for the consequences of his negligence.[64] Consequently, the results of an act will be regarded to be too remote if a reasonable man would not have foreseen them. Thus, foreseeability is not only a criterion for the determination of when a duty of care is owed, but also for the question whether a particular damage is or is not too remote[65].

This principle illustrated by the case of *Mange v Drurie*,[66] In this case, the plaintiff was riding his bicycle along the Jos-Bulewa road, when a lorry knocked him down. He suffered an injury to his leg as a result of the careless driving of the lorry by the defendant. Before completion of treatment and against medical advice, he discharged himself from the hospital and did not return until after two days. During the two days period, the leg became infected, and it was eventually amputated. His claim for damages for the loss of the leg was rejected.

The court refused his claim based on the fact that... Compensation will only be awarded in respect of a class of damage which the defendant could reasonably be expected to have foreseen and compensation will not generally be awarded in 'respect of injury sustained as the result of the act or default of the injured party, or to the extent to which the injured party has failed to take reasonable steps to mitigate the damage. In the present case, it was foreseeable that the plaintiff would, as a result of the accident, sustain pain and suffering and also incur medical expenses. But it was not reasonably foreseeable that the plaintiff would, contrary to medical advice, leave

[64] Richard Wright, Causation in Tort Law, (1985) 7 (2) *California Law Review,* 1735
[65] Gbade Akinrinmade, The Jurisprudence of Product Liability in Nigeria: A Need to Complement the Existing Fault Theory, (2016) 7 (2) *Afe Babalola University Journal of Sust. Dev. Law & Policy,* 194
[66] *Mange v Drurie* (1970) NMOR 62

the hospital where the defendant had himself taken him, spend at least two days without proper medical or surgical care or attention, and during that interval pick up an infection that necessitated the amputation of his leg. And, apart from the question of foreseeability, the plaintiff, so far from taking reasonably steps to mitigate the damage, brought upon himself the amputation of his leg by his own ill-advised action.[67]

In a medical negligence claim, like other tort cases, where the chain of causation is broken by an intervening event caused by the act of a third party, the defendant may be exempted from liability depending on the surrounding circumstances of the case. Hart and Honore[68] described succinctly as the free, deliberate and informed omission of a human being, intended to exploit the situation created by the defendant, negates causal connection[69].

2.1.8 The Concept of Negligent Misstatement

The law distinguishes between a duty to take care in respect of act or omissions to act and the duty not to make careless statement[70]. Though no logical reason was given for the distinguishing, but it has. It is submitted here that it may not be unconnected with a way of finding solution to deceit of the society[71]. Note however that, for a careless statement to be actionable the following conditions must be fulfilled:

1. There must be a clear case of careless statement (negligent report)
2. There must be a clear case of reliance on the report

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[67] Ibid.
[68] Herbert Hart and Tony Honore, '*Causation in the Law'*, (2nd ed. Oxford: Clarendon Press, 1959), 324.
[69] Ibid.
[70] *Hedley Byrne & co. Ltd v Heller & Partners ltd*. (1964) AC 465.
[71] Daniel Akhabue, 'Negligence in Nigeria- Not at claimant's beck and call', (2012) 1 (6) *International Journal of Law and Legal Jurisprudence Studies*, p. 11.

3. There must be a loss arising from the reliance[72]

Thus where a careless statement is credited to a person and there is a loss arising from reliance on the careless statement, the defendant will be liable[73]. In Hedley's case[74], a bank issued a certificate of credit worthiness to one of her customers. A company relied on it and entered into commercial transaction with the customer of the bank. Moment later, the customer went into liquidation, held the bank was liable.

It is now a settled issue that if in the ordinary course of business one person seeks advice or information from another in circumstances where that other would reasonably know that his advice is to be relied on, he is under a legal duty to take such care in giving his reply as the circumstances reasonably required[75]. However, for the duty to arise that particular relationship has to exist between the parties. It need not of course be contractual, it need not be fiduciary in the strict sense, but there need to be a sufficient degree of proximity between the parties so that the element of reasonable reliance is present[76].

2.1.9 The Concept of Limitation of Statute

There are applicable statutory provisions which stipulate time limitation within which an action can be brought[77]. The effect is that if a sustainable cause of action is not initiated within the period stipulated in the act, the right to institute an action upon such cause of actions becomes statute barred. For actions relating to tort, the period of limitation in negligence claim is three

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[72] Ibid.
[73] *Hedley Byrne & co. Ltd v Heller & Partners ltd*. (1964) AC 465.
[74] Ibid.
[75] *Hedley Byrne & co. Ltd v Heller & Partners Ltd*. (1963) 2 AII ER 575
[76] Gbade Akinrinmade, The Jurisprudence of Product Liability in Nigeria: A Need to Complement the Existing Fault Theory, (2016) 7 (2) *Afe Babalola University Journal of Sust. Dev. Law & Policy,* 194.
[77] Michael Heise, 'Statutes of Limitation' (2001) International Encyclopedia of the Social & Behavioural Sciences

years.[78]

2.1.2 Concept of Medical Ethics

It appears to me that the concept of medical ethics can be traced to the existence of human compassion for his fellow human. David Hume[79] opined that man was motivated not only by reason but also by compassion. Thomas Hobbes in his Leviathan opined that human motivation can be narrowed down to self-interest but Hume arguing to the contrary insisted that man shares a common morality founded on our emotions and rationality. Medical Ethics are based on the following four principles; autonomy, justice, non-malfeasance, and beneficence[80]. A typical medical ethics code provides sundry rules regulating both the Doctor-Patient relationship and professional etiquette[81].

The World Medical Association (WMA) is a global organization of physicians aiming to ensure the highest possible standard of ethical practice of the medical profession is maintained on a global level[82]. Pursuant to this huge ambition, the organization was established in 1947 and has since then aided in birthing the Declaration of Geneva, the Physicians Pledge (DOG), the Declaration of Helsinki, and the international code of Medical Ethics (ICoME). Of all these international documents and Instruments the ICoME is quite relevant here having been adopted

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[78] See section 8, Limitation Act, CAP 542, Laws of the Federal Capital Territory, Abuja; see also, Limitation Law, Cap L 67, Law of Lagos State, 2003; in Ogun state, it is six years; section 4 Limitation Law of Ogun State. Vol.3 Laws of Ogun State of Nigeria, 2003.

[79] David Hume, 'A Treatise on Human Nature (1740)' cited in L.A. Selby- Bigge, *A Treatise Of Human Nature: Being An Attempt To Introduce The Experimental Method Of Reasoning Into Moral Subjects* (Clarendon Press, 1896), 12.

[80] Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* (5th edn, Oxford University Press, 2001) 10.

[81] Michael Peel, 'Human Rights and Medical Ethics' (2005) 98 (4) *Journal of the Royal Society of medicine* (JRSM) 171 – 173.

[82] Ramin Parsa-Parsi, 'The International Code of Medical Ethics of the World Medical Association' (2022) 328 (20) *Journal of the American Medical Association*, 50.

in 1949. The ICoME comprehensively outlines the ethical principles and professional duties of first the medical professional responsibilities towards the patient and society, also regulating the relationship between physicians' inter se and other medical personnel or professionals. The scope of medical ethics covers physicians' duty to be honest, accountable, fair, professional, prudent, non-discriminatory etc. while relating with the patient[83].

The idea of being negligent speaks to failure to uphold the duty of care. At the junction of medical law and medical ethics is where you have the issue of medical negligence. Negligence is the failure to exercise ordinary care under the circumstances or perhaps more accurately negligence is doing something that the ordinary person would not do[84]. Medical Doctors, nurses and other hospital personnel are humans and are prone to the vagaries of human flaws of forgetful inadvertence in their actions in the course of delivering health care services to patients[85]. Approximately all claims against physicians except vicarious liability claims, founded on the allegation of negligence are based on the theory that the alleged negligence was caused by the physicians' incompetence or willingness to take an unnecessary risk when a safer course of action was available[86]. It goes to the root of the physicians' professional competence and skill. The concept of medical negligence is different from medical malpractice even though both can sometimes be used interchangeably[87]. Medical malpractice includes both negligent and intentional wrongful acts. Medical negligence occurs when practitioners fail to exercise the

[83] Roger Collier 'World Medical Association Updates Ethical Code for Physicians' (2017) 189 (44) *Canadian Medical Association Journal*, E1372

[84] Page Keeton, 'Medical Negligence – The Standard of Care' (1979) 10 *Texas Tech Law Review*, 351, 352.

[85] Danielle Bryden & Ian Storey 'Duty of Care and Medical Negligence (Continuing Education in Anasthesia Critical Care and Pain)' (2011) 11 (4) *BJA Education*, 124

[86] Bratin Kay 'Medical Negligence: An Overview' (2017) 25 (1) *Bengal Journal of Otolaryngology and Neck Surgery*, 46-54

[87] Oludamilola Adejumo & Oluseyi Adejumo 'Legal Perspectives on Liability for Medical Negligence and Malpractices in Nigeria' (2020) 35 (44) *The Pan African Medical Journal*

standard of skill and care expected of reasonably competent medical practitioners in their rendering of services to patients[88] The Consequences of Medical negligence which amounts to unprofessional conduct may result in disciplinary action by the Nigerian Medical and Dental Council (NMDC) while medical negligence that leads to premature death may result in conjunction for manslaughter and civil liability for damages also. The damages awarded for medical negligence are calculated to put the injured person in the position he or she would have been had the wrong not been committed[89].

2.1.4 Legal Obligation and the Duty of Care and Confidentiality

In medical circles confidentiality is the practice of keeping harmful, shameful, or embarrassing patient information within proper bounds. Confidentiality serves the purpose of ensuring respect for patient privacy acknowledging the patients vulnerability on the one hand while on the other hand it improves the level of health care by permitting the patient to trust the health professional with all the necessary personal information[90]. The Hippocratic Oath captures this duty. Section 37 of the Constitution of the Federal Republic of Nigeria 1999 (As amended) creates the right to privacy and the law is *ubi jus ibi remedium* – where there is a right there is a remedy- and the consequence of the existence of a right to privacy is the corresponding duty of care to ensure that this all important constitutional right is preserved[91].

[88]David McQuoid-Mason, 'What Constitutes Medical Negligence? A Current Perspective on Negligence Versus Malpractice' (2010) 7 (4) *SA HEART Journal,* 250, 251

[89] Ibid at 251

[90] Shanon King, 'Confidentiality in Medicine' (2010) 23 (4) *Current Allergy & Clinical Immunology Journal*, 196 - 198

[91] Section 37 of the Constitution of the Federal Republic of Nigeria 1999 (As amended)

Under common law the information obtained by doctors about patients is confidential[92] and under legislations there are laws such as the Nigerian Data Protection Act 2023 intended to protect personal data of the patient or data subject from being disclosed without prior informed consent. Informed consent is required for all medical investigations and procedures and is considered a corner stone of modern medicine[93]. In the past provided a health care professional acted in the patients best interest reasonably and professionally there was not too much concern over what a patient was or was not told about the risks[94]. Section 26 (1) of the National Health Act 2014 and Rule 44 of the Code of Medical Ethics for Medical Practitioners captures the duty of care to ensure information of a patient is confidential[95]. The Court of Appeal in *Digital Rights Lawyers Initiative (DRLI) v. NIMC*[96] the Court affirmed that data privacy including medical information is a constitutional right. However, as great as confidentiality is it is not set in stone as there are exceptions. So section 26 (2) National Health Act 2014 allows disclosure with consent of the user, court order or by guardian granting consent where the patient is unable to. It may be good to add that disclosure is allowed to prevent the commission of crime. In summary the physician-patient relationship has long been imbued with the special ethos of confidentiality[97].

Comparatively in the United Kingdom the position seems close just like in Nigeria every adult

[92] Jane O'Brien and Cyril Chantler, 'Confidentiality and the Duties of Care' (2003) 29 (1) *Journal of Medical Ethics* 36 - 40

[93] Christian Selinger, 'The Right to Consent: Is it Absolute?' (2009) 2 (2) *British Journal of Medical Practitioners* 50

[94] Elizabeth Larmer and Rachel Carter, 'The Issue of Consent in Medical Practice' (2016) 172 (2) *British Journal of Haematology* 300, 303

[95] Section 26 (1) of the National Health Act 2014 and Rule 44 of the Code of Medical Ethics for Medical Practitioners

[96] (Unreported) Appeal No. CA/1B/291/2020

[97] Ilene Moore and Others, "Confidentiality and Privacy in Health Care from the Patient's Perspective: Does HIPPA Help" (2007) 17 *Journal of Law and Medicine,* 215 - 272

patient has a right to bodily integrity unless he or she consents to treatment in which case the law allows the medical practitioner to administer or operate based on the consent. The law protects the right to bodily integrity and it is an assault to administer treatment without consent or negligently[98]. Informed Consent is crucial but informed consent is not as straight forward as it seems[99] because we then consider particular peculiarities of each case in light of standard of care and materiality. For over fifty (50) years, the case of *Bolam v Friern Hospital Management Committee*[100] (Bolam Case) has dominated the law on the amount of information and standard of care that doctors should provide to their patients[101]. The test in Bolam case was whether a reasonable body of doctors skilled in a particular field would have adopted the same practice applied in a particular case to determine whether the medical practitioner was negligent or not[102]. The Bloam case standard was chipped away at and qualified in *Sidaway v. Bethlem royal hospital and the Maudesley Hospital Health Authority and Others*[103] where the House of Lords held that a qualified Bolam test should apply when obtaining consent[104]. For a long time Sidaway case was good law and established that a health care professional had a duty to provide their patients with sufficient information to enable them to reach a balanced judgment as to the proposed course of treatment.[105] The patient therefore had the right to be informed of the necessity of a procedure, surgical or otherwise and advised as to any alternatives to that course of treatment and any common or serious consequences of it. Unfortunately, the test as to what

[98] *Montgomery v. Lanarkshire Health Board: Transforming Informed Consent* (2017) RCS Bull 36, 37
[99] Elizabeth Larmer and Rachel Carter, "The Issue of Consent in Medical Practice" (2016) 172. *BJH* 300.
[100] [1985] AC 871
[101] Angela Coulter and Benjamin Moulton, 'Montgomery v. Lanarkshire Health Board: Transforming Informed Consent' (2017) RCS Bull 36, 37
[102] Elizabeth Larmer and Rachel Carter, 'The Issue of Consent in Medical Practice' (2016) BJH 172, 300, 301.
[103] [1985] AC 871 [1985] 1 ALL ER 643
[104] Angela Coulter and Benjamin Moulton, 'Montgomery v. Lanarkshire Health Board: Transforming Informed Consent' (2017) RCS Bull 36
[105] Elizabeth Larmer and Rachel Carter, 'The Issue of Consent in Medical Practice' (2016) 172 *BJH*, 300, 301.

constituted 'common' or 'serious' was open to debate, and would depend upon what the health professional providing the advice interpreted as common or serious[106]. The recent case of *Montgomery v Lanarkshire Health Board*[107] decided by the UK Supreme Court takes the standard further and now provides us with a significant development in the way that medical professionals should relate with the patient in disclosing risk. We are looking at an era of joint decision making between patient and medic. The age of medical paternalism[108] is effectively over. Doctors must not withhold information simply because they disagree with the decision the patient is likely to make if given that information[109]. As a result of Montgomery judgment the Bolam Test or medical opinion standard no longer applies to information provision and disclosure, including the issue of disclosing risk[110]. The Montgomery Case firmly establishes Informed Consent as the present position of the law building on earlier cases like *Chester v. Afshar*[111] to finally introduce informed consent in the UK medical practice.

2.2 Theoretical framework

The theoretical perspective is crucial in ethics theories as it helps researchers understand relationships between seemingly unrelated events. Ethics theories aim to explain and justify moral decisions, requiring careful examination of ethical judgments. They share a broad perspective on objective morality, generating principles, axioms, and rules to answer the

[106] Ibid.
[107] [2015] AC 1430, [2015] UKSC 11
[108] John Ayodele 'The Realities Surrounding the Applicability of Medical Paternalism in Nigeria' (2015) 14 *Global Journal of Social Sciences* 57
[109] Sarah Chan and Others, 'Montgomery and Informed Consent: Where are we now?' (2017)357 *British Medical Journal* j2224
[110] Nicholas Millar, 'Informed Consent: Montgomery v. Lanarkshire Health Board' [2015] JLSHK <http://www.hk-lawyer.org/content/informed-consent-montgomery-v-lanarksgire=health-board> accessed 26 November 2023.
[111] [2004] UKHL 41

question of why being moral is important.[112]

a. Teleology and Utilitarianism

Teleological theories, also known as consequentialist theories, focus on the consequences of actions as the first step in analyzing moral activity. They argue that when the moral outcome of an action is unclear, one must choose actions that provide the best predictability for a good outcome, known as act utilitarianism or rule utilitarianism.[113] Utilitarianism, often referred to as consequentialist theory, proposes that in conflicts, one is ethical if one chooses to maximize the good and minimize the harm. It is particularly useful in resolving disputes between individuals and groups in society, as well as in medicine and healthcare delivery. However, it has been criticized for its inability to set moral action standards based on the act itself. Deontologists argue that the ultimate standard must be one's internal duty, which is a weakness of utilitarianism as a measure of the good. This has led to the distinction between act and rule utilitarianism and efforts to develop objective standards of the good that transcend individuals and societies.[114]

b. Deontology

Deontological theory, developed by Kant, emphasizes the importance of one's duties and obligations. Deon, a Greek word for duty, was developed to correct excessive teleological thinking that sought rewards outside the self for being moral. Kant aimed to preserve ethics in an age of rising science by establishing objective standards for moral conduct, independent of

112 David C. Thomasma, Theories of Medical Ethics: The Philosophical Structure, Neiswanger Institute of Bioethics and Health Policy, Stritch School of Medicine, Loyola University Chicago.

113 St. Thomas Aquinas. On Aristotle's Love and Friends, Ethics, Books VIII–IX. Guway P, trans. Providence, RI: Providence College Press; 1951

114 RM Veatch. A Theory of Medical Ethics (1981) New York: Basic Books

consequences. The centerpiece of deontological theory is the notion of personhood, which Kant elevated to moral supremacy. He argued that a person is a human being who constructed their own moral law, meaning autonomy. A moral person cannot lie because their personhood or integrity as a moral agent would be compromised.[115]

Kant's focus on the person led him to propose that it is always wrong to treat persons as means and not as an end in themselves. Respecting a person's values is essential, and nothing can be imposed on others without their consent. Kant's philosophy helps avoid rationalizations and delusions that justify personal actions and try to convince everyone, including oneself, that they are right. Deontology also aims to preserve ethics as a discipline with objective referents in a scientific age. Instead of focusing on the objective moral law, Kant focused on two other objectivities: the act of the person should always conform to the golden rule, and the person should act as if what they do would be good for others.[116]

c. Virtue Theory

Virtue practices date back to the earliest moral shaping of a child by parents and community. Socrates discussed virtues and their importance in living a good human life, while Aristotle formulated virtue theory as a branch of politics, focusing on human psychology and human affairs. Virtues are habits formed by one's personality, parental and social training, and professional standards suitable to one's life choices and roles in society.[117]

Every social group has a different measure of the balance of virtue in the socially complex mix of personal and community shaping. For many centuries, virtue theory was largely identified

115 R Gillon, Medical ethics: Four principles plus attention to scope. Br Med J. 1994;309(6948):184–188

116 Beauchamp TL, McCullough LB. Medical Ethics: The Moral Responsibilities of Physicians. Englewood Cliffs, NJ: Prentice-Hall; 1984: 22–51

117 WJ Bennett, ed. The Book of Virtues: A Treasury of Great Moral Stories. New York: Simon & Schuster; 1993

with an Aristotelian view of human nature and human social life. Later, during and after the Enlightenment, virtue theory was grounded in ideas of instinct, common sense, and gentlemanliness.

In essence, virtue theory argues that all human beings have an inborn nature that tends to the good in moral actions but needs molding and direction, especially repeated habitual action, to refine that nature away from vices and unbalanced or inordinate behavior. Virtues are defined as good operative habits that intensify the potentialities of human nature from its emotions to its intellect and will toward good actions.

People who grew up in a strong community will have been shaped this way, trained by parents and the community, secular and religious, about what sort of person one should be. Some strong communities raise persons considered reprehensible by others, such as the Nazi storm troopers of World War II and the Hezbollah in the contemporary Middle East.

2.3 Review of Empirical Studies

Most of the materials available in this area of law are predominantly foreign materials which do not take into cognizance, the peculiarity of the *corpus juris* in Nigeria, in another sense, most of the local contributions in this area of law are adoption of submissions from the foreign authorities and as such, this is so because of the fact that there is little legislative development in this area in Nigeria, therefore, most of the discussions in the area of tort law including negligence in Nigeria are adaptation of common law rules. Thus, the review in this study may have to employ English cases copiously. Also, the method adopted in this review is not based on a singular approach to the concept of negligence but an approach of attacking the elements of the concept since negligence itself does not ground liability, it is the elements of negligence that the court will consider, as stated earlier, the ingredients that must be proved for a successful claim in

negligence are:

1. a legal duty on the part of A toward B to exercise care in such conduct of A as falls within the scope of the duty
2. breach of that duty
3. consequential damages to B.[118]

We can state the definitions of authors who have contributed to this area of law in order to serve as a rough guide to the direction of the discourse. To this end, William[119] defines negligence as the failure to conform to the standard of care to which it is the defendant's duty to perform. It is a required to behave like a reasonable or prudent man in a circumstance where the law requires such reasonable behaviour. Cross on the other hand defines negligence as non-compliance with a standard of conduct and it involves blame worthy inadvertence to the circumstance and consequences mentioned in the definition of the act charged.[120] To Perkins, negligence would rather be defined as any condition intentionally or wantonly disregardful of an interest of others which falls below the standard established by law for the protection of others against unreasonable risk of harm[121]. It is common from all the definitions above that the concept of negligence presupposes that there is a duty of care which the law places on a person and he may not act out of malice, he may even act in good faith, but the problem comes as a result of the fact that he was reckless or he did not pay attention to care which eventually leads to the injury or damage on another person who in this case now becomes his victim in the contemplation, these

[118] Gbade Akinrinmade, The Jurisprudence of Product Liability in Nigeria: A Need to Complement the Existing Fault Theory, (2016) 7 (2) *Afe Babalola University Journal of Sust. Dev. Law & Policy,* 194.
[119] Glanville Williams, *Learning the Law*, (London: Sweet and Maxwell, 2010)
[120] Rupert Cross, *An Introduction to Criminal Law*, (London: SAGE Publications, 1957), 42.
[121] Rollin Perkins, *Criminal Law*, (Brooklyn foundation press, 1957), 664.

definitions have successfully incorporated all the elements of negligence[122]. The only observable lacuna in the definitions above is the fact that negligence does not necessarily mean that a person did not exercise a duty of care, the case is that the duty of care exercised by him is not sufficient in the circumstances of his case, this appears to be so because of the fact that the two persons who are engaged in the same business may not be required to exercise the same duty of care[123]. For instance, the duty of care expected of a commercial driver plying the Lagos-Ibadan expressway is different from the standard of care required of a driver who is driving an ambulance who is conveying an emergency patient on the same Lagos-Ibadan expressway, this is because of the utility of their service. Thus, it will be advanced that the encompassing definition to amend the proposition of Williams above is that: "It is a failure to behave like a reasonable or prudent man in circumstance where the law requires such reasonable behaviour *and in the circumstances of the tortfessor's position*"[124].

Akhabue[125] defines negligence as a breach of duty to take care; imposed by common law or statute, he relied on copious authorities to substantiate this ground. The correctness of this statement is further buttressed by the fact that the principle of negligence is a creation of the common law and the test of whether a person has breached the duty of care is usually undertaken by the Nigerian courts with aid from the common law cases and provisions of law, the court will only desist from towing the reasoning of the common law judges where the common law principle has been repealed by a Nigerian statutes. However, the question of breach of duty of care is not dictated by law alone as stated by the learned author, it is a question of both law and

[122] Cees Dam, *Intention and Negligence'*, European Tort Law, 2nd edn (Oxford: Oxford Academic, 2013)
[123] Orj Herstein, 'Responsibility in negligence: Why the duty of care is not a duty "to try", (2020) 23 (2) *Canadian Journal of Law and Jurisprudence*, 404.
[124] Glanville Williams, *Learning the Law*, (London: Sweet and Maxwell, 2010)
[125] Daniel Akhabue, 'Negligence in Nigeria- Not at claimant's beck and call', (2012) 1 (6) *International Journal of Law and Legal Jurisprudence Studies*, 3.

facts, the law only imposes the duty of care on persons and provides guide to its standard, in all cases, it is the situation in which the person finds himself operating from that determines whether he will be liable in negligence or not. The proper position is that a duty of care arises wherever in the circumstances it is foreseeable that if the defendant does not exercise due care, the plaintiff will be harmed.[126] Lord Atkin laid down the principle as follows:

> *"The rule that you are to love your neighbor becomes, in law, you must not injure your neighbor and the lawyer's question, 'Who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would likely injure your neighbor. 'Who, then in law is my neighbor?' The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplations as being so affected when I am directly my mind to the acts or omissions which are called in question".*[127]

The neighbour principle above is based on reasonable foreseeability or proximity. Proximity does not necessarily mean physical nearness but reasonable foreseeability, which is generally known as the neighbour test. Who then is my neighbour? My neighbour is anyone in the world who will be injured by my negligent act/conduct. Where injury is not reasonably foreseeable or damage is remote, there is no liability.[128]

According to Olomojobi[129], the determination of medical negligent cases should be determined by the experts and not the courts. Meanwhile, it is noted that Nigerian legal jurisprudence

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[126] Gilbert Kodilinye and Oluwole Aluko, *The Nigerian Law of Torts, (*1st Ed, Ibadan: Spectrum Books Ltd, 1996) 39.

[127] *Donoghue v. Stevenson* (supra).

[128] Tolulope Ibitoye 'Applicability of the Doctrine of *Res Ipsa Loquitur* in Medical Negligence in Nigeria' (2018) 9 (1) *Nnamdi Azikwe Uuniversity Journal of International Law and Jurisprudence*, 168.

[129] Yinka Olomojobi, *Medical and Health Law, The Right to Health* (Lagos: Princeton & Associates Publishing Co. Ltd, 2019) p. 143.

provides that even where a doctor volunteers to treat a patient in an emergency situation, the standard duty of care expected of a reasonable man in his standing is expected unlike in the United States, where the degree of standard of care is minimal. Olomojobi did not further explain how this can be achieved under the Nigerian Legal jurisprudence and it is this vacuum that this study intends to fill.

The voyage in this part is to seek out literature contemporary in nature which covers the field in making clear the position of the law on challenges and opportunities related to medical ethics and legal obligation of health care personnel in Nigeria. The search is also for literature which is comprehensive enough to appropriately describe the current tempo of the academia on the subject matter of research upon which one would conclude that such has covered the field.

Jackson[130] examines the relationship between medical law and good medical ethics declaring that the relationship is a complicated one. In describing the dynamics Jackson argues that there are times when medical ethics demands much more from a doctor than medical law and vice versa also, that the imbalance of power in the Doctor-Patient relationship means that Doctors must not abuse the trust placed on them.[131] Johnson declares that regardless of the tensions and discrepancies as well as similarities between a doctor's legal duties and ethical obligations the fundamental duty is to comply with both. How then does a medical practitioner derive fulfilment from the job if they are at odds in their heart with regard to legal obligation and ethical considerations. Ivanović, et al[132] considered medical law ethics stating that the study of ethical issues and health care law as a legal discipline in the awareness of health professionals of

[130] Jackson Emily, 'The Relationship between Medical Law and God Medical Ethics' (2015) 41 (1) *Journal of Medical Ethics*, 95 – 98.
[131] ibid at 96
[132] Suncica Ivanovic and Others, 'Medical Law and Ethics' (2013) 52 (3) *Acta Medica Medicinae Journal,* 67 – 74.

humans rights, and since the performance of activities of medical professionals is always linked to the issue of life saving or death, thus, lack of knowledge of legal obligations attached to their role would not justified at all. The authors opine that the consequences of errors of medical personnel lead to a disorder of some functions, and sometimes death of patients due to negligence etc[133]. The authors finally conclude that issues such as time engagement (Over time, shift work, irrational regime of work and rest, changing the work schedules, pressure to do something for a very short time period)[134]. It is very agreeable that medical professionals are at the centre of the game of life and death and must understand both ethics and law attendant to their role. Especially in Nigeria this is a call to action.

Abdulmalik, Kola and Gureje[135] adopts a health systems approach to understanding efforts for improving health care services. The work mainly focuses on Health System Governance (HSG) basically in Nigeria, also evaluates the mental Health System of Governance (HSG) of Nigeria with a view to understanding the challenges, opportunities and strategies for strengthening it. The authors extensively quote the WHO on HSG opining that the diagnosis of HSG is increasingly becoming an area of attention for international agencies, developmental agencies and donor bodies, especially in low and middle income countries. Uzochukwu using Nigeria as a case study traverses the length and breadth of primary health care in Nigeria. He begins with an overview of the Nigerian Health Care System then delves into the issue of Governance of the health care system, he ultimately opines that the three tiers of the health system in Nigeria (Federal, State and LGA) have substantial autonomy and exercise considerable authority in the allocation and utilization of their resources. According to Uzochukwu the key 'component of the

[133] Suncica Ivanovich and Others (n. 41) at 72.
[134] Suncica Ivanovich amd others (n. 41) at 73.
[135] Jubril Abdulmalik, Lola Kola and Oye Gureje, 'Mental Health System Governance in Nigeria; Challenges, Opportunities and Strategies for Improvement' 2016 (3) *Global Mental Health Journal*, 1-11.

National Health Act is the establishment of Basic Health Care Provision Fund, which will be predominantly financed through an annual budget from the federal government of not less than 1% of the Consolidated Revenue Fund (total federal revenue before it is shared to all tiers of government)[136]. Thus, the author focuses on the National Health Act 2014 and some innovations made by the said Act but he does not do a holistic review of the effectiveness of the laws but focuses on one law which is the National Health Act 2014. The author also importantly points to the Basic Health Care Provision Fund created by the National Health Act 2014 and this is instructive as the fund will be administered as part of the administrative framework of PHC in Nigeria. Half of the fund will be used to provide a basic package of services in PHC facilities through the National Health Insurance Scheme 45% will be disbursed by the National Primary Health Care Development Agency for essential drugs, maintaining PHC facilities, equipment and transportation, and strengthening human resources capacity; and the final 50% will be used by the Federal Ministry of Health to respond to health emergencies and epidemics[137].

Odejide and Morakinyo[138] highlight at the offset the paucity of psychiatrists as against the huge population dynamic of Nigeria. Early on, the authors opine that primary health care workers have very poor knowledge of mental disorders and virtually no mental health services are provided at the primary health care facilities studied. Thus, that the mental health services offered at the private general practice and government owned hospitals seem to be the only hope for the minority of the populace. The authors further aver that judging by the level of mental health training available to primary health care workers tied with the deeply rooted negative attitudes

[136] Benjamin Uzochukwu, *Primary Health Care System (PRIMASYS); Case Study of Nigeria* (World Health Organization, 2017) 36.
[137] Ibid 28.
[138] Olabisi Odejide and Jide Morakinyo, 'Mental Health and Primary Health Care' (2003) (2) (3) *World Psychiatry Journal,* 165.

and superstitious beliefs or mental disorders, mental health services offered to the populace at the primary care level is likely to be minimal. The reason the review have alluded to publications on mental health also is because of the volatile nature of the Doctor-Patient relationship attached to the mental health sub sector. Sokefun[139] examines medical ethics as it inter plays with law and right to health in Nigeria. For Sokefun medical practice ordinarily reflects a symbiotic existence between that discipline and other discipline especially law. Sokefun makes reference to the dilemma of two options of removing a life threatening foetus in order to save the life of the living person or living the foetus in order to protect it, to paint the conflict between medical ethics and law. Sokefun opines that law in its paternalistic role should codify the existing ethics of the medical profession. It is evidently impossible to legally codify all existing medical ethics in legislations because morality and law may intersect at some junctions but they both do not run necessarily on straight lines at all times. Sokefun recommends amendment of the CFRN 1999 (as amended). Section 6 (6) (c)[140] could be amended to make chapter II justiciable specifically enforcing the right to health while constitutional reform would go a long way in generally improving the quality of healthcare service in the country as suggested by Sokefun[141]however, the posture of the National Assembly at the moment does not seem to have any desire to touch chapter II with a ten foot pole let alone amend that.

[139] Justus Sokefun, 'Medical Ethics, Law and the Right to Health in Nigeria' (2018) *Human Rights and Jurisprudence Journal,* HRJJ 1-3.
[140] Constitution of the Federal Republic of Nigeria 1999 (as amended 2018).
[141] Justus Sokefun, (n. 48) at 3.

CHAPTER THREE

LEGAL AND INSTITUTIONAL FRAMEWORK FOR MEDICAL ETHICS AND LEGAL OBLIGATION IN NIGERIAN HEALTHCARE

3.1 International Legal Framework

WHO has the broadest legal jurisdiction among international organisations to handle issues related to public health around the world. WHO has extensive legal capacity to function as a platform for international health lawmaking since it is the UN specialised agency mandated by the constitution to act as the "directing and coordinating authority" on international health activities.[142] Article 19 of the WHO Constitution specifies that the World Health Assembly, WHO's legislative body composed of all of its member states, "shall have the authority to adopt conventions or agreements with respect to any matter within the competence of the Organization."[143] The WHO Constitution gives it the legal right to act as a forum for conventions and accords that might potentially cover every facet of public health. It also gives it the power to create rules under Article 21 and non-binding recommendations under Article 23. Even while WHO has up until now overlooked the evolution of international legislation to address the entire spectrum of challenges to global health,[144] it has always maintained its principal role for developing international legal cooperation in infectious disease control.[145]

The management of the international legal framework ensuring multilateral collaboration to curb the global spread of illness was passed down to WHO from its predecessor organisations when it was founded in 1948. Since its first adoption by the World Health Assembly in 1951, these international regulations have undergone several updates, most of which have been brought

[142] Taylor Allyn, *Health: The Oxford Handbook of United Nations Treaties* (New York: Oxford University Press, 2019).
[143] WHO Constitution, Article 19 (1946).
[144] Taylor Allyn, supra note 1.
[145] David Fidler, *International Law and Infectious Diseases* (Oxford: Clarendon Press, 1999)

about by advancements in epidemiological science and epidemic disease control worldwide..[146] Last revised in 2005, the current IHR are binding on 196 state parties, making it one of the most widely subscribed to binding agreements under the UN system and forming the contemporary legal foundation for international disease control.

The IHR codify WHO's legal authority to lead international efforts "to prevent, protect against, control and provide a public health response to the international spread of disease."[147] Adopted under Article 21 of the WHO Constitution, the IHR bind states parties pursuant to a unique contracting-out procedure that is designed to simplify and expedite the lawmaking process for infectious disease control. Regulations under Article 21 come into force automatically for all WHO member states, except for those states that explicitly notify WHO's Director-General of any rejection or reservations, obligating states under this international legal framework to reform domestic public health policy to comport with IHR provisions.[148] Framing responses to protect national security and international trade, the IHR have been employed over the past fifteen years to respond to six public health emergencies of international concern, including COVID-19.

3.1.1 The Alma Ata Declaration of 1978[149]

The Alma Ata Declaration of 1978 emerged as a major milestone of the twentieth century in the field of public health, and it identified primary health care as the key to the attainment of the goal

[146] Gostin Lawrence and Meier Mason, *Framing Human Rights in Global Health Governance*, in *Human Rights in Global Health*, B. Mason Meier and L. O. Gostin, eds. (New York: Oxford University Press, 2018) 63.
[147] International Health Regulations, 2005, Article 2 <https://www.who.int?publications/item/9789241580496> accessed 12 November, 2020
[148] David Fidler and Gostin Lawrence, 'The New International Health Regulations: An Historic Development for International Law and Public Health' (2006) 34 (1) *Journal of Law, Medicine & Ethics* 85.
[149] WHO called to return to the Declaration of Alma Ata <https://who/int/teams/social-determinants-of-health/declaration-of-alma-ata> accessed 10 November, 2023

of Health for All[150] around the globe. It can be easily said without mincing words that, the Alma Ata Declaration of 1978 is the most potent and widely accepted attempt at general consensus on the importance of Primary Health Care and it in turn serves as the first international declaration categorically expressing the need to make giant strides to improve primary health care around the entire world. The Alma Ata Declaration on Primary Health Care (PHC) which was made in 1978 is meant to address the main health problems in communities by providing promotional, preventive, curative and rehabilitative services. Nigeria was among the 134 signatories to this invaluable idea.[151] Primary Health Care (PHC) is a grass-root management approach to providing health care services to communities. Nigeria being a Multi-ethnic, Multi-cultural, and Multi-lingual entity is ideally suited for maximum utilization of Primary Health Care approach to health care services delivery.

3.1.2 Universal Declaration of Human Rights[152]

The World Health Organization Constitution makes it clear that the highest attainable standard of health is a fundamental right of every human being across the continents of the world[133]. The Alma-Ata Declaration 1978 further cements the position that access to health care is a right that must be pursued by every nation-state. Thus, every state is obligated to apply its maximum available resources to pursue basic health care for all its citizens and to update its laws to facilitate the achievement of health for all. It is obvious that a rights – based approach to health care mandates that health policies of states and health programmes must prioritize the needs of citizens on a basis of equality. This principle is eschewed in the 2030 Agenda for Sustainable

[150] William Shiel, 'Medical Definition of Health For All' (*Medicine net,* 2 June 2018) <https://www.medicinenet.com/script/main/art.asp?articlekey=10708> accessed 24 December, 2023

[151] Innocent Alenoghena and Others 'Primary Health Care in Nigeria; Strategies and Constraints in implementation' (2014) 3 (3) *International Journal of Community Research* 74.

[152] The Universal Declaration of Human Rights was adopted by the newly established United Nations on 10 December 1948 <https://en.m.wikipedia.org?wiki/Universal_Declaration_of_Human_Rights > accessed 10-11-2023

Development. Unfortunately the UDHR does not have an express provision on the right to health and does not place a legal obligation on medical practitioners. However article 25 is important. It provides inter alia that all humans have the right to a standard of living adequate for the health and well-being of himself and of his family, to include food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. The first interpretation that comes to mind when reading provision in article 25 is the clear expression of an acquiescence that the right to health equates to a good standard of living. Outside this provision not much can be gleaned from the UDHR. The UDHR 1948 although not binding in that the declaration does not prescribe punishment, but despite the absence of punitive measures for its non-observance; the instrument has garnered moral power of compliance over the years. Thus, the UDHR 1948 has operated to inspire the fundamental rights regime of many national Sub-Saharan African Countries Constitutions.[153] Unfortunately, the right to education is not one of the rights explicitly provided for in many African Constitutions and Bill of rights. The UDHR 1948 provides that everyone has the right to education. This provision can be explained as the one which warrants the need for teaching medical ethics to medical students and practitioners.

3.1.3 International Health Regulations 2005[154]

A central and historic responsibility of the World Health Organization (WHO) has been the management of the global regime for the control of the international spread of disease. Under Articles 21(a) and 22, the constitution of the WHO confers upon the World Health Assembly the

[153] Chapter IV of the Constitution of the Federal Republic of Nigeria 1999 (as amended 2018).
[154] International Health Regulations (IHR) was adopted by the World Health Assembly in 1969 and last revised in 2005. <https://en.m.wikipedia.org?wiki/International_Health_Regulations> accessed 10-11-2023

authority to adopt regulations "designed to prevent the international spread of disease" which, after adoption by the Health Assembly, enter into force all WHO member states that do not affirmatively opt out of them within a specified time period.[155] The International Health Regulations ("the IHR" or "Regulations") were adopted by the Health Assembly in 1969.[156] The 1969 Regulations which initially covered six quarantinable diseases were annexed in 1973 and 1981, primarily to reduce the number of covered diseases from six to three (yellow fever, plague and cholera) and to mark the global eradication of small pox.[157] The IHR (2005) were adopted by the fifty-eight World Health Assembly on 23 May 2005. They entered into force on 15 June, 2007.[158]

The IHR 2005 is relevant to PHC because PHC is the basic cell of health care system in every country and PHC is the first to come in contact with budding diseases that may eventually become a threat to the international community. Although, not all the provisions of the International Health Regulations apply to PHC, the Regulation is mutatis mutandis very relevant to the subject of research. An examination of key provisions is necessary to highlight its importance and possible nexus to PHC. There is consensus that since their adoption in 2005, the Regulation has helped the international community to prepare for and respond to public health emergencies more efficiently. Many states parties have made good progress in developing and strengthening the core capacities required by the Regulations. However, significant gaps in the core capacities persist in several countries and emerging and re-emerging threats with pandemic

[155] WHO, *International Health Regulations(2005)* ((3rd edn, World Health Organization, 2016) 1.
[156] Resolution WHA 22.46 and Annex 1 quoted in WHO, *International Health Regulations(2005)* ((3rd edn, World Health Organization 2016) 1.
[157] WHO, *International Health Regulations(2005)* ((3rd edn, World Health Organization 2016) 1.
[158] Ibid at 1.

potential continue to challenge fragile health systems.[159] The key provisions relevant to Primary Health Care (PHC) and to this research are summarized below.

The Regulation has ten parts (Part I– Part X) with Sixty-six (66) Articles. Part one covers definitions, purpose and scope including the principles and responsible authorities. Note that IHR 2005 seeks ultimately to prevent the widespread outbreak of diseases or prevent the occurrence of public health emergency of international concern. Article 1 defines Public health emergency of international concern to mean "an extraordinary event which is determined by the Regulations to constitute a public health risk to other states through the international spread of disease and to potentially require a coordinated international response". One could correctly state that Corona virus which broke out in 2019 in Wuhan China has far surpassed being a mere public health risk and is now a global pandemic thus activating the IHR 2005 provisions on safety.

Article 3 provides for the purpose and scope which is to "prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.

Article 4 provides the principles of the IHR to include inter alia, the implementation of these Regulations in full respect for the dignity, human rights and fundamental freedoms of persons,[160] the implementation of the Regulations guided by the UN Charter and WHO constitution.[161] The Regulations are to be also implemented to guarantee the protection of all people of the world

[159] WHO, *Annual report on the Implementation of the International Health Regulations (2005) by the Director-General* (World Health Organization 2018).
[160] International Health Regulations, 2005, Article 3(1).
[161] Article 3(ii) of the International Health Regulations, 2005.

from the international spread of disease,[162] and states are to exercise their sovereign right to legislate on health policies upholding the purpose of the IHR 2005.[163] Article 4 also provides for National IHR focal points in every Country to be in constant communication with WHO IHR contact points.

Part II consists of provisions on information and Public Health Response. Thus, each state party shall develop, strengthen and maintain, as soon as possible the capacity to detect, assess, notify, and report events in accordance with the Regulations.[164] This is simply a provision on mandatory surveillance and reportage to the WHO. PHC network in each country becomes useful at this point in detection and assessment of a state party's health status as it relates to diseases that pose a risk that may become a threat to the international community.

Part III is all about modalities on recommendation by the Director-General; these may be temporary recommendations,[165] or standing recommendations.[166] Part IV is on Points of entry and creates obligations to states in Airports and ports in safety measures to prevent spread of disease. Part V is on Public Health Measures on arrival and departure of persons into and out of a country. The remaining Parts from VI to X are on miscellaneous provisions from Health documents to charges to general provisions e.t.c all do not necessarily border on Primary Health Care and must be left out as not forming part of the scope of this work. Most of the provisions are focused on safeguarding Airports and entry points to prevent spread of diseases.

In summary, the IHR (2005) contain a range of innovations: - (a) a scope not limited to any specific disease or manner of transaction, but covering illness or medical condition; irrespective

[162] Article 3(iii) of the International Health Regulations, 2005
[163] Article 3 (iv) of the International Health Regulations, 2005
[164] Article 5 of the International Health Regulations, 2005.
[165] Article 15 of the International Health Regulations, 2005.
[166] Article 16 of the International Health Regulations, 2005.

of origin or source, that presents or could present significant harm to humans; (b) state party obligations to develop certain minimum core public health capacities; (c) obligations on states parties to notify WHO of events that many constitute a public health emergency of international concern according to defined criteria; (d) provisions authorizing WHO to take into consideration unofficial reports of public health emergency of international concern and issuance of corresponding temporary recommendations, after taking into account the views of an emergency committee; (f) protection of the human rights of persons and travelers; and (g) the establishment of National IHR focal points and WHO IHR contact points for urgent communications between states parties and WHO.[167]

3.2 National Legal Framework

In Nigeria, medical practice is regulated by a number of statutes; among which are: the Medical and Dental Practitioners Act[168]; the Nursing and Midwifery (Registration etc.) Act[169]; the National Health Act[170] 2014; the Code of Medical Ethics in Nigeria[171]; the Constitution of the Federal Republic of Nigeria 1999 (as amended); the Medical Oath; the Compulsory Treatment and Care for Victims of Gunshot Act[172]; the Patients' Bill of Rights[173]; the Pharmacy Act[174] and the Criminal Code Act[175]. The right to dignity of the human person is provided for in the 1999 Constitution of Nigeria. Also, the right to freedom from discrimination is protected by the Nigerian Constitution. The open season of malpractice suits is one of the major factors that

[167] WHO, *International Health Regulations (2005)* (3rd edn, World Health Organization Publication, 2016)1.
[168] Laws of the Federation of Nigeria, 2004, CAP M8.
[169] Laws of the Federation of Nigeria, 2004, CAP N143
[170] Medical and Dental Practitioner Act. 1988 No. 23 CAP. M8
[171] Mental and Dental Health Act, 2004 CAP 221
[172] Victim of Gunshot Act. 2017 No.105
[173] Patients' Bill of Right Act 2018
[174] Pharmacy Act of Nigeria 1992 No. 91 P17 – 2
[175] Criminal Code Act 1965 CAP C38

compelled the National Assembly of Nigeria to pass the National Health Bill which was assented by the President into an Act of the Federal Republic of Nigeria as the National Health Act 2014 on the 8th of December 2014.

The objectives of the National Health Act 2014 include: encompass public and private providers of health services; promote a spirit of cooperation and shared responsibility among all providers of health services in the Federation and any part thereof; provide for persons living in Nigeria the best possible health services within the limits of available resources; set out the rights and obligations of health care providers, health workers, health establishments and users; and protect, promote and fulfil the rights of the people of Nigeria to have access to health care services[176]. These statutes are very critical to medical practice in Nigeria as they provide for the rights of patients and the healthcare providers. The statutes set the basic minimum standard of care and professional conduct expected from healthcare providers.

The Medical and Dental Practitioners Act establishes the Medical and Dental Council of Nigeria17 and vest it with the power to determine the standards of knowledge and skills to be attained by persons seeking to become members of the medical or dental profession and it also has the power to review the standards from time to time. The Council is empowered to maintain registers of the names, addresses, qualifications and such other particulars of persons entitled to practice medicine and dentistry in Nigeria. Moreover, one of the major roles of the Medical and Dental Council of Nigeria is that it has the power to discipline erring medical practitioners and dental surgeons. The Medical and Dental Practitioners Act lucidly make provisions for the body charged with disciplinary role in medical practice, instances in which the disciplinary power can

[176] Olabanjo Ayenakin, Temitayo Akindejoye and Itunu Kolade-Faseyi 'Examination of the Legal and Institutional Frameworks of Medical Law in Nigeria' (2021) 9 (6) *Global Journal of Politics and Law Research*, 12.

be invoked and the mechanisms for discipline. Similarly, the Nursing and Midwifery Registration Act and Pharmacy Act have statutory regulations for the practice of nursing, midwifery and pharmacy in Nigeria as well as make provisions for discipline of nurses, midwives and pharmacists.

3.2.1 National Health Act 2014

The National Health Act 2014 (Hereinafter abbreviated as NHA) is one of the most fundamental national laws on health in the Country and its provisions cut across various layers of health care from primary to tertiary. The provisions concerned with facilitation of health care services and medical ethics regulation and development shall be highlighted briefly in this part of the research.

The NHA, 2014 has Seven (7) parts (i - vii) with sixty-five sections. Part I makes elaborate provisions for the establishment of the National Health System and eligibility for health services. Section 1 establishes the National Health System which shall define and provide a framework for standards and regulation of health services, without prejudice to extant professional regulatory laws. The National Health System shall encompass public and private providers of health,[177]promote a spirit of co-operation and shared responsibility among all providers of health services in the federation and any part thereof,[178] provide for persons living in Nigeria the best possible health services within the limits of available resources,[179] set out the rights and obligations of health care providers, health workers, health establishments and users,[180] and protect, promote and fulfil the rights of the people of Nigeria to have access to health care

[177] National Health Act, 2014 section 1 (1) (a).
[178] Section. 1 (1) (b) of the National Health Act.
[179] Section. 1 (1) (C) of the National Health Act.
[180] NHA, 2014 s. 1 (1) (d).

services.[181] From the provisions of section 1 the interpretation clearly covers health care administration and implementation. Section 1(2) makes a list of the agencies and institutions that shall together make up the National Health System. It is instructive to note that majority of the agencies listed in section 1(2) NHA, 2014 includes: the Federal Ministry of Health,[182] State Ministries and the FCT,[183]agencies under the Federal and State Ministries of Health,[184] all local government health authorities,[185] the Ward health committees,[186] the village Health Committees,[187] private health care providers,[188] traditional health care providers[189] and alternative health care providers.[190]

Section 2 list comprehensively the functions of the Federal Ministry of Health (FMOH), these functions include but are not limited to the following: ensuring the development of national health policy and issuing of guidelines for its implementation,[191] collaborate with the states and local governments to ensure that appropriate mechanisms are set up for the implementation of national health policy,[192] collaborate with national health departments in other countries and international agencies,[193] promote adherence to norms and standards for the training of human resources for health,[194] ensure the continuous monitoring, evaluation and analysis of health status

[181] Section. 1 (1) (e) of the National Health Act
[182] Section 1 (2) (a) of the National Health Act.
[183] Section 1 (2) (b) of the National Health Act.
[184] Section 1 (2) (c) of the National Health Act.
[185] Section 1 (2) (d) of the National Health Act.
[186] National Health Act 2014, section 1 (2) (e).
[187] Section 1 (2) (f) of the National Health Act.
[188] Section 1 (2) (g) of the National Health Act.
[189] Section 1 (2) (h) of the National Health Act.
[190] Section 1 (2) (i) of the National Health Act.
[191] Section 2 (1) (a) of the National Health Act.
[192] Section 2 (1) (b) of the National Health Act.
[193] Section 2 (1) (c) of the National Health Act.
[194] Section 2 (1) (d) of the National Health Act.

and performance of the functions of all aspects of the National Health System,[195] coordinate health and medical services delivery during national disasters,[196] participate in inter-sectoral and inter-ministerial collaboration, etc. The Federal Ministry of Health has an obligation to the State Ministries of health such as to provide technical assistance in the development of state health policies and plans,[197] provide commodities and technical materials, including methodologies, policies and standards for use in programme implementation including monitoring and evaluation,[198] and other technical assistance as may be necessary.[199] Often times it is the failure of the provision of adequate facilities from top to bottom which results in neglect of those who patronise the health care system.

Section 3 mandates the Minister of Health in consultation with the National Council on Health to prescribe conditions under which persons may be eligible for exemption from payment for health care services at public health establishments. Section 4 establishes and provides the composition of the National Council on Health while section 5 lists out the functions of the National Council on Health. One of the most crucial provisions concerning Primary Health Care (PHC) is the provision establishing the Basic Health Care Provision Fund in section 11. The fund is to be financed by the Federal Government (annual grant of not less than one percent of its Consolidated Revenue Fund[200]), grants by the international donor partners[201] and funds from any other source.[202]The National Primary Health Care Development Agency (NPHCDA) is very much involved in the disbursement of the fund especially with regard to vaccines, essential drugs

[195] Section 2 (1) (e) of the National Health Act.
[196] Section 2 (1) (f) of the National Health Act.
[197] Section 2 (3) (a) of the National Health Act.
[198] Section 2 (3) (b) of the National Health Act.
[199] Section 2 (3) (c) of the National Health Act.
[200] Section 11 (2) (a) of the National Health Act.
[201] Section 11 (2) (b) of the National Health Act.
[202] Section 11 (2) (c) of the National Health Act.

and consumables. The NPHCDA is mandated to develop appropriate guidelines for the administration, disbursement and monitoring of the Basic Health Care Provision Fund with the Minister's approval.[203]

Section 13 is quite instructive as it provides for Certificate of standards without which no person, entity, government or organization shall establish, construct, modify or acquire a health establishment, health agency or health technology.[204] Without a certificate of standards no entity shall increase beds or acquire prescribed health technology at a health establishment or health agency.[205] To provide prescribed health services[206] a certificate of standards is mandatory also no entity shall continue to operate a health establishment, health agency or health technology after the expiration of 24 months from the date this Act took effect.[207] Not adhering to the provision of obtaining a certificate of standards shall be penalized and liable on conviction to a fine of not less than N500, 000 or in the case of an individual, to imprisonment for a period not exceeding 2 years or both. This is provided for in section 15 of the NHA, 2014.

The Minister of Health is given wide powers under the NHA, 2014 to prescribe minimum standards and requirements for the provision of health services at non-health establishments and at public health establishment other than hospitals.[208] A user may attend any health establishment for the purposes of receiving health services[209] and if that health establishment is incapable of providing the necessary treatment, referrals to another establishment must be made.[210] The

[203] National Health Act, section 11 (7).
[204] Section 13 (1) (a) of the National Health Act.
[205] Section 13 (1) (b) of the National Health Act.
[206] Section 13 (1) (c) of the National Health Act.
[207] Section 13 (1) (d) of the National Health Act.
[208] Section 16 of the National Health Act.
[209] Section 17 (1) of the National Health Act.
[210] National Health Act, section 17 (2).

Minister again is given the mandate to prescribe mechanisms to ensure a coordinated relationship between private and public health establishments in the delivery of health services. Section 19 of the NHA 2014 mandates all health establishments to comply with the quality requirements and standards prescribed by the National Council on Health.

Part III of the Act consists of different provisions on rights and obligations of users and health care personnel. Section 20 on emergency treatment is revolutionary to the Nigerian health sector. Section 20 (1) provides that a health care provider, health worker or health establishment shall not refuse a person emergency medical treatment for any reason. A person who contravenes this section commits an offence and is liable on conviction to a fine of N100, 000 or to a period of imprisonment not exceeding six months or to both.[211] The incidence of patients needing emergency treatment but refused for not paying deposit immediately would reduce reasonably. Section 21 (2) provides the rights of health care personnel against injury and disease transmission. For the purpose of this research section 24 and 25 of the NHA, 2014 is instructive. Section 24 places a duty on the Federal Ministry of Health (FMOH), State Ministry of Health (SMOH), Local Government health Authority and every private health care provider to ensure appropriate, adequate and comprehensive information is disseminated and displayed at facility level on the health services for which they are responsible. This is good as it will be easy to locate PHC facilities as they are to be clearly labelled. Section 25 obligates person in charge of health establishment to keep proper records, section 26 – section 29 is all about health records confidentiality, access to health records and protection of health record. Section 30 empowers users of health establishments to lay complaints if treated in an inhumane manner.

Part IV deals with National Health Research and Information System. This part consisting of

[211] Section 20 (2) of the National Health Act.

sections 31 – 40 provides for establishment, composition and tenure of the National Health Research Committee among other things such as coordination of National Health Management Information system which is intended to improve the Nigerian health care system and standardize it. Part V makes provision on Human resources for health[212]. Section 41 making provision for development and provision of human resources in national health system states that 'the National Council shall develop policy and guidelines for and monitor the provision, distribution, development, management and utilization of human resources within the national health system'. Importantly, sections 41 to 46 mandate the Minister and the National Council on Health to make guidelines on adequate distribution of health care providers and health workers. This is commendable as it is supposed to offset the deficit of community health providers in the PHC service delivery system. Part VI and VII mainly deal with issues bordering on secondary and tertiary health care delivery and do not fall within the subject of this research[213].

3.2.2 Medical and Dental Council of Nigeria Act

The Medical and Dental Practitioners Act specifically establishes the Medical and Dental Council of Nigeria for the registration of medical practitioners and dental surgeons, and to provide for a disciplinary tribunal for the discipline of members[214]. Medical Practitioners form the administrative component of the health care services hence the importance of the Act in this scheme of research. Section 1 establishes the Medical and Dental Council of Nigeria and creates its functions and responsibilities. The Medical and Dental Council of Nigeria is a body corporate

[212] Aminu Yakubu and Clement Adebamowo 'Implementing National System of Health Research Ethics Regulations: The Nigarian Experience' (2012) 1 (1) *BEOnline* 4-15
[213] Anthonia Adindu, 'Health Systems Research in Nigeria' *International Journal of Health Sciences* (1991), 22 (3), 153.
[214] Olabanjo Ayenakin, Temitayo Akindejoye and Itunu Kolade-Faseyi 'Examination of the Legal and Institutional Frameworks of Medical Law in Nigeria' (2021) 9 (6) *Global Journal of Politics and Law Research*, 12.

with perpetual succession and a common seal capable of suing in its name[215]. The council's functions and responsibility includes:

a) determining the standards of knowledge and skill to be attended by persons seeking to become members of the medical or dental profession and reviewing those standards from time to time as circumstances may permit.[216]

b) securing in accordance with the provisions of the Act, the establishment and maintenance of register of persons and the publication from time to time of list of persons[217],

c) reviewing and preparing from time to time statement as to the code of conduct which the Council considers desirable for the practice of the profession in Nigeria.[218]

d) supervising and controlling the practice of homeopathy and other forms of alternative medicine[219]

e) making regulations for the operation of clinical laboratory practice in the field of pathology which includes Hispathology, forensic pathology, Autopsy and cytology, clinical cytogenetics, Haematology, Medical Micro-biology and medical parasitology, chemical pathology, chemical chemistry, immunology, and medical virology,[220] and

f) performing the other functions conferred on the council by the Act.[221]

[215] Ibid
[216] Osaretin Odia, *Law and Ethics of Medical Practice in Nigeria* (University of Port Harcourt Press Limited, 2008).
[217] Benjamin Umerah *Medical Practice and the Law in Nigeria* (Nigeria: Longman, 1989)
[218] Abidemi Omonisi, 'Contemporary Ethicolegal Issues in Medical Practice in Nigeria – the Role of Medical and Dental Council of Nigeria' (2022) 1 (1) *The Nigerian Stethoscope*.
[219] Emmanuel Nwusulor 'Homeopathy: The Nigerian Experience' (2006) 95 (2) *Homeopathy*, 105.
[220] Olabanjo Ayenakin, Temitayo Akindejoye and Itunu Kolade-Faseyi 'Examination of the Legal and Institutional Frameworks of Medical Law in Nigeria' (2021) 9 (6) *Global Journal of Politics and Law Research*, 12.
[221] Medical and Dental Practitioners Act 1963, s. 1 (2) (a) – (e).

Section 2 provides for the composition of the council. Section 6 provides for the council to appoint a fit medical practitioner or dental surgeon to be the Registrar. The Registrar per section 6(2) is to prepare and maintain register of names, address and approved qualifications and of such other particulars of persons seeking to be registered as medical practitioners or dental surgeons in so far as they apply in the specified manner. Section 7 mandates the Registrar to periodically print and publish the register and put it on sale to members of the public. Section 8 lists out the conditions for registration to include that the application must have; attended course training approved by the council. Applicant must ensure that the course was conducted at an institution approved, or partly at one such institution and partly at another or others, he or she must hold a qualification so approved, hold a certificate of experience issued in pursuance of section 11 of the Medical and Dental Practitioners Act.[222]

The duty to approve courses, qualifications and institutions in the profession is on the Council.[223]Section 11 authorizes the council to issue certificate of experience free of charge to a person who has obtained approved medical and dental qualification if the person meets the stipulated conditions.[224]

The Act further provides for limited registration of practitioners[225] who intend to be in Nigeria for a limited period of time and practitioners are obligated to pay practicing fees and where they commit any unprofessional or infamous conduct they are subject to professional discipline in accordance with sections 15, 16 and 17 of the Act. Section 17 makes it an offence to practice having not registered or to use the title of physician, surgeon, and doctor, licentiate of medicine,

[222] Medical and Dental Practitioners Act 1963, s. 8 (1) (a) – (d).
[223] Medical and Dental Practitioners Act 1963, s. 9.
[224] Medical and Dental Practitioners Act 1963, s. 11 (2) (a) – (f).
[225] Medical and Dental Practitioners Act 1963, s. 13.

medical practitioner or apothecary when not so registered. The offences are generally related to registration as a practitioner either unlawfully or procuring same contrary to the law. This Act does not make provision for punishment of medical negligence which would have been relevant here.

3.2.3 Mental Health Act 2022

Apart from the obvious low priority accorded to mental health in terms of policy, funding and personnel, the legal framework for the provision of mental healthcare in Nigeria remains a major concern to psychiatrists as well as other stakeholders. In times past mental health came up for discussion only when the *mens rea* of a crime was being inquired into. This largely distorted the need to look beyond criminal law for answers to the neglected mental health foray. The issue of human rights consideration also never made the rounds even in international discuss let alone local dispensation where metaphysics is looked to for answers and mental patients are treated with disdain and deprived of their human rights. However, with the World Health Organization (W.H.O) taking the lead it is a widely accepted standard now that those mental health patients must be accorded full human rights as being mentally challenged in no way reduces the humanity of these victims. In total 156 countries, corresponding to 80% of W.H.O member states, reported the existence of a stand-alone and/or integrated law for mental health[226] that caters for human rights also. Consequent upon this reality 38% of W.H.O member states reported that their laws were fully compliant with human rights instruments, and 46% of member states stated that their laws were in the process of implementation and was fully compliant with human right

[226] World Health Organization (WHO), *Mental Health Atlas 2020* (World Health Organization, 2020) 45.

instruments.[227]

The area where unethical practices are most rampant is in the treatment of mentally ill patients. The new Act is a new innovation meant to emphasize the importance of according human rights to those going through mental health challenges and to demystify the illness.

3.2.4 Medical Negligence under the Medical and Dental Practitioners Act

The central enactment that currently regulate the medical profession in Nigeria is Medical and Dental Practitioners Act, CAP M8 Laws of the Federation of Nigeria, 2004. Section 1 (c) of the Act creates and empowers the Medical and Dental Council of Nigeria to review and prepare a code of conduct for the regulation of the medical and dental profession. Section 15 (1) of the Medical and Dental Practitioners Act establishes the Medical and Dental Practitioners Disciplinary Tribunal which is responsible for the maintaining of medical ethics concerning the discipline of unethical medical practitioners. Under this head, the law is that the doctor is subject to the code of ethics and regulations governing its protection. As opposed to Medical negligence, it is described as professional negligence in the Code on Medical Ethics in Nigeria. Looking closely at Section 15 of the Medical and Dental Practitioners Act establishes two regulatory bodies to oversee professional negligence in Nigeria. They are Medical and Dental Practitioners Disciplinary Tribunal saddled with the responsibility of considering and handling alleged negligence against the medical practitioner. While the second body is Medical and Dental Practitioners Investigation Panel which is saddled for investigating an alleged negligence and whether or not a medical practitioner should be subject to proceedings of the tribunal.

If a medical practitioner is found liable for medical negligence, the practitioner may be subject to

[227] World Health Organization (WHO), *Mental Health Atlas 2020* (World Health Organization, 2020) 45.

the striking off his name from the professional register, suspension of practice nor admonition depending on the gravity of the misconduct or negligence. A medical practitioner who is not satisfied with the decision of the Medical and Dental Practitioners Disciplinary Tribunal has a right to appeal to the Court of Appeal.[228] In the case of *Denloye v Medical Council Disciplinary Tribunal*[229] where the court of appeal ordered that the name of the practitioner whose name was struck off the roll should be relisted. This case shows that the court has the unreserved right to interfere or override the decision of the tribunal. This is also evident in *Alakija v Medical Council Disciplinary Tribunal*,[230] where the court held that the two years suspension of a medical practitioner was an infraction to the principle of natural justice as the registrar who served as a prosecutor also participated in the proceedings of the tribunal.

3.2.5 Medical Negligence under the Rules of Professional Conduct for Medical and Dental Practitioners

The Rules of Professional Conduct for Medical and Dental Practitioners are also known as Code on Medical Ethics in Nigeria. They are made by the Medical and Dental Council of Nigeria by virtue of Section 1 (c) of the Medical and Dental Practitioners Act.[231] The purpose of the Rules is to maintain the dignity of the medical profession in Nigeria and also to stipulate what amounts to professional misconduct and the penalty prescribed thereto. Each and every medical personnel in Nigeria is duty bound to understand the high standard of care expected of them when they are dealing with their client. This is borne of the fact that a medical practitioner owes a duty of care to his client to take reasonable care in dealing with him. This also presupposes that a medical

[228] See section 16 (6) of the Medical and Dental Practitioners Act CAP M8 Laws of the Federation of Nigeria, 2004.
[229] (1968) All NLR 306.
[230] (1959) 4 FSC 59.
[231] Laws of the Federation of Nigeria, 2004 CAP M8

practitioner is expected to be diligent and must always remember the ethics of the profession in discharging his duties towards his patient.

It is observed that Rule 28 establishes professional negligence as a registered practitioner's failure to exercise skill or act with the degree of care expected of his experience and status in the process of attending to a patient. This principle was introduced with a five pronged approach stipulating that:

i. Each medical and dental practitioner owes a duty of care to their patient;

ii. The skill bestowed on a practitioner be exercised in a manner ordinarily expected by any other competent and reasonable practitioner of his experience and status;

iii. Each practitioner updates his skills pursuant to advancing knowledge in the professions;

iv. A practitioner attends frequently to patients in his admission as their conditions demand, in the case of *Oloye v Chairman, Medical & Dental Practitioners Disciplinary Tribunal*,[232] where the tribunal held that the three medical practitioners involved are liable for negligence for non-attendance to their patients.

Nigeria's peculiar social problems and obstacles that impede the full manifestation of a practitioner's skill do not exempt a practitioner from exercising the best degree of reasonable care exercisable under such circumstances[233].

[232] (1977) NMLR pt. 506 p. 550.
[233] Yinka Olomojobi, *Medical and Health Law, The Right to Health* (Lagos: Princeton & Associates Publishing Co. Ltd, 2019) p. 143.

Furthermore, the section contains an open-ended list on what may constitute professional negligence. It provides a list of nine incidents to be listed succinctly below captioned. They are as follows:

i. Unreasonable delay in attending to a patient

ii. Incompetent patient assessment

iii. Incorrect diagnosis despite glaring clinical features

iv. Proffering wrong or no advise as to risk involved in a particular type of treatment especially such that may lead to deformity or organ loss

v. Non obtainment of patient's consent prior to surgery or course of treatment, especially where necessary.

vi. Making a mistake in treatment

vii. Failure to refer or transfer a patient in good time where necessary

x. Failure to do anything that ought to reasonably be done for the patient's good

xi. Failure to see a patient as often as his medical condition demands, make proper notes on practitioner's observations and prescribed treatment during such visits or to communicate with the patient or his relation or his relation as may be necessary with regards to any developments, progress or prognosis in the patients' condition.

Rule 29 also states that a practitioner who was found liable for professional negligence may be admonished. A second time finding of liability would result in suspension for a minimum of six

months. However, a habitually negligent practitioner may have his name struck off the register. While Rule 30 also provides that if the negligent act led to the permanent disability or death of a patient, the practitioner will be liable for gross professional negligence and is liable to a six month's suspension or having his name struck off the register as the case may be[234].

3.2.6 Medical Negligence under the Nigerian Criminal Code

Section 303 of the Criminal Code[235] provides that any person who undertakes to administer surgical or medical treatment or to undertake any lawful act except in a case of necessity, that is or may be dangerous to human life, has a duty to use reasonable care and possess reasonable skill for doing such act. Also, such person is held responsible for any consequences resulting to the health and life of that person by reason of any omission to perform or observe that duty. 6the section states that:

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

Section 305 of the Criminal Code[236] also provides that a person who undertakes to do an act, the omission of which is dangerous to human life and health of that person by reason of omission to perform the duty. *Section 343 (1) of the Criminal Code*[237] provides that anyone who is in a

[234] Ibid.
[235] Section 303 of the Criminal Code
[236] Section 305 of the Criminal Code
[237] Section 343 (1) of the Criminal Code

negligent and rash manner, such as to cause harm to or endanger the life of another, gives any person he had undertaken to treat surgical or medical treatment, such a person is guilty of a misdemeanour and liable to imprisonment for one year. However, *Section 297 of the same Criminal Code*[238] provides that any medical practitioner who reasonably performs for the benefit of another, a surgical operation in good faith with reasonable care and skill, having regard to the patient's state at the time and all circumstances of the case.

3.3 Institutional Framework

As a result of the fundamental nature of health care in Nigeria there are many agencies and Institutions that can be associated with the responsibility to handle issues bordering on medical ethics. The Medical and Dental Practitioners Council is one of such agency but they are not as official as the Federal Ministry of health. When it comes to criminal prosecution of medical practitioners for gross incidences of medical negligence of a nature chargeable as manslaughter or murder then the Ministry of Justice may be involved or any other prosecutorial entity such as the Nigerian Police or even the ICPC. Rather than broadening the scope too widely it is considered better to narrow down the analysis to focus on the Ministry of Health as the Ministry empowered by the National Health Act to play the regulatory role over medical professionals.

3.3.1 Ministry of Health

Health is a fundamental human right as stipulated in the Alma Ata Declaration in Article 1, even though the Nigerian Constitution does not appreciate this fact by including it in Chapter 4 of the constitution, the state governments have over the years tried to guarantee health for all by strengthening the state Ministries of health to be active in health care implementation especially

[238] Section 297 of the same Criminal Code

Primary Health Care (PHC). The State Ministry of Health (SMOH) is responsible for policy and program direction but in practice has limited power, with little direct authority over funding, which is the authority of State Ministry of Local Government (SMOLG).[239] The state Ministry of Health has the responsibility for implementation of the National Strategic Health Development Plan in the State. At the Federal level, the Federal Ministry of Health Provides policy and program direction, The Local Government primary health care department is headed by the Local Government primary health care Coordinator. The Coordinator is responsible for LGA – level program management (i.e budgeting, measurement and evaluation, and suspension. However, they have limited direct control over PHC facility staff, given that high – level PHC employee (levels seven and above are hired and directly paid by State Ministry of Health's service commission.[240]

3.3.2 Nigerian National Health Research Ethics Committee

The National Code of Health Research Ethics, which is the highest policy document on research ethics in Nigeria, was approved by the National Council on Health in its 50th Annual Meeting in January 2007.[241] The procedure entailed that health policy be reviewed and approved by all commissioners of health for nation-wide implementation.[242] While awaiting the passage of the act of law to provide further backing for the Code, it received the Ministerial approval for implementation, as with all other health policy in the country.

The National Health Research Ethics Committee is largely responsible for the regulation of other

[239] Daniel Kress, Yanfong Su and Hong Wang, 'Assessment of Primary Health Care System Performance in Nigeria: Using the Primary Health Care Performance Indicator Conceptual Framework' (2016) (2) 4 *Journal of Health Systems & Reform* 3.
[240] Daniel Kress, Yanfong Su and Hong Wang op. cit. p. 54.
[241] Federal Ministry of Health (FMOH) FMOH; Proceedings of the 50th National Council on Health Meeting, Sheraton Hotel and Towers; Abuja, Nigeria. 2006.
[242] Federal Ministry of Health (FMOH) Revised National Health Policy. FMOH; 2004.

institutional ethics committees in the country. Each institution in which research is being conducted is encouraged to establish its own ethics committee, or enter into an agreement with an ethics committee from another institution to serve as its ethics committee of record. Central review by the NHREC is only provided for multi-centre studies and is entirely at the discretion of the researcher. This is seen as an important initiative because it provides the researcher and or sponsor with choices, to potentially avoid the problems observed with local reviews for multi-centre studies.[243]

The availability of the Code on NHREC's website, and the need for all researchers and members of ethics committees to abide by the code was publicized nationally in the media[244] conferences and the 51st National Council on Health meeting in 2008[245]. The Code requires ethics committees to register with NHREC in line with calls for accreditation of ethics committees 36, 37 which was for quality assurance purposes.

This is seen as an important avenue to lure the committees to apply the Code in their practices. The National Agency for Food and Drugs Administration and Control (NAFDAC) is the agency, for example, responsible for regulating clinical trials for new pharmaceutical products in Nigeria amongst other mandates.[246] Concerned about the ethical aspects of clinical trials and in the bid to fulfill this responsibility, NAFDAC welcomed the establishment of NHREC and its requirement for registration of ethics committees to be essential to ensuring the ethics of clinical trials in

[243] Alison While, 'Ethics Committees: Impediments to Research or Guardians of Ethical Standards' (1995) 311 *British Medical Journal*, 661.
[244] Daily Trust Advertorial. National Health Research Ethics Committee. (2006) Daily Trust Newspapers; Dec 5, 2006
[245] National Agency for the Control of HIV/AIDS (NACA) Nigeria HIV/AIDS Summit 2007. NACA; 2007. Presentation on the National Code of Health Research Ethics
[246] National Agency for Food and Drugs Administration and Control (NAFDAC) Draft National Guidelines for Good Clinical Practice in the conduct of Clinical Trials in Nigeria. NAFDAC; <http://nafdac.gov.ng/index.php?option=com_docman&task=doc_download&gid=112&Itemid=166> accessed 10 January, 2024.

Nigeria. The collaboration between these two agencies has thus far, helped in fostering the application of the Code. By this partnership, NAFDAC does not approve any clinical trial that is not approved by either NHREC, or an NHREC registered ethics committee.

3.3.3 Medical and Dental Practitioner Disciplinary Tribunal

The Medical and Dental Practitioners Disciplinary Tribunal is a similitude of a court of law created under the Medical and Dental Practitioners Act[247] and it is the body charged with responsibility of disciplining any erring medical and dental practitioners. The body otherwise known as "The Disciplinary Tribunal" is charged with the duty of considering and determining any case referred to it by the Panel established under subsection (3) of the Medical and Dental Practitioners Act and any other case of which the Disciplinary Tribunal has cognisance of under the Act. The Disciplinary Tribunal consist of the Chairman of the Council and ten other members of the Council appointed by the Council who shall include not less than two persons who are fully registered dental surgeons.

Disciplinary Tribunal has the status of a High Court of the Federal Republic of Nigeria and practitioners who appear before it, whether as complainants, defendants, or witnesses, whether or not they are also represented by a lawyer, must conduct themselves as they would before a high court. Legal practitioners who appear before the tribunal are to accord the court the decorum given to a High Court.[248] Moreover, the Tribunal has the statutory power to award penalties against medical and dental practitioners where: a registered person is adjudged by the Disciplinary Tribunal to be guilty of infamous conduct in any professional respect; a registered

[247] Establishment of Disciplinary Tribunal Investigation Panel. Section 15(3) of the Medical and Dental Practitioners Act 1988. CAP M8 – 11
[248] Ibid.

person is convicted by any court of law or Tribunal in Nigeria or elsewhere having power to impose imprisonment for an offence which in the opinion of the Tribunal is incompatible with the status of a medical practitioner or dental surgeon and if the name of any person has been fraudulently registered. Where a practitioner has been brought before the Tribunal; the Tribunal may give any of the following awards: order the Registrar to strike out the name of the erring person off the relevant register; suspend the person from practice or admonish the person.[249] Appeal against the decision of the Tribunal shall lie to the Court of Appeal. The person appealing may do so within 28days from the date of service on him. The notice of the Tribunal is decision and the Tribunal shall be a respondent to the appeal.[250] A person whose name is removed from a register in pursuance of a direction of the Disciplinary Tribunal shall not be entitled to be registered in that register again except in pursuance of a direction in that behalf given by the Tribunal on the application of the person.

3.3.3.1 Establishment of Disciplinary Tribunal and Investigation Panel

Establishment of Disciplinary Tribunal and Investigation Panel. There shall be established a tribunal to be known as the Medical and Dental Practitioners Disciplinary Tribunal (in this Act referred to as "the Disciplinary Tribunal"), which shall be charged with the duty of considering and determining any case referred to it by the Panel established under subsection (3) of this section and any other case of which the Disciplinary Tribunal has cognizance under the following provisions of this Act.[251]

[249] Section 18(7) of Pharmacists Councils of Nigeria Act 1992.
[250] *Okekearu v. Tanko* (2002) 15 NWLR Pt. 791, 657
[251] Section 15 (1) & (2) of the Medical Practitioners Act, 2004

3.3.3.2 Composition of Members

(2) The Disciplinary Tribunal shall consist of the Chairman of the Council and ten other members of the Council appointed by the Council who shall include not less than two persons who are fully registered dental surgeons[252]. It should be noted that the Body that appoints the chairman and members of the disciplinary is Medical Council.[253]

3.3.3.3 Duties of the Panel

a) conducting a preliminary investigation into any case where it is alleged that a registered person has misbehaved in his capacity as a medical practitioner or dental surgeon, or should for any other reason be the subject of proceedings before the Disciplinary Tribunal;

b) compelling any person by subpoena to give evidence before it;

c) deciding, if satisfied that to do so is necessary for the protection of members of the public, to make an order for interim suspension from the medical or dental profession in respect of the person whose case they have decided to refer for inquiry; and for the case to be given accelerated hearing by the Disciplinary Tribunal within three months; or

d) deciding, if satisfied that to do so is necessary for the protection of members of the public or is in his interest, to make an order for interim conditional registration in respect of that person, that is to say, an order that his registration shall be conditional on his compliance, during such period not exceeding two months as is specified, as the Panel may think fit to impose for the protection of members of the public or in his interest.[254]

[252] Section 15 (3) of the Medical and Dental Practitioners Act.
[253] Section 15 (4) of the Medical and Dental Practitioners Act,
[254] Section 15 (4) of the Medical and Dental Practitioners Act,

CHAPTER FOUR

MEDICAL ETHICS AND LEGAL OBLIGATION IN THE NIGERIAN HEALTH CARE

4.1 Hippocratic Oath and principles of Medical

The Hippocratic oath, which is employed in medical schools and as a guidance for medical practitioners, is an ethical code credited to the ancient Greek physician Hippocrates. A collection of manuscripts known as the Hippocratic Collection offers medical knowledge and guidelines for educators and learners. The oath establishes duties to instructors, doctors, and students, such as administering helpful therapies, abstaining from damage, and leading a moral life. Although the Hippocratic Oath is a widely accepted ethical concept, several doctors and medical institutions have questioned its legitimacy. It includes ethical norms that are relevant to modern medicine, such as beneficence, avoidance of harm, autonomy, and justice. To really appreciate the oath's extraordinary content, however, it must be seen within the framework of ancient Greek history and culture. Alterations to the oath could try to supplant a text that, for two millennia, transformed medicine and humanity.[255]

The oath states thus:

> *"I swear by Apollo the physician, and Aesculapius, and Health, and All-heal, and all the gods and goddesses, that, according to my ability and judgment, I will keep this Oath and this stipulation—to reckon him who taught me this Art equally dear to me as my parents, to share my substance with him, and relieve his necessities if required; to look upon his offspring in the same footing as my own brothers, and to teach them this Art, if they shall wish to learn it, without fee or stipulation; and that by precept, lecture, and every other mode of instruction, I will impart a knowledge of the Art to my own sons, and those of my teachers, and to disciples bound by a stipulation and oath according to the*

255 Mary-Ann O. Ajayi, Balancing Medical Doctors Hippocratic Oath And Freedom Of Association Under Nigerian Labour Law, Vol. 14, 2018*Unizik Law Journal*

law of medicine, but to none others. I will follow that system of regimen which, according to my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous. I will give no deadly medicine to any one if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion. With purity and with holiness I will pass my life and practice my Art. I will not cut persons laboring under the stone, but will leave this to be done by men who are practitioners of this work. Into whatever houses I enter, I will go into them for the benefit of the sick, and will abstain from every voluntary act of mischief and corruption; and, further from the seduction of females or males, of freemen and slaves. Whatever, in connection with my professional practice or not, in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret. While I continue to keep this Oath unviolated, may it be granted to me to enjoy life and the practice of the art, respected by all men, in all times! But should I trespass and violate this Oath, may the reverse be my lot!"[256]

The government in ancient times gave doctors monopolistic powers and mandated that they abide by the Hippocratic Oath, a set of moral principles. While recent medical graduates desire a ceremony to recognise their membership, modern doctors want to keep these privileges. Contemporary oaths are ambiguous. The traditional Hippocratic Oath, which puts the needs of the patient first, is still commonly used today. However, the lack of the Oath substitutes government interests for patient interests in a society where patient recompense is no longer a top concern.[257]

256 Peter Fenelon, Oath and Law of Hippocrates 38 (1910) Harvard Classics (Online) available at gopher..//ftp.std.com//00/obi/book/Hippocrates/Hippocratic.Oath> accessed 4th October 2024

257 Gilbert Berdine, 'The Hippocratic Oath and Principles of Medical Ethics', Medicine and Public Policy

4.2 Legal Basis for Criminalizing Medical Negligence in Nigeria

Fundamentally, criminal negligence is important to hold negligent professionals culpable where the level of negligence is so devastating that the full force of the law must be activated to hold the professional liable. The criminal code and the penal code for the Southern and Northern part of Nigeria respectively both have provisions on criminal negligence. Criminal negligence arises when the negligence or misconduct of the medical practitioner amounts to grave circumstances such as death, permanent disability, loss of limb etc.[258] The legal basis for criminalizing negligence lies in the need of ensuring a culture of responsibility for ones actions. The logic is a simple one, if a professional presents himself as a professional then the reasonable standards expected from such a professional must apply and where gross deviation leads to death or incapacitation then the professional must be held criminally liable for the negligent.

Section 344 of the Criminal Code Act[259] provides for the criminalizing of negligent act causing harm and the basis for this stems from a person's unlawful act or omission being an act specified in section 343 which is the preceding section or if the act is the person's duty to do. The guilty party commits a misdemeanor liable to six months imprisonment. Section 343 is rather interesting going on to list samples of acts that would constitute negligent or reckless acts. The qualifying component is doing said act in a rash manner capable of endangering human life or likely to cause harm to any other person.[260] The fundamental provision is in section 343 (1) (e) which provides that the medical personnel who in a manner so rash or negligent as to endanger human life or to be likely to cause harm to any other person gives medical or surgical treatment to any person whom he has undertaken to treat or dispenses, supplies or administers any

258 F.A. Animahun, *An Overview on Nigerian Medical Negligence Liability* (Libra Law Office, 2024) 4.
259 Cap 38 LFN 2004.
260 Criminal Code Act Cap C38 LFN, 2004, s. 343 (1).

medicine or poisonous or dangerous matter.[261] The offence is a misdemeanor and the offender is liable to imprisonment for one year.[262] Just like the criminal code the penal code Act also have its equivalent making it nationwide potential culpability for criminal negligence. The issue however is whether the principles of vicarious liability and principal offenders can be extended to apply.

4.3 Assessment of the Issue of Human Rights and Medical Ethics

There is a noticeable line or nexus between human rights and medical ethics. Medical Ethics have as its end goal the protection and promotion of human rights, also the prevention of bodily harm to patients. While human rights is as old as time traceable to the beginning of humanity rooted in the very idea that all humans are born equal and should be treated equally. On the other hand medical ethics can be traced to the Hippocratic Oath and particular periods in history.[263] Some other authors unlike the writer choose not to see a nexus between the two concepts. Michael Peel opines that the two concepts are parallel mechanisms with human rights working at the socio political level while medical ethics exist at the level of the Doctor-Patient relationship.[264] But even with this view the author concludes that human rights and medical ethics are complementary.

4.4 Relationship Nexus between Medical Law and Medical Ethics in Medical Practice in Nigeria

Law and Ethics can be explained either as polar opposites or as complementary elements. The law being amoral, empirical, and punishable while ethics seem based on moral values possibly

261 Criminal Code Act Cap C38 LFN, 2004, s. 343 (1) (e) & (f).
262 Criminal Code Act Cap C38 LFN, 2004, s. 343 (1).
263 Michael Peel, "Human Rights and Medical Ethics" (2005) 98 (4) *Journal of the Royal Society of Medicine,* 171-173
264 Ibid

lacking enforceability component. Although in a professional context, a professional body can enforce punishment against members who offered the ethical code. Take for example the legal profession; a lawyer who flouts the Rules of Professional Conduct (RPC) for lawyers can be disbarred even though such action does not culminate in criminal prosecution. Recently, teaching law and ethics in medical practice has emerged as part of the core curriculum in both undergraduate and post graduate medical education in many developed countries.[265] This shows how instrumental both subjects and concepts have become. Medical Ethics' is the professional competency of moral issues in medical treatment, health care system and research.[266] In a 2017 publication by the World Medical Association (WMA) the association's resolution reached the conclusion that medical ethics and human rights should be made compulsory incorporated into the curriculum of medical school, post graduate medical education and continuing professional education or development.[267] A study found that medical students are aware of the importance of medical ethics but that students studying in government medical college held stronger views regarding ethical situations concerning abortion and euthanasia.[268] It is perplexing to even consider the reality that although founders of medical ethics such as Hippocrates over two centuries ago had already published ethical documents yet there is no university used curriculum for teaching ethics to medical students.[269] The implication is that there is no strait jacket way of tackling the ethical dilemma that is sure to arise. No doubt human rights considerations ought to

265 Hau Kong-Lung, "Law and Ethics in Medical Practice" *Medical Section Journal,* (2003) 8 (6) 1-7.
266 Zaeema Ahmer, Rameen Fatima and Others, "How Important is Medical Ethics? Descriptive Cross-Sectional Survey among Medical Students of Karachi" (2021) 5(2) *European Journal of Environment and Public Health,* 1.
267 World Medical Association, 'Resolution on the inclusion of Medical Ethics and Human Rights in the Curriculum of Medical Schools Worldwide' <https://www.wma.net/policies-post/wma-resolution-on-the-inclusion-of-medical-ethics-and-human-rights-in-the-curriculum-of-medical-schools-world-wide> accessed 25 December 2023
268 Zaeema (n. 142) Ibid at 5
269 World Medical Association, *World Medical Association: Medical Ethics Manual* (World Medical Association, 2015) 5

be prioritized in tackling any ethical dilemma so the preservation of life by ensuring no negligent act leads to death or grievous bodily harm. In fact care must be taken by the medical personnel not to be negligent as it is always a matter of life and death.

Even though ethics and law are not identical, in some countries an ethical violation would lead to the law taking its course to punish the violator. Quite often ethics prescribes higher standards of behavior than does the law, and occasionally ethics requires that physicians disobey laws that demand unethical behavior.[270] In the 21st century we see legalizing abortions in western societies and supply of puberty blockers to teenagers who claim they are born in the wrong body. All these examples make for continued clash between law and ethics. Also physicians often deal with injuries that come off human right violation and abuse, and law breaking. It is rather advised that law and ethics work complementarily rather than as polar opposites.

4.5 Legal Obligation of Doctor-Patient Relationship

Patients' rights are those rights attributed to a person seeking healthcare. In general, the rights of a patient are concerned with the patient being fully informed about his or her illness, the diagnostic and therapeutic measures anticipated, and the written records of the care received. Patient rights in healthcare delivery includes; the right to privacy, information, life and quality care, as well as freedom from discrimination, torture and cruel, inhumane, or degrading treatment. The patient has the right to considerate and respectful care, delivered in response to a request for services and in a manner that provides continuity of care. In regard to payment for services, the patient has the right to examine and receive an explanation of the bill regardless of source of payment. The doctor is duty bound to honour the patients' rights. Consent and confidentiality are two key features in the Doctor-Patient relationship dynamic.

270 Ibid at 12.

4.5.1 Consent

Every adult human being of sound mind and sound disposition have a fundamental right to determine what happens to their body[271] especially if what would happen to their body would prove fatal. This is autonomy metamorphosed or morphed in the medico-legal foray into consent. For consent to be valid, it must be informed, voluntary and be given by a competent person[272] Informed consent is required for all medical investigations and procedures and is considered a corner stone of modern medicine.[273] In the past provided a health care professional acted in the patients best interest reasonably and professionally there was not too much concern over what a patient was or was not told about the risks.[274] Consent of the patient must be legally obtained at all times and where the patient is in a vegetative state a guardian or spouse can grant the much needed consent. Many hospitals have different policies on this but the fundamental necessity of consent cannot be wished away by internal rules.

4.5.2 Confidentiality

Confidentiality is the practice of keeping harmful, shameful, or embarrassing patient information within proper bounds. It differs from privacy in that it always entails a relationship. Confidentiality in medicine serves two purposes. Firstly, it ensures respect for the patient's privacy and acknowledges the patient's feeling of vulnerability. Secondly, it improves the level of health care by permitting the patient to trust the health professional with very personal information. Computerisation of laboratory and radiological investigations makes confidential information easily available, even to healthcare professionals not directly involved with the

271 Sparsh Prasher, Michael Klimatsides and Zahid Mahmood, 'The Evolution of Consent Law in the UK' (2015) 10 (1) JCS <https://www.ncbi.nlm.nih.gov/pmc/articles/pmc4693737/#_ffn_sectittle> accessed 26 March 2024.
272 Ibid at 10.
273 Christian P Selinger, 'The Right to Consent: Is it Absolute?' (2009) 2 (2) BJMP 50.
274 Elizabeth Larmer and Rachel Carter, 'The Issue of Consent in Medical Practice' [2016] BJH 172, 300, 303.

particular patient's care.[275] Confidentiality in medicine ensures respect for the patient's privacy and improves health care by enabling the patient to trust the health professional with very personal information. Confidentiality may be breached if required in terms of the law, such as in the case of gunshot wounds, child or other abuse and communicable diseases. Other justifiable exceptions to the confidentiality rule are in an emergency situation, where the patient is incompetent or incapacitated, and in the case of psychiatrically ill patients who need to be committed to hospital. The final reason to breach confidentiality is to protect third parties, whether this is concern for the safety of a specific person or in the public interest.

4.6 Impact of Informed Consent in Medical Negligence in Nigeria

In Nigeria, the regulation of informed consent is based on the Code of Medical Ethics, which emphasizes autonomy and human rights.[276] The code recognizes that consent can be obtained from the patient, their relations, or public authority, depending on the situation. The Nigerian patient holds the primary right to information and treatment decisions, but a next of kin can give consent for minors and those without capacity. When no relative is available, the most senior doctor in the institution can give an appropriate directive to preserve life.

Informed consent is a crucial process between a clinician and a patient, ensuring the patient's agreement to undergo medical procedures. The Code of Medical Ethics of Nigeria and the National Health Act 2004 prescribe the process of obtaining consent before medical interventions. Practitioners involved in procedures requiring patient consent must ensure appropriate consent is obtained before surgery or diagnostic purposes. Consent forms should be in printed or written form, and explanations should be simple, concise, and unambiguous. Proper

275 Sharon Kling , "Confidentiality in medicine" (2010) 23 (4) *Current Allergy & Clinical Immunology Journal,22.*

276 Aderonke Abimbola Ojo, The Right to Patients' Informed Consent in Nigeria and South Africa: A Comparative Discourse, (2021) 9 (11) Journal of Research in Humanities and Social Science, pp: 43-58

counseling should precede the signing of the consent form, and in cases where the patient is underage, unconscious, or in a state of mental impairment, a next-of-kin should stand in. In special situations, a court order may be necessary to enable life-saving procedures. Counseling sessions should be undertaken at least three sittings to give the patient ample time to take an informed decision before a consent form is signed.[277]

Good medical practice recognizes the inherent right of the patient to their body and life, and it is essential to obtain formal consent from the patient. The Medical and Dental Council of Nigeria has approved a simple format for guidance and use in clinical management, the coded Form MDCN/COMEIN/R19, for universal application throughout Nigeria. This form is now the standard layout for registered practitioners in Nigeria to obtain appropriate consent to carry out procedures on patients. Nigerians' diverse religious beliefs, ethnicity, and cultural backgrounds influence patient-physician relationships and informed consent practices, despite the country's diverse economic, social, and cultural backgrounds.[278]

4.6. Options Available to Victims of Medical Negligence in Nigeria

The options that a victim can explore in dealing with medical negligence can be categorized into three:[279] to wit;

a. Civil Jurisdiction

b. Criminal jurisdiction

c. The principle of *res ipsa loquitur*

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[277] Aderonke Abimbola Ojo, The Right to Patients' Informed Consent in Nigeria and South Africa: A Comparative Discourse, (2021) 9 (11) Journal of Research in Humanities and Social Science, pp: 43-58

278 Emmanuel R. Ezeome And Patricia A. Marshall, Informed Consent Practices in Nigeria, Developing World Bioethics ISSN 1471-8731 (print); 1471-8847 (online).

279 Y. Olomojobi op. cit. p. 156.

Civil Jurisdiction: Negligence is actionable in the Court's civil jurisdiction under a tortuous or contractual claim. The origin of the civil nature of negligence is enshrined in the neighbourhood principle as established in *Donoghue v Stevenson*.[280] In Civil, the plaintiff or the injured party is entitled to remedies under the law. The court usually grants damages or monetary compensation, specific performance, order of restitution etc. the civil tort of negligence is a common law practice extended to Nigeria by virtue of colonialism. It is actionable by the victim personally such that he requires no consent or leave to commence an action. It should be noted that the damage need not be physical. The Courts have to consider mental status, stress, and trauma that may arise from a situation. This principle has been adopted and applied in various Nigerian cases.[281]

Criminal Jurisdiction: Negligence is not actionable per se in criminal litigation, having its roots in the civil practice of Courts. However, if a crime is committed in any situation that negligence is alleged, the crime has to be tried separately from the civil matter. It has been empathized by the Courts that where a criminal and civil matter arise from a particular of facts, the civil matter ought to be suspended till the determination of the criminal matter. A crime is a direct breach of criminal laws and as such attracts graver punishment than a civil matter. Consequently, damages are not awarded in such situations. If the claims are successful under this head, the court may make an order pursuant to the statutory provision in respect of such crimes. This could be capital punishment, imprisonment or fine.

However, compensatory damages are not awarded to the victim in a criminal matter. Another peculiar characteristic of criminal litigation is that the victim has no legal right to institute an

280 (1932) AC 562.
281 See Agbonmagbe Bank Ltd. V CFAO Ltd (1967) NWLR 173; Abubakar v Joseph (2008) 13 NWLR (pt. 1104) 307

action against the alleged criminal. It falls within the confines of the relevant law enforcement agent or the Attorney General to institute such action. Ordinarily, the victim is required to make a formal report to the police, who will in turn carry out the requisite investigation and where necessary, commence an action. However, if a victim seeks to prosecute as a criminal action related to negligence, the law requires the victim to secure a fiat that is to seek the consent or the leave of the Attorney General before he can institute the criminal action. Medical negligence can be found under the criminal code most especially in *Sections 315, 316, and 317 of the Criminal Code Act* and *Section 321 of the Penal Code* where these sections provide inter alia for the unlawful killing of another. Suffice to say that a medical practitioner who is alleged of a medical misconduct or negligence can be charged for either manslaughter or murder depending on the circumstances of the negligence. Meanwhile, provocation cannot be a shield or reduce the offence of murder to manslaughter in the case of medical negligence. Also, in *R. v Akerele*,[282] the facts of this case is that Akerele, a medical practitioner administered injections of a drug known as 'sobita' as a treatment for yaws. An overdose of the drug causes stomatitis thereafter painful symptoms occur in the mouth which may eventually cause in death. On the 6th May, 1940 at Asaga Akere administered the said injections to a number of children including a child named Kalu Ibe, who later had the symptoms of stomatitis and later died. Nine of the other children also had similar symptoms and later died. Akerele was convicted of manslaughter. His appeal against conviction was later dismissed by the West African Court of Appeal. The rationale of the court was that the medical act was negligent and had apparent penalties.

Consequent upon the above, it can be contended that a medical practitioner may be tried under the Criminal Jurisdiction. In terms of murder and manslaughter, where liability is imputed, it

282 (1942) 8 W.A.C.A 5, p. 8

goes beyond the purview of professional negligence and becomes a crime in proper terms. This principle is trite as in *Garba v University of Maduiguri*[283] where the Supreme Court of Nigeria held that a tribunal or administrative panel lacks jurisdiction to entertain an allegation of crime. That the jurisdiction of the regular court ought to have been invoked by the parties as the tribunal lacks the requisite to adjudicate on the matter involving allegation of crime. This means that the administrative tribunal lacks jurisdiction to entertain a criminal matter. When discussing the issue of jurisdiction, it is seen as a threshold issue; it is radical that it forms the foundation of adjudication. If a court lacks jurisdiction, it also lacks the necessary competence to try the issue before it. A defect in competence is fatal to the proceedings as they are null and *void ab initio*., however well conducted and well decided they may otherwise be. It follows therefore that jurisdiction is the bedrock of every court and no court can assume jurisdiction where it has none by circumventing and misrepresenting the prevailing law[284].

Based on the above authorities, it is very clear that where a court assumes jurisdiction over a matter where it has none, all its proceedings amount to nullity *ab initio.* Put differently, a judgment or decision arrived at by a court without jurisdiction is tantamount to no decision at all in that an appellate court will waste no time in nullifying such decision. It is for this very nature of jurisdiction that the law permits the issue of jurisdiction to be raised at any time irrespective of the stages of the proceedings even for the first time on appeal. *See Alims Nig. Ltd. vs. U.B.A*[285] where it was held as follows:

283 (2007) 19 NSCC 306

284 *Emuze vs. v. Uniben (2013) FWLR (pt. 170) 1411 at 1421-1422, See also Oloba vs. Akereja (1988) 3 NWLR (pt. 84) 508; Odofin vs. Agu (1992) 350 and Turaki vs. Dalhatu (2003) FWLR (pt. 170) 1378 at 1405 c-d*

285 *(2007) All FWLR (Pt. 348) 771*

"The issue of jurisdiction can be raised at any time and at any stage of the proceedings as it is very fundamental to adjudication or can be raised suo motu by the court."

A deep reflection on the authorities cited above is to the effect that the issue of jurisdiction can be raised at any point in time and at any stage of the proceedings even for the first time on appeal. *See also Davis v. Mendes*[286] Where the court held that as follows:

> *"Jurisdiction is very vital in the realm of the administration of justice. It is the bedrock of all trials. It is such a threshold issue that when a tribunal or court does not possess it, it cannot exercise any judicial powers whatsoever. The questions of absence of jurisdiction of a court to hear a case can be raised at any stage of the proceedings and even for the first time on appeal."*

In summary, when a medical misconduct or negligence alleges crime, the Medical and Dental Disciplinary Committee will not have jurisdiction to entertain the matter as only the regular court has jurisdiction.

4.8 Defences to Medical Negligence

In terms of applicable defences, it must be noted that the following defences apply to negligent cases. These are contributory negligence, *volenti non fit injuria*, voluntary assumption of risk and limitation. These principles however, apply to all forms of negligent claims.

4.8.1 *Volenti non fit injuria*

286 *(2007) All FWLR (Pt. 348) 883 at 901 C-E*

This principle is to the effect that no harm is done or occasioned to anyone who knowingly and voluntarily consents to the act leading to such an injury. For instance, if a product has an expiry date, as a result of which it has been withdrawn off the shelve, a consumer conscious of the expiry date solicits an attendant to sell it to him, though illegal, cannot hold the manufacturer liable for any consulting injury occasioned by such product. This will also be so in cases like occupiers liability where for instance, a person having been previously warned by the occupier enters the premises without taking the required care.

4.8.2 Contributory Negligence

The effect of the defence of contributory negligence in a product liability case is to the effect that it will reduce the liability of the manufacturer, to the extent of his liability.[287] Liability for the resulting damage will be occasioned between the tortfeassor and the injured party.[288] The potency of this defence was stated by the court in *Nance v British Colombian Electric Ry. Co ltd.*[289] As follows:

> *... all that is necessary is to prove to the satisfaction of the jury that the injured party did not in his own interest, take reasonable care of himself and contributed, by this want of care to his own injury. Relevance*

This is based on the legal principle that one person in fault will not dispense with another's using ordinary care for himself.[290] However, under the Dilemma principle or doctrine of alternative danger, any action or step taken by the plaintiff to escape from the negligence of the defendant

287 See the English Law Reform (Contributory Negligence) Act, 1945; Evans v Bakare (1973) 3 SC 77
288 Pasterck v Poulton (1973) 2 All ER 74
289 (1951) AC 601
290 See Butterfield v Forrester (1809) 11 East 60

will not constitute contributory negligence. Also, the acts of children, physically challenged persons or incapacitated persons are usually not treated as contributory negligence.[291]

4.8.3 Exturpi Causa

This maxim is a legal principle which literally proves that a claim that has arisen from the breaking of a law. It also follows that one knowingly engaged in an illegal activity my not claim damages arising out of that activity.

The defence of illegality finds its origin in the Latin maxim *ex turpi causa non oritur actio*, meaning 'no cause of action may be founded on an immoral or illegal act'. Although often referred to as a singular doctrine, there are in fact two distinct lenses through which the illegality defence is interpreted and applied. The first, *ex turpi causa non oritur actio* ('from a dishonourable cause an action does not arise'), focuses on the illegality of the underlying act and holds that if one is engaged in illegal activity, one cannot sue another for damages that arose out of that doubtful activity. The second, *in pari delicto est conditio defendtis* ('of equal guilt or fault'), focuses on the allocation of fault between the parties and provides that in the case of mutual fault, the position of the defendant is the stronger one. These two perspectives serve as the starting point for the divergence in judicial application of this defence across jurisdictions.[292]

In analysing the illegality defence, the Supreme Court noted two underlying policy rationales. First, the illegality defence prevents a person from profiting from his or her own wrongdoing. Second, the law must be coherent, not condoning illegality by giving with the left hand what it

291 See Yachuk v Oliver Blais (1949) AC 386

[292] L Caylor and MsS Kenney ***in Pari Delicto*** and ***Ex Turpi Causa***: The Defence of Illegality – Approaches Taken in England and Wales, Canada and the US, Business Law International,2017, 18 (3), p. 260.

takes with the right. In determining the type of conduct that would produce such damage or inconsistency in the law, the court noted three considerations:

'In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way.

4.9 Proof of Medical Negligence in Nigeria

Essentially, negligence is founded in the aspect of law known as civil law or private law by virtue of its origin from the English common law where the tort of negligence was separated from criminal action as acts which would not require the requirements of "*mens rea*".[293]In *the case of Thorns*,[294] it was held that the remedy in negligence comes from the fact that a person is doing a lawful act but causes damage which he could have prevented, it is therefore, important to state that the victim of a negligent act has to show that the tortfeasor was negligent, this will then require a level of proof, it will also be added that since negligence is a civil action, the level of proof required will be that of a civil action.

The quantum of proof in civil action is a preponderance of probability.[295] The plaintiff has to adduce evidence to show that the medical practitioner was negligent. *Section 135 (1) of the*

293 BA Susu, Law of Torts, (Lagos: CJC Nig. Ltd.), 1996, p. 85; see also, The Case of Thorns (1466) Y.B. Ed. 4
294 Ibid.
295 section 134 of the Evidence Act, 2011. However, where a civil claim involves a claim relating to crime or fraud, the standard of proof shall be beyond reasonable doubt as in section 135 (1), Evidence Act.

Evidence Act, 2011 stipulates that whoever desires any court to give judgment as to any right or liability dependent on the existence of facts which he asserts must prove the those facts exist while *Section 132* of the same Act places the burden of proof on the person who would fail if no evidence was given on either side. This position is the representation of the general burden of proof in every case. Generally, the general burden of proof at all times does not shift. Thus, in *Omotosho v. B.O.N Ltd*,[296] Ogunwumi JCA held as follows:

The law is that law is that the burden of proof rests on the person who asserts a fact… it is fixed at the beginning by the pleadings and rests on the party asserting an affirmation… the burden of proof shifts when evidence given by one party gives rise to a presumption favourable to it and unless rebutted satisfies the court that the fact sought to be proved is established… in that case, the burden of proof does not shift but the evidential burden shifts from one party to another as the scale of evidence preponderates.[297]

In negligence, like other civil cases, the burden of proof is prescribed by Section 133 (1), (2) and (3) of the Evidence Act, 2011 which provides:

In civil cases, the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption may arise on the pleadings

If the party referred to in subsection (1) of this section adduces evidence which ought reasonably to satisfy the court that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced and so on successively until all the issues in the pleadings have been dealt with

296 (2006) 9 NWLR (Pt. 986) 573 at 590-591.
297 See also Ezemka v. Ibeneme (2004) 14 NWLR(Pt. 894) 617.

Where there are conflicting presumptions, the case is the same as there were conflicting evidence[298]

Negligence is not one of the torts that are actionable per se and as such, the claimant must show that he suffered injury by the acts of the defendant. It is up to the plaintiff to prove generally those acts or omissions that he claims amount to negligence. What the plaintiff has to prove before a court to hold the defendant liable may in many cases not be available, that is direct evidence.[299]

There is also another way in which the plaintiff's task is made easier. This is the doctrine of *res ipsa loquitur* (the thing speaks for itself). The rule can be invoked when it can be established that the injury is such as does not occur in the ordinary cause of event involving the absence of negligence, the facts proved must point to the defendant as being the negligent party, and there must be absence of explanation.[300]Generally, in medical malpractice and traffic accident cases, it may be difficult for the patient plaintiff to prove negligence because he may not know what happened.[301] In view of this difficulty of direct proof of fault and of the causal nexus between the fault and injury, the court may allow the plaintiff to rely on the doctrine of *Res Isa Loquitur*. Literally, this maxim means, "The event speaks for itself". In its inception, Res Ipsa Loquitur was nothing but a reasonable conclusion from the circumstances of an accident that, the accident was probably due to the defendant's fault, there are further requirements which must be supplied for the rule of res Ipsa loquitur to apply,[302] that, the plaintiff must prove not that:

298 Sokwo v. Kpongbo (2008) 2 NWLR (Pt. 1086) 346 SC.
299 KA Obafemi , Op. cit, p 109
300 DA Akhabue, Op. cit. p. 7
301 Ibid
302 See Bello I. (2000), Tortious Liability of Medical Practitioners in Nigeria: An Appraisal, (Unpublished), LL.M Dissertation Submitted to the Faculty of Law, Ahmadu Bello University, Zaria, Nigeria. P. 19

1. The event is of the kind that ordinarily does not occur in the absence of someone's negligence, but also that it was caused by an agency or instrumentality within the exclusive control of the defendant. This is illustrated by the case of *Scot. v. The London St Katherine Dock Co*,[303] where bags of sugar fell on the plaintiff, while he was lawfully passing the doorway of the defendant's warehouse. The defendants called no evidence. Erie C.J. stated that there must be reasonable evidence of negligence, but where the thing is shown to be under the management of the defendant or his servant and the accident is such that in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants, that the accident arose from want of care.

2. The second requirement is that the accident was not due to any voluntary action or contribution on the part of the part of the plaintiff.[304]

The effect of the last condition is that it may create some problems because the plaintiff is normally unconscious and does not know what he or the defendant happens to be doing. His natural bodily reaction or condition, which may have contributed to the final harm, is certainly neither wilful nor controllable or observable by himself in most cases and yet can absolve the medical practitioner from responsibility. Where the plea of res ipsa loquitur is allowed, there are two effects as follows:

It raises a prima facie inference of negligence which requires the defendant to explain why the accident could have occurred without negligence by him and where he cannot explain, he will be liable.

303 [1865] 3 H & C 596
304 Akhabue, Op cit p. 8
304 Ibid

The plea *res Ipsa loquitor* has the effect of reversing the burden of proof[305].

However, the presumption of *res ipsa loquitur* will be rebutted where the defendant can explain the occurrence of the injury/accident, or where the facts are sufficiently known. Consequently, the doctrine was stated by Erle, C. J. in *Scott v London and St. Kathrine Docks Co*[306] thus:

> *…Where the thing is shown to be under the management of the defendant or his servant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of care…*

Meanwhile, it is important to also state that some negligent acts may also involve actions that are related to crime. In all, the ways of proving negligence considered in this chapter include the following:

1. Proof of negligence through evidential burden of proof
2. Proof of negligence through the doctrine of res ipsa loquitur

4.9.1 Proof of Negligence Through Evidential Burden of Proof

The quantum of proof in civil action is a preponderance of probability.[307] The plaintiff has to adduce evidence to show that the medical practitioner was negligent. *Section 135 (1) of the Evidence Act, 2011* stipulates that whoever desires any court to give judgment as to any right or

305 Henderson v. Henry E. Jenkins & sons (1970) A.C. 82

306 (1865) 3 H & C 596; See also Byrne v Boadle (1863) 159 Eng. Rep. 299

307 See section 134 of the Evidence Act, 2011. However, where a civil claim involves a claim relating to crime or fraud, the standard of proof shall be beyond reasonable doubt as in section 135 (1), Evidence Act

liability dependent on the existence of facts which he asserts must prove the those facts exist while *Section 132* of the same Act places the burden of proof on the person who would fail if no evidence was given on either side. This position is the representation of the general burden of proof in every case. Generally, the general burden of proof at all times does not shift. Thus, in *Omotosho v. B.O.N Ltd*,[308] Ogunwumi JCA held as follows:

> The law is that the burden of proof rests on the person who asserts a fact… it is fixed at the beginning by the pleadings and rests on the party asserting an affirmation… the burden of proof shifts when evidence given by one party gives rise to a presumption favourable to it and unless rebutted satisfies the court that the fact sought to be proved is established… in that case, the burden of proof does not shift but the evidential burden shifts from one party to another as the scale of evidence preponderates.[309]

In negligence, like other civil cases, the burden of proof is prescribed by Section 133 (1), (2) and (3) of the Evidence Act, 2011 which provides:

a. In civil cases, the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption may arise on the pleadings

b. If the party referred to in subsection (1) of this section adduces evidence which ought reasonably to satisfy the court that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if

[308] (2006) 9 NWLR (Pt. 986) 573 at 590-591
309 See also Ezemka v. Ibeneme (2004) 14 NWLR(Pt. 894) 617

no more evidence were adduced and so on successively until all the issues in the pleadings have been dealt with.

Where there are conflicting presumptions, the case is the same as there were conflicting evidence.[310]

Negligence is not one of the torts that are actionable per se[311] and as such, the claimant must show that he suffered injury by the acts of the defendant. It is up to the plaintiff to prove generally those acts or omissions that he claims amount to negligence. What the plaintiff has to prove before a court to hold the defendant liable may in many cases not be available, that is direct evidence.[312] In discharging the evidential burden, the plaintiff may prove his case by either direct or circumstantial evidence. The concept of direct and circumstantial evidence is then considered below.

4.9.2 Direct and Circumstantial Evidence

The plaintiff, in seeking to prove his or her case, may have recourse to both direct and circumstantial evidence. Direct evidence is a proof of fact arising from the testimony of what a witness personally saw, or heard or did establishing such a fact without inference or presumption, while Circumstantial evidence is evidence based on inference and not on personal knowledge or observation, all termed indirect evidence, oblique evidence, it is the kind of evidence that is not

310 See Sokwo v. Kpongbo (2008) 2 NWLR (Pt. 1086) 346 SC
311 Example of such torts actionable per se include libel, trespass to chattel, conversion
312 KA Obafemi, Op cit, p 109

given by eyewitness testimony.[313] Indirect evidence, more commonly known as circumstantial evidence is that which is applied to the principal fact, indirectly, or through the medium of other facts, already described as evidentiary, from which the principal fact is extracted and gathered by a process of special inference[314] According to Hon,[315] Circumstantial evidence is the direct opposite of direct evidence, in that it denotes the evidence of relevant facts from which the existence or non-existence of facts in issue may be inferred.[316] It is evidence that does not directly prove the existence of a fact or happening, but which gives rise to a logical inference that such a fact exists or that the happening occurred.[317] It also means the combination or conglomeration of facts creating a network from which there is no other escape, for instance in a criminal trial, for a defendant, because the facts taken as a whole do not admit of inference but point irresistibly to his guilt.[318] Thus in *Idiok v State*,[319] the Supreme Court held;

A circumstance is a subordinate or accessory fact which has legitimate bearing on the main fact. And so, circumstantial evidence is not evidence based on the actual personal knowledge of the witness of the act of killing or murder, but of other surrounding facts, which in their aggregate content lead cogently, strongly and unequivocal to the conclusion that the act, conduct or omission of the accused killed the deceased. Speculative or conjectural evidence cannot be basis for circumstantial evidence to convict an accused person for the offence of murder.

313 The Black's Law Dictionary, 10th edition, pg 674
314 Alexander M Burrill, A treatise on the Nature, Principles and Rules of Circumstantial Evidence 4 (1868).
315 Sebastine Tar HON (SAN), Law of Evidence in Nigeria (2011) 2nd ed. Pg 7-8
316 Ahmed v State, Tegwonor vs state (2008) All FWLR (pt 424) 1484 at 1506-1507 CA
317 Igabele v State (2005) All FWLR (pt 285) 568 CA
318 Igabele v State, Abacha v State (2002) FWLR (pt. 118) 1224 SC and Enwereji v State (2005) All FWLR (pt. 280) 1606 CA
319 (2008) All FWLR (pt 421) 797

In *Ijiffor v State*,[320] the Supreme Court held that circumstantial evidence is receivable in criminal as well as civil cases; but that the necessity of admitting such evidence is more obvious in the former than in the latter. That a judge sitting on a criminal case based on circumstantial evidence is permitted to complete the elements of guilt or establish innocence," by his consideration of such circumstantial evidence. In other words, the judge "is permitted to raise a presumption from the proof of some fact the existence of another fact without further proof of that other fact." However, in raising this inference, the judge must narrowly consider the evidence led in the case, which means that for the defendant to be held responsible in such circumstances, there must not be any co-existence circumstances which would weaken or destroy the inference that such defendant is guilty.

Contrasted with circumstantial evidence, direct evidence is evidence of fact in issue. When it is testimonial evidence, it is evidence of the witness who claims personal knowledge of the fact he testifies about. Circumstantial evidence on the other hand is evidence of relevant fact from which the existence or non-existence of facts in issue may be inferred.[321] Evidence may be direct or circumstantial.[322] Proof of identity of a deceased person can be by direct or circumstantial evidence provided such circumstantial evidence leads irresistibly to one conclusion, that the autopsy performed was on the body of the deceased.[323] In criminal trial for instance, where direct evidence is not available, circumstantial evidence which is cogent, and pointing irresistibly and unequivocally as well as compelling at the accused is admissible to support a conviction.[324] A conviction cannot be based on circumstantial evidence unless and until all the inference to be

320 (2001) 9 NWLR (pt 718) 371 SC
321 Sule Ahmed (alias Eza) v. The State (2002) 1 SCM 39
322 Ikomi & Ors. v. The State (1986) 1 NSCC 730
323 Idemudia v The State (1999) 5 SCNJ 55
324 The State v John Ogbubunjo & Anor (2007) 3 SCM 119

drawn from the whole history of the case point strongly to the commission of the crime by the accused.[325] For example, in medical negligence claims where a swab, sponge, broken needle or any surgical instrument has been left inside a patient's womb or body following surgery, this fact creates a reasonable inference that a member of the surgical team was guilty of an act of negligence in failing to have removed it.[326]

4.10 Proof of Negligence Through the Doctrine of Res Ipsa Loquitur

There is also another way in which the plaintiff's task is made easier. This is the doctrine of *res ipsa loquitur* (the thing speaks for itself). The rule can be invoked when it can be established that the injury is such as does not occur in the ordinary cause of event involving the absence of negligence, the facts proved must point to the defendant as being the negligent party, and there must be absence of explanation.[327]Generally, in medical malpractice and traffic accident cases, it may be difficult for the patient plaintiff to prove negligence because he may not know what happened.[328] In view of this difficulty of direct proof of fault and of the causal nexus between the fault and injury, the court may allow the plaintiff to rely on the doctrine of *Res Isa Loquitur*. Literally, this maxim means, "The event speaks for itself". In its inception, Res Ipsa Loquitur was nothing but a reasonable conclusion from the circumstances of an accident that, the accident was probably due to the defendant's fault. The doctrine of *res ipsa loquitur* was first used by the Court of Exchequer in *Byrne v Boadle*[329]where a barrel had fallen from the defendant's premises and injured the plaintiff on the road below. The precise circumstances leading to the accident

325 Durwode v The State (2000) 12 SCNJ 1

326 KA Obafemi, Medical Negligence Litigation in Nigeria: Identifying the Challenges and Proposing a Model Law Reform Act (unpublished), Thesis submitted to the Trinity College, Dublin in fulfilment of the requirement of the award of the Degree of Doctor of Philosophy, 2017, p. 250

327 D.A. Akhabue, Op cit p 7

328 Ibid

329(1863) 2 H & C 722

were not known to the plaintiff. During argument, counsel for the defendant sought a dismissal of the claim on the basis that there was not a scintilla of evidence of negligence. Pollock CB held that there are certain cases of which it may be said *res ipsa loquitur* and this seems one of them.[330]

Statutorily, the principle of res ipsa loquitur can be inferred from the provision of Section 136 (1) and (2) of the Evidence Act, 2011 which provides that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence *unless it is provided by any law that the proof of that fact shall lie on any particular person.* From the provision of this section, the italicize part means that the Act recognizes that the law may be an exception to the general burden of proof (*affirmanti non negante incubit probatio*).[331] Subsection (2) further provides that in considering the amount of evidence necessary to shift the burden of proof, regard shall be had by the court to the *opportunity of knowledge with respect to the fact to be proved which may be possessed by the parties respectively.* the word "knowledge" in the provision recognizes the fact that in cases where *res ipsa loquitur* are pleaded, the defendant who would not have had the initial onus of proof would then be required to prove by virtue of the fact that he has the opportunity of knowledge with respect to the fact (that is, accident or negligence) to be proved.

4.11 The Requirements for the Application of the Rule of Res Ipsa Loquitor

The classic exposition of the principles of *res ipsa loquitur* was provided in the case of *Scott v London & St.Katherine Docks Co.*[332]the plaintiff whilst in the discharge of his duty as he was

330 C.B. Pollock op. cit p 21
331 It is for he who asserts to prove.
332(1865) 3 H & C 596

passing in front of a warehouse in the dock, six bags of sugar fell upon him. In deciding the requirements for inferring negligence for the purposes of liability, Erle CJ stated:

> *There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary circumstances does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."*[333]

There are further requirements which must be supplied for the rule of res Ipsa loquitur to apply,[334] that, the plaintiff must prove that:

the event is of the kind that ordinarily does not occur in the absence of someone's negligence, but also that it was caused by an agency or instrumentality within the exclusive control of the defendant. This is illustrated by the case of *Scot. v. The London St Katherine Dock Co*,[335] where bags of sugar fell on the plaintiff, while he was lawfully passing the doorway of the defendant's warehouse. The defendants called no evidence. Erie C.J. stated that there must be reasonable evidence of negligence, but where the thing is shown to be under the management of the defendant or his servant and the accident is such that in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants, that the accident arose from want of care.

333 Ibid at 601

334 I Bello, Tortious Liability of Medical Practitioners in Nigeria: An Appraisal, Ll.M Dissertation Submitted to the Faculty of Law, Ahmadu Bello University, Zaria, Nigeria (2000) P 19

335 [1865] 3 H & C 596

The second requirement is that the accident was not due to any voluntary action or contribution on the part of the part of the plaintiff.[336]

The effect of the last condition is that it may create some problems because the plaintiff is normally unconscious and does not know what he or the defendant happens to be doing. His natural bodily reaction or condition, which may have contributed to the final harm, is certainly neither wilful nor controllable or observable by himself in most cases and yet can absolve the medical practitioner from responsibility. Where the plea of *res ipsa loquitur is allowed*, there are two effects as follows:

It raises a prima facie inference of negligence which requires the defendant to explain why the accident could have occurred without negligence by him and where he cannot explain, he will be liable. If the plaintiff's case has established that the *res ipsa loquitur* doctrine applies, the plaintiff will be assured that his or her case is sufficiently strong to defeat an application by a defendant to non-suit the plaintiff by directing the jury to find for defendant.[337]

The plea *res Ipsa loquitor* has the effect of reversing the burden of proof[338].

However, the presumption of *res ipsa loquitur* will be rebutted where the defendant can explain the occurrence of the injury/accident, or where the facts are sufficiently known. Consequently, the doctrine was stated by Erle, C. J. in *Scott v London and St. Kathrine Docks Co*[339] thus:

> …Where the thing is shown to be under the management of the defendant or his servant, and the accident is such as in the ordinary course of things does not

336 DA Akhabue, Op. cit. p. 8
336 Ibid
337 K A Obafemi op cit, p. 254
338 Henderson v Henry E. Jenkins & sons (1970) AC 82
339 (1865) 3 H & C 596; See also *Byrne v Boadle* (1863) 159 Eng Rep 299

happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of care…

4.12 Application of Res ipsa loquitur to Medical Negligence

The rationale for the application of res ipsa loquitur in medical negligence is based on the fact that the instrument of conducting the surgery is within the full control of the practitioner as agreed to by the court in *Miss Felicia Osagiede Ojo v Dr Gharoro & UBTH Management Board*,[340] the plaintiff's claim arose from a medical or surgical operation performed on her by the defendants, the operation was designed to correct a certain medical condition, but at the end of it, one of the surgical needles used in the operation got broken and the broken part could not be located or retrieved and it was consequently left inside the plaintiff. It is the fact that a piece of surgical needle being in the plaintiff and the effects thereof as well as the effort to remove it that led to this action. The plaintiff said that after the operation she had serious pain in her abdominal and vagina and she complained to the 1st defendant, who ascribed the pains to the stitches on the site of the operation wound. Four days later when pains would not subside, the 1st defendant ordered for an X-ray examination. The plaintiff said she had two X-rays and the X-rays confirmed that there was a broken needle in her stomach, which was not there before the operation. The plaintiff said the 1st and 3rd defendants informed her that due to the fresh wounds from the surgical operation they could not immediately conduct another surgical operation to recover the needle and also that the 1st and 3rd defendants did not tell her that they left anything behind in her stomach. The plaintiff gave evidence that she saw another gynaecologist who informed her that judging from the way she was operated upon she would be unable to have a

340 Supra

child. The defendants admitted the broken needle in her stomach but said the plaintiff was informed after the first operation. The defendants admitted also that nowadays sub-standard needles are being used and that such needles break easily during operations. He denied that the plaintiff could not have any child because of the broken needle in her stomach, that where the needle was located is in the anterior abdominal wall and there was no relationship with pregnancy. Certain legal questions arose, since the plaintiff pleaded particulars of negligence. One question was whether the plaintiff could still rely on the doctrine of *res ipsa loquitur*. In answering this question, the court reviewed the cases of *Management Enterprises Ltd v Otusanya*[341]and *Strabag Construction Nig. Ltd v Oguarekpe*[342]and held that the doctrine could be pleaded in the alternative.

Also, the Doctrine of *res ipsa loquitu*r is applied in cases of medical negligence where it cannot be ascertained as to which specific act of the hospital or that of his employees had caused the injury and where the situation is never outside the control of the hospitals.[343] Thus, as held in *Cassidy v. Ministry of Health,*[344]a hospital authority was liable to a patient in respect of negligent treatment; even though the patient could not show which member of the hospital staff was responsible. Furthermore, in *Ybarra v. Spangard*,[345]a patient undergoing surgery experienced back complications as a result of the surgery, but it could not be determined the specific member of the surgical team who had breached the duty so it was held that they had all breached, as it was certain that at least one of them was the only person who was in exclusive control of the instrumentality of harm.

341 [1987] 18 NSCC (Pt 1) 57
342 [1991] 1 NWLR (Pt 170) 733
343 Tolulope Revelation IBITOYE, LL.B (Hons) (Ilorin), BL, LL.M (Swansea), Lecturer, Department of Public and International Law, Bowen University, Iwo, Osun State, Nigeria, on the Applicability of res ipsa loquitur, 177-178
344 (1951) 2 KB 343
345 (1944)25 Cal 2d 486

Res ipsa loquitur can also arise in the 'scalpel left behind' variety of cases, for instance, in *Mahon v. Osborne*[346]where swabs were left in the body of the patient after abdominal operation, the doctrine of res ipsa loquitur was applied when Goddard L.J. stated that:

> *The surgeon is in command of the operation, it is for him to decide what instruments, swabs and the like are to be used, and it is he who uses them. The patient, or if he dies, his representatives, can know nothing about this matter…If therefore, a swab is left in the patient's body, it seems to me clear that the surgeon is called on for an explanation…*

Thus, a surgeon in a theatre room is the Commander-in-Chief of all medical/operational activities there, and final check-up should not be shifted to the nurses or other officers in the room. Where he shifts his duty to others, he is negligent. Also, in *Anderson v. Chasney*[347], a sponge was left behind by the defendant during a tonsil and adenoid operation. The Court of Appeal contended that one of two existing security methods, that is, sponge counting or using sponges with tapes, should have been adopted. The defendant was found negligent based on the doctrine of *res ipsa loquitur.*

In other cases, the doctrine is applicable simply where the doctor is negligent but the patient is unable to explain or does not understand how the damage happened. In the case of *Igbokwe & Ors v. University College Board of Management*,[348] a woman who just delivered her baby fell from the 4th floor of the hospital building. A doctor had specifically asked a nurse to keep an eye on her, but she was found fatally wounded after her fall. The court found the hospital negligent on the application of res ipsa loquitor. The similar decision was pronounced in *Fish v Kapur*,[349] where a dental extraction resulted in a jaw fracture. Thus, the purpose of this doctrine in medical

346 (1939) 1 All ER 535
347 (1950) CanLII 336 (SC)
348 (1961) WNLR 173
349 (1948) 2 All ER 176

negligent cases is to preclude the defendant from defending on the submission of 'no case to answer'. In *Ibekendu v. Ike,*[350]the plaintiff/respondent sued the appellant claiming damages for injuries sustained in an accident caused by the negligence of the appellants. The said accident occurred when the haice-bus driven by the appellant swerved from its own side of the road to the other side and collided with the respondent who was walking by the side of the highway. The bus eventually ended up in a ditch along the road. The court held that these facts clearly raised a prima facie presumption of negligence which automatically brings into play the doctrine of *Res Ipsa Loquitur.*

4.13 **The Role of the Judiciary in Resolving Medical Malpractice/Negligence Claims**

The Nigerian judiciary plays a crucial role in the country's justice system, interpreting the constitution and legislation, resolving disputes between private individuals and the government, and resolving medical negligence/malpractice cases. The judiciary is often referred to as the last hope of the common man, upholding the rule of law. However, recent developments in election petition tribunals, medical malpractice claims, and political matters have raised concerns about the judiciary's continued representation and justice. The 1999 constitution of the Federal Republic of Nigeria establishes the judiciary as an arm of the government, with the power to safeguard the rule of law, uphold the supremacy of law, adjudicate disputes, and serve as an unbiased arbiter. However, recent indices in Nigeria, such as the Presidential Election Petition Tribunal, have raised questions about the judiciary's continued relevance and representation in the country's justice system.[351]

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350 (1993) ELR 33260 (SC)

351 Henry C Okeke.' An Inquiry into the Nigerian Healthcare System: The Role of Judiciary in Guaranteeing Medico-Legal Rights of the Health Users, NAUJILJ 14 (2) 2023

CHAPTER FIVE
CONCLUSION

5.1 Summary

The fundamental objective of this research captured succinctly is to interrogate as cogently as possible the intersection of medical ethics and legal obligations taking into cognizance interplay between morality and law in health care provision in Nigeria. The research also set out to identify the challenges that abound in the area of respecting medical ethics and enforcing legal obligations in health care provision in Nigeria viz a viz identifying the opportunities that abound in this area of the law. Negligence, which can be seen as a basis of culpability in the law of tort,

is defined as 'the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to prevent others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregardful of others' right. Negligence is a matter of risk, that is to say, of recognizable danger of injury. In most instances, it is caused by heedlessness or inadvertence, by which the negligent party is unaware of the result, which may follow his act.

Also, the options available to the victims of negligence including medical negligence, are all provided for and recognized by law. It is imperative to note that the complainant plays a role in setting the course of the three options in motion in all circumstances; the burden of proof is on the complainant to establish a prima facie case that would necessitate the possible investigation where necessary and activate the jurisdiction of the court. In respect to civil jurisdiction, the principle of *res ipsa loquitur* may apply. This is borne out of the fact that where there is no proof of medical practitioner's negligence other than the act or omission in question. Since proof is the backbone of every claim in law, the study of *res ipsa loquitur* become imperative as a means of establishing medical negligence in law. In the process of establishment of negligence, the plaintiff in all cases may not have the means of proving that the defendant has breached the duty of care, there is also another way in which the plaintiff's task is made easier. This is the doctrine of *res ipsa loquitur* (the thing speaks for itself). The rule can be invoked when it can be established that the injury is such as does not occur in the ordinary cause of event involving the absence of negligence, the facts proved must point to the defendant as being the negligent party, and there must be absence of explanation. Generally, in medical malpractice, it may be difficult for the patient plaintiff to prove negligence because he may not know what happened. In view of

this difficulty of direct proof of fault and of the causal nexus between the fault and injury, the court may allow the plaintiff to rely on the doctrine of *Res Isa Loquitur*

Res ipsa loquitur typically arises in cases where the negligent act is so obvious that there is no need for evidence of what happened. What must have happened is apparent from the surrounding circumstances. The finder of fact must be able to infer, through common knowledge and experience that negligence occurred.

Res ipsa loquitur is also sometimes applied in medical malpractice cases where something obviously went wrong in surgery, for example, but precisely what went wrong cannot be proven. A foreign object might have ended up in a patient or suturing may have been proven to be ineffective. While it may not be possible to prove precisely what happened during the surgery, possibly because the only people conscious at the time work for the defendant hospital, events occurred that do not ordinarily occur in the absence of negligence. This is sufficient to swing the burden of proof to the defendant hospital so that it will be held liable unless it can prove the chain of events that demonstrates that it was not negligent.

5.2 Conclusion

From this study, it can be seen that when medical ethics are breached, there is medical negligence. Thus, medical negligence is a specie of negligence that can be proved through an evidential burden and by extension, the doctrine of *res ipa loquitur.*

The principle of *Res Ipsa Loquitur* is simple, whereas in a case of negligence, the plaintiff must prove by evidence, regarding the defendant's conducts, that the defendant was negligent, but when the plaintiff does not know how and why the accident happened, in such a case the plaintiff

can invoke the assistant of the rule of evidence known by the latin maxim *Res ipsa loquitur* ("the event speaks for itself"), thereby shifting the burden of proof to the defendant, to prove that they were not negligent.

Since its inception, the doctrine of *res ipsa loquitur* has produced conflict, confusion, and doubt. In Nigeria, the requirement under which the doctrine of *"res ipsa loquitur"* becomes operative includes firstly, proof of the happening of an unexplained occurrence, secondly, the occurrence must be one which would not have happened in the ordinary course of things without negligence on the part of somebody other than the plaintiff, and lastly, the circumstances must point to the negligence in question being that of the defendant rather than that of any other person.

Findings revealed that there is legal clarity with regard to the nature, requirements for and especially the effect of the application of the doctrine on the onus of proof in Nigeria. The approach followed by the courts is that the doctrine of *res ipsa loquitur* is a permissible factual inference which the court is at liberty but not compelled to make and which does not affect the onus of proof, which can either be with the plaintiff or the defendant. Normally the onus of proof of the negligence alleged at the onset is on the plaintiff, but where this doctrine is applicable, after evidence of how the accident occurred is given by the plaintiff, the onus shifts on the defendant to offer an explanation as to why the accident happened. Such explanation would seek to show that the defendant is not at fault.

It is also quite clear that in Nigeria, the plaintiff can only rely on the doctrine if the cause of the accident remains unknown. On rebuttal by the defendant, the nature of the explanation is such that although it should conform to certain rather stringent principles it is not expected of the defendant to prove his blamelessness on a balance of probabilities. This implies that if, after all the evidence is in, the probabilities are still equal, the defendant should prevail.

Conclusively, the doctrine of *res ipsa loquitur* is basically an application of principles of circumstantial evidence. The traditional elements that must be shown by a plaintiff who seeks to invoke the doctrine are merely factors by which the defendant may be so closely connected with the fact of plaintiff's injury as to make the inference that his negligence caused the injury more plausible than any other.

5.3 Recommendations

Consequent upon the findings of this study, it is hereby recommended as follows:

1. With the continued exploits in technological sophistication and the digital economy, instead of just floating policies to cater for changes these policies should be transformed into legislation of Parliament. It is therefore recommended that policies such as the content of the Hippocratic Oath should by now have morphed into legislation. Policymakers should consider the establishment of dynamic frameworks that can adapt to the ever-changing medical landscape. This includes regular reviews of health related policies to ensure their relevance and effectiveness in capturing issues from emerging digital health care models.
2. It is recommended to get legal support from a professional medical negligence solicitor while filing claims in the court. A solicitor who has years of experience in handling clinical negligence claims can best handle claims related to medical negligence. The professional will take a detailed account of your case; check all the relevant documents and try to assess if the case has enough grounds to prove the claims. Most of the solicitors in the UK accept cases on the basis of their winning potential. The medical negligence lawyers acquire fantastic communications skills and they use it for establishing the cases in court. It is upon the severity of the patient's condition that determines that amount of

compensation to be awarded to him. The greater is the degree of suffering, the higher is the amount of compensation.

3. The next National Health Act that amends or revises the National Health Act of 2014 should cater for a special appropriation for spending to support good Doctor-Patient relationship removing road blocks to immediate emergency care to avoid avoidable deaths caused by not opening a file with the hospital or making down payments.
4. There are portions of the population still unaware of several changes in health care related laws over the landscape, so the Ministry of Health needs to till out resources in the area of citizen education on changes in the health care especially related to exposure from digital medical care, goods and services. Policymakers should actively participate in international organizations like the World Health Organization (WHO) to develop standardized guidelines and frameworks for improved medical digital services. By collaborating on a global level, Nigeria can reduce the risk of stagnation a more predictable environment for medicine.
5. Prioritize robust data security measures to protect sensitive patient information. Implement encryption, access controls, and compliance with data protection regulations.
6. Adopt a phased implementation approach that gradually introduces digital tools and processes. This approach allows for testing, refining, and addressing any challenges before full-scale implementation.
7. Engage with Medical businesses, medical practitioners, and other stakeholders during the design and implementation phases. Incorporate their feedback to ensure that the digital side of medical health care provision in the Nigerian system meets their needs and is user or patient friendly.

8. The legislative arm of government must ensure that oversight functions on Medical health care administrative agencies are in full swing because as we have seen over a forty year period since the Alma Ata Declaration that passing laws alone does not suffice rather implementation must be at the forefront. Efforts must be doubled because of the crucial nature of health in Nigeria.
9. For a sustainable ethical system of health care provision in Nigeria, each ward needs to develop coasted Annual Operational Plan of Action based on community, diagnosis, age, wealth of the patient invariably prioritize patient needs, assess available resources and utilise them optimally.[352] It is high time we leverage on the ward delineations not just for elections only but for Primary Health Care service delivery in Nigeria.
10. Routine re-orientation of health workforce on attitudinal change including training and retraining in Interpersonal Communication (IPC) skills and work ethics are to be conducted for the promotion of client satisfaction and improvement of quality of care. A system of recognition, reward and sanctions will be instituted. It is also vital to establish and institutionalize a framework for an integrated supportive supervision with adequate committed resources for all types and levels of care providers across public and private sectors. Mechanisms should be established to monitor health worker performance, including use of client feedback. This is very important to improve administration of health care in Nigeria.
11. Government at all levels must express, in practical terms, political commitment through funding, capacity building and system support. They must put money where their mouth is and translate the great ideas behind primary health care into great programmes and

352 Olayinka Akanke Abosede and Olugbenga Fola Sholeye, 'Strengthening the Foundation For Sustainable Primary Health Care Services in Nigeria' (2014) 4 (3) *Journal of Primary Health Care*, 8.

great services. Primary health care services are not third-class services meant for third-class citizens. Therefore, adequate provision must be made in national, state and local budgets for quality healthcare delivery using the primary healthcare system.

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This is to certify that the thesis by Oyeyemi Juliannah OMOPE with the matriculation number LCU/PG/003770 in the Faculty of Law, Lead City University, is in full compliance with the approved University format and style.

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This is to certify that Oyeyemi Juliannah OMOPE with the matriculation number LCU/PG/003770 carried out this research work titled "Ethical and Legal Consequences of Medical Negligence in Nigeria's Healthcare System" in the Faculty of Law, Lead City University Ibadan, Oyo State, Nigeria for the award of Masters of Laws (LLM) Degree and that this has not been previously submitted.

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

A legal duty of care requires people to refrain from hurting other people in a civilised setting. When doing something that might injure someone else, you have a legal duty to take reasonable care. If someone doesn't follow this obligation, there is a breach that can result in financial, emotional, or bodily harm that can be repaired by legal means. The relationship between health care providers and patients is one built on trust, with an inherent expectation that medical practitioners will act in the best interest of their patients. However, this delicate balance can be disrupted when a patient suffers harm as a result of medical negligence which may in turn trigger questions of legal liability. Health is a crucial asset for human existence, ensuring wealth generation and productive lives. Ill health can hinder productivity and reduce economic power. A healthier life is essential for human existence, and raising health concerns is a matter of immense concern as good health is essential.

Medical injuries can be caused by medical professionals who have attended to the patient. The court determines negligence by assessing the standard of skill expected from the practitioner in the medical context against customary practice. The slogan "WE CARE, BUT GOD HEALS" in hospitals serves as a warning and a cause for relief. However, not all medical practitioners follow this rule and ethics of the medical profession, as many patients die before, during, and after treatment which are result of their negligent act. Negligence can lead to serious errors, permanently impacting victims with emotional and physical consequences. A doctor owes certain duties to their patient, and a breach of these duties can lead to a cause of action for

negligence. The standard of care required by a medical practitioner is an objective one, based on the standard of an ordinary reasonable medical practitioner in the defendant's shoes. Factors affecting this standard include the locality or society, availability of relevant medical facilities, specialist skill of the practitioner, accepted medical practice, and whether there was an emergency.

Medical ethics is an essential field of study for healthcare professionals globally, emphasising moral principles and assessments in the medical field. It is still important today, having originated in ancient civilisation. Ethics, with its Greek roots, is the science of understanding and analyzing what is wrong and right, good and bad, admirable and deplorable, acceptable and unacceptable. It is the application of values and moral rules to human activities, including healthcare. In healthcare, it encompasses respect for autonomy, privacy, freedom of choice, control, not causing harm to others, beneficence, nonmaleficence, promotion of welfare, and justice, especially equity in benefits and access to healthcare delivery.

The legal concept of medical negligence originated with the Donoghue V. Stevenson decision in 1932, which established a broad responsibility to use reasonable care to prevent foreseeable harm to another person. It must be demonstrated that a duty of care was due, the duty was broken, and that the harm or damage was the direct result of the break in order to prove carelessness. Physicians have a responsibility to provide treatment for all patients, including those who are not directly under their supervision. In many places, such as Nigeria, the Medical and Dental Council of Nigeria, professional ethics regulations establish the standard of care for medical practitioners. The Nigerian Medical Association and the Medical and Dental Consultants Association of Nigeria are two more medical organisations that have ethics principles and disciplinary measures in place to ensure compliance.

In Nigeria, healthcare systems suffer from a lack of manpower and infrastructure, leading to 80 percent of incidents resulting in death or serious injury. Medical litigation is a process where a client files a lawsuit against a physician over perceived wrong treatment. In Nigeria, patients suspected of negligence have the right to petition the Nigerian Medical and Dental Council and report a case of negligence. The goals of malpractice litigation include deterring unsafe practices, compensating injured individuals, and ensuring corrective justice. However, in Nigeria, medical negligence is a global health problem, and legal action against erring health workers and institutions is not available.

1.2 Statement of the Problem

This study aims to address the standard of care expected of medical practitioners, particularly the ethical implication of negligent practice by healthcare professional and how the Nigerian legal system addresses issues of compensation, liability and practical measures for victims of medical negligence. Despite 80% of medical practitioners having some education related to medical ethics, the incidence of medical negligence and unprofessional conduct in the Nigerian health care sector does not reflect the knowledge base of a system of accountability. This is a significant problem, as the knowledge of medical ethics by Nigerian doctors is inadequate. Legal obligations are not well marshaled to ensure that unethical behavior can lead to career loss or criminal action. Furthermore, adequate research has not been conducted to reveal the challenges and opportunities that underlie the interplay between medical ethics and legal obligation in the administration of health care. The study also questions whether a cursory look at decided cases could shed light on future occurrences or help interpret the relationship between medical ethics and the legal obligation of key stakeholders in the Nigerian health care sector.

1.3 Aim and Objectives of Study

The aim of the study is to analyze the intersection of medical ethics and legal obligations in Nigeria while the specific objectives of the research are to:

1. Discuss the medical ethics available in health care.
2. Evaluate the predominant problems encountered by litigants in the pursuit of remedy for acts of medical negligence.
3. Examine the body of laws and regulations available in the medical issues in Nigeria.

1.4 Research Questions

1. What are the medical ethics available in health care?
2. What are the predominant problems encountered by litigants in the pursuit of remedy for medical negligent acts?
3. How does the body of laws regulate medical ethics in Nigeria?

1.5 Significance of the Study

The popular adage is that health is wealth and that all round health consist of soundness of mind, body, soul, and spirit. It is because of this selfsame importance of health that its administration must be done ethically not negligently. The law creates a duty of care and a duty if confidentiality often described as Doctor - Patient privilege to guide the way and manner in which the parties relate with them. In the medical profession the basic qualifications necessary are generally the possession of degrees from an accredited university with well recognized and well-rounded curriculum. The guiding principles around ethics are honesty, dedication, and

commitment among other values.[353] Members of the medical profession are governed by standards which emerge from the ethics of the profession. The relationship between the physician and patient is not a simple one but one undergirded with morality and law and inherent conflict. This research is significant in that it identifies those intersections between medical ethics and law or legal obligations. Many instances abound where law and morality collide in healthcare. A very ready example is a situation where the physician is to either remove a life threatening fetus in order to save the life of the mother or taking chances by leaving the fetus to grow to term. The issue if euthanasia or mercy killing is a still hotly debated and unsettling area where the reality of conflict between law and morality meets head on. The issue of legalizing abortions is a major area of conflict between morality and law but this seems to be confined to the West at the moment especially for life preserving reasons, with some western nations, already taking the lead constitute some of the areas of clear interplay of law and morality in health care. In Nigeria, we have instances where patients are left to die for not buying a card at the hospital or making certain payments for treatment to commence. All these issues considered together make the research quite timely. In identifying or attempting to identify the intersections or overlap between medical ethics and law especially Nigerian law side by side the attendant challenges and opportunities would offer up a novel perspective to the discussion opening the way for practical recommendations to be made herein.

1.6 Scope of the Study

The study keenly focuses on Medical and Health law covering particularly the issues of proper physician-patient relationship and consequences for medical negligence accountability and

[353] Justus Sokefun, 'Medical Ethics, Law, and the Right to Health in Nigeria' (2018) 4 *Human Rights and Jurisprudence Journal* (HRJJ), 8-33.

development. The legal framework consisting of laws and regulations regulating medical ethics and legal obligations of medical persons also form central focus in this work. Consequently, with this focus the work can be a tool for explaining the lacklustre development of medical law sub-Saharan Africa particularly Nigeria. The purpose of this research is limited to what is obtainable in Nigeria specifically, although reference is made to international health standards and legal framework for other jurisdictions would be referenced occasionally. The time period of the research is focused on the current dispensation of health care development and treatment in Nigeria even though in several parts of the research foundation is laid by making reference to historical antecedents and international law position on the subject of research.

1.7 Methodology

This study shall utilize a doctrinal approach towards achieving the research objectives. Descriptive and detailed analysis of legal rules found in primary sources, such as, cases, statutes, or regulations, will be made reference to. This will then involve the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the Medical and Dental Practitioners Act, Rules of Professional Conduct for Medical and Dental Practitioners, The Nigerian Criminal Code, The Nigerian Penal Code and the Evidence Act While secondary authorities, which comprises relevant information from leading authorities, textbooks on the subject matter of the research, online sources, journal articles, opinions of specialists and practitioners on aspect of law relating thereto.

1.8 Synopsis of Chapters

Chapter One: this chapter deals with the foundation of the research by laying the groundwork for the preceding chapters. Hence, it includes the Background to the study, Statement of the

problem, Aim and objectives, Research questions, Significance of the Study, Scope of the Study, and Methodology.

Chapter Two: this chapter reviews previously published works exposing the lacuna and area necessitating further research for the future. It will further appraise different concepts of law in relation to the subject matter.

1.9 Definition of Terms

The following terms wherever used throughout the research shall carry the meaning herein expressed in this part.

Health

Health is a state of complete physical, mental and social wellbeing and not merely the absence of infirmity[354]. In fact, the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, belief, economic or social condition[355].

Ethics

Ethics refer to rules and principles that ensure right conduct and it touches every facet of life.[356] Ethics also refer to moral standards whether documented or not but which should be obeyed to ensure sanity and probity in the health care sector.

Medical Ethics

Medical Ethics refer to rules, Principles, medical oaths and codes that prescribe a physician's character, prices, duties, etc which are expected to produce a right conduct and this is ideally

[354] World Health Organization, Basic Documents (49th edn, World Health Organization, 2020).
[355] Declaration of Alma-Ata International Conference on Primary Health Care, Alma-Ata, USSR, 6-12 September 1978
[356] Clement Osime 'Understanding Medical Ethics in a Contemporary Society' (2008) 10(2) *Benin Journal of Postgraduate Medicine*, 2

designed to guide members of the medical profession in their patients and with their states.[357] The Hippocratic Oath is the most prominent encapsulation of medical ethics because it mandates the Oath takers would be physicians to strive to help their patients and do no harm. Medical Ethics focuses on ensuring a healthy balance between the physician and the patient.

Legal

Legal simply means founded in law, conforming to the law, created by law, or recognized by law[358]. The description of any phenomenon as legal means it is relating to law; falling within the province of law[359].

Obligation

A generic word derived from the Latin substantive '*obligatio*' meaning that which a person is bound to do or forbear. An obligation is also a moral or legal duty which renders a person liable to coercion or punishment for neglecting it[360].

Negligence

Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do[361]. It is the breach of duty to take care; imposed by common law or statute.

> *You must take care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neigbour. Who, then in law, is my neigbour? The answer seems to be a person who is so closely and directly affected*

[357] Ibid at 2
[358] Henry Campbell, *Black's Law Dictionary* (4th edn, West Publishing 1968) 1038
[359] Bryan A. Garner, *Black's Law Dictionary* (8th edn, West Publishing 2004) 2844
[360] Ibid at 1223
[361] *Blyths v. Birmigham Waterworks Company* [1856] II Ex. CH 781

> *by my act that I ought reasonably to have them in contemplation as being so affected when I was directing my mind to the acts or omission which are called in question.*[362]

The dictum above constitutes the basis of the doctrine of negligence in the law of tort. Also, in the case of *Kabo Air Ltd v. Mohammed*,[363] the Supreme Court of Nigeria held that negligence is the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation. It is also any conduct that falls below the legal standard established to protect others against unreasonable risk of harm.

Thus, the dictum suggests the existence of a general duty of care towards anyone who is likely to suffer injury through the defendant's careless conduct. Even though the rule was propounded in the context of a manufacturer/consumer relationship, it is applied as a general principle beyond the initial context in which it was propounded. This dictum has proved the foundation upon which countless cases of alleged negligence have been tried and still continue to be judged. If a duty of care exists then the next inquiry is whether the defendant's conduct was in breach of such duty[364]. The mere occurrence of some misfortune does not as a rule make someone automatically liable. The judge must look at the evidence and decide whether or not the defendant did something he ought not to have done or failed to do that which he ought to have done. The judge is then guided in deciding whether a 22defendant is liable by applying the test stated in *Hazel v. British Transport Commission*[365] where Pearce J said:

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[362] (As decided by Lord Atkin in the landmark case) *Donoghue v Stevenson* [1932] AC 562.

[363] [2015] 5 NWLR (PTt. 1451) 38

[364] Hubart Community Legal Services 2018 'Negligence and Duty of Care' <https://www.hubartlegal.org.au/handbook/accidents-and assurance/negligence-and-duty-of-care> assessed 18, December, 2023

[365] [1958] 1 WLR 169; see also *UNILORIN Teaching Hospital v. Abegunde* [2015] 3 NWLR (Pt. 1447) 421 CA. at

> *The basic rule is that negligence consists in doing something which a reasonable man would not have done in that situation or omitting to do something which a reasonable man would have done in that situation.*

After it is established that the defendant owed a duty of care, which he has breached; of which such damage could be a physical one, for instance a broken leg. The first thing to do is to determine as a matter of fact whether indeed the defendant's breach of duty led to the damage and this is referred to as causation of the facts[366]. Generally, tort law offers compensation for personal injury under intentional torts like assault and battery and the tort of negligence as well as strict liability torts like compensation for hazardous activities under the rule in *Rylands v Fletcher* and liability for keeping dangerous animals. Within the negligence principle, there are many heads of claims which encompass occupier's liability, professional or medical negligence, road and other commuting accidents, employers' liability and product liability *inter alia*. Thus, Medical negligence as a specie of negligence is a type of professional negligence in which a medical doctor or practitioner is liable to his patient for professional misconduct[367]. It is against this background that this study sets out to examine the prospects and challenges of medical negligence under the Nigerian statutes.

Neighbour

This means a person who is so closely and directly affected by one's act that one ought reasonably to have them in contemplation as being so affected when one was directing his mind to the acts or omission which are called in question[368].

440, Paras D-F**;** *Abubakar v. Joseph* [2011] 13 NWLR (Pt. 1104) 307.

[366] William Vaughan Horton Rogers, *Law of Tort,* (11th ed, London, Sweet & Maxwell, 1979), 234.

[367] Oluwakemi Adekile, 'Compensating victims of personal injury in tort: The Nigerian Experience so far'. [2013] *AUDJ* 9, 144–158

[368] *Donoghue v. Stevenson* (1932) AC 562.

Causation

This refers to the acts that constitute the breach of duty. The consideration here is for the claimant to establish that the breach of duty caused or was responsible for the injury occasioned to him. There are two aspects to the causation requirement, namely, causation in fact and causation in law, otherwise known as the remoteness of damage.

Health

According to the world health organization, Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity[369]. The international labor organization equally defines health as the promotion and maintenance of the highest degree of physical, mental and social well-being of workers in all occupations by preventing departures from health, controlling risks and the adaptation of work to people and people to their jobs. Living a healthy life is a fundamental requirement to long life. Healthy living is not always about not being sick or feeling sick for that matter. It is also about mental health and social well-being. Maintaining a healthy life at the workplace is very important as this reflects in the output of an individual. (Nigerian laws on health).

Safety

Safety is described as the condition of feeling safe from injury, risk and danger. In other words, when one is safe, it means that one is protected from potential harm. Safety at the workplace is very necessary because when employees feel safe in their working environment, productivity is affected positively. Also, enforcing safety protocols mean that not only are employees safe but the entire environment is safe. The international labour organization has set out more than 40

[369] Ibid.

standards aimed at improving occupational safety and health. It also has about 40 codes of practice and these include, safety in health and mines convention, safety and health in agricultural convention, radiation protection convention, chemicals convention among others[370]. (Nigerian laws on safety)

Health and safety are a general term used to refer to laws, rules, regulations[371] and efforts put in place to protect the safety and health of employees and the public as well as the environment from workplace associated hazards. This also means that it is what organizations must do in order not to harm anyone. The National Policy on Labour is based on the provisions of Section 17 of the 1999 Constitution of the Federal Republic of Nigeria[372] which provides that "the State social order is founded on the ideals of Freedom, Equality and Justice".

[370]International Labour Organization on Occupational Safety and Health <https://www.ilo.org/international-labour-standards/subjects-covered-international-labour-standards/international-labour-standards-occupational-safety-and-health> accessed 24th October, 2023.

[371] Digital Learning Techniques for Effective EHS Training < https://blog.commlabindia.com/training-solutions/elearning-to-create-engaging-ehs-training > accessed 20, December,2023
2023.

[372] Constitution of the Federal Republic of Nigeria, 1999.

CHAPTER TWO

LITERATURE REVIEW

2.1 Conceptual Framework

2.1.1 Fundamental Concepts under Tort of Negligence in Nigeria

Negligence as a tort is a breach of legal duty to take care of one's neighbor, which results in damages undesired by the defendant to the plaintiff. This suggests that there is a sort of duty with other surrounding factors which the claimant must assert to have been found in law before the court will consider him meritorious to be awarded a remedy in law. In domesticating this common law concept, section 217 of the *Torts Law of Anambra State*[373] defines negligence as

> *civil wrong shall consist of breach of a legal duty to take care which results in damage, which may not have been desired or even contemplated by the person committing the breach, to the person to whom the duty is owing.*

This whole concept of what the claimant must do in a claim on negligence was summarized by Oguntade JSC in *U.T.B. v. Ozoemena*[374] as follows:

> *…to maintain an action for negligence it must be shown (a) that there was a duty on the part of the defendant towards the person injured (b) that the defendant negligently performed or omitted to perform his duty (c) that such negligence was the effective causes of injury of damage to the plaintiff. See Mc Dowall v. G. W. Ry (1903) 2 K.B. at page 338. The onus of proving that the result of the negligence was the effective cause of the injury is upon the plaintiff. See Ruoff v. Long (1916) 1 K.B. 152. The defendant is responsible for all the consequences he could foresee or reasonably be expected to foresee as the*

[373] *1986 Cap 135*

[374] (2007) 3 NWLR (Pt.1022) 448; *Abubakar v Joseph* (2008) 13 NWLR (Pt 1104) 307, *Iyere V Bendel Feeds and Flour Mills Ltd* (2008) 18 NWLR (Pt 1119) 300, *GKF Investment Nigeria Ltd V Nigerian Telecommunications Plc* (2009) 15 NWLR (Pt 1164) 344 and *Diamond Bank Plc V Partnership Investment Co Ltd.*

> *natural result of his negligent act or his negligent act or omission See Clark v. Chambers (1878) 3 Q.B.D. 327. The defendant is also liable for all the direct physical consequences even though they could not have been foreseen.* See *Ire Polemis and Rurness Withy (1921) 3K.B. 560. The statement of claim 'ought to state the facts upon which the supposed duty is founded and the duty to the plaintiff with the breach of which the defendant is charged'. Particulars must be given in the pleading showing in which respect the defendant was negligent, and the details of the damage sustained…*[375]

The above suggests that the claimant in a claim predicated on negligence has to establish certain ingredients which are as follows:

i. a legal duty on the part of A toward B to exercise care in such conduct of A as falls within the scope of the duty
ii. breach of that duty
iii. consequential damages to B.[376]

The necessary objective attitude of the court to this tort is made clear in what Alderson, B said in *Blyth v. Birmingham Waterworks*[377]

> *Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do*[378].

Thus the doctrine of negligence have therefore, evolved three basic elements which are preconditions for the success of any case on negligence.[379] These requirements are discussed *ad seriatim.*

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[375] Section *218, Torts Law of Anambra State*

[376] *Lufthansa German Airlines v Ballanye* (2013) 1 NWLR (Pt. 1336) 527, *Nigerian Airways Ltd. V Abe* (1988) 4 NWLR (Pt. 90) 524; *Anyah V. Imo Concorde Hotels Ltd* (2002) 18 NWLR (Pt. 799) 377; *Agbonmagbe Bank Ltd. V. CFAO* (1966) 1 All NLR 140 at 145

[377] *Blyth v. Birmingham Waterworks* (1856) II Ex. CH 781

[378]Daniel Akhabue, 'Negligence in Nigeria- Not at claimant's beck and call' (2012) 1 (6), *International Journal of Law and Legal Jurisprudence Studies*, 2

[379] Benedicta Susu, *Law of Torts*, (Lagos: CJC Nig. Ltd. 1996) p. 89

2.1.2 The Concept of Duty of Care

It is not for every careless act that a man may be held liable in law. It is important to examine what a plaintiff who alleges negligence would have to prove.[380] The most accepted expression of the duty principle is the one made by Lord Atkin in the leading case of *Donoghue v Stevenson*.[381] The plaintiff's friends bought her a ginger beer in a café, she drank some of it and as she was helping herself to a second glass, the remains of a decomposed snail floated to the top of her glass. The nauseating sight of this and the impurities she already drank resulted in a shock and severe gastroenteritis. The case went all the way to the House of Lords on the preliminary issue as to whether a duty of care existed. The question for the House of Lords to decide was: if a company produced a drink and sold it to a distributor, was it under any legal duty to the ultimate purchaser or consumer to ensure reasonable care that the article was free from defect likely to cause injury to health? Lord Atkin stated that the English law states that there must be and is, some general conception of relations given rise to a duty of which the particular cause found in the books are but instances. He went on to lay down the basis of the present law in the "neighbour" principle in this much–quoted passage:

> *The rule that you are to "love your neighbour" and the lawyer's question saying 'who is my neighbour' receives a restricted reply. You must take 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? The answer seems to be a person who is so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I was directing my mind to the acts or*

[380] *Donohue v. Stevenson* (1932) A.C. 562, 580.

[381] Ori Herstein 'Responsibility in Negligence: Why the Duty of Care is not a Duty to try' (2010) 23 (02) *University of Western Ontario Law Review* 402-428

omission which are called in question[382].

This statement suggests the existence of a general duty of care towards anyone who is likely to suffer injury through the defendant's careless conduct. Even though the rule was propounded in the context of a manufacturer/consumer relationship, it is applied as a general principle beyond the initial context in which it was propounded[383]. This text has proved the foundation upon which countless cases of alleged negligence have been tried and still continue to be judged. If a duty of care exists then the next inquiry is whether the defendant's conduct was in breach of such duty.[384] The mere occurrence of some misfortune does not as a rule make someone automatically liable. The judge must look at the evidence and decide whether or not the defendant did something he ought not to have done or failed to do that which he ought to have done. How then is the judge to decide whether a defendant is liable? What test can the judge then apply? In *Hazel v. British Transport Commission*[385] Pearce J said:

> *The basic rule is that negligence consists in doing something which a reasonable man would not have done in that situation or omitting to do something which a reasonable man would have done in that situation.*

The first constituent element of negligence, which is one of the bases of establishing culpability in respect of product defect, is the existence of a duty of care. The duty in question must be a legal and not a moral one. What does a duty of care connote and when does it arise? To Dias,

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[382] Ibid.

[383] The principle now applies to many kinds of contractual relationships which did not leave out the aspects of negligent misstatement as shall soon be seen. *Hedley Byrne & co. Ltd v. Heller & partners Ltd* (1964) AC 465

[384] Komolafe Akinlabi Obafemi, *Medical Negligence Litigation in Nigeria: Identifying the Challenges and Proposing a Model Law Reform Act,* (unpublished) Ph.D Thesis submitted to the Trinity College, Dublin, 2017, P. 107.

[385] [1963] 2 ALL ER at 864.

'duty is seen as a notional pattern of behaviour,[386] while to Winfield, duty means a restriction of the defendant's freedom of conduct; and the particular restriction here is that of behaving as a reasonably careful man behave in similar circumstances'[387].

Onyemenam, J.C.A. in *P.W. (NIG.) LTD v Mansel Motors LTD & anor*[388] has the following to say about duty of care;

> *A duty of care arises whenever a person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger...*[389]

Meanwhile, the existence of a duty of care depends on the facts of each case as it is not a fixed situation[390]. Describing what a duty relation connotes, Morrison[391] observed as follows:

> *By duty situation is meant a situation described by reference to the particular characters and relations of the parties involved in it recognized by the courts as giving rise to a legal duty to take care. Such, for example, are the duty situations of occupiers and invitee, manufacturer or repairer of chattels and the user of the chattels. It is a short method of referring with some particularity and correctness to the specific set of concrete circumstances*

[386] Reginald Dias, '*The Duty Problem in Negligence Cases*' (1928), 13 (2) *Cambridge Law Journal* 98-214
[387] Ibid.
[388] Gbade Akinrinmade, 'The Jurisprudence of Product Liability in Nigeria: A Need to Complement the Existing Fault Theory', (2016) 7 (2), *Afe Babalola University Journal Of Sust. Dev. Law & Policy*, 194.
[389] Ibid, P. 11, Paras. F-A; *Anyah V. Imo Concorde Hotels LTD*. (2002) 18 NWLR (PT.799) 377.
[390] This position of the law is inevitable because what amounts to negligence is not law but a question of fact which must be decided according to the facts and circumstances of a particular case. See *Kallza v. Jamakani Transport Ltd*. (1961) ALL NLR 747; *Ngilari v. Mothercat Limited* (1999) LPELR SC; (1999) 13 NWLR (PT. 636) 626
[391] W.L Morrison '*A Re-examination of the duty of care'* 1948, 11 Mod. LR 9

giving rise to the duty of care in the individual case[392].

Brett, M. R., in his own contribution to this issue in the case of *Heaven v. Pender*,[393] observed as follows:

> *Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.*

Thus a doctor owes his patient a duty of care. The law on Medical negligence provides the injured patient, the right to a cause of action for negligence on every occasion he or she suffers any harm from the negligent act of a medial practitioner[394]. The rationale behind this is that doctors owe duty of care to take care of their clients. Suffice to say that a patient can maintain medical negligence against a doctor who is not careful in his or her treatment. Such doctor could be held liable for damages in a civil court or criminally liable. In order to determine whether or not a doctor owes his patient a duty of care, the case of *Caparo Industries Plc v Dickman*[395] lays down the following standards:

i. Was the injury reasonable foreseeable?

ii. Was the relationship proximate?

iii. Is it fair and reasonable to impose a duty of care?

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[392] Ibid; also, it is not enough for a plaintiff to make a blanket allegation of negligence; he must state the particulars of duty of care owed to him by the defendant. See *Diamond Bank Ltd. v. Partnership Investment Co. Ltd. & Anor* (2009) 18 NWLR (PT. 1172) 67; *MTN Nigeria Communications Ltd v. Mr. Ganiyu Sadiku* (2013) LPELR 27705 CA

[393] (1883) 11QBD 503

[394] Yinka Olomojobi, *Medical and Health Law, The Right to Health* (Lagos: Princeton & Associates Publishing Co. Ltd, 2019) p. 143

[395] (1990) 2 AC 605

If the above questions are answered in the affirmative, then it is probable that doctors owed his/her a duty of care. It must also be noted that where a person attempts to practice medicine has a case of negligence alleged against them, they are judged with the same standards as qualified doctors.[396] International Code of Medical Ethics also states that,[397] "a physician shall owe his/her patients complete loyalty and all the scientific resources available to him/or her. This position is also buttressed by the Declaration of Geneva[398] which states among others that the health of my patient will be my first consideration.

From the foregoing, it is evident that a doctor owes his patient a duty and a shortfall in the delivery of such could amount to extreme complications, the worse and the most frequent of which is death. It is also interesting to state that the relationship between a doctor and his patient is fiduciary in nature. This type of this relationship is described as follows[399]:

> *A doctor passing by an accident on the road is under no duty to stop and render first aid, but if he undertakes to do so, he has to exercise some degree of care. However, he could not be expected to achieve the same standard in the emergency as would be expected of him were the victims brought to him in a properly equipped hospital.*

Also, Black's Law Dictionary[400] also described fiduciary relationship as a relationship which one person is under a duty to act for the benefit of another on matters within the scope of the relationship.

After it is established that the defendant owed a duty of care, which he has breached; of which

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[396] i. e. native doctors who practice as qualified medical doctors
[397] Adopted by the 3rd General Assembly of the World Medical Association, London, England, by October, 1949
[398] As Adopted by the Second Assembly of the World Medical Association , Geneva, Switzerland, September 1948
[399] Eunice Uzodike and Enosakhare Akpata, *The Doctor and The Law: Professional Negligence and Medical Ethics* (Lagos: Lagos State University Press, 1983) p. 56
[400] B.A Garner op. cit. p. 1402

such damage could be a physical one, for instance forgetting a needle in the abdomen of the patient. The first thing to do is to determine as a matter of fact whether indeed the defendant's breach of duty led to the damage and this is referred to as causation of the facts .The second stage is to determine as a matter of law whether the injury was not remote. This is referred to as remoteness of damage in law.

2.1.3 The Concept of Breach of Duty of Care

The second constituent element necessary to establishing liability is for the claimant to establish that the defendant breached the duty owed. The idea behind breaching a duty presupposes that the defendant is handling a particular object or doing something which, if not properly managed, would lead to discomfort of certain persons. This illustration was summed up by the following passage culled from *Baker V. Longhurst & Sons Ltd.*[401] where Lord Scrutton L.J observed thus:

> *If a person rides in the dark he must ride at such pace that he can pull up within the limit of his vision and if, in those circumstances, he strikes something, either he is going too fast or he has not been keeping a proper look out.*

Alderson[402] describing what negligent act entails posited as follows:

> *Negligence is the omission to do something which a reasonable man, guided by upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.*[403]

Breach of duty to take care occurs where the defendant conducts himself in a way that falls below the legal standard established to protect others against unreasonable risk of harm. To

[401] (1933) 2KB 461 at 468
[402] In Donoghue's case (supra)
[403] *Blyth v Birmingham Waterworks Co* (1856)

determine what a reasonable person would have done in the circumstances and to assess the standard of care expected of him, the court customarily takes into consideration or account what may be called the risk factors, which comprised of the following four elements:

i. The likelihood of harm;

ii. Knowledge;

iii. Skill;

iv. Damages.[404]

For instance, the greater the likelihood of the defendant's conduct causing harm, the greater the amount of caution required of him. In the case of *Northwestern Utilities Ltd* v *London Guarantee & Accident Co Ltd*,[405] Lord Wright opined thus: 'The degree of care which the duty involves must be proportioned to the degree of risk involved of the duty of care should not be fulfilled.' In *Osemobor* v *Niger Biscuit Co Ltd*[406] the court arrived at the conclusion that duty of care owed to the claimant was breached, given that she had no opportunity of intermediate examination of the biscuit in which she found a decayed tooth. For instance, the court in *P.W. (NIG.) LTD v. Mansel Motors LTD & anor* held that a driver driving at night must show that he paid particular attention to his driving, ensuring his speed is such that he can stop within a short range of vicinity visibility.[407]

[404] Gbade Akinrinmade, The Jurisprudence of Product Liability in Nigeria: A Need to Complement the Existing Fault Theory, (2016) 7 (2) *Afe Babalola University Journal of Sust. Dev. Law & Policy,* p. 194
[405] (1935) 53 Lloyds Rep. 67
[406] Ibid
[407] Basil Varkey 'Principles of Clinical Ethics and their Application to Practice' (2021) 30 (1) Medical Principles and Practice' 17

2.1.4 The Concept of Damage

It behooves on the plaintiff to prove that the defendant's breach of duty of care caused the damage complained of. Since the focus of this study is restricted to the province of tort, it must be stated from the outset that the scope of recoverable damages to be discussed will be those permitted under tort law. Once a claimant in a product liability claim can establish that he was owed a duty, which had been breached, consequent upon which he suffered an injury, such claimant is entitled to compensation in the form of damages paid to him[408]. Damages recoverable in a product liability claim can conveniently be grouped as follows: damage to person or property caused by the defective product along with financial losses arising as a result of such damage, cost of effecting repairs in anticipation that a defect in the property may cause damage and consequential loss from such, damage to the defective product itself, cost of remedying a defect inherent in the product which in itself pose threat to person and loss of profit or financial loss caused as a result of the defective nature of the product despite the fact that it does not pose threat of damage to person or the property in question[409].

In deciding this last element of negligence as a tort, there are essentially two main issues involved namely; the issue of causation and remoteness of damage[410].

2.1.5 The Concept of Causation

The consideration here is for the claimant to establish that the breach of duty caused or was

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[408] Mytal Gilboa 'Multiple Reasonable Behaviours Cases: The Problem of Casual Underdetermination in Tort Law' (2019) 25 (2) *Legal Theory* 77-104

[409] *Junior Books v The Veitch Co* [1983]1 A.C.520, *Muirhead v. Industrial Tank Specialities* [1986] QB507, *D.F. Estates v Church Comrs for England* [1988] 2 W.L.R.368, *Murphy v Brentwood District Council*. [1991] AC 398. See also the decision in *Bellefield Computers Services Ltd v E.Turner and Sons Ltd* [2000] BLR 97, *Anns v Merton London Borough* [1978] *AC 728 and Spartan Steel v Martin & Co. Contractors Ltd* [1972] 3 ALL E.R. 705

[410] Gilbert Kodinlinye: *The Nigerian Law of Torts* (Ibadan: Spectrum Law Publishing; 1997) p. 68

responsible for the injury occasioned to him.[411] There are two aspects to the causation requirement, namely, causation in fact and causation in law, otherwise known as the remoteness of damage.

2.1.6 The Concept of Causation in Fact

The first step of the causation enquiry is whether the defendant's breach of duty, in fact, caused the damage.[412] If this question is answered in the affirmative, then the defendant may be held liable if other conditions are fulfilled. In ascertaining whether the defendant's act was, in fact, the cause of the injury sustained by the plaintiff, the 'but for test' test is used.[413] This was adopted in the case of *Barnett* v *Chelsea and Kessington Hospital Management Committee*,[414] the facts of which can be summarized as follows:

> *"The plaintiff's husband, after drinking some tea, experienced persistent vomiting for three hours. He went later that night to the casualty department of the defendant's hospital along with another man who drank tea with him. A nurse contacted the casualty officer, Dr. B by telephone and she informed him of the man's symptoms. Dr. B., who was himself, tired and unwell, sent a message to the men through the nurse to the effect that they should go home to bed and consult their own doctors the following morning. Some hours later, the plaintiff's husband died of arsenical poisoning, and the coroner's verdict was one of murder by a person or persons unknown. In a subsequent action for negligence brought by the plaintiff against the hospital authority as employers of Dr. B., it was held that, in failing to examine the deceased, Dr. B., was guilty of a*

[411] Herbert Hart and Tony Honore, '*Causation in the Law'*, (2nd ed. Oxford: Clarendon Press, 1959), 324
[412] Ilias Plakokefalos, Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity, (2015) 26 (2) *European Journal of International Law,* 471
[413] Wex Malone, Ruminations on Cause-in-Fact, (1956) 9 (1) *Stanford Law Review* 60
[414] [1968] 1 All E.R.1068. See also the cases of *Overseas Tankship (U.K) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound No 1)* 1961 A.C. 388

> *breach of his duty of care, but this breach could not be said to have been the cause of the deceased death because even if he had been examined and treated with proper care, he would in all probability have died. It could not, therefore, be said that 'but for the doctor's negligence' the deceased would have lived*."

The 'but for' act test was also adopted by the court when it dismissed the plaintiff's/claimant's claim in the case of *Nigerian Bottling Company Plc v Okwejiminor & Anor*[415]. In this case, the first respondent claimed against the second respondent and the appellant jointly and severally the sum of (N2,000,000.00) being special and general damages for injuries suffered by him arising from a Fanta drink, which he drank. The first respondent case was that on or about 13 February 1991 at Ughelli, he bought a crate of Coca-Cola mineral drink from the second respondent, an agent of the appellant the manufacturers of Coca-Cola range of mineral drinks. From the crate of drinks, he opened a bottle, took some of its content during which process he felt some sediment down his throat. On examination, he discovered that another bottle of Fanta drink in the same create contained some foreign bodies. He felt uncomfortable and went to sleep without food. The following morning, he developed stomach pain and was rushed to a nearby hospital where he was confirmed to be suffering from food poisoning which could have been caused by the Fanta orange drink which he consumed. He was subjected to some laboratory tests and later discharged. Despite copious evidence in his favour by witnesses, including a medical doctor and a laboratory scientist report, it was held that there was no nexus between his injury and the Fanta drink, which he allegedly consumed. It follows that if there is no nexus between the injury and the breach of duty the defendant would not be held culpable for the resulting damage. If however, the reverse is the case, then the issue of the remoteness of damage comes up for consideration.

[415] *Edward Okwejiminor v Nigerian Bottling Company Plc* (2008) S.C. 67/2002

2.1.7 The Concept of Remoteness of Damage or Causation in Law

Bearing in mind that the consequences of an act of carelessness on the part of a defendant may be far reaching, the concept of the remoteness of the damage came into play to determine the extent of a tortfeasor's liability for the consequences of his negligence.[416] Consequently, the results of an act will be regarded to be too remote if a reasonable man would not have foreseen them. Thus, foreseeability is not only a criterion for the determination of when a duty of care is owed, but also for the question whether a particular damage is or is not too remote[417].

This principle illustrated by the case of *Mange v Drurie*,[418] In this case, the plaintiff was riding his bicycle along the Jos-Bulewa road, when a lorry knocked him down. He suffered an injury to his leg as a result of the careless driving of the lorry by the defendant. Before completion of treatment and against medical advice, he discharged himself from the hospital and did not return until after two days. During the two days period, the leg became infected, and it was eventually amputated. His claim for damages for the loss of the leg was rejected.

The court refused his claim based on the fact that... Compensation will only be awarded in respect of a class of damage which the defendant could reasonably be expected to have foreseen and compensation will not generally be awarded in 'respect of injury sustained as the result of the act or default of the injured party, or to the extent to which the injured party has failed to take reasonable steps to mitigate the damage. In the present case, it was foreseeable that the plaintiff would, as a result of the accident, sustain pain and suffering and also incur medical expenses. But it was not reasonably foreseeable that the plaintiff would, contrary to medical advice, leave

[416] Richard Wright, Causation in Tort Law, (1985) 7 (2) *California Law Review,* 1735
[417] Gbade Akinrinmade, The Jurisprudence of Product Liability in Nigeria: A Need to Complement the Existing Fault Theory, (2016) 7 (2) *Afe Babalola University Journal of Sust. Dev. Law & Policy,* 194
[418] *Mange v Drurie* (1970) NMOR 62

the hospital where the defendant had himself taken him, spend at least two days without proper medical or surgical care or attention, and during that interval pick up an infection that necessitated the amputation of his leg. And, apart from the question of foreseeability, the plaintiff, so far from taking reasonably steps to mitigate the damage, brought upon himself the amputation of his leg by his own ill-advised action.[419]

In a medical negligence claim, like other tort cases, where the chain of causation is broken by an intervening event caused by the act of a third party, the defendant may be exempted from liability depending on the surrounding circumstances of the case. Hart and Honore[420] described succinctly as the free, deliberate and informed omission of a human being, intended to exploit the situation created by the defendant, negates causal connection[421].

2.1.8 The Concept of Negligent Misstatement

The law distinguishes between a duty to take care in respect of act or omissions to act and the duty not to make careless statement[422]. Though no logical reason was given for the distinguishing, but it has. It is submitted here that it may not be unconnected with a way of finding solution to deceit of the society[423]. Note however that, for a careless statement to be actionable the following conditions must be fulfilled:

1. There must be a clear case of careless statement (negligent report)
2. There must be a clear case of reliance on the report

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[419] Ibid.
[420] Herbert Hart and Tony Honore, '*Causation in the Law'*, (2nd ed. Oxford: Clarendon Press, 1959), 324.
[421] Ibid.
[422] *Hedley Byrne & co. Ltd v Heller & Partners ltd*. (1964) AC 465.
[423] Daniel Akhabue, 'Negligence in Nigeria- Not at claimant's beck and call', (2012) 1 (6) *International Journal of Law and Legal Jurisprudence Studies*, p. 11.

3. There must be a loss arising from the reliance[424]

Thus where a careless statement is credited to a person and there is a loss arising from reliance on the careless statement, the defendant will be liable[425]. In Hedley's case[426], a bank issued a certificate of credit worthiness to one of her customers. A company relied on it and entered into commercial transaction with the customer of the bank. Moment later, the customer went into liquidation, held the bank was liable.

It is now a settled issue that if in the ordinary course of business one person seeks advice or information from another in circumstances where that other would reasonably know that his advice is to be relied on, he is under a legal duty to take such care in giving his reply as the circumstances reasonably required[427]. However, for the duty to arise that particular relationship has to exist between the parties. It need not of course be contractual, it need not be fiduciary in the strict sense, but there need to be a sufficient degree of proximity between the parties so that the element of reasonable reliance is present[428].

2.1.9 The Concept of Limitation of Statute

There are applicable statutory provisions which stipulate time limitation within which an action can be brought[429]. The effect is that if a sustainable cause of action is not initiated within the period stipulated in the act, the right to institute an action upon such cause of actions becomes statute barred. For actions relating to tort, the period of limitation in negligence claim is three

[424] Ibid.
[425] *Hedley Byrne & co. Ltd v Heller & Partners ltd*. (1964) AC 465.
[426] Ibid.
[427] *Hedley Byrne & co. Ltd v Heller & Partners Ltd*. (1963) 2 AII ER 575
[428] Gbade Akinrinmade, The Jurisprudence of Product Liability in Nigeria: A Need to Complement the Existing Fault Theory, (2016) 7 (2) *Afe Babalola University Journal of Sust. Dev. Law & Policy,* 194.
[429] Michael Heise, 'Statutes of Limitation' (2001) International Encyclopedia of the Social & Behavioural Sciences

years.[430]

2.1.2 Concept of Medical Ethics

It appears to me that the concept of medical ethics can be traced to the existence of human compassion for his fellow human. David Hume[431] opined that man was motivated not only by reason but also by compassion. Thomas Hobbes in his Leviathan opined that human motivation can be narrowed down to self-interest but Hume arguing to the contrary insisted that man shares a common morality founded on our emotions and rationality. Medical Ethics are based on the following four principles; autonomy, justice, non-malfeasance, and beneficence[432]. A typical medical ethics code provides sundry rules regulating both the Doctor-Patient relationship and professional etiquette[433].

The World Medical Association (WMA) is a global organization of physicians aiming to ensure the highest possible standard of ethical practice of the medical profession is maintained on a global level[434]. Pursuant to this huge ambition, the organization was established in 1947 and has since then aided in birthing the Declaration of Geneva, the Physicians Pledge (DOG), the Declaration of Helsinki, and the international code of Medical Ethics (ICoME). Of all these international documents and Instruments the ICoME is quite relevant here having been adopted

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[430] See section 8, Limitation Act, CAP 542, Laws of the Federal Capital Territory, Abuja; see also, Limitation Law, Cap L 67, Law of Lagos State, 2003; in Ogun state, it is six years; section 4 Limitation Law of Ogun State. Vol.3 Laws of Ogun State of Nigeria, 2003.

[431] David Hume, 'A Treatise on Human Nature (1740)' cited in L.A. Selby- Bigge, *A Treatise Of Human Nature: Being An Attempt To Introduce The Experimental Method Of Reasoning Into Moral Subjects* (Clarendon Press, 1896), 12.

[432] Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* (5th edn, Oxford University Press, 2001) 10.

[433] Michael Peel, 'Human Rights and Medical Ethics' (2005) 98 (4) *Journal of the Royal Society of medicine* (JRSM) 171 – 173.

[434] Ramin Parsa-Parsi, 'The International Code of Medical Ethics of the World Medical Association' (2022) 328 (20) *Journal of the American Medical Association*, 50.

in 1949. The ICoME comprehensively outlines the ethical principles and professional duties of first the medical professional responsibilities towards the patient and society, also regulating the relationship between physicians' inter se and other medical personnel or professionals. The scope of medical ethics covers physicians' duty to be honest, accountable, fair, professional, prudent, non-discriminatory etc. while relating with the patient[435].

The idea of being negligent speaks to failure to uphold the duty of care. At the junction of medical law and medical ethics is where you have the issue of medical negligence. Negligence is the failure to exercise ordinary care under the circumstances or perhaps more accurately negligence is doing something that the ordinary person would not do[436]. Medical Doctors, nurses and other hospital personnel are humans and are prone to the vagaries of human flaws of forgetful inadvertence in their actions in the course of delivering health care services to patients[437]. Approximately all claims against physicians except vicarious liability claims, founded on the allegation of negligence are based on the theory that the alleged negligence was caused by the physicians' incompetence or willingness to take an unnecessary risk when a safer course of action was available[438]. It goes to the root of the physicians' professional competence and skill. The concept of medical negligence is different from medical malpractice even though both can sometimes be used interchangeably[439]. Medical malpractice includes both negligent and intentional wrongful acts. Medical negligence occurs when practitioners fail to exercise the

[435] Roger Collier 'World Medical Association Updates Ethical Code for Physicians' (2017) 189 (44) *Canadian Medical Association Journal*, E1372

[436] Page Keeton, 'Medical Negligence – The Standard of Care' (1979) 10 *Texas Tech Law Review*, 351, 352.

[437] Danielle Bryden & Ian Storey 'Duty of Care and Medical Negligence (Continuing Education in Anasthesia Critical Care and Pain)' (2011) 11 (4) *BJA Education*, 124

[438] Bratin Kay 'Medical Negligence: An Overview' (2017) 25 (1) *Bengal Journal of Otolaryngology and Neck Surgery*, 46-54

[439] Oludamilola Adejumo & Oluseyi Adejumo 'Legal Perspectives on Liability for Medical Negligence and Malpractices in Nigeria' (2020) 35 (44) *The Pan African Medical Journal*

standard of skill and care expected of reasonably competent medical practitioners in their rendering of services to patients[440] The Consequences of Medical negligence which amounts to unprofessional conduct may result in disciplinary action by the Nigerian Medical and Dental Council (NMDC) while medical negligence that leads to premature death may result in conjunction for manslaughter and civil liability for damages also. The damages awarded for medical negligence are calculated to put the injured person in the position he or she would have been had the wrong not been committed[441].

2.1.4 Legal Obligation and the Duty of Care and Confidentiality

In medical circles confidentiality is the practice of keeping harmful, shameful, or embarrassing patient information within proper bounds. Confidentiality serves the purpose of ensuring respect for patient privacy acknowledging the patients vulnerability on the one hand while on the other hand it improves the level of health care by permitting the patient to trust the health professional with all the necessary personal information[442]. The Hippocratic Oath captures this duty. Section 37 of the Constitution of the Federal Republic of Nigeria 1999 (As amended) creates the right to privacy and the law is *ubi jus ibi remedium* – where there is a right there is a remedy- and the consequence of the existence of a right to privacy is the corresponding duty of care to ensure that this all important constitutional right is preserved[443].

[440]David McQuoid-Mason, 'What Constitutes Medical Negligence? A Current Perspective on Negligence Versus Malpractice' (2010) 7 (4) *SA HEART Journal,* 250, 251

[441] Ibid at 251

[442] Shanon King, 'Confidentiality in Medicine' (2010) 23 (4) *Current Allergy & Clinical Immunology Journal*, 196 - 198

[443] Section 37 of the Constitution of the Federal Republic of Nigeria 1999 (As amended)

Under common law the information obtained by doctors about patients is confidential[444] and under legislations there are laws such as the Nigerian Data Protection Act 2023 intended to protect personal data of the patient or data subject from being disclosed without prior informed consent. Informed consent is required for all medical investigations and procedures and is considered a corner stone of modern medicine[445]. In the past provided a health care professional acted in the patients best interest reasonably and professionally there was not too much concern over what a patient was or was not told about the risks[446]. Section 26 (1) of the National Health Act 2014 and Rule 44 of the Code of Medical Ethics for Medical Practitioners captures the duty of care to ensure information of a patient is confidential[447]. The Court of Appeal in *Digital Rights Lawyers Initiative (DRLI) v. NIMC*[448] the Court affirmed that data privacy including medical information is a constitutional right. However, as great as confidentiality is it is not set in stone as there are exceptions. So section 26 (2) National Health Act 2014 allows disclosure with consent of the user, court order or by guardian granting consent where the patient is unable to. It may be good to add that disclosure is allowed to prevent the commission of crime. In summary the physician-patient relationship has long been imbued with the special ethos of confidentiality[449].

Comparatively in the United Kingdom the position seems close just like in Nigeria every adult

[444] Jane O'Brien and Cyril Chantler, 'Confidentiality and the Duties of Care' (2003) 29 (1) *Journal of Medical Ethics* 36 - 40

[445] Christian Selinger, 'The Right to Consent: Is it Absolute?' (2009) 2 (2) *British Journal of Medical Practitioners* 50

[446] Elizabeth Larmer and Rachel Carter, 'The Issue of Consent in Medical Practice' (2016) 172 (2) *British Journal of Haematology* 300, 303

[447] Section 26 (1) of the National Health Act 2014 and Rule 44 of the Code of Medical Ethics for Medical Practitioners

[448] (Unreported) Appeal No. CA/1B/291/2020

[449] Ilene Moore and Others, "Confidentiality and Privacy in Health Care from the Patient's Perspective: Does HIPPA Help" (2007) 17 *Journal of Law and Medicine,* 215 - 272

patient has a right to bodily integrity unless he or she consents to treatment in which case the law allows the medical practitioner to administer or operate based on the consent. The law protects the right to bodily integrity and it is an assault to administer treatment without consent or negligently[450]. Informed Consent is crucial but informed consent is not as straight forward as it seems[451] because we then consider particular peculiarities of each case in light of standard of care and materiality. For over fifty (50) years, the case of *Bolam v Friern Hospital Management Committee*[452] (Bolam Case) has dominated the law on the amount of information and standard of care that doctors should provide to their patients[453]. The test in Bolam case was whether a reasonable body of doctors skilled in a particular field would have adopted the same practice applied in a particular case to determine whether the medical practitioner was negligent or not[454]. The Bloam case standard was chipped away at and qualified in *Sidaway v. Bethlem royal hospital and the Maudesley Hospital Health Authority and Others*[455] where the House of Lords held that a qualified Bolam test should apply when obtaining consent[456]. For a long time Sidaway case was good law and established that a health care professional had a duty to provide their patients with sufficient information to enable them to reach a balanced judgment as to the proposed course of treatment.[457] The patient therefore had the right to be informed of the necessity of a procedure, surgical or otherwise and advised as to any alternatives to that course of treatment and any common or serious consequences of it. Unfortunately, the test as to what

[450] *Montgomery v. Lanarkshire Health Board: Transforming Informed Consent* (2017) RCS Bull 36, 37
[451] Elizabeth Larmer and Rachel Carter, "The Issue of Consent in Medical Practice" (2016) 172. *BJH* 300.
[452] [1985] AC 871
[453] Angela Coulter and Benjamin Moulton, 'Montgomery v. Lanarkshire Health Board: Transforming Informed Consent' (2017) RCS Bull 36, 37
[454] Elizabeth Larmer and Rachel Carter, 'The Issue of Consent in Medical Practice' (2016) BJH 172, 300, 301.
[455] [1985] AC 871 [1985] 1 ALL ER 643
[456] Angela Coulter and Benjamin Moulton, 'Montgomery v. Lanarkshire Health Board: Transforming Informed Consent' (2017) RCS Bull 36
[457] Elizabeth Larmer and Rachel Carter, 'The Issue of Consent in Medical Practice' (2016) 172 *BJH*, 300, 301.

constituted 'common' or 'serious' was open to debate, and would depend upon what the health professional providing the advice interpreted as common or serious[458]. The recent case of *Montgomery v Lanarkshire Health Board*[459] decided by the UK Supreme Court takes the standard further and now provides us with a significant development in the way that medical professionals should relate with the patient in disclosing risk. We are looking at an era of joint decision making between patient and medic. The age of medical paternalism[460] is effectively over. Doctors must not withhold information simply because they disagree with the decision the patient is likely to make if given that information[461]. As a result of Montgomery judgment the Bolam Test or medical opinion standard no longer applies to information provision and disclosure, including the issue of disclosing risk[462]. The Montgomery Case firmly establishes Informed Consent as the present position of the law building on earlier cases like *Chester v. Afshar*[463] to finally introduce informed consent in the UK medical practice.

2.2 Theoretical framework

The theoretical perspective is crucial in ethics theories as it helps researchers understand relationships between seemingly unrelated events. Ethics theories aim to explain and justify moral decisions, requiring careful examination of ethical judgments. They share a broad perspective on objective morality, generating principles, axioms, and rules to answer the

[458] Ibid.
[459] [2015] AC 1430, [2015] UKSC 11
[460] John Ayodele 'The Realities Surrounding the Applicability of Medical Paternalism in Nigeria' (2015) 14 *Global Journal of Social Sciences* 57
[461] Sarah Chan and Others, 'Montgomery and Informed Consent: Where are we now?' (2017)357 *British Medical Journal* j2224
[462] Nicholas Millar, 'Informed Consent: Montgomery v. Lanarkshire Health Board' [2015] JLSHK <http://www.hk-lawyer.org/content/informed-consent-montgomery-v-lanarksgire=health-board> accessed 26 November 2023.
[463] [2004] UKHL 41

question of why being moral is important.[464]

a. Teleology and Utilitarianism

Teleological theories, also known as consequentialist theories, focus on the consequences of actions as the first step in analyzing moral activity. They argue that when the moral outcome of an action is unclear, one must choose actions that provide the best predictability for a good outcome, known as act utilitarianism or rule utilitarianism.[465] Utilitarianism, often referred to as consequentialist theory, proposes that in conflicts, one is ethical if one chooses to maximize the good and minimize the harm. It is particularly useful in resolving disputes between individuals and groups in society, as well as in medicine and healthcare delivery. However, it has been criticized for its inability to set moral action standards based on the act itself. Deontologists argue that the ultimate standard must be one's internal duty, which is a weakness of utilitarianism as a measure of the good. This has led to the distinction between act and rule utilitarianism and efforts to develop objective standards of the good that transcend individuals and societies.[466]

b. Deontology

Deontological theory, developed by Kant, emphasizes the importance of one's duties and obligations. Deon, a Greek word for duty, was developed to correct excessive teleological thinking that sought rewards outside the self for being moral. Kant aimed to preserve ethics in an age of rising science by establishing objective standards for moral conduct, independent of

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464 David C. Thomasma, Theories of Medical Ethics: The Philosophical Structure, Neiswanger Institute of Bioethics and Health Policy, Stritch School of Medicine, Loyola University Chicago.

465 St. Thomas Aquinas. On Aristotle's Love and Friends, Ethics, Books VIII–IX. Guway P, trans. Providence, RI: Providence College Press; 1951

466 RM Veatch. A Theory of Medical Ethics (1981) New York: Basic Books

consequences. The centerpiece of deontological theory is the notion of personhood, which Kant elevated to moral supremacy. He argued that a person is a human being who constructed their own moral law, meaning autonomy. A moral person cannot lie because their personhood or integrity as a moral agent would be compromised.[467]

Kant's focus on the person led him to propose that it is always wrong to treat persons as means and not as an end in themselves. Respecting a person's values is essential, and nothing can be imposed on others without their consent. Kant's philosophy helps avoid rationalizations and delusions that justify personal actions and try to convince everyone, including oneself, that they are right. Deontology also aims to preserve ethics as a discipline with objective referents in a scientific age. Instead of focusing on the objective moral law, Kant focused on two other objectivities: the act of the person should always conform to the golden rule, and the person should act as if what they do would be good for others.[468]

c. Virtue Theory

Virtue practices date back to the earliest moral shaping of a child by parents and community. Socrates discussed virtues and their importance in living a good human life, while Aristotle formulated virtue theory as a branch of politics, focusing on human psychology and human affairs. Virtues are habits formed by one's personality, parental and social training, and professional standards suitable to one's life choices and roles in society.[469]

Every social group has a different measure of the balance of virtue in the socially complex mix of personal and community shaping. For many centuries, virtue theory was largely identified

467 R Gillon, Medical ethics: Four principles plus attention to scope. Br Med J. 1994;309(6948):184–188

468 Beauchamp TL, McCullough LB. Medical Ethics: The Moral Responsibilities of Physicians. Englewood Cliffs, NJ: Prentice-Hall; 1984: 22–51

469 WJ Bennett, ed. The Book of Virtues: A Treasury of Great Moral Stories. New York: Simon & Schuster; 1993

with an Aristotelian view of human nature and human social life. Later, during and after the Enlightenment, virtue theory was grounded in ideas of instinct, common sense, and gentlemanliness.

In essence, virtue theory argues that all human beings have an inborn nature that tends to the good in moral actions but needs molding and direction, especially repeated habitual action, to refine that nature away from vices and unbalanced or inordinate behavior. Virtues are defined as good operative habits that intensify the potentialities of human nature from its emotions to its intellect and will toward good actions.

People who grew up in a strong community will have been shaped this way, trained by parents and the community, secular and religious, about what sort of person one should be. Some strong communities raise persons considered reprehensible by others, such as the Nazi storm troopers of World War II and the Hezbollah in the contemporary Middle East.

2.3 Review of Empirical Studies

Most of the materials available in this area of law are predominantly foreign materials which do not take into cognizance, the peculiarity of the *corpus juris* in Nigeria, in another sense, most of the local contributions in this area of law are adoption of submissions from the foreign authorities and as such, this is so because of the fact that there is little legislative development in this area in Nigeria, therefore, most of the discussions in the area of tort law including negligence in Nigeria are adaptation of common law rules. Thus, the review in this study may have to employ English cases copiously. Also, the method adopted in this review is not based on a singular approach to the concept of negligence but an approach of attacking the elements of the concept since negligence itself does not ground liability, it is the elements of negligence that the court will consider, as stated earlier, the ingredients that must be proved for a successful claim in

negligence are:

1. a legal duty on the part of A toward B to exercise care in such conduct of A as falls within the scope of the duty
2. breach of that duty
3. consequential damages to B.[470]

We can state the definitions of authors who have contributed to this area of law in order to serve as a rough guide to the direction of the discourse. To this end, William[471] defines negligence as the failure to conform to the standard of care to which it is the defendant's duty to perform. It is a required to behave like a reasonable or prudent man in a circumstance where the law requires such reasonable behaviour. Cross on the other hand defines negligence as non-compliance with a standard of conduct and it involves blame worthy inadvertence to the circumstance and consequences mentioned in the definition of the act charged.[472] To Perkins, negligence would rather be defined as any condition intentionally or wantonly disregardful of an interest of others which falls below the standard established by law for the protection of others against unreasonable risk of harm[473]. It is common from all the definitions above that the concept of negligence presupposes that there is a duty of care which the law places on a person and he may not act out of malice, he may even act in good faith, but the problem comes as a result of the fact that he was reckless or he did not pay attention to care which eventually leads to the injury or damage on another person who in this case now becomes his victim in the contemplation, these

[470] Gbade Akinrinmade, The Jurisprudence of Product Liability in Nigeria: A Need to Complement the Existing Fault Theory, (2016) 7 (2) *Afe Babalola University Journal of Sust. Dev. Law & Policy,* 194.
[471] Glanville Williams, *Learning the Law*, (London: Sweet and Maxwell, 2010)
[472] Rupert Cross, *An Introduction to Criminal Law*, (London: SAGE Publications, 1957), 42.
[473] Rollin Perkins, *Criminal Law*, (Brooklyn foundation press, 1957), 664.

definitions have successfully incorporated all the elements of negligence[474]. The only observable lacuna in the definitions above is the fact that negligence does not necessarily mean that a person did not exercise a duty of care, the case is that the duty of care exercised by him is not sufficient in the circumstances of his case, this appears to be so because of the fact that the two persons who are engaged in the same business may not be required to exercise the same duty of care[475]. For instance, the duty of care expected of a commercial driver plying the Lagos-Ibadan expressway is different from the standard of care required of a driver who is driving an ambulance who is conveying an emergency patient on the same Lagos-Ibadan expressway, this is because of the utility of their service. Thus, it will be advanced that the encompassing definition to amend the proposition of Williams above is that: "It is a failure to behave like a reasonable or prudent man in circumstance where the law requires such reasonable behaviour *and in the circumstances of the tortfessor's position*"[476].

Akhabue[477] defines negligence as a breach of duty to take care; imposed by common law or statute, he relied on copious authorities to substantiate this ground. The correctness of this statement is further buttressed by the fact that the principle of negligence is a creation of the common law and the test of whether a person has breached the duty of care is usually undertaken by the Nigerian courts with aid from the common law cases and provisions of law, the court will only desist from towing the reasoning of the common law judges where the common law principle has been repealed by a Nigerian statutes. However, the question of breach of duty of care is not dictated by law alone as stated by the learned author, it is a question of both law and

[474] Cees Dam, *Intention and Negligence'*, European Tort Law, 2nd edn (Oxford: Oxford Academic, 2013)
[475] Orj Herstein, 'Responsibility in negligence: Why the duty of care is not a duty "to try", (2020) 23 (2) *Canadian Journal of Law and Jurisprudence*, 404.
[476] Glanville Williams, *Learning the Law*, (London: Sweet and Maxwell, 2010)
[477] Daniel Akhabue, 'Negligence in Nigeria- Not at claimant's beck and call', (2012) 1 (6) *International Journal of Law and Legal Jurisprudence Studies*, 3.

facts, the law only imposes the duty of care on persons and provides guide to its standard, in all cases, it is the situation in which the person finds himself operating from that determines whether he will be liable in negligence or not. The proper position is that a duty of care arises wherever in the circumstances it is foreseeable that if the defendant does not exercise due care, the plaintiff will be harmed.[478] Lord Atkin laid down the principle as follows:

> *"The rule that you are to love your neighbor becomes, in law, you must not injure your neighbor and the lawyer's question, 'Who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would likely injure your neighbor. 'Who, then in law is my neighbor?' The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplations as being so affected when I am directly my mind to the acts or omissions which are called in question".*[479]

The neighbour principle above is based on reasonable foreseeability or proximity. Proximity does not necessarily mean physical nearness but reasonable foreseeability, which is generally known as the neighbour test. Who then is my neighbour? My neighbour is anyone in the world who will be injured by my negligent act/conduct. Where injury is not reasonably foreseeable or damage is remote, there is no liability.[480]

According to Olomojobi[481], the determination of medical negligent cases should be determined by the experts and not the courts. Meanwhile, it is noted that Nigerian legal jurisprudence

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[478] Gilbert Kodilinye and Oluwole Aluko, *The Nigerian Law of Torts, (*1st Ed, Ibadan: Spectrum Books Ltd, 1996) 39.

[479] *Donoghue v. Stevenson* (supra).

[480] Tolulope Ibitoye 'Applicability of the Doctrine of *Res Ipsa Loquitur* in Medical Negligence in Nigeria' (2018) 9 (1) *Nnamdi Azikwe Uuniversity Journal of International Law and Jurisprudence*, 168.

[481] Yinka Olomojobi, *Medical and Health Law, The Right to Health* (Lagos: Princeton & Associates Publishing Co. Ltd, 2019) p. 143.

provides that even where a doctor volunteers to treat a patient in an emergency situation, the standard duty of care expected of a reasonable man in his standing is expected unlike in the United States, where the degree of standard of care is minimal. Olomojobi did not further explain how this can be achieved under the Nigerian Legal jurisprudence and it is this vacuum that this study intends to fill.

The voyage in this part is to seek out literature contemporary in nature which covers the field in making clear the position of the law on challenges and opportunities related to medical ethics and legal obligation of health care personnel in Nigeria. The search is also for literature which is comprehensive enough to appropriately describe the current tempo of the academia on the subject matter of research upon which one would conclude that such has covered the field.

Jackson[482] examines the relationship between medical law and good medical ethics declaring that the relationship is a complicated one. In describing the dynamics Jackson argues that there are times when medical ethics demands much more from a doctor than medical law and vice versa also, that the imbalance of power in the Doctor-Patient relationship means that Doctors must not abuse the trust placed on them.[483] Johnson declares that regardless of the tensions and discrepancies as well as similarities between a doctor's legal duties and ethical obligations the fundamental duty is to comply with both. How then does a medical practitioner derive fulfilment from the job if they are at odds in their heart with regard to legal obligation and ethical considerations. Ivanović, et al[484] considered medical law ethics stating that the study of ethical issues and health care law as a legal discipline in the awareness of health professionals of

[482] Jackson Emily, 'The Relationship between Medical Law and God Medical Ethics' (2015) 41 (1) *Journal of Medical Ethics*, 95 – 98.
[483] ibid at 96
[484] Suncica Ivanovic and Others, 'Medical Law and Ethics' (2013) 52 (3) *Acta Medica Medicinae Journal,* 67 – 74.

humans rights, and since the performance of activities of medical professionals is always linked to the issue of life saving or death, thus, lack of knowledge of legal obligations attached to their role would not justified at all. The authors opine that the consequences of errors of medical personnel lead to a disorder of some functions, and sometimes death of patients due to negligence etc[485]. The authors finally conclude that issues such as time engagement (Over time, shift work, irrational regime of work and rest, changing the work schedules, pressure to do something for a very short time period)[486]. It is very agreeable that medical professionals are at the centre of the game of life and death and must understand both ethics and law attendant to their role. Especially in Nigeria this is a call to action.

Abdulmalik, Kola and Gureje[487] adopts a health systems approach to understanding efforts for improving health care services. The work mainly focuses on Health System Governance (HSG) basically in Nigeria, also evaluates the mental Health System of Governance (HSG) of Nigeria with a view to understanding the challenges, opportunities and strategies for strengthening it. The authors extensively quote the WHO on HSG opining that the diagnosis of HSG is increasingly becoming an area of attention for international agencies, developmental agencies and donor bodies, especially in low and middle income countries. Uzochukwu using Nigeria as a case study traverses the length and breadth of primary health care in Nigeria. He begins with an overview of the Nigerian Health Care System then delves into the issue of Governance of the health care system, he ultimately opines that the three tiers of the health system in Nigeria (Federal, State and LGA) have substantial autonomy and exercise considerable authority in the allocation and utilization of their resources. According to Uzochukwu the key 'component of the

[485] Suncica Ivanovich and Others (n. 41) at 72.
[486] Suncica Ivanovich amd others (n. 41) at 73.
[487] Jubril Abdulmalik, Lola Kola and Oye Gureje, 'Mental Health System Governance in Nigeria; Challenges, Opportunities and Strategies for Improvement' 2016 (3) *Global Mental Health Journal*, 1-11.

National Health Act is the establishment of Basic Health Care Provision Fund, which will be predominantly financed through an annual budget from the federal government of not less than 1% of the Consolidated Revenue Fund (total federal revenue before it is shared to all tiers of government)[488]. Thus, the author focuses on the National Health Act 2014 and some innovations made by the said Act but he does not do a holistic review of the effectiveness of the laws but focuses on one law which is the National Health Act 2014. The author also importantly points to the Basic Health Care Provision Fund created by the National Health Act 2014 and this is instructive as the fund will be administered as part of the administrative framework of PHC in Nigeria. Half of the fund will be used to provide a basic package of services in PHC facilities through the National Health Insurance Scheme 45% will be disbursed by the National Primary Health Care Development Agency for essential drugs, maintaining PHC facilities, equipment and transportation, and strengthening human resources capacity; and the final 50% will be used by the Federal Ministry of Health to respond to health emergencies and epidemics[489].

Odejide and Morakinyo[490] highlight at the offset the paucity of psychiatrists as against the huge population dynamic of Nigeria. Early on, the authors opine that primary health care workers have very poor knowledge of mental disorders and virtually no mental health services are provided at the primary health care facilities studied. Thus, that the mental health services offered at the private general practice and government owned hospitals seem to be the only hope for the minority of the populace. The authors further aver that judging by the level of mental health training available to primary health care workers tied with the deeply rooted negative attitudes

[488] Benjamin Uzochukwu, *Primary Health Care System (PRIMASYS); Case Study of Nigeria* (World Health Organization, 2017) 36.
[489] Ibid 28.
[490] Olabisi Odejide and Jide Morakinyo, 'Mental Health and Primary Health Care' (2003) (2) (3) *World Psychiatry Journal,* 165.

and superstitious beliefs or mental disorders, mental health services offered to the populace at the primary care level is likely to be minimal. The reason the review have alluded to publications on mental health also is because of the volatile nature of the Doctor-Patient relationship attached to the mental health sub sector. Sokefun[491] examines medical ethics as it inter plays with law and right to health in Nigeria. For Sokefun medical practice ordinarily reflects a symbiotic existence between that discipline and other discipline especially law. Sokefun makes reference to the dilemma of two options of removing a life threatening foetus in order to save the life of the living person or living the foetus in order to protect it, to paint the conflict between medical ethics and law. Sokefun opines that law in its paternalistic role should codify the existing ethics of the medical profession. It is evidently impossible to legally codify all existing medical ethics in legislations because morality and law may intersect at some junctions but they both do not run necessarily on straight lines at all times. Sokefun recommends amendment of the CFRN 1999 (as amended). Section 6 (6) (c)[492] could be amended to make chapter II justiciable specifically enforcing the right to health while constitutional reform would go a long way in generally improving the quality of healthcare service in the country as suggested by Sokefun[493]however, the posture of the National Assembly at the moment does not seem to have any desire to touch chapter II with a ten foot pole let alone amend that.

[491] Justus Sokefun, 'Medical Ethics, Law and the Right to Health in Nigeria' (2018) *Human Rights and Jurisprudence Journal,* HRJJ 1-3.
[492] Constitution of the Federal Republic of Nigeria 1999 (as amended 2018).
[493] Justus Sokefun, (n. 48) at 3.

CHAPTER THREE

LEGAL AND INSTITUTIONAL FRAMEWORK FOR MEDICAL ETHICS AND LEGAL OBLIGATION IN NIGERIAN HEALTHCARE

3.1 International Legal Framework

WHO has the broadest legal jurisdiction among international organisations to handle issues related to public health around the world. WHO has extensive legal capacity to function as a platform for international health lawmaking since it is the UN specialised agency mandated by the constitution to act as the "directing and coordinating authority" on international health activities.[494] Article 19 of the WHO Constitution specifies that the World Health Assembly, WHO's legislative body composed of all of its member states, "shall have the authority to adopt conventions or agreements with respect to any matter within the competence of the Organization."[495] The WHO Constitution gives it the legal right to act as a forum for conventions and accords that might potentially cover every facet of public health. It also gives it the power to create rules under Article 21 and non-binding recommendations under Article 23. Even while WHO has up until now overlooked the evolution of international legislation to address the entire spectrum of challenges to global health,[496] it has always maintained its principal role for developing international legal cooperation in infectious disease control.[497]

The management of the international legal framework ensuring multilateral collaboration to curb the global spread of illness was passed down to WHO from its predecessor organisations when it was founded in 1948. Since its first adoption by the World Health Assembly in 1951, these international regulations have undergone several updates, most of which have been brought

[494] Taylor Allyn, *Health: The Oxford Handbook of United Nations Treaties* (New York: Oxford University Press, 2019).
[495] WHO Constitution, Article 19 (1946).
[496] Taylor Allyn, supra note 1.
[497] David Fidler, *International Law and Infectious Diseases* (Oxford: Clarendon Press, 1999)

about by advancements in epidemiological science and epidemic disease control worldwide..[498] Last revised in 2005, the current IHR are binding on 196 state parties, making it one of the most widely subscribed to binding agreements under the UN system and forming the contemporary legal foundation for international disease control.

The IHR codify WHO's legal authority to lead international efforts "to prevent, protect against, control and provide a public health response to the international spread of disease."[499] Adopted under Article 21 of the WHO Constitution, the IHR bind states parties pursuant to a unique contracting-out procedure that is designed to simplify and expedite the lawmaking process for infectious disease control. Regulations under Article 21 come into force automatically for all WHO member states, except for those states that explicitly notify WHO's Director-General of any rejection or reservations, obligating states under this international legal framework to reform domestic public health policy to comport with IHR provisions.[500] Framing responses to protect national security and international trade, the IHR have been employed over the past fifteen years to respond to six public health emergencies of international concern, including COVID-19.

3.1.1 The Alma Ata Declaration of 1978[501]

The Alma Ata Declaration of 1978 emerged as a major milestone of the twentieth century in the field of public health, and it identified primary health care as the key to the attainment of the goal

[498] Gostin Lawrence and Meier Mason, *Framing Human Rights in Global Health Governance*, in *Human Rights in Global Health*, B. Mason Meier and L. O. Gostin, eds. (New York: Oxford University Press, 2018) 63.
[499] International Health Regulations, 2005, Article 2 <https://www.who.int?publications/item/9789241580496> accessed 12 November, 2020
[500] David Fidler and Gostin Lawrence, 'The New International Health Regulations: An Historic Development for International Law and Public Health' (2006) 34 (1) *Journal of Law, Medicine & Ethics* 85.
[501] WHO called to return to the Declaration of Alma Ata <https://who/int/teams/social-determinants-of-health/declaration-of-alma-ata> accessed 10 November, 2023

of Health for All[502] around the globe. It can be easily said without mincing words that, the Alma Ata Declaration of 1978 is the most potent and widely accepted attempt at general consensus on the importance of Primary Health Care and it in turn serves as the first international declaration categorically expressing the need to make giant strides to improve primary health care around the entire world. The Alma Ata Declaration on Primary Health Care (PHC) which was made in 1978 is meant to address the main health problems in communities by providing promotional, preventive, curative and rehabilitative services. Nigeria was among the 134 signatories to this invaluable idea.[503] Primary Health Care (PHC) is a grass-root management approach to providing health care services to communities. Nigeria being a Multi-ethnic, Multi-cultural, and Multi-lingual entity is ideally suited for maximum utilization of Primary Health Care approach to health care services delivery.

3.1.2 Universal Declaration of Human Rights[504]

The World Health Organization Constitution makes it clear that the highest attainable standard of health is a fundamental right of every human being across the continents of the world[133]. The Alma-Ata Declaration 1978 further cements the position that access to health care is a right that must be pursued by every nation-state. Thus, every state is obligated to apply its maximum available resources to pursue basic health care for all its citizens and to update its laws to facilitate the achievement of health for all. It is obvious that a rights – based approach to health care mandates that health policies of states and health programmes must prioritize the needs of citizens on a basis of equality. This principle is eschewed in the 2030 Agenda for Sustainable

[502] William Shiel, 'Medical Definition of Health For All' (*Medicine net,* 2 June 2018) <https://www.medicinenet.com/script/main/art.asp?articlekey=10708> accessed 24 December, 2023

[503] Innocent Alenoghena and Others 'Primary Health Care in Nigeria; Strategies and Constraints in implementation' (2014) 3 (3) *International Journal of Community Research* 74.

[504] The Universal Declaration of Human Rights was adopted by the newly established United Nations on 10 December 1948 <https://en.m.wikipedia.org?wiki/Universal_Declaration_of_Human_Rights > accessed 10-11-2023

Development. Unfortunately the UDHR does not have an express provision on the right to health and does not place a legal obligation on medical practitioners. However article 25 is important. It provides inter alia that all humans have the right to a standard of living adequate for the health and well-being of himself and of his family, to include food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. The first interpretation that comes to mind when reading provision in article 25 is the clear expression of an acquiescence that the right to health equates to a good standard of living. Outside this provision not much can be gleaned from the UDHR. The UDHR 1948 although not binding in that the declaration does not prescribe punishment, but despite the absence of punitive measures for its non-observance; the instrument has garnered moral power of compliance over the years. Thus, the UDHR 1948 has operated to inspire the fundamental rights regime of many national Sub-Saharan African Countries Constitutions.[505] Unfortunately, the right to education is not one of the rights explicitly provided for in many African Constitutions and Bill of rights. The UDHR 1948 provides that everyone has the right to education. This provision can be explained as the one which warrants the need for teaching medical ethics to medical students and practitioners.

3.1.3 International Health Regulations 2005[506]

A central and historic responsibility of the World Health Organization (WHO) has been the management of the global regime for the control of the international spread of disease. Under Articles 21(a) and 22, the constitution of the WHO confers upon the World Health Assembly the

[505] Chapter IV of the Constitution of the Federal Republic of Nigeria 1999 (as amended 2018).
[506] International Health Regulations (IHR) was adopted by the World Health Assembly in 1969 and last revised in 2005. <https://en.m.wikipedia.org?wiki/International_Health_Regulations> accessed 10-11-2023

authority to adopt regulations "designed to prevent the international spread of disease" which, after adoption by the Health Assembly, enter into force all WHO member states that do not affirmatively opt out of them within a specified time period.[507] The International Health Regulations ("the IHR" or "Regulations") were adopted by the Health Assembly in 1969.[508] The 1969 Regulations which initially covered six quarantinable diseases were annexed in 1973 and 1981, primarily to reduce the number of covered diseases from six to three (yellow fever, plague and cholera) and to mark the global eradication of small pox.[509] The IHR (2005) were adopted by the fifty-eight World Health Assembly on 23 May 2005. They entered into force on 15 June, 2007.[510]

The IHR 2005 is relevant to PHC because PHC is the basic cell of health care system in every country and PHC is the first to come in contact with budding diseases that may eventually become a threat to the international community. Although, not all the provisions of the International Health Regulations apply to PHC, the Regulation is mutatis mutandis very relevant to the subject of research. An examination of key provisions is necessary to highlight its importance and possible nexus to PHC. There is consensus that since their adoption in 2005, the Regulation has helped the international community to prepare for and respond to public health emergencies more efficiently. Many states parties have made good progress in developing and strengthening the core capacities required by the Regulations. However, significant gaps in the core capacities persist in several countries and emerging and re-emerging threats with pandemic

[507] WHO, *International Health Regulations(2005)* ((3rd edn, World Health Organization, 2016) 1.
[508] Resolution WHA 22.46 and Annex 1 quoted in WHO, *International Health Regulations(2005)* ((3rd edn, World Health Organization 2016) 1.
[509] WHO, *International Health Regulations(2005)* ((3rd edn, World Health Organization 2016) 1.
[510] Ibid at 1.

potential continue to challenge fragile health systems.[511] The key provisions relevant to Primary Health Care (PHC) and to this research are summarized below.

The Regulation has ten parts (Part I– Part X) with Sixty-six (66) Articles. Part one covers definitions, purpose and scope including the principles and responsible authorities. Note that IHR 2005 seeks ultimately to prevent the widespread outbreak of diseases or prevent the occurrence of public health emergency of international concern. Article 1 defines Public health emergency of international concern to mean "an extraordinary event which is determined by the Regulations to constitute a public health risk to other states through the international spread of disease and to potentially require a coordinated international response". One could correctly state that Corona virus which broke out in 2019 in Wuhan China has far surpassed being a mere public health risk and is now a global pandemic thus activating the IHR 2005 provisions on safety.

Article 3 provides for the purpose and scope which is to "prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.

Article 4 provides the principles of the IHR to include inter alia, the implementation of these Regulations in full respect for the dignity, human rights and fundamental freedoms of persons,[512] the implementation of the Regulations guided by the UN Charter and WHO constitution.[513] The Regulations are to be also implemented to guarantee the protection of all people of the world

[511] WHO, *Annual report on the Implementation of the International Health Regulations (2005) by the Director-General* (World Health Organization 2018).
[512] International Health Regulations, 2005, Article 3(1).
[513] Article 3(ii) of the International Health Regulations, 2005.

from the international spread of disease,[514] and states are to exercise their sovereign right to legislate on health policies upholding the purpose of the IHR 2005.[515] Article 4 also provides for National IHR focal points in every Country to be in constant communication with WHO IHR contact points.

Part II consists of provisions on information and Public Health Response. Thus, each state party shall develop, strengthen and maintain, as soon as possible the capacity to detect, assess, notify, and report events in accordance with the Regulations.[516] This is simply a provision on mandatory surveillance and reportage to the WHO. PHC network in each country becomes useful at this point in detection and assessment of a state party's health status as it relates to diseases that pose a risk that may become a threat to the international community.

Part III is all about modalities on recommendation by the Director-General; these may be temporary recommendations,[517] or standing recommendations.[518] Part IV is on Points of entry and creates obligations to states in Airports and ports in safety measures to prevent spread of disease. Part V is on Public Health Measures on arrival and departure of persons into and out of a country. The remaining Parts from VI to X are on miscellaneous provisions from Health documents to charges to general provisions e.t.c all do not necessarily border on Primary Health Care and must be left out as not forming part of the scope of this work. Most of the provisions are focused on safeguarding Airports and entry points to prevent spread of diseases.

In summary, the IHR (2005) contain a range of innovations: - (a) a scope not limited to any specific disease or manner of transaction, but covering illness or medical condition; irrespective

[514] Article 3(iii) of the International Health Regulations, 2005
[515] Article 3 (iv) of the International Health Regulations, 2005
[516] Article 5 of the International Health Regulations, 2005.
[517] Article 15 of the International Health Regulations, 2005.
[518] Article 16 of the International Health Regulations, 2005.

of origin or source, that presents or could present significant harm to humans; (b) state party obligations to develop certain minimum core public health capacities; (c) obligations on states parties to notify WHO of events that many constitute a public health emergency of international concern according to defined criteria; (d) provisions authorizing WHO to take into consideration unofficial reports of public health emergency of international concern and issuance of corresponding temporary recommendations, after taking into account the views of an emergency committee; (f) protection of the human rights of persons and travelers; and (g) the establishment of National IHR focal points and WHO IHR contact points for urgent communications between states parties and WHO.[519]

3.2 National Legal Framework

In Nigeria, medical practice is regulated by a number of statutes; among which are: the Medical and Dental Practitioners Act[520]; the Nursing and Midwifery (Registration etc.) Act[521]; the National Health Act[522] 2014; the Code of Medical Ethics in Nigeria[523]; the Constitution of the Federal Republic of Nigeria 1999 (as amended); the Medical Oath; the Compulsory Treatment and Care for Victims of Gunshot Act[524]; the Patients' Bill of Rights[525]; the Pharmacy Act[526] and the Criminal Code Act[527]. The right to dignity of the human person is provided for in the 1999 Constitution of Nigeria. Also, the right to freedom from discrimination is protected by the Nigerian Constitution. The open season of malpractice suits is one of the major factors that

[519] WHO, *International Health Regulations (2005)* (3rd edn, World Health Organization Publication, 2016)1.
[520] Laws of the Federation of Nigeria, 2004, CAP M8.
[521] Laws of the Federation of Nigeria, 2004, CAP N143
[522] Medical and Dental Practitioner Act. 1988 No. 23 CAP. M8
[523] Mental and Dental Health Act, 2004 CAP 221
[524] Victim of Gunshot Act. 2017 No.105
[525] Patients' Bill of Right Act 2018
[526] Pharmacy Act of Nigeria 1992 No. 91 P17 – 2
[527] Criminal Code Act 1965 CAP C38

compelled the National Assembly of Nigeria to pass the National Health Bill which was assented by the President into an Act of the Federal Republic of Nigeria as the National Health Act 2014 on the 8th of December 2014.

The objectives of the National Health Act 2014 include: encompass public and private providers of health services; promote a spirit of cooperation and shared responsibility among all providers of health services in the Federation and any part thereof; provide for persons living in Nigeria the best possible health services within the limits of available resources; set out the rights and obligations of health care providers, health workers, health establishments and users; and protect, promote and fulfil the rights of the people of Nigeria to have access to health care services[528]. These statutes are very critical to medical practice in Nigeria as they provide for the rights of patients and the healthcare providers. The statutes set the basic minimum standard of care and professional conduct expected from healthcare providers.

The Medical and Dental Practitioners Act establishes the Medical and Dental Council of Nigeria17 and vest it with the power to determine the standards of knowledge and skills to be attained by persons seeking to become members of the medical or dental profession and it also has the power to review the standards from time to time. The Council is empowered to maintain registers of the names, addresses, qualifications and such other particulars of persons entitled to practice medicine and dentistry in Nigeria. Moreover, one of the major roles of the Medical and Dental Council of Nigeria is that it has the power to discipline erring medical practitioners and dental surgeons. The Medical and Dental Practitioners Act lucidly make provisions for the body charged with disciplinary role in medical practice, instances in which the disciplinary power can

[528] Olabanjo Ayenakin, Temitayo Akindejoye and Itunu Kolade-Faseyi 'Examination of the Legal and Institutional Frameworks of Medical Law in Nigeria' (2021) 9 (6) *Global Journal of Politics and Law Research*, 12.

be invoked and the mechanisms for discipline. Similarly, the Nursing and Midwifery Registration Act and Pharmacy Act have statutory regulations for the practice of nursing, midwifery and pharmacy in Nigeria as well as make provisions for discipline of nurses, midwives and pharmacists.

3.2.1 National Health Act 2014

The National Health Act 2014 (Hereinafter abbreviated as NHA) is one of the most fundamental national laws on health in the Country and its provisions cut across various layers of health care from primary to tertiary. The provisions concerned with facilitation of health care services and medical ethics regulation and development shall be highlighted briefly in this part of the research.

The NHA, 2014 has Seven (7) parts (i - vii) with sixty-five sections. Part I makes elaborate provisions for the establishment of the National Health System and eligibility for health services. Section 1 establishes the National Health System which shall define and provide a framework for standards and regulation of health services, without prejudice to extant professional regulatory laws. The National Health System shall encompass public and private providers of health,[529]promote a spirit of co-operation and shared responsibility among all providers of health services in the federation and any part thereof,[530] provide for persons living in Nigeria the best possible health services within the limits of available resources,[531] set out the rights and obligations of health care providers, health workers, health establishments and users,[532] and protect, promote and fulfil the rights of the people of Nigeria to have access to health care

[529] National Health Act, 2014 section 1 (1) (a).
[530] Section. 1 (1) (b) of the National Health Act.
[531] Section. 1 (1) (C) of the National Health Act.
[532] NHA, 2014 s. 1 (1) (d).

services.[533] From the provisions of section 1 the interpretation clearly covers health care administration and implementation. Section 1(2) makes a list of the agencies and institutions that shall together make up the National Health System. It is instructive to note that majority of the agencies listed in section 1(2) NHA, 2014 includes: the Federal Ministry of Health,[534] State Ministries and the FCT,[535]agencies under the Federal and State Ministries of Health,[536] all local government health authorities,[537] the Ward health committees,[538] the village Health Committees,[539] private health care providers,[540] traditional health care providers[541] and alternative health care providers.[542]

Section 2 list comprehensively the functions of the Federal Ministry of Health (FMOH), these functions include but are not limited to the following: ensuring the development of national health policy and issuing of guidelines for its implementation,[543] collaborate with the states and local governments to ensure that appropriate mechanisms are set up for the implementation of national health policy,[544] collaborate with national health departments in other countries and international agencies,[545] promote adherence to norms and standards for the training of human resources for health,[546] ensure the continuous monitoring, evaluation and analysis of health status

[533] Section. 1 (1) (e) of the National Health Act
[534] Section 1 (2) (a) of the National Health Act.
[535] Section 1 (2) (b) of the National Health Act.
[536] Section 1 (2) (c) of the National Health Act.
[537] Section 1 (2) (d) of the National Health Act.
[538] National Health Act 2014, section 1 (2) (e).
[539] Section 1 (2) (f) of the National Health Act.
[540] Section 1 (2) (g) of the National Health Act.
[541] Section 1 (2) (h) of the National Health Act.
[542] Section 1 (2) (i) of the National Health Act.
[543] Section 2 (1) (a) of the National Health Act.
[544] Section 2 (1) (b) of the National Health Act.
[545] Section 2 (1) (c) of the National Health Act.
[546] Section 2 (1) (d) of the National Health Act.

and performance of the functions of all aspects of the National Health System,[547] coordinate health and medical services delivery during national disasters,[548] participate in inter-sectoral and inter-ministerial collaboration, etc. The Federal Ministry of Health has an obligation to the State Ministries of health such as to provide technical assistance in the development of state health policies and plans,[549] provide commodities and technical materials, including methodologies, policies and standards for use in programme implementation including monitoring and evaluation,[550] and other technical assistance as may be necessary.[551] Often times it is the failure of the provision of adequate facilities from top to bottom which results in neglect of those who patronise the health care system.

Section 3 mandates the Minister of Health in consultation with the National Council on Health to prescribe conditions under which persons may be eligible for exemption from payment for health care services at public health establishments. Section 4 establishes and provides the composition of the National Council on Health while section 5 lists out the functions of the National Council on Health. One of the most crucial provisions concerning Primary Health Care (PHC) is the provision establishing the Basic Health Care Provision Fund in section 11. The fund is to be financed by the Federal Government (annual grant of not less than one percent of its Consolidated Revenue Fund[552]), grants by the international donor partners[553] and funds from any other source.[554]The National Primary Health Care Development Agency (NPHCDA) is very much involved in the disbursement of the fund especially with regard to vaccines, essential drugs

[547] Section 2 (1) (e) of the National Health Act.
[548] Section 2 (1) (f) of the National Health Act.
[549] Section 2 (3) (a) of the National Health Act.
[550] Section 2 (3) (b) of the National Health Act.
[551] Section 2 (3) (c) of the National Health Act.
[552] Section 11 (2) (a) of the National Health Act.
[553] Section 11 (2) (b) of the National Health Act.
[554] Section 11 (2) (c) of the National Health Act.

and consumables. The NPHCDA is mandated to develop appropriate guidelines for the administration, disbursement and monitoring of the Basic Health Care Provision Fund with the Minister's approval.[555]

Section 13 is quite instructive as it provides for Certificate of standards without which no person, entity, government or organization shall establish, construct, modify or acquire a health establishment, health agency or health technology.[556] Without a certificate of standards no entity shall increase beds or acquire prescribed health technology at a health establishment or health agency.[557] To provide prescribed health services[558] a certificate of standards is mandatory also no entity shall continue to operate a health establishment, health agency or health technology after the expiration of 24 months from the date this Act took effect.[559] Not adhering to the provision of obtaining a certificate of standards shall be penalized and liable on conviction to a fine of not less than N500, 000 or in the case of an individual, to imprisonment for a period not exceeding 2 years or both. This is provided for in section 15 of the NHA, 2014.

The Minister of Health is given wide powers under the NHA, 2014 to prescribe minimum standards and requirements for the provision of health services at non-health establishments and at public health establishment other than hospitals.[560] A user may attend any health establishment for the purposes of receiving health services[561] and if that health establishment is incapable of providing the necessary treatment, referrals to another establishment must be made.[562] The

[555] National Health Act, section 11 (7).
[556] Section 13 (1) (a) of the National Health Act.
[557] Section 13 (1) (b) of the National Health Act.
[558] Section 13 (1) (c) of the National Health Act.
[559] Section 13 (1) (d) of the National Health Act.
[560] Section 16 of the National Health Act.
[561] Section 17 (1) of the National Health Act.
[562] National Health Act, section 17 (2).

Minister again is given the mandate to prescribe mechanisms to ensure a coordinated relationship between private and public health establishments in the delivery of health services. Section 19 of the NHA 2014 mandates all health establishments to comply with the quality requirements and standards prescribed by the National Council on Health.

Part III of the Act consists of different provisions on rights and obligations of users and health care personnel. Section 20 on emergency treatment is revolutionary to the Nigerian health sector. Section 20 (1) provides that a health care provider, health worker or health establishment shall not refuse a person emergency medical treatment for any reason. A person who contravenes this section commits an offence and is liable on conviction to a fine of N100, 000 or to a period of imprisonment not exceeding six months or to both.[563] The incidence of patients needing emergency treatment but refused for not paying deposit immediately would reduce reasonably. Section 21 (2) provides the rights of health care personnel against injury and disease transmission. For the purpose of this research section 24 and 25 of the NHA, 2014 is instructive. Section 24 places a duty on the Federal Ministry of Health (FMOH), State Ministry of Health (SMOH), Local Government health Authority and every private health care provider to ensure appropriate, adequate and comprehensive information is disseminated and displayed at facility level on the health services for which they are responsible. This is good as it will be easy to locate PHC facilities as they are to be clearly labelled. Section 25 obligates person in charge of health establishment to keep proper records, section 26 – section 29 is all about health records confidentiality, access to health records and protection of health record. Section 30 empowers users of health establishments to lay complaints if treated in an inhumane manner.

Part IV deals with National Health Research and Information System. This part consisting of

[563] Section 20 (2) of the National Health Act.

sections 31 – 40 provides for establishment, composition and tenure of the National Health Research Committee among other things such as coordination of National Health Management Information system which is intended to improve the Nigerian health care system and standardize it. Part V makes provision on Human resources for health[564]. Section 41 making provision for development and provision of human resources in national health system states that 'the National Council shall develop policy and guidelines for and monitor the provision, distribution, development, management and utilization of human resources within the national health system'. Importantly, sections 41 to 46 mandate the Minister and the National Council on Health to make guidelines on adequate distribution of health care providers and health workers. This is commendable as it is supposed to offset the deficit of community health providers in the PHC service delivery system. Part VI and VII mainly deal with issues bordering on secondary and tertiary health care delivery and do not fall within the subject of this research[565].

3.2.2 Medical and Dental Council of Nigeria Act

The Medical and Dental Practitioners Act specifically establishes the Medical and Dental Council of Nigeria for the registration of medical practitioners and dental surgeons, and to provide for a disciplinary tribunal for the discipline of members[566]. Medical Practitioners form the administrative component of the health care services hence the importance of the Act in this scheme of research. Section 1 establishes the Medical and Dental Council of Nigeria and creates its functions and responsibilities. The Medical and Dental Council of Nigeria is a body corporate

[564] Aminu Yakubu and Clement Adebamowo 'Implementing National System of Health Research Ethics Regulations: The Nigarian Experience' (2012) 1 (1) *BEOnline* 4-15
[565] Anthonia Adindu, 'Health Systems Research in Nigeria' *International Journal of Health Sciences* (1991), 22 (3), 153.
[566] Olabanjo Ayenakin, Temitayo Akindejoye and Itunu Kolade-Faseyi 'Examination of the Legal and Institutional Frameworks of Medical Law in Nigeria' (2021) 9 (6) *Global Journal of Politics and Law Research*, 12.

with perpetual succession and a common seal capable of suing in its name[567]. The council's functions and responsibility includes:

a) determining the standards of knowledge and skill to be attended by persons seeking to become members of the medical or dental profession and reviewing those standards from time to time as circumstances may permit.[568]

b) securing in accordance with the provisions of the Act, the establishment and maintenance of register of persons and the publication from time to time of list of persons[569],

c) reviewing and preparing from time to time statement as to the code of conduct which the Council considers desirable for the practice of the profession in Nigeria.[570]

d) supervising and controlling the practice of homeopathy and other forms of alternative medicine[571]

e) making regulations for the operation of clinical laboratory practice in the field of pathology which includes Hispathology, forensic pathology, Autopsy and cytology, clinical cytogenetics, Haematology, Medical Micro-biology and medical parasitology, chemical pathology, chemical chemistry, immunology, and medical virology,[572] and

f) performing the other functions conferred on the council by the Act.[573]

[567] Ibid
[568] Osaretin Odia, *Law and Ethics of Medical Practice in Nigeria* (University of Port Harcourt Press Limited, 2008).
[569] Benjamin Umerah *Medical Practice and the Law in Nigeria* (Nigeria: Longman, 1989)
[570] Abidemi Omonisi, 'Contemporary Ethicolegal Issues in Medical Practice in Nigeria – the Role of Medical and Dental Council of Nigeria' (2022) 1 (1) *The Nigerian Stethoscope*.
[571] Emmanuel Nwusulor 'Homeopathy: The Nigerian Experience' (2006) 95 (2) *Homeopathy*, 105.
[572] Olabanjo Ayenakin, Temitayo Akindejoye and Itunu Kolade-Faseyi 'Examination of the Legal and Institutional Frameworks of Medical Law in Nigeria' (2021) 9 (6) *Global Journal of Politics and Law Research*, 12.
[573] Medical and Dental Practitioners Act 1963, s. 1 (2) (a) – (e).

Section 2 provides for the composition of the council. Section 6 provides for the council to appoint a fit medical practitioner or dental surgeon to be the Registrar. The Registrar per section 6(2) is to prepare and maintain register of names, address and approved qualifications and of such other particulars of persons seeking to be registered as medical practitioners or dental surgeons in so far as they apply in the specified manner. Section 7 mandates the Registrar to periodically print and publish the register and put it on sale to members of the public. Section 8 lists out the conditions for registration to include that the application must have; attended course training approved by the council. Applicant must ensure that the course was conducted at an institution approved, or partly at one such institution and partly at another or others, he or she must hold a qualification so approved, hold a certificate of experience issued in pursuance of section 11 of the Medical and Dental Practitioners Act.[574]

The duty to approve courses, qualifications and institutions in the profession is on the Council.[575]Section 11 authorizes the council to issue certificate of experience free of charge to a person who has obtained approved medical and dental qualification if the person meets the stipulated conditions.[576]

The Act further provides for limited registration of practitioners[577] who intend to be in Nigeria for a limited period of time and practitioners are obligated to pay practicing fees and where they commit any unprofessional or infamous conduct they are subject to professional discipline in accordance with sections 15, 16 and 17 of the Act. Section 17 makes it an offence to practice having not registered or to use the title of physician, surgeon, and doctor, licentiate of medicine,

[574] Medical and Dental Practitioners Act 1963, s. 8 (1) (a) – (d).
[575] Medical and Dental Practitioners Act 1963, s. 9.
[576] Medical and Dental Practitioners Act 1963, s. 11 (2) (a) – (f).
[577] Medical and Dental Practitioners Act 1963, s. 13.

medical practitioner or apothecary when not so registered. The offences are generally related to registration as a practitioner either unlawfully or procuring same contrary to the law. This Act does not make provision for punishment of medical negligence which would have been relevant here.

3.2.3 Mental Health Act 2022

Apart from the obvious low priority accorded to mental health in terms of policy, funding and personnel, the legal framework for the provision of mental healthcare in Nigeria remains a major concern to psychiatrists as well as other stakeholders. In times past mental health came up for discussion only when the *mens rea* of a crime was being inquired into. This largely distorted the need to look beyond criminal law for answers to the neglected mental health foray. The issue of human rights consideration also never made the rounds even in international discuss let alone local dispensation where metaphysics is looked to for answers and mental patients are treated with disdain and deprived of their human rights. However, with the World Health Organization (W.H.O) taking the lead it is a widely accepted standard now that those mental health patients must be accorded full human rights as being mentally challenged in no way reduces the humanity of these victims. In total 156 countries, corresponding to 80% of W.H.O member states, reported the existence of a stand-alone and/or integrated law for mental health[578] that caters for human rights also. Consequent upon this reality 38% of W.H.O member states reported that their laws were fully compliant with human rights instruments, and 46% of member states stated that their laws were in the process of implementation and was fully compliant with human right

[578] World Health Organization (WHO), *Mental Health Atlas 2020* (World Health Organization, 2020) 45.

instruments.[579]

The area where unethical practices are most rampant is in the treatment of mentally ill patients. The new Act is a new innovation meant to emphasize the importance of according human rights to those going through mental health challenges and to demystify the illness.

3.2.4 Medical Negligence under the Medical and Dental Practitioners Act

The central enactment that currently regulate the medical profession in Nigeria is Medical and Dental Practitioners Act, CAP M8 Laws of the Federation of Nigeria, 2004. Section 1 (c) of the Act creates and empowers the Medical and Dental Council of Nigeria to review and prepare a code of conduct for the regulation of the medical and dental profession. Section 15 (1) of the Medical and Dental Practitioners Act establishes the Medical and Dental Practitioners Disciplinary Tribunal which is responsible for the maintaining of medical ethics concerning the discipline of unethical medical practitioners. Under this head, the law is that the doctor is subject to the code of ethics and regulations governing its protection. As opposed to Medical negligence, it is described as professional negligence in the Code on Medical Ethics in Nigeria. Looking closely at Section 15 of the Medical and Dental Practitioners Act establishes two regulatory bodies to oversee professional negligence in Nigeria. They are Medical and Dental Practitioners Disciplinary Tribunal saddled with the responsibility of considering and handling alleged negligence against the medical practitioner. While the second body is Medical and Dental Practitioners Investigation Panel which is saddled for investigating an alleged negligence and whether or not a medical practitioner should be subject to proceedings of the tribunal.

If a medical practitioner is found liable for medical negligence, the practitioner may be subject to

[579] World Health Organization (WHO), *Mental Health Atlas 2020* (World Health Organization, 2020) 45.

the striking off his name from the professional register, suspension of practice nor admonition depending on the gravity of the misconduct or negligence. A medical practitioner who is not satisfied with the decision of the Medical and Dental Practitioners Disciplinary Tribunal has a right to appeal to the Court of Appeal.[580] In the case of *Denloye v Medical Council Disciplinary Tribunal*[581] where the court of appeal ordered that the name of the practitioner whose name was struck off the roll should be relisted. This case shows that the court has the unreserved right to interfere or override the decision of the tribunal. This is also evident in *Alakija v Medical Council Disciplinary Tribunal*,[582] where the court held that the two years suspension of a medical practitioner was an infraction to the principle of natural justice as the registrar who served as a prosecutor also participated in the proceedings of the tribunal.

3.2.5 Medical Negligence under the Rules of Professional Conduct for Medical and Dental Practitioners

The Rules of Professional Conduct for Medical and Dental Practitioners are also known as Code on Medical Ethics in Nigeria. They are made by the Medical and Dental Council of Nigeria by virtue of Section 1 (c) of the Medical and Dental Practitioners Act.[583] The purpose of the Rules is to maintain the dignity of the medical profession in Nigeria and also to stipulate what amounts to professional misconduct and the penalty prescribed thereto. Each and every medical personnel in Nigeria is duty bound to understand the high standard of care expected of them when they are dealing with their client. This is borne of the fact that a medical practitioner owes a duty of care to his client to take reasonable care in dealing with him. This also presupposes that a medical

[580] See section 16 (6) of the Medical and Dental Practitioners Act CAP M8 Laws of the Federation of Nigeria, 2004.
[581] (1968) All NLR 306.
[582] (1959) 4 FSC 59.
[583] Laws of the Federation of Nigeria, 2004 CAP M8

practitioner is expected to be diligent and must always remember the ethics of the profession in discharging his duties towards his patient.

It is observed that Rule 28 establishes professional negligence as a registered practitioner's failure to exercise skill or act with the degree of care expected of his experience and status in the process of attending to a patient. This principle was introduced with a five pronged approach stipulating that:

i. Each medical and dental practitioner owes a duty of care to their patient;

ii. The skill bestowed on a practitioner be exercised in a manner ordinarily expected by any other competent and reasonable practitioner of his experience and status;

iii. Each practitioner updates his skills pursuant to advancing knowledge in the professions;

iv. A practitioner attends frequently to patients in his admission as their conditions demand, in the case of *Oloye v Chairman, Medical & Dental Practitioners Disciplinary Tribunal*,[584] where the tribunal held that the three medical practitioners involved are liable for negligence for non-attendance to their patients.

Nigeria's peculiar social problems and obstacles that impede the full manifestation of a practitioner's skill do not exempt a practitioner from exercising the best degree of reasonable care exercisable under such circumstances[585].

[584] (1977) NMLR pt. 506 p. 550.
[585] Yinka Olomojobi, *Medical and Health Law, The Right to Health* (Lagos: Princeton & Associates Publishing Co. Ltd, 2019) p. 143.

Furthermore, the section contains an open-ended list on what may constitute professional negligence. It provides a list of nine incidents to be listed succinctly below captioned. They are as follows:

i. Unreasonable delay in attending to a patient

ii. Incompetent patient assessment

iii. Incorrect diagnosis despite glaring clinical features

iv. Proffering wrong or no advise as to risk involved in a particular type of treatment especially such that may lead to deformity or organ loss

v. Non obtainment of patient's consent prior to surgery or course of treatment, especially where necessary.

vi. Making a mistake in treatment

vii. Failure to refer or transfer a patient in good time where necessary

x. Failure to do anything that ought to reasonably be done for the patient's good

xi. Failure to see a patient as often as his medical condition demands, make proper notes on practitioner's observations and prescribed treatment during such visits or to communicate with the patient or his relation or his relation as may be necessary with regards to any developments, progress or prognosis in the patients' condition.

Rule 29 also states that a practitioner who was found liable for professional negligence may be admonished. A second time finding of liability would result in suspension for a minimum of six

months. However, a habitually negligent practitioner may have his name struck off the register. While Rule 30 also provides that if the negligent act led to the permanent disability or death of a patient, the practitioner will be liable for gross professional negligence and is liable to a six month's suspension or having his name struck off the register as the case may be[586].

3.2.6 Medical Negligence under the Nigerian Criminal Code

Section 303 of the Criminal Code[587] provides that any person who undertakes to administer surgical or medical treatment or to undertake any lawful act except in a case of necessity, that is or may be dangerous to human life, has a duty to use reasonable care and possess reasonable skill for doing such act. Also, such person is held responsible for any consequences resulting to the health and life of that person by reason of any omission to perform or observe that duty. 6the section states that:

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

Section 305 of the Criminal Code[588] also provides that a person who undertakes to do an act, the omission of which is dangerous to human life and health of that person by reason of omission to perform the duty. *Section 343 (1) of the Criminal Code*[589] provides that anyone who is in a

[586] Ibid.
[587] Section 303 of the Criminal Code
[588] Section 305 of the Criminal Code
[589] Section 343 (1) of the Criminal Code

negligent and rash manner, such as to cause harm to or endanger the life of another, gives any person he had undertaken to treat surgical or medical treatment, such a person is guilty of a misdemeanour and liable to imprisonment for one year. However, *Section 297 of the same Criminal Code*[590] provides that any medical practitioner who reasonably performs for the benefit of another, a surgical operation in good faith with reasonable care and skill, having regard to the patient's state at the time and all circumstances of the case.

3.3 Institutional Framework

As a result of the fundamental nature of health care in Nigeria there are many agencies and Institutions that can be associated with the responsibility to handle issues bordering on medical ethics. The Medical and Dental Practitioners Council is one of such agency but they are not as official as the Federal Ministry of health. When it comes to criminal prosecution of medical practitioners for gross incidences of medical negligence of a nature chargeable as manslaughter or murder then the Ministry of Justice may be involved or any other prosecutorial entity such as the Nigerian Police or even the ICPC. Rather than broadening the scope too widely it is considered better to narrow down the analysis to focus on the Ministry of Health as the Ministry empowered by the National Health Act to play the regulatory role over medical professionals.

3.3.1 Ministry of Health

Health is a fundamental human right as stipulated in the Alma Ata Declaration in Article 1, even though the Nigerian Constitution does not appreciate this fact by including it in Chapter 4 of the constitution, the state governments have over the years tried to guarantee health for all by strengthening the state Ministries of health to be active in health care implementation especially

[590] Section 297 of the same Criminal Code

Primary Health Care (PHC). The State Ministry of Health (SMOH) is responsible for policy and program direction but in practice has limited power, with little direct authority over funding, which is the authority of State Ministry of Local Government (SMOLG).[591] The state Ministry of Health has the responsibility for implementation of the National Strategic Health Development Plan in the State. At the Federal level, the Federal Ministry of Health Provides policy and program direction, The Local Government primary health care department is headed by the Local Government primary health care Coordinator. The Coordinator is responsible for LGA – level program management (i.e budgeting, measurement and evaluation, and suspension. However, they have limited direct control over PHC facility staff, given that high – level PHC employee (levels seven and above are hired and directly paid by State Ministry of Health's service commission.[592]

3.3.2 Nigerian National Health Research Ethics Committee

The National Code of Health Research Ethics, which is the highest policy document on research ethics in Nigeria, was approved by the National Council on Health in its 50th Annual Meeting in January 2007.[593] The procedure entailed that health policy be reviewed and approved by all commissioners of health for nation-wide implementation.[594] While awaiting the passage of the act of law to provide further backing for the Code, it received the Ministerial approval for implementation, as with all other health policy in the country.

The National Health Research Ethics Committee is largely responsible for the regulation of other

[591] Daniel Kress, Yanfong Su and Hong Wang, 'Assessment of Primary Health Care System Performance in Nigeria: Using the Primary Health Care Performance Indicator Conceptual Framework' (2016) (2) 4 *Journal of Health Systems & Reform* 3.
[592] Daniel Kress, Yanfong Su and Hong Wang op. cit. p. 54.
[593] Federal Ministry of Health (FMOH) FMOH; Proceedings of the 50th National Council on Health Meeting, Sheraton Hotel and Towers; Abuja, Nigeria. 2006.
[594] Federal Ministry of Health (FMOH) Revised National Health Policy. FMOH; 2004.

institutional ethics committees in the country. Each institution in which research is being conducted is encouraged to establish its own ethics committee, or enter into an agreement with an ethics committee from another institution to serve as its ethics committee of record. Central review by the NHREC is only provided for multi-centre studies and is entirely at the discretion of the researcher. This is seen as an important initiative because it provides the researcher and or sponsor with choices, to potentially avoid the problems observed with local reviews for multi-centre studies.[595]

The availability of the Code on NHREC's website, and the need for all researchers and members of ethics committees to abide by the code was publicized nationally in the media[596] conferences and the 51st National Council on Health meeting in 2008[597]. The Code requires ethics committees to register with NHREC in line with calls for accreditation of ethics committees 36, 37 which was for quality assurance purposes.

This is seen as an important avenue to lure the committees to apply the Code in their practices. The National Agency for Food and Drugs Administration and Control (NAFDAC) is the agency, for example, responsible for regulating clinical trials for new pharmaceutical products in Nigeria amongst other mandates.[598] Concerned about the ethical aspects of clinical trials and in the bid to fulfill this responsibility, NAFDAC welcomed the establishment of NHREC and its requirement for registration of ethics committees to be essential to ensuring the ethics of clinical trials in

[595] Alison While, 'Ethics Committees: Impediments to Research or Guardians of Ethical Standards' (1995) 311 *British Medical Journal*, 661.
[596] Daily Trust Advertorial. National Health Research Ethics Committee. (2006) Daily Trust Newspapers; Dec 5, 2006
[597] National Agency for the Control of HIV/AIDS (NACA) Nigeria HIV/AIDS Summit 2007. NACA; 2007. Presentation on the National Code of Health Research Ethics
[598] National Agency for Food and Drugs Administration and Control (NAFDAC) Draft National Guidelines for Good Clinical Practice in the conduct of Clinical Trials in Nigeria. NAFDAC; <http://nafdac.gov.ng/index.php?option=com_docman&task=doc_download&gid=112&Itemid=166> accessed 10 January, 2024.

Nigeria. The collaboration between these two agencies has thus far, helped in fostering the application of the Code. By this partnership, NAFDAC does not approve any clinical trial that is not approved by either NHREC, or an NHREC registered ethics committee.

3.3.3 Medical and Dental Practitioner Disciplinary Tribunal

The Medical and Dental Practitioners Disciplinary Tribunal is a similitude of a court of law created under the Medical and Dental Practitioners Act[599] and it is the body charged with responsibility of disciplining any erring medical and dental practitioners. The body otherwise known as "The Disciplinary Tribunal" is charged with the duty of considering and determining any case referred to it by the Panel established under subsection (3) of the Medical and Dental Practitioners Act and any other case of which the Disciplinary Tribunal has cognisance of under the Act. The Disciplinary Tribunal consist of the Chairman of the Council and ten other members of the Council appointed by the Council who shall include not less than two persons who are fully registered dental surgeons.

Disciplinary Tribunal has the status of a High Court of the Federal Republic of Nigeria and practitioners who appear before it, whether as complainants, defendants, or witnesses, whether or not they are also represented by a lawyer, must conduct themselves as they would before a high court. Legal practitioners who appear before the tribunal are to accord the court the decorum given to a High Court.[600] Moreover, the Tribunal has the statutory power to award penalties against medical and dental practitioners where: a registered person is adjudged by the Disciplinary Tribunal to be guilty of infamous conduct in any professional respect; a registered

[599] Establishment of Disciplinary Tribunal Investigation Panel. Section 15(3) of the Medical and Dental Practitioners Act 1988. CAP M8 – 11
[600] Ibid.

person is convicted by any court of law or Tribunal in Nigeria or elsewhere having power to impose imprisonment for an offence which in the opinion of the Tribunal is incompatible with the status of a medical practitioner or dental surgeon and if the name of any person has been fraudulently registered. Where a practitioner has been brought before the Tribunal; the Tribunal may give any of the following awards: order the Registrar to strike out the name of the erring person off the relevant register; suspend the person from practice or admonish the person.[601] Appeal against the decision of the Tribunal shall lie to the Court of Appeal. The person appealing may do so within 28days from the date of service on him. The notice of the Tribunal is decision and the Tribunal shall be a respondent to the appeal.[602] A person whose name is removed from a register in pursuance of a direction of the Disciplinary Tribunal shall not be entitled to be registered in that register again except in pursuance of a direction in that behalf given by the Tribunal on the application of the person.

3.3.3.1 Establishment of Disciplinary Tribunal and Investigation Panel

Establishment of Disciplinary Tribunal and Investigation Panel. There shall be established a tribunal to be known as the Medical and Dental Practitioners Disciplinary Tribunal (in this Act referred to as "the Disciplinary Tribunal"), which shall be charged with the duty of considering and determining any case referred to it by the Panel established under subsection (3) of this section and any other case of which the Disciplinary Tribunal has cognizance under the following provisions of this Act.[603]

[601] Section 18(7) of Pharmacists Councils of Nigeria Act 1992.
[602] *Okekearu v. Tanko* (2002) 15 NWLR Pt. 791, 657
[603] Section 15 (1) & (2) of the Medical Practitioners Act, 2004

3.3.3.2 Composition of Members

(2) The Disciplinary Tribunal shall consist of the Chairman of the Council and ten other members of the Council appointed by the Council who shall include not less than two persons who are fully registered dental surgeons[604]. It should be noted that the Body that appoints the chairman and members of the disciplinary is Medical Council.[605]

3.3.3.3 Duties of the Panel

a) conducting a preliminary investigation into any case where it is alleged that a registered person has misbehaved in his capacity as a medical practitioner or dental surgeon, or should for any other reason be the subject of proceedings before the Disciplinary Tribunal;

b) compelling any person by subpoena to give evidence before it;

c) deciding, if satisfied that to do so is necessary for the protection of members of the public, to make an order for interim suspension from the medical or dental profession in respect of the person whose case they have decided to refer for inquiry; and for the case to be given accelerated hearing by the Disciplinary Tribunal within three months; or

d) deciding, if satisfied that to do so is necessary for the protection of members of the public or is in his interest, to make an order for interim conditional registration in respect of that person, that is to say, an order that his registration shall be conditional on his compliance, during such period not exceeding two months as is specified, as the Panel may think fit to impose for the protection of members of the public or in his interest.[606]

[604] Section 15 (3) of the Medical and Dental Practitioners Act.
[605] Section 15 (4) of the Medical and Dental Practitioners Act,
[606] Section 15 (4) of the Medical and Dental Practitioners Act,

CHAPTER FOUR

MEDICAL ETHICS AND LEGAL OBLIGATION IN THE NIGERIAN HEALTH CARE

4.1 Hippocratic Oath and principles of Medical

The Hippocratic oath, which is employed in medical schools and as a guidance for medical practitioners, is an ethical code credited to the ancient Greek physician Hippocrates. A collection of manuscripts known as the Hippocratic Collection offers medical knowledge and guidelines for educators and learners. The oath establishes duties to instructors, doctors, and students, such as administering helpful therapies, abstaining from damage, and leading a moral life. Although the Hippocratic Oath is a widely accepted ethical concept, several doctors and medical institutions have questioned its legitimacy. It includes ethical norms that are relevant to modern medicine, such as beneficence, avoidance of harm, autonomy, and justice. To really appreciate the oath's extraordinary content, however, it must be seen within the framework of ancient Greek history and culture. Alterations to the oath could try to supplant a text that, for two millennia, transformed medicine and humanity.[607]

The oath states thus:

> *"I swear by Apollo the physician, and Aesculapius, and Health, and All-heal, and all the gods and goddesses, that, according to my ability and judgment, I will keep this Oath and this stipulation—to reckon him who taught me this Art equally dear to me as my parents, to share my substance with him, and relieve his necessities if required; to look upon his offspring in the same footing as my own brothers, and to teach them this Art, if they shall wish to learn it, without fee or stipulation; and that by precept, lecture, and every other mode of instruction, I will impart a knowledge of the Art to my own sons, and those of my teachers, and to disciples bound by a stipulation and oath according to the*

607 Mary-Ann O. Ajayi, Balancing Medical Doctors Hippocratic Oath And Freedom Of Association Under Nigerian Labour Law, Vol. 14, 2018*Unizik Law Journal*

law of medicine, but to none others. I will follow that system of regimen which, according to my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous. I will give no deadly medicine to any one if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion. With purity and with holiness I will pass my life and practice my Art. I will not cut persons laboring under the stone, but will leave this to be done by men who are practitioners of this work. Into whatever houses I enter, I will go into them for the benefit of the sick, and will abstain from every voluntary act of mischief and corruption; and, further from the seduction of females or males, of freemen and slaves. Whatever, in connection with my professional practice or not, in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret. While I continue to keep this Oath unviolated, may it be granted to me to enjoy life and the practice of the art, respected by all men, in all times! But should I trespass and violate this Oath, may the reverse be my lot!"[608]

The government in ancient times gave doctors monopolistic powers and mandated that they abide by the Hippocratic Oath, a set of moral principles. While recent medical graduates desire a ceremony to recognise their membership, modern doctors want to keep these privileges. Contemporary oaths are ambiguous. The traditional Hippocratic Oath, which puts the needs of the patient first, is still commonly used today. However, the lack of the Oath substitutes government interests for patient interests in a society where patient recompense is no longer a top concern.[609]

608 Peter Fenelon, Oath and Law of Hippocrates 38 (1910) Harvard Classics (Online) available at gopher..//ftp.std.com//00/obi/book/Hippocrates/Hippocratic.Oath> accessed 4th October 2024

609 Gilbert Berdine, 'The Hippocratic Oath and Principles of Medical Ethics', Medicine and Public Policy

4.2 Legal Basis for Criminalizing Medical Negligence in Nigeria

Fundamentally, criminal negligence is important to hold negligent professionals culpable where the level of negligence is so devastating that the full force of the law must be activated to hold the professional liable. The criminal code and the penal code for the Southern and Northern part of Nigeria respectively both have provisions on criminal negligence. Criminal negligence arises when the negligence or misconduct of the medical practitioner amounts to grave circumstances such as death, permanent disability, loss of limb etc.[610] The legal basis for criminalizing negligence lies in the need of ensuring a culture of responsibility for ones actions. The logic is a simple one, if a professional presents himself as a professional then the reasonable standards expected from such a professional must apply and where gross deviation leads to death or incapacitation then the professional must be held criminally liable for the negligent.

Section 344 of the Criminal Code Act[611] provides for the criminalizing of negligent act causing harm and the basis for this stems from a person's unlawful act or omission being an act specified in section 343 which is the preceding section or if the act is the person's duty to do. The guilty party commits a misdemeanor liable to six months imprisonment. Section 343 is rather interesting going on to list samples of acts that would constitute negligent or reckless acts. The qualifying component is doing said act in a rash manner capable of endangering human life or likely to cause harm to any other person.[612] The fundamental provision is in section 343 (1) (e) which provides that the medical personnel who in a manner so rash or negligent as to endanger human life or to be likely to cause harm to any other person gives medical or surgical treatment to any person whom he has undertaken to treat or dispenses, supplies or administers any

610 F.A. Animahun, *An Overview on Nigerian Medical Negligence Liability* (Libra Law Office, 2024) 4.
611 Cap 38 LFN 2004.
612 Criminal Code Act Cap C38 LFN, 2004, s. 343 (1).

medicine or poisonous or dangerous matter.[613] The offence is a misdemeanor and the offender is liable to imprisonment for one year.[614] Just like the criminal code the penal code Act also have its equivalent making it nationwide potential culpability for criminal negligence. The issue however is whether the principles of vicarious liability and principal offenders can be extended to apply.

4.3 Assessment of the Issue of Human Rights and Medical Ethics

There is a noticeable line or nexus between human rights and medical ethics. Medical Ethics have as its end goal the protection and promotion of human rights, also the prevention of bodily harm to patients. While human rights is as old as time traceable to the beginning of humanity rooted in the very idea that all humans are born equal and should be treated equally. On the other hand medical ethics can be traced to the Hippocratic Oath and particular periods in history.[615] Some other authors unlike the writer choose not to see a nexus between the two concepts. Michael Peel opines that the two concepts are parallel mechanisms with human rights working at the socio political level while medical ethics exist at the level of the Doctor-Patient relationship.[616] But even with this view the author concludes that human rights and medical ethics are complementary.

4.4 Relationship Nexus between Medical Law and Medical Ethics in Medical Practice in Nigeria

Law and Ethics can be explained either as polar opposites or as complementary elements. The law being amoral, empirical, and punishable while ethics seem based on moral values possibly

613 Criminal Code Act Cap C38 LFN, 2004, s. 343 (1) (e) & (f).
614 Criminal Code Act Cap C38 LFN, 2004, s. 343 (1).
615 Michael Peel, "Human Rights and Medical Ethics" (2005) 98 (4) *Journal of the Royal Society of Medicine,* 171-173
616 Ibid

lacking enforceability component. Although in a professional context, a professional body can enforce punishment against members who offered the ethical code. Take for example the legal profession; a lawyer who flouts the Rules of Professional Conduct (RPC) for lawyers can be disbarred even though such action does not culminate in criminal prosecution. Recently, teaching law and ethics in medical practice has emerged as part of the core curriculum in both undergraduate and post graduate medical education in many developed countries.[617] This shows how instrumental both subjects and concepts have become. Medical Ethics' is the professional competency of moral issues in medical treatment, health care system and research.[618] In a 2017 publication by the World Medical Association (WMA) the association's resolution reached the conclusion that medical ethics and human rights should be made compulsory incorporated into the curriculum of medical school, post graduate medical education and continuing professional education or development.[619] A study found that medical students are aware of the importance of medical ethics but that students studying in government medical college held stronger views regarding ethical situations concerning abortion and euthanasia.[620] It is perplexing to even consider the reality that although founders of medical ethics such as Hippocrates over two centuries ago had already published ethical documents yet there is no university used curriculum for teaching ethics to medical students.[621] The implication is that there is no strait jacket way of tackling the ethical dilemma that is sure to arise. No doubt human rights considerations ought to

617 Hau Kong-Lung, "Law and Ethics in Medical Practice" *Medical Section Journal,* (2003) 8 (6) 1-7.

618 Zaeema Ahmer, Rameen Fatima and Others, "How Important is Medical Ethics? Descriptive Cross-Sectional Survey among Medical Students of Karachi" (2021) 5(2) *European Journal of Environment and Public Health,* 1.

619 World Medical Association, 'Resolution on the inclusion of Medical Ethics and Human Rights in the Curriculum of Medical Schools Worldwide' <https://www.wma.net/policies-post/wma-resolution-on-the-inclusion-of-medical-ethics-and-human-rights-in-the-curriculum-of-medical-schools-world-wide> accessed 25 December 2023

620 Zaeema (n. 142) Ibid at 5

621 World Medical Association, *World Medical Association: Medical Ethics Manual* (World Medical Association, 2015) 5

be prioritized in tackling any ethical dilemma so the preservation of life by ensuring no negligent act leads to death or grievous bodily harm. In fact care must be taken by the medical personnel not to be negligent as it is always a matter of life and death.

Even though ethics and law are not identical, in some countries an ethical violation would lead to the law taking its course to punish the violator. Quite often ethics prescribes higher standards of behavior than does the law, and occasionally ethics requires that physicians disobey laws that demand unethical behavior.[622] In the 21st century we see legalizing abortions in western societies and supply of puberty blockers to teenagers who claim they are born in the wrong body. All these examples make for continued clash between law and ethics. Also physicians often deal with injuries that come off human right violation and abuse, and law breaking. It is rather advised that law and ethics work complementarily rather than as polar opposites.

4.5 Legal Obligation of Doctor-Patient Relationship

Patients' rights are those rights attributed to a person seeking healthcare. In general, the rights of a patient are concerned with the patient being fully informed about his or her illness, the diagnostic and therapeutic measures anticipated, and the written records of the care received. Patient rights in healthcare delivery includes; the right to privacy, information, life and quality care, as well as freedom from discrimination, torture and cruel, inhumane, or degrading treatment. The patient has the right to considerate and respectful care, delivered in response to a request for services and in a manner that provides continuity of care. In regard to payment for services, the patient has the right to examine and receive an explanation of the bill regardless of source of payment. The doctor is duty bound to honour the patients' rights. Consent and confidentiality are two key features in the Doctor-Patient relationship dynamic.

622 Ibid at 12.

4.5.1 Consent

Every adult human being of sound mind and sound disposition have a fundamental right to determine what happens to their body[623] especially if what would happen to their body would prove fatal. This is autonomy metamorphosed or morphed in the medico-legal foray into consent. For consent to be valid, it must be informed, voluntary and be given by a competent person[624] Informed consent is required for all medical investigations and procedures and is considered a corner stone of modern medicine.[625] In the past provided a health care professional acted in the patients best interest reasonably and professionally there was not too much concern over what a patient was or was not told about the risks.[626] Consent of the patient must be legally obtained at all times and where the patient is in a vegetative state a guardian or spouse can grant the much needed consent. Many hospitals have different policies on this but the fundamental necessity of consent cannot be wished away by internal rules.

4.5.2 Confidentiality

Confidentiality is the practice of keeping harmful, shameful, or embarrassing patient information within proper bounds. It differs from privacy in that it always entails a relationship. Confidentiality in medicine serves two purposes. Firstly, it ensures respect for the patient's privacy and acknowledges the patient's feeling of vulnerability. Secondly, it improves the level of health care by permitting the patient to trust the health professional with very personal information. Computerisation of laboratory and radiological investigations makes confidential information easily available, even to healthcare professionals not directly involved with the

623 Sparsh Prasher, Michael Klimatsides and Zahid Mahmood, 'The Evolution of Consent Law in the UK' (2015) 10 (1) JCS <https://www.ncbi.nlm.nih.gov/pmc/articles/pmc4693737/#_ffn_sectittle> accessed 26 March 2024.
624 Ibid at 10.
625 Christian P Selinger, 'The Right to Consent: Is it Absolute?' (2009) 2 (2) BJMP 50.
626 Elizabeth Larmer and Rachel Carter, 'The Issue of Consent in Medical Practice' [2016] BJH 172, 300, 303.

particular patient's care.[627] Confidentiality in medicine ensures respect for the patient's privacy and improves health care by enabling the patient to trust the health professional with very personal information. Confidentiality may be breached if required in terms of the law, such as in the case of gunshot wounds, child or other abuse and communicable diseases. Other justifiable exceptions to the confidentiality rule are in an emergency situation, where the patient is incompetent or incapacitated, and in the case of psychiatrically ill patients who need to be committed to hospital. The final reason to breach confidentiality is to protect third parties, whether this is concern for the safety of a specific person or in the public interest.

4.6 Impact of Informed Consent in Medical Negligence in Nigeria

In Nigeria, the regulation of informed consent is based on the Code of Medical Ethics, which emphasizes autonomy and human rights.[628] The code recognizes that consent can be obtained from the patient, their relations, or public authority, depending on the situation. The Nigerian patient holds the primary right to information and treatment decisions, but a next of kin can give consent for minors and those without capacity. When no relative is available, the most senior doctor in the institution can give an appropriate directive to preserve life.

Informed consent is a crucial process between a clinician and a patient, ensuring the patient's agreement to undergo medical procedures. The Code of Medical Ethics of Nigeria and the National Health Act 2004 prescribe the process of obtaining consent before medical interventions. Practitioners involved in procedures requiring patient consent must ensure appropriate consent is obtained before surgery or diagnostic purposes. Consent forms should be in printed or written form, and explanations should be simple, concise, and unambiguous. Proper

627 Sharon Kling , "Confidentiality in medicine" (2010) 23 (4) *Current Allergy & Clinical Immunology Journal,22.*
628 Aderonke Abimbola Ojo, The Right to Patients' Informed Consent in Nigeria and South Africa: A Comparative Discourse, (2021) 9 (11) Journal of Research in Humanities and Social Science, pp: 43-58

counseling should precede the signing of the consent form, and in cases where the patient is underage, unconscious, or in a state of mental impairment, a next-of-kin should stand in. In special situations, a court order may be necessary to enable life-saving procedures. Counseling sessions should be undertaken at least three sittings to give the patient ample time to take an informed decision before a consent form is signed.[629]

Good medical practice recognizes the inherent right of the patient to their body and life, and it is essential to obtain formal consent from the patient. The Medical and Dental Council of Nigeria has approved a simple format for guidance and use in clinical management, the coded Form MDCN/COMEIN/R19, for universal application throughout Nigeria. This form is now the standard layout for registered practitioners in Nigeria to obtain appropriate consent to carry out procedures on patients. Nigerians' diverse religious beliefs, ethnicity, and cultural backgrounds influence patient-physician relationships and informed consent practices, despite the country's diverse economic, social, and cultural backgrounds.[630]

4.6. Options Available to Victims of Medical Negligence in Nigeria

The options that a victim can explore in dealing with medical negligence can be categorized into three:[631] to wit;

a. Civil Jurisdiction

b. Criminal jurisdiction

c. The principle of *res ipsa loquitur*

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[629] Aderonke Abimbola Ojo, The Right to Patients' Informed Consent in Nigeria and South Africa: A Comparative Discourse, (2021) 9 (11) Journal of Research in Humanities and Social Science, pp: 43-58

630 Emmanuel R. Ezeome And Patricia A. Marshall, Informed Consent Practices in Nigeria, Developing World Bioethics ISSN 1471-8731 (print); 1471-8847 (online).

631 Y. Olomojobi op. cit. p. 156.

Civil Jurisdiction: Negligence is actionable in the Court's civil jurisdiction under a tortuous or contractual claim. The origin of the civil nature of negligence is enshrined in the neighbourhood principle as established in *Donoghue v Stevenson*.[632] In Civil, the plaintiff or the injured party is entitled to remedies under the law. The court usually grants damages or monetary compensation, specific performance, order of restitution etc. the civil tort of negligence is a common law practice extended to Nigeria by virtue of colonialism. It is actionable by the victim personally such that he requires no consent or leave to commence an action. It should be noted that the damage need not be physical. The Courts have to consider mental status, stress, and trauma that may arise from a situation. This principle has been adopted and applied in various Nigerian cases.[633]

Criminal Jurisdiction: Negligence is not actionable per se in criminal litigation, having its roots in the civil practice of Courts. However, if a crime is committed in any situation that negligence is alleged, the crime has to be tried separately from the civil matter. It has been empathized by the Courts that where a criminal and civil matter arise from a particular of facts, the civil matter ought to be suspended till the determination of the criminal matter. A crime is a direct breach of criminal laws and as such attracts graver punishment than a civil matter. Consequently, damages are not awarded in such situations. If the claims are successful under this head, the court may make an order pursuant to the statutory provision in respect of such crimes. This could be capital punishment, imprisonment or fine.

However, compensatory damages are not awarded to the victim in a criminal matter. Another peculiar characteristic of criminal litigation is that the victim has no legal right to institute an

632 (1932) AC 562.
633 See Agbonmagbe Bank Ltd. V CFAO Ltd (1967) NWLR 173; Abubakar v Joseph (2008) 13 NWLR (pt. 1104) 307

action against the alleged criminal. It falls within the confines of the relevant law enforcement agent or the Attorney General to institute such action. Ordinarily, the victim is required to make a formal report to the police, who will in turn carry out the requisite investigation and where necessary, commence an action. However, if a victim seeks to prosecute as a criminal action related to negligence, the law requires the victim to secure a fiat that is to seek the consent or the leave of the Attorney General before he can institute the criminal action. Medical negligence can be found under the criminal code most especially in *Sections 315, 316, and 317 of the Criminal Code Act* and *Section 321 of the Penal Code* where these sections provide inter alia for the unlawful killing of another. Suffice to say that a medical practitioner who is alleged of a medical misconduct or negligence can be charged for either manslaughter or murder depending on the circumstances of the negligence. Meanwhile, provocation cannot be a shield or reduce the offence of murder to manslaughter in the case of medical negligence. Also, in *R. v Akerele*,[634] the facts of this case is that Akerele, a medical practitioner administered injections of a drug known as 'sobita' as a treatment for yaws. An overdose of the drug causes stomatitis thereafter painful symptoms occur in the mouth which may eventually cause in death. On the 6th May, 1940 at Asaga Akere administered the said injections to a number of children including a child named Kalu Ibe, who later had the symptoms of stomatitis and later died. Nine of the other children also had similar symptoms and later died. Akerele was convicted of manslaughter. His appeal against conviction was later dismissed by the West African Court of Appeal. The rationale of the court was that the medical act was negligent and had apparent penalties.

Consequent upon the above, it can be contended that a medical practitioner may be tried under the Criminal Jurisdiction. In terms of murder and manslaughter, where liability is imputed, it

634 (1942) 8 W.A.C.A 5, p. 8

goes beyond the purview of professional negligence and becomes a crime in proper terms. This principle is trite as in *Garba v University of Maduiguri*[635] where the Supreme Court of Nigeria held that a tribunal or administrative panel lacks jurisdiction to entertain an allegation of crime. That the jurisdiction of the regular court ought to have been invoked by the parties as the tribunal lacks the requisite to adjudicate on the matter involving allegation of crime. This means that the administrative tribunal lacks jurisdiction to entertain a criminal matter. When discussing the issue of jurisdiction, it is seen as a threshold issue; it is radical that it forms the foundation of adjudication. If a court lacks jurisdiction, it also lacks the necessary competence to try the issue before it. A defect in competence is fatal to the proceedings as they are null and *void ab initio*., however well conducted and well decided they may otherwise be. It follows therefore that jurisdiction is the bedrock of every court and no court can assume jurisdiction where it has none by circumventing and misrepresenting the prevailing law[636].

Based on the above authorities, it is very clear that where a court assumes jurisdiction over a matter where it has none, all its proceedings amount to nullity *ab initio.* Put differently, a judgment or decision arrived at by a court without jurisdiction is tantamount to no decision at all in that an appellate court will waste no time in nullifying such decision. It is for this very nature of jurisdiction that the law permits the issue of jurisdiction to be raised at any time irrespective of the stages of the proceedings even for the first time on appeal. *See Alims Nig. Ltd. vs. U.B.A*[637] where it was held as follows:

635 (2007) 19 NSCC 306

636 *Emuze vs. v. Uniben (2013) FWLR (pt. 170) 1411 at 1421-1422, See also Oloba vs. Akereja (1988) 3 NWLR (pt. 84) 508; Odofin vs. Agu (1992) 350 and Turaki vs. Dalhatu (2003) FWLR (pt. 170) 1378 at 1405 c-d*

637 *(2007) All FWLR (Pt. 348) 771*

"The issue of jurisdiction can be raised at any time and at any stage of the proceedings as it is very fundamental to adjudication or can be raised suo motu by the court."

A deep reflection on the authorities cited above is to the effect that the issue of jurisdiction can be raised at any point in time and at any stage of the proceedings even for the first time on appeal. *See also Davis v. Mendes*[638] Where the court held that as follows:

> *"Jurisdiction is very vital in the realm of the administration of justice. It is the bedrock of all trials. It is such a threshold issue that when a tribunal or court does not possess it, it cannot exercise any judicial powers whatsoever. The questions of absence of jurisdiction of a court to hear a case can be raised at any stage of the proceedings and even for the first time on appeal."*

In summary, when a medical misconduct or negligence alleges crime, the Medical and Dental Disciplinary Committee will not have jurisdiction to entertain the matter as only the regular court has jurisdiction.

4.8 Defences to Medical Negligence

In terms of applicable defences, it must be noted that the following defences apply to negligent cases. These are contributory negligence, *volenti non fit injuria*, voluntary assumption of risk and limitation. These principles however, apply to all forms of negligent claims.

4.8.1 *Volenti non fit injuria*

638 *(2007) All FWLR (Pt. 348) 883 at 901 C-E*

This principle is to the effect that no harm is done or occasioned to anyone who knowingly and voluntarily consents to the act leading to such an injury. For instance, if a product has an expiry date, as a result of which it has been withdrawn off the shelve, a consumer conscious of the expiry date solicits an attendant to sell it to him, though illegal, cannot hold the manufacturer liable for any consulting injury occasioned by such product. This will also be so in cases like occupiers liability where for instance, a person having been previously warned by the occupier enters the premises without taking the required care.

4.8.2 Contributory Negligence

The effect of the defence of contributory negligence in a product liability case is to the effect that it will reduce the liability of the manufacturer, to the extent of his liability.[639] Liability for the resulting damage will be occasioned between the tortfeassor and the injured party.[640] The potency of this defence was stated by the court in *Nance v British Colombian Electric Ry. Co ltd.*[641] As follows:

> *... all that is necessary is to prove to the satisfaction of the jury that the injured party did not in his own interest, take reasonable care of himself and contributed, by this want of care to his own injury. Relevance*

This is based on the legal principle that one person in fault will not dispense with another's using ordinary care for himself.[642] However, under the Dilemma principle or doctrine of alternative danger, any action or step taken by the plaintiff to escape from the negligence of the defendant

639 See the English Law Reform (Contributory Negligence) Act, 1945; Evans v Bakare (1973) 3 SC 77
640 Pasterck v Poulton (1973) 2 All ER 74
641 (1951) AC 601
642 See Butterfield v Forrester (1809) 11 East 60

will not constitute contributory negligence. Also, the acts of children, physically challenged persons or incapacitated persons are usually not treated as contributory negligence.[643]

4.8.3 Exturpi Causa

This maxim is a legal principle which literally proves that a claim that has arisen from the breaking of a law. It also follows that one knowingly engaged in an illegal activity my not claim damages arising out of that activity.

The defence of illegality finds its origin in the Latin maxim *ex turpi causa non oritur actio*, meaning 'no cause of action may be founded on an immoral or illegal act'. Although often referred to as a singular doctrine, there are in fact two distinct lenses through which the illegality defence is interpreted and applied. The first, *ex turpi causa non oritur actio* ('from a dishonourable cause an action does not arise'), focuses on the illegality of the underlying act and holds that if one is engaged in illegal activity, one cannot sue another for damages that arose out of that doubtful activity. The second, *in pari delicto est conditio defendtis* ('of equal guilt or fault'), focuses on the allocation of fault between the parties and provides that in the case of mutual fault, the position of the defendant is the stronger one. These two perspectives serve as the starting point for the divergence in judicial application of this defence across jurisdictions.[644]

In analysing the illegality defence, the Supreme Court noted two underlying policy rationales. First, the illegality defence prevents a person from profiting from his or her own wrongdoing. Second, the law must be coherent, not condoning illegality by giving with the left hand what it

643 See Yachuk v Oliver Blais (1949) AC 386

644 L Caylor and MsS Kenney ***in Pari Delicto*** and ***Ex Turpi Causa***: The Defence of Illegality – Approaches Taken in England and Wales, Canada and the US, Business Law International,2017, 18 (3), p. 260.

takes with the right. In determining the type of conduct that would produce such damage or inconsistency in the law, the court noted three considerations:

'In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way.

4.9 Proof of Medical Negligence in Nigeria

Essentially, negligence is founded in the aspect of law known as civil law or private law by virtue of its origin from the English common law where the tort of negligence was separated from criminal action as acts which would not require the requirements of "*mens rea*".[645]In *the case of Thorns*,[646] it was held that the remedy in negligence comes from the fact that a person is doing a lawful act but causes damage which he could have prevented, it is therefore, important to state that the victim of a negligent act has to show that the tortfeasor was negligent, this will then require a level of proof, it will also be added that since negligence is a civil action, the level of proof required will be that of a civil action.

The quantum of proof in civil action is a preponderance of probability.[647] The plaintiff has to adduce evidence to show that the medical practitioner was negligent. *Section 135 (1) of the*

645 BA Susu, Law of Torts, (Lagos: CJC Nig. Ltd.), 1996, p. 85; see also, The Case of Thorns (1466) Y.B. Ed. 4
646 Ibid.
647 section 134 of the Evidence Act, 2011. However, where a civil claim involves a claim relating to crime or fraud, the standard of proof shall be beyond reasonable doubt as in section 135 (1), Evidence Act.

Evidence Act, 2011 stipulates that whoever desires any court to give judgment as to any right or liability dependent on the existence of facts which he asserts must prove the those facts exist while *Section 132* of the same Act places the burden of proof on the person who would fail if no evidence was given on either side. This position is the representation of the general burden of proof in every case. Generally, the general burden of proof at all times does not shift. Thus, in *Omotosho v. B.O.N Ltd*,[648] Ogunwumi JCA held as follows:

The law is that law is that the burden of proof rests on the person who asserts a fact… it is fixed at the beginning by the pleadings and rests on the party asserting an affirmation… the burden of proof shifts when evidence given by one party gives rise to a presumption favourable to it and unless rebutted satisfies the court that the fact sought to be proved is established… in that case, the burden of proof does not shift but the evidential burden shifts from one party to another as the scale of evidence preponderates.[649]

In negligence, like other civil cases, the burden of proof is prescribed by Section 133 (1), (2) and (3) of the Evidence Act, 2011 which provides:

In civil cases, the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption may arise on the pleadings

If the party referred to in subsection (1) of this section adduces evidence which ought reasonably to satisfy the court that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced and so on successively until all the issues in the pleadings have been dealt with

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648 (2006) 9 NWLR (Pt. 986) 573 at 590-591.
649 See also Ezemka v. Ibeneme (2004) 14 NWLR(Pt. 894) 617.

Where there are conflicting presumptions, the case is the same as there were conflicting evidence[650]

Negligence is not one of the torts that are actionable per se and as such, the claimant must show that he suffered injury by the acts of the defendant. It is up to the plaintiff to prove generally those acts or omissions that he claims amount to negligence. What the plaintiff has to prove before a court to hold the defendant liable may in many cases not be available, that is direct evidence.[651]

There is also another way in which the plaintiff's task is made easier. This is the doctrine of *res ipsa loquitur* (the thing speaks for itself). The rule can be invoked when it can be established that the injury is such as does not occur in the ordinary cause of event involving the absence of negligence, the facts proved must point to the defendant as being the negligent party, and there must be absence of explanation.[652]Generally, in medical malpractice and traffic accident cases, it may be difficult for the patient plaintiff to prove negligence because he may not know what happened.[653] In view of this difficulty of direct proof of fault and of the causal nexus between the fault and injury, the court may allow the plaintiff to rely on the doctrine of *Res Isa Loquitur*. Literally, this maxim means, "The event speaks for itself". In its inception, Res Ipsa Loquitur was nothing but a reasonable conclusion from the circumstances of an accident that, the accident was probably due to the defendant's fault, there are further requirements which must be supplied for the rule of res Ipsa loquitur to apply,[654] that, the plaintiff must prove not that:

650 Sokwo v. Kpongbo (2008) 2 NWLR (Pt. 1086) 346 SC.
651 KA Obafemi , Op. cit, p 109
652 DA Akhabue, Op. cit. p. 7
653 Ibid
654 See Bello I. (2000), Tortious Liability of Medical Practitioners in Nigeria: An Appraisal, (Unpublished), LL.M Dissertation Submitted to the Faculty of Law, Ahmadu Bello University, Zaria, Nigeria. P. 19

1. The event is of the kind that ordinarily does not occur in the absence of someone's negligence, but also that it was caused by an agency or instrumentality within the exclusive control of the defendant. This is illustrated by the case of *Scot. v. The London St Katherine Dock Co*,[655] where bags of sugar fell on the plaintiff, while he was lawfully passing the doorway of the defendant's warehouse. The defendants called no evidence. Erie C.J. stated that there must be reasonable evidence of negligence, but where the thing is shown to be under the management of the defendant or his servant and the accident is such that in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants, that the accident arose from want of care.

2. The second requirement is that the accident was not due to any voluntary action or contribution on the part of the part of the plaintiff.[656]

The effect of the last condition is that it may create some problems because the plaintiff is normally unconscious and does not know what he or the defendant happens to be doing. His natural bodily reaction or condition, which may have contributed to the final harm, is certainly neither wilful nor controllable or observable by himself in most cases and yet can absolve the medical practitioner from responsibility. Where the plea of res ipsa loquitur is allowed, there are two effects as follows:

It raises a prima facie inference of negligence which requires the defendant to explain why the accident could have occurred without negligence by him and where he cannot explain, he will be liable.

655 [1865] 3 H & C 596
656 Akhabue, Op cit p. 8
656 Ibid

The plea *res Ipsa loquitor* has the effect of reversing the burden of proof[657].

However, the presumption of *res ipsa loquitur* will be rebutted where the defendant can explain the occurrence of the injury/accident, or where the facts are sufficiently known. Consequently, the doctrine was stated by Erle, C. J. in *Scott v London and St. Kathrine Docks Co*[658] thus:

> *…Where the thing is shown to be under the management of the defendant or his servant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of care…*

Meanwhile, it is important to also state that some negligent acts may also involve actions that are related to crime. In all, the ways of proving negligence considered in this chapter include the following:

1. Proof of negligence through evidential burden of proof
2. Proof of negligence through the doctrine of res ipsa loquitur

4.9.1 Proof of Negligence Through Evidential Burden of Proof

The quantum of proof in civil action is a preponderance of probability.[659] The plaintiff has to adduce evidence to show that the medical practitioner was negligent. *Section 135 (1) of the Evidence Act, 2011* stipulates that whoever desires any court to give judgment as to any right or

657 Henderson v. Henry E. Jenkins & sons (1970) A.C. 82

658 (1865) 3 H & C 596; See also Byrne v Boadle (1863) 159 Eng. Rep. 299

659 See section 134 of the Evidence Act, 2011. However, where a civil claim involves a claim relating to crime or fraud, the standard of proof shall be beyond reasonable doubt as in section 135 (1), Evidence Act

liability dependent on the existence of facts which he asserts must prove the those facts exist while *Section 132* of the same Act places the burden of proof on the person who would fail if no evidence was given on either side. This position is the representation of the general burden of proof in every case. Generally, the general burden of proof at all times does not shift. Thus, in *Omotosho v. B.O.N Ltd*,[660] Ogunwumi JCA held as follows:

> The law is that the burden of proof rests on the person who asserts a fact… it is fixed at the beginning by the pleadings and rests on the party asserting an affirmation… the burden of proof shifts when evidence given by one party gives rise to a presumption favourable to it and unless rebutted satisfies the court that the fact sought to be proved is established… in that case, the burden of proof does not shift but the evidential burden shifts from one party to another as the scale of evidence preponderates.[661]

In negligence, like other civil cases, the burden of proof is prescribed by Section 133 (1), (2) and (3) of the Evidence Act, 2011 which provides:

a. In civil cases, the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption may arise on the pleadings

b. If the party referred to in subsection (1) of this section adduces evidence which ought reasonably to satisfy the court that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if

[660] (2006) 9 NWLR (Pt. 986) 573 at 590-591
661 See also Ezemka v. Ibeneme (2004) 14 NWLR(Pt. 894) 617

no more evidence were adduced and so on successively until all the issues in the pleadings have been dealt with.

Where there are conflicting presumptions, the case is the same as there were conflicting evidence.[662]

Negligence is not one of the torts that are actionable per se[663] and as such, the claimant must show that he suffered injury by the acts of the defendant. It is up to the plaintiff to prove generally those acts or omissions that he claims amount to negligence. What the plaintiff has to prove before a court to hold the defendant liable may in many cases not be available, that is direct evidence.[664] In discharging the evidential burden, the plaintiff may prove his case by either direct or circumstantial evidence. The concept of direct and circumstantial evidence is then considered below.

4.9.2 Direct and Circumstantial Evidence

The plaintiff, in seeking to prove his or her case, may have recourse to both direct and circumstantial evidence. Direct evidence is a proof of fact arising from the testimony of what a witness personally saw, or heard or did establishing such a fact without inference or presumption, while Circumstantial evidence is evidence based on inference and not on personal knowledge or observation, all termed indirect evidence, oblique evidence, it is the kind of evidence that is not

662 See Sokwo v. Kpongbo (2008) 2 NWLR (Pt. 1086) 346 SC
663 Example of such torts actionable per se include libel, trespass to chattel, conversion
664 KA Obafemi, Op cit, p 109

given by eyewitness testimony.[665] Indirect evidence, more commonly known as circumstantial evidence is that which is applied to the principal fact, indirectly, or through the medium of other facts, already described as evidentiary, from which the principal fact is extracted and gathered by a process of special inference[666] According to Hon,[667] Circumstantial evidence is the direct opposite of direct evidence, in that it denotes the evidence of relevant facts from which the existence or non-existence of facts in issue may be inferred.[668] It is evidence that does not directly prove the existence of a fact or happening, but which gives rise to a logical inference that such a fact exists or that the happening occurred.[669] It also means the combination or conglomeration of facts creating a network from which there is no other escape, for instance in a criminal trial, for a defendant, because the facts taken as a whole do not admit of inference but point irresistibly to his guilt.[670] Thus in *Idiok v State*,[671] the Supreme Court held;

A circumstance is a subordinate or accessory fact which has legitimate bearing on the main fact. And so, circumstantial evidence is not evidence based on the actual personal knowledge of the witness of the act of killing or murder, but of other surrounding facts, which in their aggregate content lead cogently, strongly and unequivocal to the conclusion that the act, conduct or omission of the accused killed the deceased. Speculative or conjectural evidence cannot be basis for circumstantial evidence to convict an accused person for the offence of murder.

665 The Black's Law Dictionary, 10th edition, pg 674
666 Alexander M Burrill, A treatise on the Nature, Principles and Rules of Circumstantial Evidence 4 (1868).
667 Sebastine Tar HON (SAN), Law of Evidence in Nigeria (2011) 2nd ed. Pg 7-8
668 Ahmed v State, Tegwonor vs state (2008) All FWLR (pt 424) 1484 at 1506-1507 CA
669 Igabele v State (2005) All FWLR (pt 285) 568 CA
670 Igabele v State, Abacha v State (2002) FWLR (pt. 118) 1224 SC and Enwereji v State (2005) All FWLR (pt. 280) 1606 CA
671 (2008) All FWLR (pt 421) 797

In *Ijiffor v State*,[672] the Supreme Court held that circumstantial evidence is receivable in criminal as well as civil cases; but that the necessity of admitting such evidence is more obvious in the former than in the latter. That a judge sitting on a criminal case based on circumstantial evidence is permitted to complete the elements of guilt or establish innocence," by his consideration of such circumstantial evidence. In other words, the judge "is permitted to raise a presumption from the proof of some fact the existence of another fact without further proof of that other fact." However, in raising this inference, the judge must narrowly consider the evidence led in the case, which means that for the defendant to be held responsible in such circumstances, there must not be any co-existence circumstances which would weaken or destroy the inference that such defendant is guilty.

Contrasted with circumstantial evidence, direct evidence is evidence of fact in issue. When it is testimonial evidence, it is evidence of the witness who claims personal knowledge of the fact he testifies about. Circumstantial evidence on the other hand is evidence of relevant fact from which the existence or non-existence of facts in issue may be inferred.[673] Evidence may be direct or circumstantial.[674] Proof of identity of a deceased person can be by direct or circumstantial evidence provided such circumstantial evidence leads irresistibly to one conclusion, that the autopsy performed was on the body of the deceased.[675] In criminal trial for instance, where direct evidence is not available, circumstantial evidence which is cogent, and pointing irresistibly and unequivocally as well as compelling at the accused is admissible to support a conviction.[676] A conviction cannot be based on circumstantial evidence unless and until all the inference to be

672 (2001) 9 NWLR (pt 718) 371 SC
673 Sule Ahmed (alias Eza) v. The State (2002) 1 SCM 39
674 Ikomi & Ors. v. The State (1986) 1 NSCC 730
675 Idemudia v The State (1999) 5 SCNJ 55
676 The State v John Ogbubunjo & Anor (2007) 3 SCM 119

drawn from the whole history of the case point strongly to the commission of the crime by the accused.[677] For example, in medical negligence claims where a swab, sponge, broken needle or any surgical instrument has been left inside a patient's womb or body following surgery, this fact creates a reasonable inference that a member of the surgical team was guilty of an act of negligence in failing to have removed it.[678]

4.10 Proof of Negligence Through the Doctrine of Res Ipsa Loquitur

There is also another way in which the plaintiff's task is made easier. This is the doctrine of *res ipsa loquitur* (the thing speaks for itself). The rule can be invoked when it can be established that the injury is such as does not occur in the ordinary cause of event involving the absence of negligence, the facts proved must point to the defendant as being the negligent party, and there must be absence of explanation.[679]Generally, in medical malpractice and traffic accident cases, it may be difficult for the patient plaintiff to prove negligence because he may not know what happened.[680] In view of this difficulty of direct proof of fault and of the causal nexus between the fault and injury, the court may allow the plaintiff to rely on the doctrine of *Res Isa Loquitur*. Literally, this maxim means, "The event speaks for itself". In its inception, Res Ipsa Loquitur was nothing but a reasonable conclusion from the circumstances of an accident that, the accident was probably due to the defendant's fault. The doctrine of *res ipsa loquitur* was first used by the Court of Exchequer in *Byrne v Boadle*[681]where a barrel had fallen from the defendant's premises and injured the plaintiff on the road below. The precise circumstances leading to the accident

677 Durwode v The State (2000) 12 SCNJ 1

678 KA Obafemi, Medical Negligence Litigation in Nigeria: Identifying the Challenges and Proposing a Model Law Reform Act (unpublished), Thesis submitted to the Trinity College, Dublin in fulfilment of the requirement of the award of the Degree of Doctor of Philosophy, 2017, p. 250

679 D.A. Akhabue, Op cit p 7

680 Ibid

681(1863) 2 H & C 722

were not known to the plaintiff. During argument, counsel for the defendant sought a dismissal of the claim on the basis that there was not a scintilla of evidence of negligence. Pollock CB held that there are certain cases of which it may be said *res ipsa loquitur* and this seems one of them.[682]

Statutorily, the principle of res ipsa loquitur can be inferred from the provision of Section 136 (1) and (2) of the Evidence Act, 2011 which provides that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence *unless it is provided by any law that the proof of that fact shall lie on any particular person.* From the provision of this section, the italicize part means that the Act recognizes that the law may be an exception to the general burden of proof (*affirmanti non negante incubit probatio*).[683] Subsection (2) further provides that in considering the amount of evidence necessary to shift the burden of proof, regard shall be had by the court to the *opportunity of knowledge with respect to the fact to be proved which may be possessed by the parties respectively.* the word "knowledge" in the provision recognizes the fact that in cases where *res ipsa loquitur* are pleaded, the defendant who would not have had the initial onus of proof would then be required to prove by virtue of the fact that he has the opportunity of knowledge with respect to the fact (that is, accident or negligence) to be proved.

4.11 The Requirements for the Application of the Rule of Res Ipsa Loquitor

The classic exposition of the principles of *res ipsa loquitur* was provided in the case of *Scott v London & St.Katherine Docks Co.*[684]the plaintiff whilst in the discharge of his duty as he was

682 C.B. Pollock op. cit p 21
683 It is for he who asserts to prove.
684(1865) 3 H & C 596

passing in front of a warehouse in the dock, six bags of sugar fell upon him. In deciding the requirements for inferring negligence for the purposes of liability, Erle CJ stated:

> *There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary circumstances does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."*[685]

There are further requirements which must be supplied for the rule of res Ipsa loquitur to apply,[686] that, the plaintiff must prove that:

the event is of the kind that ordinarily does not occur in the absence of someone's negligence, but also that it was caused by an agency or instrumentality within the exclusive control of the defendant. This is illustrated by the case of *Scot. v. The London St Katherine Dock Co*,[687] where bags of sugar fell on the plaintiff, while he was lawfully passing the doorway of the defendant's warehouse. The defendants called no evidence. Erie C.J. stated that there must be reasonable evidence of negligence, but where the thing is shown to be under the management of the defendant or his servant and the accident is such that in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants, that the accident arose from want of care.

685 Ibid at 601

686 I Bello, Tortious Liability of Medical Practitioners in Nigeria: An Appraisal, Ll.M Dissertation Submitted to the Faculty of Law, Ahmadu Bello University, Zaria, Nigeria (2000) P 19

687 [1865] 3 H & C 596

The second requirement is that the accident was not due to any voluntary action or contribution on the part of the part of the plaintiff.[688]

The effect of the last condition is that it may create some problems because the plaintiff is normally unconscious and does not know what he or the defendant happens to be doing. His natural bodily reaction or condition, which may have contributed to the final harm, is certainly neither wilful nor controllable or observable by himself in most cases and yet can absolve the medical practitioner from responsibility. Where the plea of *res ipsa loquitur is allowed*, there are two effects as follows:

It raises a prima facie inference of negligence which requires the defendant to explain why the accident could have occurred without negligence by him and where he cannot explain, he will be liable. If the plaintiff's case has established that the *res ipsa loquitur* doctrine applies, the plaintiff will be assured that his or her case is sufficiently strong to defeat an application by a defendant to non-suit the plaintiff by directing the jury to find for defendant.[689]

The plea *res Ipsa loquitor* has the effect of reversing the burden of proof[690].

However, the presumption of *res ipsa loquitur* will be rebutted where the defendant can explain the occurrence of the injury/accident, or where the facts are sufficiently known. Consequently, the doctrine was stated by Erle, C. J. in *Scott v London and St. Kathrine Docks Co*[691] thus:

> …Where the thing is shown to be under the management of the defendant or his servant, and the accident is such as in the ordinary course of things does not

688 DA Akhabue, Op. cit. p. 8
688 Ibid
689 K A Obafemi op cit, p. 254
690 Henderson v Henry E. Jenkins & sons (1970) AC 82
691 (1865) 3 H & C 596; See also *Byrne v Boadle* (1863) 159 Eng Rep 299

> happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of care…

4.12 Application of Res ipsa loquitur to Medical Negligence

The rationale for the application of res ipsa loquitur in medical negligence is based on the fact that the instrument of conducting the surgery is within the full control of the practitioner as agreed to by the court in *Miss Felicia Osagiede Ojo v Dr Gharoro & UBTH Management Board*,[692] the plaintiff's claim arose from a medical or surgical operation performed on her by the defendants, the operation was designed to correct a certain medical condition, but at the end of it, one of the surgical needles used in the operation got broken and the broken part could not be located or retrieved and it was consequently left inside the plaintiff. It is the fact that a piece of surgical needle being in the plaintiff and the effects thereof as well as the effort to remove it that led to this action. The plaintiff said that after the operation she had serious pain in her abdominal and vagina and she complained to the 1st defendant, who ascribed the pains to the stitches on the site of the operation wound. Four days later when pains would not subside, the 1st defendant ordered for an X-ray examination. The plaintiff said she had two X-rays and the X-rays confirmed that there was a broken needle in her stomach, which was not there before the operation. The plaintiff said the 1st and 3rd defendants informed her that due to the fresh wounds from the surgical operation they could not immediately conduct another surgical operation to recover the needle and also that the 1st and 3rd defendants did not tell her that they left anything behind in her stomach. The plaintiff gave evidence that she saw another gynaecologist who informed her that judging from the way she was operated upon she would be unable to have a

692 Supra

child. The defendants admitted the broken needle in her stomach but said the plaintiff was informed after the first operation. The defendants admitted also that nowadays sub-standard needles are being used and that such needles break easily during operations. He denied that the plaintiff could not have any child because of the broken needle in her stomach, that where the needle was located is in the anterior abdominal wall and there was no relationship with pregnancy. Certain legal questions arose, since the plaintiff pleaded particulars of negligence. One question was whether the plaintiff could still rely on the doctrine of *res ipsa loquitur*. In answering this question, the court reviewed the cases of *Management Enterprises Ltd v Otusanya*[693]and *Strabag Construction Nig. Ltd v Oguarekpe*[694]and held that the doctrine could be pleaded in the alternative.

Also, the Doctrine of *res ipsa loquitu*r is applied in cases of medical negligence where it cannot be ascertained as to which specific act of the hospital or that of his employees had caused the injury and where the situation is never outside the control of the hospitals.[695] Thus, as held in *Cassidy v. Ministry of Health,*[696]a hospital authority was liable to a patient in respect of negligent treatment; even though the patient could not show which member of the hospital staff was responsible. Furthermore, in *Ybarra v. Spangard*,[697]a patient undergoing surgery experienced back complications as a result of the surgery, but it could not be determined the specific member of the surgical team who had breached the duty so it was held that they had all breached, as it was certain that at least one of them was the only person who was in exclusive control of the instrumentality of harm.

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693 [1987] 18 NSCC (Pt 1) 57

694 [1991] 1 NWLR (Pt 170) 733

695 Tolulope Revelation IBITOYE, LL.B (Hons) (Ilorin), BL, LL.M (Swansea), Lecturer, Department of Public and International Law, Bowen University, Iwo, Osun State, Nigeria, on the Applicability of res ipsa loquitur, 177-178

696 (1951) 2 KB 343

697 (1944)25 Cal 2d 486

Res ipsa loquitur can also arise in the 'scalpel left behind' variety of cases, for instance, in *Mahon v. Osborne*[698]where swabs were left in the body of the patient after abdominal operation, the doctrine of res ipsa loquitur was applied when Goddard L.J. stated that:

> *The surgeon is in command of the operation, it is for him to decide what instruments, swabs and the like are to be used, and it is he who uses them. The patient, or if he dies, his representatives, can know nothing about this matter…If therefore, a swab is left in the patient's body, it seems to me clear that the surgeon is called on for an explanation…*

Thus, a surgeon in a theatre room is the Commander-in-Chief of all medical/operational activities there, and final check-up should not be shifted to the nurses or other officers in the room. Where he shifts his duty to others, he is negligent. Also, in *Anderson v. Chasney*[699], a sponge was left behind by the defendant during a tonsil and adenoid operation. The Court of Appeal contended that one of two existing security methods, that is, sponge counting or using sponges with tapes, should have been adopted. The defendant was found negligent based on the doctrine of *res ipsa loquitur.*

In other cases, the doctrine is applicable simply where the doctor is negligent but the patient is unable to explain or does not understand how the damage happened. In the case of *Igbokwe & Ors v. University College Board of Management*,[700] a woman who just delivered her baby fell from the 4th floor of the hospital building. A doctor had specifically asked a nurse to keep an eye on her, but she was found fatally wounded after her fall. The court found the hospital negligent on the application of res ipsa loquitor. The similar decision was pronounced in *Fish v Kapur*,[701] where a dental extraction resulted in a jaw fracture. Thus, the purpose of this doctrine in medical

698 (1939) 1 All ER 535
699 (1950) CanLII 336 (SC)
700 (1961) WNLR 173
701 (1948) 2 All ER 176

negligent cases is to preclude the defendant from defending on the submission of 'no case to answer'. In *Ibekendu v. Ike,*[702]the plaintiff/respondent sued the appellant claiming damages for injuries sustained in an accident caused by the negligence of the appellants. The said accident occurred when the haice-bus driven by the appellant swerved from its own side of the road to the other side and collided with the respondent who was walking by the side of the highway. The bus eventually ended up in a ditch along the road. The court held that these facts clearly raised a prima facie presumption of negligence which automatically brings into play the doctrine of *Res Ipsa Loquitur.*

4.13 **The Role of the Judiciary in Resolving Medical Malpractice/Negligence Claims**

The Nigerian judiciary plays a crucial role in the country's justice system, interpreting the constitution and legislation, resolving disputes between private individuals and the government, and resolving medical negligence/malpractice cases. The judiciary is often referred to as the last hope of the common man, upholding the rule of law. However, recent developments in election petition tribunals, medical malpractice claims, and political matters have raised concerns about the judiciary's continued representation and justice. The 1999 constitution of the Federal Republic of Nigeria establishes the judiciary as an arm of the government, with the power to safeguard the rule of law, uphold the supremacy of law, adjudicate disputes, and serve as an unbiased arbiter. However, recent indices in Nigeria, such as the Presidential Election Petition Tribunal, have raised questions about the judiciary's continued relevance and representation in the country's justice system.[703]

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702 (1993) ELR 33260 (SC)

703 Henry C Okeke.' An Inquiry into the Nigerian Healthcare System: The Role of Judiciary in Guaranteeing Medico-Legal Rights of the Health Users, NAUJILJ 14 (2) 2023

CHAPTER FIVE
CONCLUSION

5.1 Summary

The fundamental objective of this research captured succinctly is to interrogate as cogently as possible the intersection of medical ethics and legal obligations taking into cognizance interplay between morality and law in health care provision in Nigeria. The research also set out to identify the challenges that abound in the area of respecting medical ethics and enforcing legal obligations in health care provision in Nigeria viz a viz identifying the opportunities that abound in this area of the law. Negligence, which can be seen as a basis of culpability in the law of tort,

is defined as 'the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to prevent others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregardful of others' right. Negligence is a matter of risk, that is to say, of recognizable danger of injury. In most instances, it is caused by heedlessness or inadvertence, by which the negligent party is unaware of the result, which may follow his act.

Also, the options available to the victims of negligence including medical negligence, are all provided for and recognized by law. It is imperative to note that the complainant plays a role in setting the course of the three options in motion in all circumstances; the burden of proof is on the complainant to establish a prima facie case that would necessitate the possible investigation where necessary and activate the jurisdiction of the court. In respect to civil jurisdiction, the principle of *res ipsa loquitur* may apply. This is borne out of the fact that where there is no proof of medical practitioner's negligence other than the act or omission in question. Since proof is the backbone of every claim in law, the study of *res ipsa loquitur* become imperative as a means of establishing medical negligence in law. In the process of establishment of negligence, the plaintiff in all cases may not have the means of proving that the defendant has breached the duty of care, there is also another way in which the plaintiff's task is made easier. This is the doctrine of *res ipsa loquitur* (the thing speaks for itself). The rule can be invoked when it can be established that the injury is such as does not occur in the ordinary cause of event involving the absence of negligence, the facts proved must point to the defendant as being the negligent party, and there must be absence of explanation. Generally, in medical malpractice, it may be difficult for the patient plaintiff to prove negligence because he may not know what happened. In view of

this difficulty of direct proof of fault and of the causal nexus between the fault and injury, the court may allow the plaintiff to rely on the doctrine of *Res Isa Loquitur*

Res ipsa loquitur typically arises in cases where the negligent act is so obvious that there is no need for evidence of what happened. What must have happened is apparent from the surrounding circumstances. The finder of fact must be able to infer, through common knowledge and experience that negligence occurred.

Res ipsa loquitur is also sometimes applied in medical malpractice cases where something obviously went wrong in surgery, for example, but precisely what went wrong cannot be proven. A foreign object might have ended up in a patient or suturing may have been proven to be ineffective. While it may not be possible to prove precisely what happened during the surgery, possibly because the only people conscious at the time work for the defendant hospital, events occurred that do not ordinarily occur in the absence of negligence. This is sufficient to swing the burden of proof to the defendant hospital so that it will be held liable unless it can prove the chain of events that demonstrates that it was not negligent.

5.2 Conclusion

From this study, it can be seen that when medical ethics are breached, there is medical negligence. Thus, medical negligence is a specie of negligence that can be proved through an evidential burden and by extension, the doctrine of *res ipa loquitur.*

The principle of *Res Ipsa Loquitur* is simple, whereas in a case of negligence, the plaintiff must prove by evidence, regarding the defendant's conducts, that the defendant was negligent, but when the plaintiff does not know how and why the accident happened, in such a case the plaintiff

can invoke the assistant of the rule of evidence known by the latin maxim *Res ipsa loquitur* ("the event speaks for itself"), thereby shifting the burden of proof to the defendant, to prove that they were not negligent.

Since its inception, the doctrine of *res ipsa loquitur* has produced conflict, confusion, and doubt. In Nigeria, the requirement under which the doctrine of *"res ipsa loquitur"* becomes operative includes firstly, proof of the happening of an unexplained occurrence, secondly, the occurrence must be one which would not have happened in the ordinary course of things without negligence on the part of somebody other than the plaintiff, and lastly, the circumstances must point to the negligence in question being that of the defendant rather than that of any other person.

Findings revealed that there is legal clarity with regard to the nature, requirements for and especially the effect of the application of the doctrine on the onus of proof in Nigeria. The approach followed by the courts is that the doctrine of *res ipsa loquitur* is a permissible factual inference which the court is at liberty but not compelled to make and which does not affect the onus of proof, which can either be with the plaintiff or the defendant. Normally the onus of proof of the negligence alleged at the onset is on the plaintiff, but where this doctrine is applicable, after evidence of how the accident occurred is given by the plaintiff, the onus shifts on the defendant to offer an explanation as to why the accident happened. Such explanation would seek to show that the defendant is not at fault.

It is also quite clear that in Nigeria, the plaintiff can only rely on the doctrine if the cause of the accident remains unknown. On rebuttal by the defendant, the nature of the explanation is such that although it should conform to certain rather stringent principles it is not expected of the defendant to prove his blamelessness on a balance of probabilities. This implies that if, after all the evidence is in, the probabilities are still equal, the defendant should prevail.

Conclusively, the doctrine of *res ipsa loquitur* is basically an application of principles of circumstantial evidence. The traditional elements that must be shown by a plaintiff who seeks to invoke the doctrine are merely factors by which the defendant may be so closely connected with the fact of plaintiff's injury as to make the inference that his negligence caused the injury more plausible than any other.

5.3 Recommendations

Consequent upon the findings of this study, it is hereby recommended as follows:

1. With the continued exploits in technological sophistication and the digital economy, instead of just floating policies to cater for changes these policies should be transformed into legislation of Parliament. It is therefore recommended that policies such as the content of the Hippocratic Oath should by now have morphed into legislation. Policymakers should consider the establishment of dynamic frameworks that can adapt to the ever-changing medical landscape. This includes regular reviews of health related policies to ensure their relevance and effectiveness in capturing issues from emerging digital health care models.
2. It is recommended to get legal support from a professional medical negligence solicitor while filing claims in the court. A solicitor who has years of experience in handling clinical negligence claims can best handle claims related to medical negligence. The professional will take a detailed account of your case; check all the relevant documents and try to assess if the case has enough grounds to prove the claims. Most of the solicitors in the UK accept cases on the basis of their winning potential. The medical negligence lawyers acquire fantastic communications skills and they use it for establishing the cases in court. It is upon the severity of the patient's condition that determines that amount of

compensation to be awarded to him. The greater is the degree of suffering, the higher is the amount of compensation.

3. The next National Health Act that amends or revises the National Health Act of 2014 should cater for a special appropriation for spending to support good Doctor-Patient relationship removing road blocks to immediate emergency care to avoid avoidable deaths caused by not opening a file with the hospital or making down payments.
4. There are portions of the population still unaware of several changes in health care related laws over the landscape, so the Ministry of Health needs to till out resources in the area of citizen education on changes in the health care especially related to exposure from digital medical care, goods and services. Policymakers should actively participate in international organizations like the World Health Organization (WHO) to develop standardized guidelines and frameworks for improved medical digital services. By collaborating on a global level, Nigeria can reduce the risk of stagnation a more predictable environment for medicine.
5. Prioritize robust data security measures to protect sensitive patient information. Implement encryption, access controls, and compliance with data protection regulations.
6. Adopt a phased implementation approach that gradually introduces digital tools and processes. This approach allows for testing, refining, and addressing any challenges before full-scale implementation.
7. Engage with Medical businesses, medical practitioners, and other stakeholders during the design and implementation phases. Incorporate their feedback to ensure that the digital side of medical health care provision in the Nigerian system meets their needs and is user or patient friendly.

8. The legislative arm of government must ensure that oversight functions on Medical health care administrative agencies are in full swing because as we have seen over a forty year period since the Alma Ata Declaration that passing laws alone does not suffice rather implementation must be at the forefront. Efforts must be doubled because of the crucial nature of health in Nigeria.
9. For a sustainable ethical system of health care provision in Nigeria, each ward needs to develop coasted Annual Operational Plan of Action based on community, diagnosis, age, wealth of the patient invariably prioritize patient needs, assess available resources and utilise them optimally.[704] It is high time we leverage on the ward delineations not just for elections only but for Primary Health Care service delivery in Nigeria.
10. Routine re-orientation of health workforce on attitudinal change including training and retraining in Interpersonal Communication (IPC) skills and work ethics are to be conducted for the promotion of client satisfaction and improvement of quality of care. A system of recognition, reward and sanctions will be instituted. It is also vital to establish and institutionalize a framework for an integrated supportive supervision with adequate committed resources for all types and levels of care providers across public and private sectors. Mechanisms should be established to monitor health worker performance, including use of client feedback. This is very important to improve administration of health care in Nigeria.
11. Government at all levels must express, in practical terms, political commitment through funding, capacity building and system support. They must put money where their mouth is and translate the great ideas behind primary health care into great programmes and

704 Olayinka Akanke Abosede and Olugbenga Fola Sholeye, 'Strengthening the Foundation For Sustainable Primary Health Care Services in Nigeria' (2014) 4 (3) *Journal of Primary Health Care*, 8.

great services. Primary health care services are not third-class services meant for third-class citizens. Therefore, adequate provision must be made in national, state and local budgets for quality healthcare delivery using the primary healthcare system.

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