Appraisal of Medical Rights of Patients in Nigeria

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Certification

This is to certify that this long essay titled 'The Appraisal of Medical Negligence and Fundamental Rights of Patients under the Nigerian Law,' was written by Musa Olaiya Kehinde in the Faculty of Law, Lead City University, Ibadan. The information derived from the literature has been fully acknowledged in the text and the lists of references provided. No part of this work has been presented for another degree at any institution.

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Approval

This research titled 'The Appraisal of Medical Negligence and Fundamental Rights of Patients under the Nigerian Law" written by Musa Kehinde Olaiya has been read and approved as meeting the standards of the Faculty of Law, Lead City University, Ibadan in partial fulfilment of the requirement for the award of Master of Laws of Lead City University, Ibadan.

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Prof. Foluke O. Abimbola DATE

SUPERVISOR

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Dedication

This thesis is dedicated to Almighty God for sparing my life and whose grace this work to be completed. Also, to Late Ahmed Sa'ad Alhaji and Late Mrs. Bolanle Aderonke Odanye.

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List of Statutes

Acronyms

AC	Appeal Court
QB	Queen's Bench
NWLR	Nigerian Weekly Law Reports
NMLR	Nigerian Monthly Law Reports
NLR	Nigerian Law Reports

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Abstract

The aim of this work is to appraise and review medical rights of patients in nigeria. It will also look into human rights violations of the patients due to medical malpractice and how the ethics of the medical profession can be enforced to reduce the human rights violations in conjunction with the right of consent that the patients have when it comes to treatment of their infirmity. The violation of the rights of citizens to be properly informed about treatment and its consequences is also a deficiency in the medical system and this thesis aims to proffer legal solutions to protect this right. This study will analyse the legal effects of violations of human rights in relation to medical negligence in Nigeria; and make recommendations on the implementations of these laws in Nigeria in order to curb the unfortunate incidence of medical malpractice. The current legal structure addressing medical malpractice is deficient and often does not address the obstacles and drawbacks for medical practitioners, healthcare institutions and patients at large. The methodology adopted and explored in this research work is qualitative i.e. library oriented research. The materials employed in the research include; Primary sources which include, Constitution of the Federation Republic of Nigeria,1999 (as amended), African Charter on Human and Peoples' Right (Ratification and Enforcement) Act, Medical and Dental Practitioners Act, and case laws. Secondary authorities, which comprises relevant information from leading authorities, textbooks on the subject matter of the research, journal articles, opinions of specialists and practitioners on aspect of laws relating thereto. The aftermath of this study is to provide recommendations to bolster the legal system and institutional mechanisms which will aid in addressing medical malpractice in Nigeria. This includes the enactment of specialized laws, the establishment of unique courts, increased public awareness, and strengthened professional regulation. The study aims to contribute to academic knowledge and policy debate on the topics at hand. Ultimately, concrete solutions and recommendations are provided to improve accountability, quality, and safety in Nigeria's healthcare sector.

Keywords: Law, Medical, Negligence, *Res ipsa loquitur*, malpractice and health.

Word count: 332

Chapter One

Introduction

1.1 Background to the Study

To every human being, good health is the basis for a long life and it is a matter of immense concern. This is so regardless of age, socio-economic status, gender or ethnicity.[1] A positive and stable health status is very basic and essential to any man; ill health on the other hand would impede productivity or hinder full participation in daily obligations. This therefore, makes individuals to invest and sacrifice finances, time and energy in order to attain an appreciable state of wellbeing. Hence, when the wellbeing of a person is discussed, the health of that person is actually of specific interest because the Constitution guarantees right to life.[2]

The general rule under law of tort is that in the event that a person is allowed to go about his daily activities without any form of regulation in relation to other persons in the society, he would turn the world into an island where he alone will dominate by his might in respect of the goods he produces, the premises he occupies, chattels and animals which he controls and the legal services he renders to the public. This regulation is more important by virtue of the fact that the world is lived in association with others and not in isolation of persons.[3]Thus, the area of the common law which has invariably become part of Nigerian law[4] with regards to protecting the right of other persons not to be subject to injury is known as the law of negligence.

The prevalence of medical errors in Nigeria can be attributed to systemic dysfunction rather than individual irresponsibility alone.[5] Factors such as inadequate infrastructure and equipment shortages contribute to lapses during diagnosis or treatment processes. Additionally, 'brain drain' the emigration of skilled health personnel is prevalent due to poor

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[1] Y. Olomojobi, *Medical & Health Law; The right to Health* (Lagos: Princeton & Associates Publishing Co. Ltd, 2019), 1.
[2] Section 33 of the 1999 Constitution of the Federal Republic of Nigeria, as amended.
[3] B.A Susu, *Law of Torts*, (Lagos: CJC Nig. Ltd. 1996), 85.
[4] The English common law has become part of Nigerian law as a result of the Statute of General Application, 1900 which was made part of the Nigerian law by the Supreme Court Ordinance of 1914.
[5] K.A 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 fulfillment of the requirement of the award of the Degree of Doctor of Philosophy, 2017, 250.

working conditions and limited career prospects. This exacerbates the problem by compromising patient care quality.[6]

One of the challenges faced by patients seeking justice for cases involving medical negligence in Nigerian hospitals is that legal remedies are often inaccessible.[7] In addition, despite constitutional provisions protecting citizens' rights, the judicial process is characterized by delays. Furthermore, lack of forensic evidence and sometimes mistrust in its authenticity if available further complicates the legal battle for victims or their families. As there exists no specific legislation governing matters relating directly to 'Civil Liability', obtaining compensation remains an uphill task.[8] Proving causation between breached duty-of-care standards and resultant harm can also pose a challenge due to gaps in evidentiary requirements within the present legal system.[9]

However, certain reforms have been proposed to discourage occurrences of medical negligence. These include introducing amendments into existing laws, prioritizing timely access to needed diagnostics and rehabilitative care, and promoting continuous education and training among health practitioners. The establishment of a clearer legal framework and enforcement mechanisms can address the issue of medical negligence in Nigeria.[10]

Meanwhile, since proof is the backbone of every claim in law,[11] the study of the principle of *res ipsa loquitur* becomes imperative as a means of establishing 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 principle of *res ipsa loquitur* (the facts speak for themselves). The rule can be invoked when it can be established that the injury is such as does not occur in the ordinary cause of events 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.[12]Generally, in medical malpractice and traffic accident cases, it may be difficult

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[6] Obafemi, Komolafe Akinlabi Richard. "Medical negligence litigation in Nigeria: Identifying the challenges and proposing a model law reform act." PhD diss., Trinity College Dublin, 2017.
[7] Y. Olomojobi, *Medical & Health Law; The right to Health* (Lagos: Princeton & Associates Publishing Co. Ltd, 2019), 1.
[8] A. Omotesho, *The Law of Tort in Nigeri*a (1st Ed., Malthouse Press Limited, 2009) p. 5.
[9] Donald, Dennis Uba. "The curious case of Medical Negligence in Nigeria" (2014) 2 (1), *The International Journal of Indian Psychology*, 138-142.
[10] Ibid.
[11] J.O. Asein, *Introduction to Nigerian Legal System* (2nd Ed., *Lagos:* Ababa Press Limited, 2005), 102.
[12] A. Omotesho, *The Law of Tort in Nigeri*a (1st Ed., Malthouse Press Limited, 2009), 5.

for the patient plaintiff to prove negligence because he may not know what happened.[13] 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 Ipsa Loquitur*. Literally, this maxim means, "The event speaks for itself."

It is upon the foregoing that this study sets out to consider the fundamental rights of patients and medical negligence in Nigeria.

1.2 Statement of the Problem

The doctrine of *res ipsa loquitur* as formulated under the common law has become part of the Nigerian corpus juris and has been applied in plethora of cases.[14] Meanwhile, the doctrine is an exception to the principle of proof under the Evidence Act, 2023 as amended which provides in Section 131 (1) 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 that 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. Thus, this area of the law has not been fully explored in certain areas of medical negligence cases and this study seeks to use relevant statutes and judicial authorities to explore this area of law.

Another problem this study seeks to address is the fact that adequate research has not been conducted to really reveal the challenges and opportunities that undergird the interplay between medical ethics and legal obligation in the administration of health care. Research mostly examines challenges alone without considering the possibility of opportunities to change the existing situation. In other words, what does the law say and which set of laws really regulate how physicians administer care to their patients? In the event of gross negligence, will the law take its course to make sure a suspect does not escape the throes of justice as a result of challenges such as corruption or an underdeveloped legal system? The issue also is whether a cursory look at decided cases in this area of the law could shed any light on future occurrences or aid in interpreting the relationship between medical ethics and the legal obligation of key stakeholders in Nigerians health care sector.

It is in this light that this study examines the legal framework in tort law concerning personal injury under medical law in Nigeria especially in the light of policy and legislative

[13] Ibid.
[14] See for example, Alao v Inaolaji Builders Ltd (1990) 7 NWLR Pt. 160, P. 36 C.A; Ifeagwu v Tabansi Motors Ltd (1972) 2 ECSLR 790; Kuti v Tubogbo (1967) All NLR 331 SC.

developments. In the same vein, this study will contribute to the development of this area of research as the basic problem is a difficult in the absence of relevant information to assist the courts in proving medical negligence. This study will be an eye opener particularly in the area of policy change or amendment of laws for the protection of the innocent patients who may be subject to procedures which are not properly explained to them. The laws can be expanded to include policies and regulations that may ensure that there would be a remedy for the patient with minimal proof.

1.3 Aim and Objectives of the Study

The aim of this study is to appraise medical rights of patients in Nigeria. The objectives accompanying this aim include:

i. To bring to the fore, the significance of the tort of medical negligence under the Nigerian legal system
ii. Establish a connection between the breach of duty of care and remedies thereto in Nigeria as it relates to its adequacy or otherwise.
iii. Assess the roles of the judiciary in protecting and advancing the rights of patients in Nigeria
iv. Examine the predominant problems encountered by litigants in the pursuit of remedy for medical negligent acts.

1.4 Research Questions

1. What is the significance of the tort of medical negligence under the Nigerian legal system?
2. What is the connection between the breach of duty of care and remedies thereto in Nigeria as it relates to its adequacy or otherwise?
3. What are the roles of the judiciary in protecting and advancing the rights of patients in Nigeria?
4. What are the predominant problems encountered by litigants in the pursuit of remedy for medical negligent acts?

1.5 Research Methodology

The methodology adopted in this research is qualitative. The materials employed in the research comprise primary authorities which include Acts of the National Assembly, Laws of the states and case laws. This will then involve the Constitution of the Federal Republic of

Nigeria 1999 (as amended), Medical and Dental Practitioners Act, the Law Reform (Tort) Law and common law positions which have not been repealed by specific statutes and secondary authorities, which comprises relevant information from leading authorities, textbooks on the subject matter of the research, journal articles, opinions of specialists and practitioners on aspect of law relating thereto.

1.6 Significance of the study

The review revealed the limitations of the framework such as incoherent laws, overlaps, duplications and conflicting application of the doctrine of *res ipsa loquitur* to medical negligence. In addition, the research will look beyond the medico-legal to factors within wider socio-political and governance context that contribute to the non-effectiveness of the application of the doctrine. Also, so many issues are associated with the doctrine in the proper application to medical negligence. In view of the above, this research will allow for a bedrock analysis of the underlying issues that would be specific factors that students of law, and oil researchers, lecturers in the field of law of tort and the general public to carry out further research on, after going through this study.

1.7 Operational Definition of Terms

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. It is the breach of duty to take care; imposed by common law or statute.

Neighbour: in this context, a neighbor 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.

Causation: in this context, causation 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.

Law: this is the rule that guides human conduct.

Res ipsa loquitur: this is a latin word that means 'the thing speaks for itself'.

Chapter Two

Literature Review

2.1 An overview of legal opinions

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, there is little legislative development in this area in Nigeria. Therefore, most of the discussions in the area of tort law including Medical 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 medical negligence but an approach of attacking the elements of the concept since medical negligence itself does not ground liability, it is the elements of medical negligence that the court will consider. As stated earlier, the ingredients that must be proved for a successful claim in medical negligence are:

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.[15]

One of the authors in this area of law is Akhabue[16] who defines medical 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 medical negligence is a creation of common law and statutes and the test of whether a person has breached the duty of care is usually undertaken by the Nigerian courts with the aid of common law cases and provisions of law. Thus, 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 statute.[17] 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 facts, the law only imposes the duty of care on persons and provides a guide to its

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[15] G 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* 124.

[16] *D.A Akhabue, 'Negligence in Nigeria- Not at claimant's beck and call' (2012), 1(6) International Journal of Law and Legal Jurisprudence Studies, p. 3.*

[17] G. Kodinlinye: *The Nigerian Law of Torts* (Ibadan: Spectrum Law Publishing; 1997), 68.

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.[18]

According to Cross, medical 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 alleged act.[19] To William,[20] it is seen as the failure to conform to the standard of care to which it is the defendant's duty to perform.

Kodilinye and Aluko[21] also see medical negligence as a duty of care that arises where in the circumstances it is foreseeable that if the defendant does not exercise due care, the plaintiff will be harmed. As the general rule under law of tort is that in the event that a person is allowed to go about his daily acts without any form of regulation as to other persons in the society, he would turn the world into an island where he alone will dominate by his might in respect of the goods he produces, the premises, chattels and animals which he controls and the services he renders to the public, this regulation is more important by virtue of the fact that the world is lived in association with others and not in isolation of persons.[22] Thus, the area of the common law which has invariably become part of Nigerian law[23] with regards to protecting the rights of other persons not to be subject to injury is known as the law of negligence.

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.[24] 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 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. The mere occurrence of some misfortune does not as a

[18] Ibid.
[19] R Cross, *An introduction to Criminal Law*, (London: SAGE Publications, 1957), p. 42.
[20] See G Williams, *Learning the Law*, (London: Sweet and Maxwell, 2010), cited in D.A Akhabue, Negligence in Nigeria- Not at claimant's beck and call, *International Journal of Law and Legal Jurisprudence Studies* (2012) 1 (6), 3.
[21] G. Kodinlinye, and O. Aluko, *Nigerian Law of Torts* (2nd Ed., Ibadan: Spectrum Books Limited, 2010), 1.
[22] B.A Susu, *Law of Torts*, (Lagos: CJC Nig. Ltd. 1996), 85.
[23] The English the common law has become part of Nigerian law as a result of the Statute of General Application, 1900 which was made part of the Nigerian law by the Supreme Court Ordinance of 1914.
[24] E. Malemi, *Introduction to Law of Torts in Nigeria*, (Lagos: Princeton Publishing & Co 2nd Edition, 2014), 177.

rule make someone automatically liable.[25] 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 defendant is liable by applying the test stated in *Hazel v. British Transport Commission*[26]where 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.

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.[27] 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*[28] and liability for keeping dangerous animals. Within the negligence principle, there are many heads of claims which encompass occupier's liability, professional negligence, road and other commuting accidents, employers' liability and product liability *inter alia*. It is against this background that this study sets out to examine the law of negligence and the various circumstances as it is being applied by the Nigerian courts. Nigeria has seen a rise in cases of medical negligence over recent years. The criminal laws related to medical negligence do not differentiate between recklessness and ignorance-based criminal acts. As a result, individuals who commit acts of medical malpractice are treated similarly regardless of intent or knowledge.[29]

To Perkins, medical negligence would rather be defined as any condition intentionally or wantonly and willfully disregardful of an interest of others which falls below the standard established by law for the protection of others against unreasonable risk of harm.[30] 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

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[25] B.A Susu, *Law of Torts*, (Lagos: CJC Nig. Ltd. 1996), 85.
[26] [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.
[27] W Rogers, Winfield and Jolowicz*, The Law of Tort*, (11thed, London, Sweet & Maxwell, 1979), 234.
[28] (1866) LR 1 Exch 265.
[29] Adejumo, Oludamilola Adebola, and Oluseyi Ademola Adejumo. "Legal perspectives on liability for medical negligence and malpractices in Nigeria" (2020)3 (5), *The Pan African Medical Journal*, 25.
[30] R Perkins, Criminal law, (Brooklyn foundation press, 1957), p.664.

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 definitions have successfully incorporated all the elements of negligence. 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. 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 behavior *and* in the circumstances of the tortfessor's position."[31]

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 neighbor?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would likely to 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.[32]

The neighbor 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 neighbor test. Who then is my neighbor? My neighbor 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.[33]

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[31] (Italicize mine).
[32] Donoghue v. Stevenson (1932), AC, 562.
[33] T.R Ibitoye, "Applicability of the Doctrine of Res Ipsa Loquitur in Medical Negligence in Nigeria", (2018) 9 (1) NAUJILJ, 168.

According to Olomojobi[34] the determination of medical negligent cases should be determined by the experts and not the courts. Meanwhile, it is noted that Nigerian legal jurisprudence 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.[35] 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.

Obafemi[36] also posited that the prevalence of medical errors in Nigeria can be attributed to systemic dysfunction rather than individual irresponsibility alone. Factors such as inadequate infrastructure and equipment shortages contribute to lapses during diagnosis or treatment processes. Additionally, 'brain drain' the emigration of skilled health personnel is prevalent due to poor working conditions and limited career prospects. This exacerbates the problem by compromising patient care quality.

One challenge faced by patients seeking justice for cases involving medical negligence in Nigerian hospitals is that legal remedies are often inaccessible. Despite constitutional provisions protecting citizens' rights, the judicial process is characterized by delays. Additionally, lack and sometimes mistrust in forensic evidence further complicates the legal battle for victims or their families. As there exists no specific legislation governing matters relating directly to 'Civil Liability,' obtaining compensation remains an uphill task. Proving causation between breached duty-of-care standards and resultant harm can also pose a challenge due to gaps in evidentiary requirements within the present legal system.

2.2 Conceptual Framework

Under this heading, different concepts associated with medical negligence shall be discussed and some of them include the following:

2.2.1 The Principle of Negligence

In law, negligence is the omission of doing something a reasonable man would under the same circumstances or doing something that a prudent or reasonable man would not.[37] The

[34] Y. Olomojobi, *Medical & Health Law; The right to Health* (Lagos: Princeton & Associates Publishing Co. Ltd, 2019), 1.
[35] Ibid.
[36] K.A. Obafemi, Komolafe Akinlabi Richard, 'Medical negligence litigation in Nigeria: Identifying the challenges and proposing a model law reform,' PhD diss., Trinity College Dublin, 2017, 8.
[37] Diamond Bank Ltd v P.I.C. Ltd (2009) 18 NWLR (Pt. 1172) 67.

area of the common law which has invariably become part of Nigerian law[38] with regards to protecting the right of other persons not to be subject to injury is known as the law of negligence.

It is therefore, important to also state that the tort of medical negligence is designed to enable an individual seek redress against the tortfeasor and also seek compensation for the wrong done by the act of the defendant rather than seeking punishment, most of the acts that constitute negligence are actionable in civil litigation except where the law places a duty on the defendant, breach of which may bring up criminal liability. Even in cases where the law makes the act or omission constituting negligence punishable as a crime, the claimant may still go ahead to seek civil remedies whether concurrently[39] or otherwise.

Thus, negligence arises where there is a breach of duty or a standard of care, reasonably and ordinarily expected by a practitioner in the said profession.[40] Succinctly put, medical negligence connotes a medical professional's inability to meet the acceptable standard of care practiced by colleagues of similar professional calling.[41]

Negligence as a tort is a breach of legal duty to take care of one's neighbour, 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*[42]*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[43] as follows:

[38] The common law has become part of Nigerian law as a result of the Statute of General Application, 1900 which was made part of the Nigerian law by the Supreme Court Ordinance of 1914.
[39] The principle above is a reversal from the age-long principle in Smith v Selwyn[39] where it was previously conceived that where the action constitutes a felony, the plaintiff has to wait for the end of the criminal action before he can institute a civil action; see Veritas Insurance Company ltd. v Citii Trust Investment Ltd (1993) 3 NWLR Pt. 281, 349, CA.
[40] Y. Olomojobi, *Medical and Health Law, the Right to Health* (Lagos: Princeton & Associates Publishing Co. Ltd, 2019) p. 143.
[41] See E. J. Uko, *Human Rights Law, Right to Health in Africa; and Aspects of Tortous Liability and Medical Negligence* (Lagos: Living Publications, 2007), 85.
[42] 1986 Cap. 135.
[43] (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

> …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 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…[44]

The above suggests that the claimant in a claim predicated on negligence has to establish certain ingredients which are as follows:[45]

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.[46]

The necessary objective attitude of the court to this tort is made clear in what Alderson, B said in *Blyth v. Birmingham Waterworks*:[47]

Telecommunications Plc (2009) 15 NWLR (Pt 1164) 344 and Diamond Bank Plc V Partnership Investment Co Ltd.

[44] This common law principle as stated by his Lordship seems to have been encapsulated by section *218, Torts Law of Anambra State which provides that …*every person shall have a duty to take reasonable care to avoid any act or omission which he is reasonably expected to foresee as likely to injure persons who are so closely and directly affected by his acts or omissions that he ought reasonably to have them in contemplation as being so affected when he is directing his mind to any such act or commission.

[45] See the Cases of Guaranty Trust Bank Plc. v. Professor Kobina Keme-Ebi Imananagha (2024) 5 NWLR, (Pt. 1930) 72, C.A; Agboola v. A.S.B. Investment Limited (2023) 16 NWLR 241 C.A; MT Sea Pioneer v. Adeyeye (2023) 15 NWLR 35 C.A.

[46] D.A Akhabue, "Negligence in Nigeria- Not at claimant's beck and call", (2012), 1 (6), *International Journal of Law and Legal Jurisprudence Studies*; 2; In Lufthansa German Airlines v Ballanye (2013) 1 NWLR (Pt. 1336) 527, the Supreme Court Per Kalgo J.S.C. had this to say: "The general principle is that the tort of negligence arises when a legal duty owed by the defendant to the plaintiff is breached and to succeed in an action for negligence the plaintiff must proof by the preponderance of evidence or the balance of probabilities that: "(a) the defendant owed him a duty of care; (b) the duty of care was breached; (c) the defendant suffered damages arising from the breach." 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. C.F.A.O. (1966) 1 All NLR 140 at 145.

[47] (1856) II Ex. CH 781.

> 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.[48]

Thus, the doctrine of negligence has therefore, evolved three basic elements which are preconditions for the success of any case on negligence.[49] These requirements are discussed *ad seriatim.*

2.2.1.1 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.[50] The most accepted expression of the duty principle is the one made by Lord Atkin in the leading case of *Donoghue v Stevenson*.[51] 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 neigbour. Who, then in law, is my neigbour? 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 omission which are called in question.[52]

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

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[48] Ibid.
[49] B.A Susu, *Law of Torts*, (Lagos: CJC Nig. Ltd.), 1996, p. 89.
[50] Donoghue v. Stevenson (1932) A.C. 562, 580.
[51] Ibid.
[52] Ibid.

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.[53] 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.[54] 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*[55] 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 basis 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, 'duty is seen as a notional pattern of behaviour,[56] 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.'[57]

Onyemenam, J.C.A. in P.W. (NIG.) LTD v. Mansel Motors LTD & anor[58] 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...[59]

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[53] 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.
[54]K.A 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.
[55] [1963] 2 ALL ER at 864.
[56] R.W.M Dias, 'The Duty Problem in Negligence Cases' 1928, 28 Col. L.R. 1014 cited in G. 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.
[57] Ibid.
[58] (2017) LPELR-43390(CA).
[59] Ibid, P. 11, Paras. F-A; Anyah V. Imo Concorde Hotels LTD. (2002) 18 NWLR (PT.799) 377.

Meanwhile, the existence of a duty of care depends on the facts of each case as it is not a fixed situation.[60] Describing what a duty relation connotes, Morrison[61] observed as follows:

> By duty 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 giving rise to the duty of care in the individual case.[62]

Brett, M. R., in his own contribution to this issue in the case of *Heaven v. Pender*,[63] 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.[64] 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[65] lays down the following standards:

i. Was the injury reasonably foreseeable?
ii. Was the relationship proximate?

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[60] 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.
[61] W.L Morrison 'A Re-examination of the duty of care' 1948, 11 Mod. LR 9.
[62] 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.
[63] (1883) 11QBD 503.
[64] Y. Olomojobi (n.40), 142.
[65] (1990) 2 AC 605.

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

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 and who has a case of negligence alleged against him, he will be judged with the same standards as qualified doctors.[66] International Code of Medical Ethics also states that,[67] "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[68] 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:[69]

> 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[70] 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 such damage could be a physical one, for instance forgetting a needle in the abdomen of the patient.[71] 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.

[66] i. e. native doctors who practice as qualified medical doctors.
[67] Adopted by the 3rd General Assembly of the World Medical Association, London, England, by October, 1949.
[68] As Adopted by the Second Assembly of the World Medical Association, Geneva, Switzerland, September 1948.
[69] E. N. Uzodike, E.S. Akpata, *The Doctor and The Law: Professional Negligence and Medical Ethics* (Lagos: Lagos State University Press, 1983) p. 56.
[70] B. A. Garner, *Black's Law Dictionary*, (9th Ed. United States: Thomson Reuters Publishing Company, 2009), 1402.
[71] Ibid.

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.[72]

2.2.1.2 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*,[73] 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 B,[74] describing what negligent act entails posited as follows:

> Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.[75]

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.[76] To 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.[77]

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*

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[72] D.A Akhabue, Negligence in Nigeria- Not at claimant's beck and call*, International Journal of Law and Legal Jurisprudence Studies*; (2012) 1 (6), 2.
[73] (1933) 2KB 461 at 468.
[74] In Donoghue v Steveson (1932) AC 562.
[75] Ibid.
[76]B.A Susu, Law of Torts, (Lagos: CJC Nig. Ltd.), 1996, 76.
[77] G 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,* 124.

Guarantee & Accident Co Ltd,[78] Lord Wright opined thus: 'The degree of care which the duty involves must be proportionate to the degree of risk involved if the duty of care should not be fulfilled.' In *Osemobor* v *Niger Biscuit Co Ltd*[79] 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.[80]

2.2.1.3 The Concept of Damage

The onus is 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. 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.[81]

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.[82]

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[78] (1935) 53 Lloyds Rep. 67.
[79] Ibid.
[80] Ibid, 25 (paras. A-B).
[81] 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.
[82] G. Kodinlinye: *The Nigerian Law of Torts* (Ibadan: Spectrum Law Publishing; 1997), 68.

2.2.1.4 The Concept of Causation

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.

2.2.1.5 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. 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. This was adopted in the case of *Barnett* v *Chelsea and Kessington Hospital Management Committee*,[83] 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 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.*[84] In this case, the first respondent claimed against the second respondent and the appellant jointly and severally the sum of (₦2,000,000.00) being special and general damages for injuries suffered by him arising from a Fanta drink, which he drank. The first respondent

[83] [1968] 2 WLR 422.
[84] (1938) 5 N.W.L.R. 295.

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.

2.2.1.6 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. 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.[85]

This principle illustrated by the case of *Mange v Drurie*,[86] 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.

[85] Ibid.
[86] (1970) NNLR 62.

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 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.[87]

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[88] put this view succinctly:

The free, deliberate and informed omission of a human being, intended to exploit the situation created by the defendant, negates causal connection.[89]

2.2.1.7 The concept of Negligent Misstatement

The law distinguishes between a duty to take care in respect of acts or omissions to act and the duty not to make careless statement.[90] 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.[91] Note however that, for a careless statement to be actionable the following conditions must be fulfilled:

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

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[87] Ibid.
[88] H.L.A Hart and T. Honore, *Causation in the Law*, (2nd ed. Oxford: Clarendon Press, 1959), 324.
[89] Ibid.
[90] This principle was advanced in the celebrated case of *Hedley Byrne & co. Ltd v Heller & partner's ltd.* (1964) AC 465.
[91] D.A Akhabue, "Negligence in Nigeria- Not at claimant's beck and call,' (2012) 1 (6) *International Journal of Law and Legal Jurisprudence Studies* 11.

iii. There must be a loss arising from the reliance.[92]

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.[93] In Hedley's case,[94] 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. 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.[95]

2.2.1.8 The concept of Limitation of Statute

There are applicable statutory provisions which stipulate time limitation within which an action can be brought. 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 years.[96]

2.3 The Concept of Human Rights

The best way to describe a term as complicated as "Human Rights" in jurisprudence is by way of etymology, hence, the term involves two distinct objects which are Human and Rights. While "Human" means "relating to human beings," relating to members of the races of *homo sapiens* that is, men women, children, 'Right' refers to that which is just or correct, truth, fairness, justice, just or legal claim. Therefore, human rights may be described as the freedoms, immunities, and benefits that according to modern values, all human beings should

[92] Ibid.
[93] Hedley Byrne & co. Ltd v Heller & partners ltd. (1964) AC 465.
[94] Ibid.
[95] Akhabue, (n.91), 11.
[96] 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.

be able to claim as a matter of right in the society in which they live.[97] In the Nigerian context, human rights can be said to be applicable to every person but it is not correct to state that human rights are absolute as every right is subject to some level of restriction or exception. Human rights involve all those rights allowed by the constitution and those bestowed on individuals by statues and common law, for example, those found in the law of tort. Therefore, human rights law in Nigeria is that area of the law that recognizes and protects the legitimate claims of persons in Nigeria.[98]

The Court of Appeal while delving into a jurisprudential analysis explained the term "Human Rights" as inherent to all human beings, whatever the nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status, every person by virtue of being human (a class of the homo sapiens) is entitled to human rights.[99]

2.3.1. Human Rights or Fundamental Rights?

Fundamental rights are generally regarded as those aspects of human rights which have been recognised and entrenched in the Constitution of a country[100]. They are specially provided for to enhance human dignity and liberty in every modern State. In Nigerian context the terms "human rights" and "fundamental rights" are always used interchangeably. This has been justified by a learned author who has stated:

"Human rights remain so, whether they occur in the international plane or within municipal plane or within municipal confines, and whether they are called "human rights" or "fundamental rights." It should be noted that the international bills of rights-the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights-use the expression fundamental human rights. So also, the UN Charter.[101]

Since the constitution specifically provides for 'fundamental rights" Nigerian Courts have found it expedient to draw a line of dichotomy between 'human rights' and 'fundamental rights. Thus, in *Uzoukwu v. Ezeonu II Ors.*[102] The Court of Appeal (per Nasir J.C.A) said:

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[97] B.A Garner (n.70), 209.
[98] Osita Nnamani Ogbu, *Human Rights Law and Practice in Nigeria; an introduction*, (CIDJAPRESS, Enugu 1999), 31.
[99] Fort Royal Homes Ltd and anor. v. EFCC and Anor (2017) LPELR-42807, p. 19 per Yahaya JCA.
[100] See Chapter Four of the 1999 Constitution of the Federal Republic of Nigeria, as amended.
[101] Osita Nnamani Ogbu, *Human Rights Law and Practice in Nigeria; an introduction*, (CIDJAPRESS, Enugu 1999) P.31.
[102] (1991) 6 NWLR (Pt. 200)708 at 761.

> Due to the development of Constitutional Law in this field distinct difference has emerged between 'Fundamental Rights' and 'Human Rights'. It may be recalled that human rights were derived from and out of the wider concept of natural rights. They are rights which every civilized society must accept as belonging to each person as human being. These were termed human rights. When the United Nations made its declaration, it was in respect of 'Human Rights' as it was envisaged that certain Rights belong to all human beings irrespective of citizenship, race, religion and so on. This has now formed part of International Law. Fundamental Rights remain in the realm of domestic law. They are fundamental because they have been guaranteed by the fundamental law of the country; that is by the constitution.

The confusion associated with the difference between 'Human Rights and 'Fundamental Rights' has been removed in Nigeria.[103] Human Rights are now said to include fundamental rights and any of the rights provided for in the Chapter IV of the constitution and the African Charter on Human and People's Rights (Ratification and Enforcement) Act.[104] On the need for judges to bear in mind that the Constitution cannot condescend to details in its description of the fundamental rights and freedoms it guarantees, Ayoola J.C.A (as he then was) once observed thus:

> The constitution is an organic document, which must be treated as speaking from time to time. It can therefore only describe the fundamental rights and freedoms it guarantees in broad terms. It is for the courts to fill the fundamental rights such as would fulfil their purpose and infuse them with life. A narrow and literal construction of human rights provisions in our constitution can only make the constitution arid in the sphere of human rights. Such approach will retard the realizations, enjoyment and protection of those rights and freedoms, and is unacceptable.

2.4 The Principle of Medical Negligence

It is imperative to state that law of medical negligence is concerned with the injury to the plaintiff's interest and such interest must be protected and recognized by law.[105] This means that where there is an interference to the health of the plaintiff and such interference is recognized or enforceable in law, such interference can be legally protected. However, there are many interferences or interests that are not enforceable. No wonder the law is settled that there may be damage without any right of action. This type of damage includes but not limited to the following:

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[103] Order 1 Rule 2 of the Fundamental Rights Enforcement Procedure Rules, 2009.
[104] (CAP A9) Laws of the Federation of Nigeria, 2004.
[105] B.A Susu, Law of Torts, (Lagos: CJC Nig. Ltd.), 1996, 4-5.

a. Unexpected damage from natural causes
b. Damage resulting from the proper conduct of a defendant which conduct I protected by an existing law
c. Damage which from policy consideration, is regarded too minimal to be subject to the legal process.

Apart from the afore-listed damage, it must be known that the courts are usually ready and prepared to fashion a remedy for any damage to a person's personal interest. There are even instances where the court recognizes the existence of a legal injury, and therefore actionable in court, without any acknowledged damage by the plaintiff. These involve those unusual occasions where the interest being interfered with is of such grave societal importance, and there is a matching need to proscribe the type of conduct causing such interference that any such interference is actionable without actual proof of damage. This is popularly expressed in a maxim *"injuria sine damno*' which literally means injury without damage. The wrongful conduct or act is actionable per se and the tortfeasor is held liable primarily for his conduct. i.e. assault and battery and medical negligence etc.

Consequent upon the above, it can be said that medical negligence is that aspect of the civil law which is concerned with the nature and extent of unliquidated civil liability with reference to injuries to a patient as a result of the medical practitioner and patient relationship. The primary function of tort medical negligence is to provide protection for the individual's personal interests and against the unreasonable interference with such interests by another. This position is well reiterated by the American Restatement on Torts[106] as follows|:

> If society recognized a desire as so far legitimate as to make one who interferes with its realization civilly liable, the interest is given legal protection, generally against the world, so that everyone is under not to invade the interest by interfering with the realization of the desire by certain forms of conduct.

It is also settled law that once it can be established that the plaintiff is injured by the act of the defendant, the law usually provides for the paymet of compensation to the plaintiff. It also follows that the plaintiff receives compensation for injury suffered as the result of the wrongful conduct of others.[107] The provision of financial compensation for a non- financial

[106] A. Abu, *Restatement of the Law*, (2nd Minn., St. Paul (American Law Institute), 1965, 45.
[107] Bellefield Computers Services Ltd v E.Turner and Sons Ltd [2000] BLR 97.

situation which could be emotional loss would seem both inadequate and improper to many laymen considering the African culture and tradition.

To this end, it can be argued that the tort of medical negligence and the award of compensation to the injured party protects the rights of patients as right to life is a right that is protected by extant laws and statutes. It is not designed to replace the interest lost as a result of the wrongful conduct of the tortfeasor. It is merely intended to assuage the grief of the victim over the loss by helping shift the burden of the loss which would have aggravated the pain of such loss.[108] The development of this area of law can be seen as having a commendable societal objective and the maintenance of societal peace. For many violent and injurious acts of retaliation must have been discouraged by the thought of the receipt of adequate compensation by the victim of the initial tort.[109]

Thus, tort of medical negligence prohibits unlawful interference with the rights and health of patients, and where a tort is committed the law of tort provides a remedy for it, by an award of damages or other equitable relief. Medical negligence also deals with variety of wrongs and also enforce the rights and liability and where appropriately, remedies to those wrongs that are protected by law.

[108] K.A 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, 107.
[109] Ibid.

Chapter Three

Legal and Institutional Framework of Medical Negligence in Nigeria

3.1 Legal Framework of Medical Negligence in Nigeria

Historically, Nigerian laws are largely derived from English laws as a result of its colonial heritage, ratified international treaties, conventions and protocols as well as local legislations. In 1963, the Medical and Dental Practitioners Act was enacted under parliament and the law established the Nigerian Medical Council. In 1980, the Nigerian Medical Council was replaced by the Medical and Dental Council of Nigeria by military decree 23 of 1988. Over the years, it has been observed that there are different laws and regulatory agencies regulating the medical profession in Nigeria. This is borne out of the fact that man is avaricious in nature and if there is no law to checkmate him, he might hurt his neighbor. In order to protect his neighbor from his professional conduct, some enactments need to be in place and a regulatory body to implement the enactments.

It is upon this background that the Medical and Dental Practitioners Act, CAP M8 Laws of the Federation of Nigeria, 2004, Rules of Professional Conduct for Medical and Dental Practitioners, revised in 2004 and currently known as Code on Medical Ethics in Nigeria, Criminal Code, Penal Code, Declaration of Geneva,[110] International Code of Medical Ethics[111]was enacted and other related laws. This chapter will therefore assess relevant laws in relation to the subject matter.

3.1.1 Medical and Dental Practitioners Act

The central enactment that currently regulates the medical profession in Nigeria is the 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

[110] Adopted by the 2nd General Assembly of the World Medical Association, Geneva, Switzerland, September, 1948.
[111] Adopted by the 3nd General Assembly of the World Medical Association, London, England, by October 1948.

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, it 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 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.[112] In the case of *Denloye v Medical Council Disciplinary Tribunal*[113] 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*,[114] 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.

3.1.2 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.[115] 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

[112] See section 16 (6) of the Medical and Dental Practitioners Act CAP M8 Laws of the Federation of Nigeria, 2004.
[113] (1968) All NLR 306.
[114] (1959) 4 FSC 59.
[115] CAP M8 Laws of the Federation of Nigeria, 2004.

him. This also presupposes that a medical practitioner is expected to be diligent and must always remember the ethics of the profession in discharging his duties towards his patient.[116]

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*,[117] 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.[118] 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

[116] K.A 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, 107.
[117] (1977) NMLR pt. 506 p. 550.
[118] Y. Olomojobi (n.40), 154.

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.[119]

3.1.3 The Nigerian Criminal Code

Section 303 of the Criminal Code[120] 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[121] 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*[122] provides that anyone who is in a negligent and rash manner, such as to cause harm to or endanger the life of

[119] Ibid.
[120] Cap C38 Laws of the Federation of Nigeria, 2004.
[121] Ibid.
[122] Ibid.

another, gives any person he had undertaken to treat surgical or medical treatment, such a person is guilty of a misdemeanor and liable to imprisonment for one year. However, *Section 297 of the same Criminal Code*[123] 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.

3.2 Institutional Framework for the Tort of Medical Negligence

3.2.1 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.[124]

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.[125] It should be noted that the Body that appoints the chairman and members of the disciplinary is Medical Council.[126]

The Tribunal is given responsibility to Conduct 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;

To Compel any person by subpoena to give evidence before it;

Also, 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 deciding, if

[123] Ibid.
[124] Section 15 (1) & (2) of the Medical Practitioners Act, 2004.
[125] section 15 (3) Medical and Dental Practitioners Act, CAP M8 Laws of the Federation of Nigeria, 2004.
[126] Ibid, section 15 (4).

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.[127]

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[127] Ibid, Section 15 (4).

Chapter Four

Comparative Studies of Medical Negligence in The United Kingdom, Canada and Nigeria

4.1 Medical Negligence in United Kingdom

Tracing the historical antecedent of Medical Negligence in United Kingdom, Lord Denning was of the view that:

> A medical man, for instance, should not be found guilty of negligence unless he has done something of which his colleagues would say: "he really did make a mistake there, He ought not to have done it.[128]

The above position of Lord Denning MR shows that the applicable test for the tort of negligence is objective. That is, what a reasonable man on the street will think. It is interesting to observe that Medical Profession is practiced in United Kingdom under the National Health Service.[129] The body saddled with the responsibility of regulating medical profession in United Kingdom is General Medical Council (GMC).[130] It is noted that the lawsuit, settled by Field Fisher Waterhouse LLP, resulted in one of the UK's largest medical negligence claims pay outs at an estimated £24 million over the course of Maisha's lifetime.

Medical negligence takes place when a physician fails to provide the standard of treatment expected to treat a specific medical condition and the patient suffers due to the negligence of the doctor.[131] The patients rest great faith in the medical practitioners and believe that they have the ability to treat the medical conditions effectively. In most of the cases, the physicians treat the ailments successfully and help the patients get back to their normal lives. However, in some exclusive cases, the doctors fail to maintain the standard of treatment specified by law and his carelessness aggravates the condition of the patient. This entire

[128] Bolam v Friern Hospital Management Committee (1957) 2 All ER.
[129] Professor J. Hodgson's speech delivered at the Fourth Annual Comparative Health Law Conference, "Medical Malpractice: A Comparative Analysis," sponsored by Loyola University Chicago School of Law Institute for Health Law in October of 1993 @ http://lawecommons.luc.edu/annals last accessed 12/7/2024.
[130] This can be found in http://www.nationalarchives.gov.uk/doc/open.
[131] PIWH.ORG.

incident can be seen as an instance of medical negligence. In the UK, the medical negligence law protects all those who have suffered in the hands of the doctors.[132]

4.2 Medical Negligence in Canada

In Canada, it is noted that medical practitioners usually often engage in private practice needless to say that they are sued individually for the tort of medical negligence.[133] This is evident in the private practice of Canadian Medical Practitioners as they are nit largely employed by the state or under a unified state control. In order to bring Medical Negligence under control in Canada, Canadian Medical Practice Law, 2001 was enacted.[134] Also, each jurisdiction and province in Canada have their respective Hospital Act and accompanying regulations.[135] The entire medical profession is regulated by Canadian Medical Association with other professional bodies like Federation of Medical Regulatory Authority of Canada (FMRAC). The Canadian Medical Association regulates the medical profession by virtue of an enactment known as Canadian Medical Association Code of Ethics (Ottawa 2004) and by virtue of this enactment, every Canadian medical practitioner knows what is expected of him in dealing with his patient.[136]

4.2.1 Causation and Proof of Medical Negligence in Canada

Causation is the relationship that must be found to exist between the tortious act of a defendant and the injury to the plaintiff in order to justify compensation of the latter out of the pocket of the former.[137] The plaintiff has the burden of proving, on a balance of probabilities that the defendant caused or contributed to the injury.[138] Our Courts have consistently and recently reaffirmed that the general test for causation is that which requires the plaintiff to show that the injury would not have occurred "but for" the negligence of the defendant.[139] The test requires the plaintiff to establish on a balance. There are difficulties in

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[132] Professor J. Hodgson's speech delivered at the Fourth Annual Comparative Health Law Conference, "Medical Malpractice: A Comparative Analysis," sponsored by Loyola University Chicago School of Law Institute for Health Law in October of 1993 @ http://lawecommons.luc.edu/annals last accessed 12/7/2024.
[133] Medical Liability: Canada, England, & Wales, Germany & India, the law liability of congress, Global Legal Research Centre (202) 707-6462 available at http://www.law.gov last assessed 12th July, 2024.
[134] Canadian Medical Malpractice Law in 2011: Missing the mark as Patient Safety, (86 Chikent Law Review 1553, 2011) at https://schorlaship.kentlaw..iitredu.cklawreview/vol86/iss/34 last accessed 12th July, 2024.
[135] For instance, Ontario Health LAW regulating Ontario Health Insurance Plan.
[136] This can be found in https://policybase.cmacal/policy/pdf/pdo4-6 last assessed 12th July, 2024
[137] Snell v. Farrell, [1990] 2 S.C.R. 311 at para. 226.
[138] Athey v. Leonati, [1996]3 S.C.R. 458 at para. 13; Snell v. Farrell, [1990] 2 S.C.R. 311 at para. 14; McGhee v. National Coal Board, [1972] All E.R. 1008 at 4 (H.L.).
[139] McLachlin, J., summarised the problem in "Negligence Law - Proving the Connection" in Mullany and Linden eds., Torts Tomorrow, A Tribute to John Fleming (L.B.C. Information Services, 1998) at 18, stating:

the application of this test. The Courts have recognised that the criteria used by scientists to determine whether or not damages are probably related to a particular cause are, occasionally, at odds with common sense and experience. There are cases in which the negligent act of the defendant has made it impossible for the injured party to prove causation. There are cases in which the ability to prove or disprove causation rests particularly with one party. There are cases in which it is impossible to prove whether or not a negligent act, which created a risk of injury, actually caused the resultant injury. In attempting to apply the general principles to such cases, the Courts have identified circumstances in which the strict application of the "but for" test, or application of scientific standards of certainty in the application of the test, would result in an injustice. As a result, our courts have been prepared to draw an inference of causation from "very little affirmative evidence"[140] and have identified exceptions to the "but for" test with a view toward avoiding injustice. Attempts to shift the Onus of Proof When the House of Lords decided *McGhee v. National Coal Board*, [141] it was widely expected that the decision would lead to a significant reappraisal of the approach taken to causation in negligence cases. Just as *Donoghue v. Stevenson*[142] expanded the scope of those to whom an individual owes a duty of care, so it was thought that McGhee would result in significant relaxation of the standard test for causation of damages. Despite the subsequent restriction or repudiation of the decision in McGhee, there are still those who see the case as the beginning of the end of general application of the "but for" test in negligence cases generally.[143] The case of the unwashed coal miner is almost as familiar as that of the consumer of ginger beer. Mr. McGhee's employers had been negligent in failing to provide him with or nothing, test denies recovery where our instinctive sense of justice - what is the right result for the situation - tells us the victim should obtain some compensation washing facilities at his workplace. It was recognised that coal dust increased the risk of an individual suffering from dermatitis and Mr. McGhee had in fact contracted that uncomfortable condition. His dermatitis might have resulted from his working conditions generally but it stood to reason that the long ride home covered in coal dust certainly increased the risk of illness. The Law Lords held that in these circumstances, it fell to the employer, the Coal

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Why are the courts now asking questions that for decades, indeed centuries, they did not pose themselves, or if they did, were of no great urgency? I would suggest that it is because too often that traditional "but for," all - 3 - probabilities that the defendant's tortious act was a necessary cause of his or her injuries.

[140] Snell v. Farrell, [1990] 2 S.C.R. 311.

[141] [1972] 3 All E.R. 1008 (H.L.).

[142] [1932] A.C. 562 (H.L.).

[143] There is a very enlightening review of the case and its impact on the law by Lord Hope of Craighead, "James McGhee - A Second Mrs. Donahue?" (2003) 62 Cambridge L. J. 587.- 4.

Board, to establish that appropriate washing facilities would not have avoided the resultant injury. Lord Wilberforce noted: First, it is a sound principle that where a person has, by breach of a duty of care, created a risk, and an injury occurs within the area of that risk, the loss should be borne by him unless he shows that it had some other cause. Secondly from an evidential point of view, one may ask, why should a man who is able to show that his employer should have taken certain precautions, because then there is a risk, or an added risk of injury or disease, have to assume the burden of proving more: namely that it was the addition of the risk, caused by the breach of duty, which caused or materially contributed to the injury? In many cases, of which the present is typical, this is impossible to prove, just because honest medical opinion cannot segregate the causes of an illness between compound causes. If one asks which of the parties, the workman or the employers, should suffer from this inherent evidential difficulty, the answer as a matter of policy or justice should be that it is the creator of the risk who, ex hypothesis must be taken to have foreseen the possibility of damage, who should bear its consequences. The judgment in this case and Lord Wilberforce's comments, in particular, have been relied upon as authority for the proposition that where the plaintiff is able to establish that negligence has increased the risk of a particular type of injury, and that type of injury has occurred, the onus of disproving causation then falls upon the defendant. The argument that the case stands for such a broad principle, which would wholly displace the "but for" test in an extremely wide range of cases, should have been put to rest by the subsequent decision of the House of Lords in Wilshire v. Essex Area Health Authority.[144] In Wilshire, a neonate developed an eye condition that was caused either by the provision of excessive oxygen by employees of the National Health Authority, or by other, non-tortious, factors. The claim against the National Health Authority succeeded in the Court of Appeal. The majority applied the reasoning that served as the foundation of the judgment in *McGhee v. National Coal Board*,[145] finding that the negligent care increased the risk of the eye condition that materialized and that it fell to the National Health Authority to disprove causation, which it could not do. Sir Nicolas Browne-Wilkinson dissented, finding that *McGhee v. National Coal Board*[146] should not be applied in circumstances where there are both tortious and non-tortious causes of the injury, either of which would have been sufficient to cause the damages. The House of Lords agreed with Sir Browne-Wilkinson and dismissed the case. Lord Bridge noted that in certain passages in

[144] Wilshire v. Essex Area Health Authority, [1988] 2 W.L.R. 557 at 569
[145] Ibid.
[146] Ibid.

McGhee v. National Coal Board, the Lords had been careful to restrict the application of the case. Lord Bridge noted: The conclusion that I draw from these passages is that *McGhee v. National Coal Board*[147] laid down no principle of law whatsoever. On the contrary, it affirmed the principle that the onus of proving causation lies on the pursuer or plaintiff. Adopting a robust and pragmatic approach to the undisputed primary facts of the case, the majority concluded that it was a legitimate inference of fact that the defender's negligence had materially contributed to the pursuer's injury.[148] Our Supreme Court considered the principles addressed in *McGhee*[149] *and Wilshire*[150] and put another nail in the coffin of the argument that the burden of proof of causation in negligence cases should shift in cases where there is scientific uncertainty in its decision in *Snell v. Farrell*. In that case, the plaintiff underwent surgery that was not performed to an appropriate standard of care, following which he suffered a stroke and became blind. Neither the plaintiff's nor the defendant's experts could say with medical certainty whether the stroke that triggered the blindness was caused by the admitted negligence. There was no doubt that the negligence in surgery - producing in fact a retrobulbar bleed - increased the risk of stroke. The trial and appellate courts considered the English decisions and differed on the extent to which there could be said to be a shifting of the burden of proof of causation. At the Supreme Court of Canada, Sopinka J,[151] described the principles that should be applied in addressing causation in circumstances where medical opinion evidence is an imperfect tool to establish or disprove a causal link between established breach of duty and obvious damages: 1. Causation need not be determined with scientific precision; 2. Factfinders are to take a "robust and pragmatic approach" to the facts relied upon by an injured person to support the conclusion that the misconduct of a defendant is a factual cause of his or her injury; 3. Where the relevant facts are particularly within the knowledge of the defendant "very little affirmative evidence will be needed to justify an inference of causation, in the absence of evidence to the contrary"; and 4. Factual causation is a question to be answered by the application of "ordinary common sense." A portion of the judgment of Sopinka J.[152] is often cited in arguments on causation. Mr. Justice Sopinka makes it clear in his judgment that the Court is describing circumstances

[147] McGhee v. National Coal Board supra.
[148] Professor J. Hodgson's speech delivered at the Fourth Annual Comparative Health Law Conference, "Medical Malpractice: A Comparative Analysis," sponsored by Loyola University Chicago School of Law Institute for Health Law in October of 1993 @ http://lawecommons.luc.edu/annals last accessed 12/7/2024.
[149] Ibid.
[150] Ibid.
[151] McGhee v. National Coal Board (1972), UKHL 7, 1 W.L.R 1.
[152] David Cheifetz, "The Snell Inference and Material Contribution: Defining the Indefinable and Hunting the Causative Snark" (2005) 30:1 Advocates' Q. 45.

in which inferences may be drawn from evidence properly adduced, rather than a shifting of the burden of proof in difficult causation cases. He notes "[t]his is sometimes referred to as imposing on the defendant a provisional or tactical burden", and continues as follows: The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced. If some evidence to the contrary is adduced by the defendant, the trial judge is entitled to take account of Lord Mansfield's famous precept.[153] This is, I believe, what Lord Bridge had in mind in Wilshire when he referred to a robust and pragmatic approach to the facts." *Snell v. Farrell* is a case in which the Court, as a result of evidentiary constraints, drew inferences from evidence before the Court. In drawing those inferences, the Court, in *Snell v. Farrell,*[154] gave the well-established principles, weighed the nature of the evidence that each party was likely to have been able to lead. The judgment has, accurately in our view, been described as an application of the evidentiary rules governing circumstantial evidence. Mr. Justice Sopinka clearly understood that such circumstantial evidence is often all that exists in medical cases and that medical defendants, like other professionals, are often in a better position to adduce evidence than are plaintiffs. He noted: In many malpractice cases, the facts lie particularly within the knowledge of the defendant. In these circumstances, very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary.[155] In a number of cases, courts have attempted to confine the application of the judgment in Snell to cases where there is circumstantial or prima facie evidence of causation and where no evidence has been led by the defendant. Mr. Justice Sopinka's judgment clearly contemplates such a restriction. In *Moore v. Castlegar & District Hospital,*[156] the plaintiff established that the defendant doctor breached the duty of care owed to the plaintiff by failing to take appropriate spinal x-rays following a motor vehicle accident. At issue was whether the plaintiff's spinal cord injury occurred before or after the plaintiff's admission to hospital. Both parties led evidence on the issue of causation. The trial judge rejected the plaintiff's evidence on causation and accepted the defendant's evidence and the

[153] Professor J. Hodgson's speech delivered at the Fourth Annual Comparative Health Law Conference, "Medical Malpractice: A Comparative Analysis," sponsored by Loyola University Chicago School of Law Institute for Health Law in October of 1993 @ http://lawecommons.luc.edu/annals last accessed 12/7/2024.
[154] Ibid.
[155] Professor J. Hodgson's speech delivered at the Fourth Annual Comparative Health Law Conference, "Medical Malpractice: A Comparative Analysis," sponsored by Loyola University Chicago School of Law Institute for Health Law in October of 1993 @ http://lawecommons.luc.edu/annals last accessed 12/7/2024.
[156] (1998), 49 B.C.L.R. (3d) 100 (C.A.) leave to appeal to S.C.C. ref'd (1998) S.C.C.A. No. 171. 21

action was dismissed. On appeal, the plaintiff contended that the trial judge erred in failing to draw an inference, in the absence of affirmative x-ray evidence[157] that the defendant's spinal cord injury occurred after he arrived in the hospital. Hollinrake J.A. determined that, since expert evidence had been led on the causation issue, this was not a case in which the court could rely upon an inference of causation, as described in Snell.[158] Further, part of the physician's breach of duty was that appropriate x-rays had not been taken. Had the x-rays been taken there would have been affirmative evidence, one way or the other, with respect to when the spinal cord damage occurred. With respect, I think in a case such as this where there is affirmative medical evidence leading to a medical conclusion it is not open to apply "the common-sense reasoning urged in *Snell v. Farrell*." I take it this is what the trial judge was referring to when she said: All parties have led evidence on this issue [causation] and it would be inappropriate to resort to an inferential analysis as was argued on the plaintiff's behalf. I share that view.[159] A similar result was obtained in *Bigcharles v. Dawson Creek* and District Health Care Society.[160] Mr. Bigcharles suffered a spinal injury in a motor vehicle accident, attended at hospital and was later found to have suffered a neurological injury resulting in paraplegia. He had not received an appropriate series of x-rays and the Court had to wrestle with the difficult question whether or not a failure to immobilise Mr. Bigcharles caused or contributed to his ultimate injury. In dissenting reasons, Madam Justice Southin noted at para. 5: Because of the nature of the evidence, this case raises what to me is the most elusive concept in the common law - a concept which arises in many branches of the law - „causation". In the very close case, which this is, that essential ingredient is made not less elusive by being dependent on the doctrine of burden of proof. That doctrine is easy enough to put into words, but in every close case, its proper application is an intellectual minefield made more dangerous in medical malpractice cases where, if the law is as [defence counsel] asserts, it is all or nothing, by which I mean that no matter how grossly incompetent the physician is the plaintiff gets nothing unless he can prove," causation" or „material contribution", but if he can show a material contribution" from some act which is on the very

[157] David Cheifetz, "The Snell Inference and Material Contribution: Defining the Indefinable and Hunting the Causative Snark" (2005) 30:1 Advocates' Q. 45.
[158] Ibid.
[159] David Cheifetz, "The Snell Inference and Material Contribution: Defining the Indefinable and Hunting the Causative Snark" (2005) 30:1 Advocates' Q. 45.
[160] Bigcharles v. Lomax, 2001 BCCA 350. 24.

borderline of negligence, he may recover an enormous sum of money no matter how tenuous his moral right. [161] Hon. Justice Southin held as follows:

> It would not be a right formalistic proposition to deny any recovery to the appellant, but it would equally not be right to hold that he is entitled to judgment in the same amount as he would have recovered from the driver of the other vehicle if that driver had been the sole cause of the collision and the resultant paraplegia.

Southin J.A. would have granted judgment to the plaintiff in the sum of $150,000, an amount which appears to have been intended to reflect either the blameworthiness of the defendant physician's conduct relative to that of the other tortfeasor or the relative contribution in causal terms of each contributor to the Plaintiff's indivisible injury. The majority of the Court in Bigcharles took a more conventional approach to causation, holding that, because substantial evidence on the issue of causation had been adduced by the defendants, a ruling on the factual evidence was required. That substantial body of evidence had been weighed by the trial judge, who had refused to draw an inference favourable to the plaintiff on causation. Hollinrake J.A. held: I do not view the principle in Snell as being one to permit a trial judge to leap to a conclusion by way of an inference without a full consideration of the evidence during the weighing process. If that process leads to a conclusion that neither party has made out its case on a balance of probabilities where, as here, there is a substantial body of evidence led by the defendants on the issue of causation, it is in my opinion open to the trial judge to decline to draw an inference on this issue.[162] Further confirmation that the inferential approach is not appropriate in cases where affirmative medical evidence is adduced by the defence on the issue of causation came from the *C.P.M. (Guardian ad litem of) v. Martin's*[163] decision. In Martin, a woman gave birth to twins, one of whom was diagnosed with herpes shortly after delivery. She brought an action in negligence against Dr. Martin, a specialist in obstetrics and gynecology for failing to diagnose her genital herpes. The mother also sued, as guardian ad litem of one of the twins, claiming that the infant contracted herpes in the birth canal during delivery, a result which could have been avoided if Dr. Martin diagnosed her herpes in a timely fashion and recommended birth by caesarean section. Dr. Martin was found negligent at trial for failing to properly test the mother for and exclude the diagnosis of herpes. However, the infant plaintiff's claim was dismissed on the basis that causation had not been proven. There were three possible periods during which herpes could have been

[161] Ibid.
[162] Ibid.
[163] (1999) 1 Exchr. 24.

acquired by the infant plaintiff in Martin: in utero; during birth; post-birth in the hospital nursery. Only if the Court could find that herpes was contracted during birth could it hold that Dr. Martin's negligence in failing to diagnose herpes and recommend birth by caesarean section, which the mother would have accepted, caused the injury. Each party called expert evidence on the issue of the medical degree of likelihood that the infant plaintiff contracted herpes during delivery. The plaintiff's expert opined that based on the fact that 90-95% of cases of neonatal herpes infections occur at the time of delivery, it was more likely that the infant plaintiff also contracted herpes during delivery. The defence's expert did not disagree with the plaintiff's expert's statistics, but concluded that specific facts made it more likely that the infant plaintiff's case fell in the exceptional category of cases in which herpes was contracted in utero or after delivery. The most significant fact favouring this conclusion was that the infant plaintiff's twin, who was delivered first and was thus exposed to hours of broken membranes and maternal genital secretions, had not contracted the virus. Having heard both experts" evidence, the trial judge concluded that there were two equally plausible theories of causation and that the infant plaintiff's case did not cross the necessary threshold of proof of causation on a balance of probabilities. On appeal, the infant plaintiff argued that the trial judge erred in failing to apply the robust and pragmatic approach in Snell to the issue of causation. The basis of the infant plaintiff's argument was that in the absence of "definitive medical proof on a balance of probabilities, it was incumbent on the trial judge to instead apply the Snell approach"[164] If she had applied Snell, the argument went, the trial judge would have concluded that Dr. Martin's negligence "materially contributed" to the risk that the infant.[165]The plaintiff would acquire the virus during birth, amounting to proof of causation. The Court of Appeal disagreed with this argument, noting that the defence led ample evidence that the virus had not been contracted during delivery and that, based on that evidence, the trial judge concluded that the plaintiff failed to establish causation on a balance of probabilities. Snell, in the opinion of the Court of Appeal, did not stand for the proposition that, as the infant plaintiff's argument implied, a "tie means that the plaintiff succeeds or, to put it another way, that 50% equals 51%". Further, in distinguishing the Martin case from the Snell case, the Court of Appeal noted: The defendant in Snell negligently failed to detect and treat a condition that might have led directly to the plaintiff's blindness in one eye. Dr. Martin did not cause the adult plaintiff to have genital herpes. He did not alter her physical condition. His negligence was his failure to pursue medical investigation that would have resulted in the

[164] Ibid.
[165] C.P.M. (Guardian ad litem of) v. Martin, 2006 BCCA 333.

correct diagnosis. Had he made the correct diagnosis, the risk of either twin contracting herpes during birth would have been lessened by resort to caesarean section, although some risk would have continued. But the question still remained as to whether the infant plaintiff contracted the virus during birth or as a result of one of the other possible causes. The expert evidence was directed to that question. The ability of the medical experts in this case to render a subjective opinion as to the likely cause of the infant plaintiff's exposure to the virus was not obscured by anything done or not done by Dr. Martin.[166] Another example of a defendant leading "evidence to the contrary" to prevent the drawing of an inference of causation from circumstantial evidence as per Snell is the case of Sam v. Wilson.[167] In Sam, the defendant doctor and provincial nurses were found negligent in failing to monitor Mr. Sam while he was taking certain medication with potentially serious side effects. The trial judge held that it could be inferred on the basis of Snell that the defendants" negligence caused Mr. Sam's liver failure. On appeal, the trial judge's finding of causation was overturned. Mr. Justice Smith, speaking for the majority in Sam, held that because the defendant, Dr. Wilson, led expert evidence that proper monitoring (in accordance with hospital protocols) would not have likely disclosed the abnormally elevated liver enzymes at the time when such disclosure would have altered the outcome for Mr. Sam, there was no support for the finding that Dr. Wilson's failure to monitor Mr. Sam was a cause of his liver failure. This was, in the opinion of Smith J.A., "evidence to the contrary" to an inference that Dr. Wilson's negligence caused Mr. Sam's liver failure.[168] Therefore, causation could not be proven on a "but for" test by resorting to a common-sense inference on the basis of Snell. The initial consideration of McGhee and Wilshire in Canada, as reflected in the judgment in Snell v. Farrell, led to a refusal to shift the onus of proof of causation and a reiteration of the "but for" test. However, it also led to confirmation that the onus could be discharged, in appropriate cases, by little positive evidence. An inference of causation would be more readily drawn where the defendant did not call evidence on causation and even more readily drawn in cases where the defendants were uniquely qualified to lead such evidence but failed to do so. As can be seen from the decisions noted above, after *Snell v. Farrell* we all became more conscious of our obligation to lead evidence on causation of damages so as to avoid the invitation to draw inferences from circumstantial evidence.

[166] 2006 BCCA 623, 14.
[167] 2007 BCCA 622.-12.
[168] Chaplin v. Hicks, [1911] 2 K.B. 786 (C.A.).

Loss of Chance:

In cases where the Court receives affirmative expert evidence addressing factual causation, there are particular problems that arise when error deprives the plaintiff of a chance of avoiding injury. Where there is a probability that a specific injury (either the whole or part of the plaintiff's damages) would have been avoided, but for the error of the defendant, the plaintiff is entitled to compensatory damages. Where there is some possibility of the avoidance of damage, that is less than a probability, the Courts have wrestled with the manner in which this "loss of a chance" should be addressed. The loss of a chance analysis evolved in the context of claims arising out of the loss of a right to participate in a contest or game of chance. In Chaplin v. Hicks,[169] the Court considered an appeal from a jury verdict in favour of a plaintiff who had lost an opportunity to enter a contest to select actresses for theatre productions. The plaintiff was selected as one of 50 finalists to be interviewed for one of the 12 prizes. The offer to participate in the contest set out terms that were found to be contractually binding once accepted by the participants. The defendant failed to properly notify Miss Chaplin of her opportunity to attend for an interview and she lost her opportunity to participate further in the contest. Although it was admitted that there was a breach of contract, the defendant argued that damages were too remote to be foreseeable or were incapable of assessment. Despite the fact that Chaplin v. Hicks[170] is frequently cited as leading and ground-breaking authority for the proposition that a plaintiff may recover for the loss of a chance, the Court does not appear to have regarded the case as a novel one. The case came on appeal from a jury verdict for the Plaintiff awarding £100. The judgment on appeal notes that a chance may be a possibility or probability and that the assessment of the damages by the jury was not unreasonable in light of the value and probability of success. If success was very probable, that would only result in a higher award of damages by the jury. The award was simply regarded as a common-sense assessment of a layperson's perception of the value of the loss occasioned by inability to participate further in the competition. Had the plaintiff not been selected as one of the 50 finalists, the Court indicated that damages might have appeared to be too speculative for assessment by the jury. In anomalous cases, damages for the loss of a chance have occasionally been awarded in cases of medical negligence without careful or significant analysis of the case law. In *Seyfert v. Burnaby Hospital*

[169] Chaplin v. Hicks, [1911] 2 K.B. 786 (C.A.).
[170] Ibid.

Society[171] for example, McEachern C.J.S.C. considered a claim brought by a plaintiff who attended at hospital following a stab wound to the abdomen. The Court found that the patient had been discharged from hospital without the careful period of observation necessary so as to ensure that the wound had not resulted in bowel perforation and the attendant risk of infection, which constituted a failure to meet the standard of care. The issue at trial was whether delay in providing the plaintiff with treatment caused or contributed to the subsequent abdominal infection, which required a second surgery and the performance of a colostomy. The Court considered the plaintiff's submission that *McGhee v. National Coal Board* was applicable in the circumstances of the case, but rejected that argument holding: In my view, it would be contrary to principle to hold the defendant responsible for damage he may not have caused unless there is a compelling reason why the Court should reach such a conclusion.[172] The Court went on, however, to hold that there was 25% chance that the second surgery could have been avoided by early and prompt treatment and awarded the plaintiff 25% of the measure of damages that would otherwise have been awarded for the second surgery and colostomy. There is no reference in the judgment to any case law on the loss of chance issue. Careful consideration of the claims for the loss of a chance of better outcome have regularly resulted in the dismissal of claims. In *Hotson v. East Berkshire Area Health Authority*[173] the House of Lords considered an appeal brought from a judgment in favour of an infant plaintiff who suffered avascular necrosis as a result of late diagnosis of a hip fracture. Significant evidence was adduced at trial with respect to the chance that the avascular necrosis could have been avoided if there had been prompt diagnosis and treatment of the fracture. The trial judge found that there was a 75% chance that the plaintiff's injury would have occurred even with prompt care and awarded the plaintiff damages that were the equivalent of 25% of those that would ordinarily have been awarded for the entire injury. The Lords were careful not to rule out entirely the possibility of medical malpractice cases resulting in a judgment for the loss of a chance, but held that the Hotson case was not such a case. In this respect, Lord Bridge held: In some cases, perhaps particularly in medical negligence cases, causation may be so shrouded in mystery that the Court can only measure statistical chances. But that was not so here. On the evidence, there was a clear conflict as to what had caused the avascular necrosis. The authority's evidence was that the sole cause was the original traumatic injury to the hip. The plaintiff's evidence, at its highest, was that the

[171] (1986), 27 D.L.R. (4th) 96 (B.C.S.C.). 14.
[172] Ibid.
[173] 1987] 2 All E.R. 909 (H.L.).

delay in treatment was a material contributory cause. This was a conflict, like any other about some relevant past event, which the judge could not avoid resolving on a balance of probabilities. Unless the plaintiff proved on a balance of probabilities that the delayed treatment was at a material contributory cause of the avascular necrosis, he failed on the issue of causation and no question of quantification could arise[174] Lord Bridge went on to hold that the case should not be decided as a loss of chance case, despite the fact that there was a "superficially attractive analogy" between the principle applied in such cases as *Chaplin v. Hicks* and "the principle of awarding damages for the lost chance of avoiding personal injury or, in medical negligence cases, for the lost chance of a better medical result which might have been achieved by prompt diagnosis and correct treatment."[175]Lord Bridge held that "there are formidable difficulties in the way of accepting the analogy."[176]

4.3 Medical Negligence in Nigeria

In Nigeria, if a medical practitioner is found liable for medical negligence, the practitioner may be subject to 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.[177] In the case of *Denloye v Medical Council Disciplinary Tribunal*[178] 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*,[179] 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.

[174] David Cheifetz, "The Snell Inference and Material Contribution: Defining the Indefinable and Hunting the Causative Snark" (2005) 30:1 Advocates,' 45.
[175] Ibid.
[176] Ibid.
[177] See section 16 (6) of the Medical and Dental Practitioners Act CAP M8 Laws of the Federation of Nigeria, 2004.
[178] (1968) All NLR 306.
[179] (1959) 4 FSC 59.

4.5 Proof of Medical Negligence under Law of Torts in Nigeria

Essentially, Tort 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 was separated from criminal action as acts which would not require the requirements of "*mens rea.*"[180]In *the case of Thorns*,[181] it was held that the remedy in tort 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 or tortuous act has to show that the tortfeasor was negligent, this will then require a level of proof, it will also be added that since law of tort 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.[182] The plaintiff has to adduce evidence to show that the defendant committed an infraction which amounts to a breach of tort. For instance, it may ne negligence, malicious prosecution, assault and battery etc. No wonder *Section 135 (1) of the 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 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*,[183] 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.[184]

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

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[180] B.A Susu, *Law of Torts*, (Lagos: CJC Nig. Ltd. 1996) p. 85; see also, The Case of Thorns (1466) Y.B. Ed. 4.
[181] Ibid.
[182] 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.
[183] (2006) 9 NWLR (Pt. 986) 573 at 590-591.
[184] See also Ezemka v. Ibeneme (2004) 14 NWLR (Pt. 894) 617.

i. 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
ii. 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
iii. Where there are conflicting presumptions, the case is the same as there were conflicting evidence.[185]

Torts may be actionable per se or not actionable per se depending on the circumstances of each case. Where it is actionable per se, 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 tortuous acts. 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.[186]

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.[187]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.[188] 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.

[185] Sokwo v. Kpongbo (2008) 2 NWLR (Pt. 1086) 346 SC.
[186] K.A. Obafemi (n.54), 109.
[187] D.A. Akhabue, (n.91), 7.
[188] Ibid.

From the above, it can be seen that the doctrine of res ipsa loquitur is only applicable to Tort of negligence. Meanwhile, where the plea of res ipsa loquitur is allowed, there are two effects as follows:

i. 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.
ii. The plea *res Ipsa loquitor* has the effect of reversing the burden of proof.[189]

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*[190] 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 tortuous 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

4.5.1 Proof of Law of Medical Negligence through Evidential Burden of Proof

The quantum of proof in civil action is a preponderance of probability.[191] The plaintiff has to adduce evidence to show that the defendant is liable in medical negligence under law of tort. *Section 135 (1) of the 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 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

[189] Henderson v. Henry E. Jenkins & sons (1970) A.C. 82.
[190] (1865) 3 H & C 596; See also Byrne v Boadle (1863) 159 Eng. Rep. 299.
[191] 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.

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*,[192] 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.[193]

4.5.2 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 given by eyewitness testimony.[194] 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[195] According to Hon,[196] 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.[197] 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.[198] 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

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[192] (2006) 9 NWLR (Pt. 986) 573 at 590-591.

[193] See also Ezemka v. Ibeneme (2004) 14 NWLR (Pt. 894) 617.

[194] The Black's Law Dictionary, 10th edition, pg. 674.
[195] Alexander M. Burrill, A treatise on the Nature, Principles and Rules of Circumstantial Evidence 4 (1868).
[196] Sebastine Tar. HON (SAN), *Law of Evidence in Nigeria* (2nd ed. Nelag Publishing, 2011), 7-8.
[197] Ahmed v State, Tegwonor v state (2008) All FWLR (pt. 424) 1484 at 1506-1507 C.A.
[198] Igabele v State (2005) All FWLR (pt 285) 568 C.A.

the facts taken as a whole do not admit of inference but point irresistibly to his guilt.[199] Thus in *Idiok v State*,[200] 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.

In *Ijiffor v State*,[201] 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.[202] Evidence may be direct or circumstantial.[203] 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.[204] 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

[199] Abacha v State (2002) FWLR (pt. 118) 1224 S.C. and Enwereji v State (2005) All FWLR (pt. 280) 1606 C.A.
[200] (2008) All FWLR (pt. 421) 797.
[201] (2001) 9 NWLR (pt. 718) 371 S.C.
[202] Sule Ahmed (alias Eza) v. The State (2002) 1 SCM 39.
[203] Ikomi & Ors. v The State (1986) 1 NSCC 730.
[204] Idemudia v The State (1999) 5 SCNJ 55.

to support a conviction.[205] A conviction cannot be based on circumstantial evidence unless and until all the inference to be drawn from the whole history of the case point strongly to the commission of the crime by the accused.[206] 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.[207]

4.6 Application of the Doctrine of *Res Ipsa Loquitur*

Res ipsa loquitur [208] is a latin phrase which means '' the fact speaks for itself. '' The term is sued to refer to describe anything that is, plain, clear, or self -explanatory and needs no further explanation, proof, or clarification. Res ipsa loquitur of the law of evidence whereby the mere fact that a thing happened raise in inference of negligence on the part of the defendant, so that there is prima facie case and he has to make his defence. The principle of *res ipsa loquitur* as a rule of evidence does not apply in criminal law. The doctrine of *res ipsa loquitur* does not apply when the fact of what happened are sufficiently known, but the rule only applies when there is no explanation.

The court has applied the doctrine of *res ipsa loquitur* and presumed negligence in many cases which include the following:

1 Things falling from a building and inuring the plaintiff[209]
2 Accident due defective machine, objective vehicle, structure and so forth.
3 Motor vehicle veering off and mounting a pavement[210]
4 Aircraft which crashed immediately after taking off [211]
5 Swab left in the body of a patient after an abdominal operation[212]
6 Having four stiff fingers and a useless arm after treatment of the hand and arm[213]
7 Clothing containing harmful sulphite which inflicted dermatitis on the wearer[214]

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[205] The State v John Ogbubunjo & Anor (2007) 3 SCM 119.
[206] Durwode v The State (2000) 12 SCNJ 1.
[207] K.A 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 fulfillment of the requirement of the award of the Degree of Doctor of Philosophy, 2017, p. 250.
[208] E. Malemi, *Introduction to Law of Torts in Nigeria*, (Lagos: Princeton Publishing & Co 2nd Edition, 2014), 177 Scott v London & St. Katherine Docks Co (1865) 159 ER 665.
[209] Scott v London & St Katherine Dock Co. (1865) 159 ER 665. Bryne v Boadle (1863) 159 ER 29.
[210] Laurie v Raglan Building Co. (1941) 3 All ER 332.
[211] Fosbroke Hobbes v Airwork Ltd. (1937) 1 All ER 108.
[212] Mahon v Osborne (1937) 1 All ER 535 CA.
[213] Cassidy v Ministry of Health (1951) 1 All ER 574 CA.
[214] Grant v Australian Knitting Mills Ltd (1936) AC 85.

8 Motor vehicle knocking down a person walking on the road side from behind [215]

Meanwhile, for the purpose of this study, we shall be more concerned about the application of *res ipsa loquitur* to medical negligence in Nigeria.

4.6.1 Proof of Medical 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.[216]Generally, in medical malpractice and traffic accident cases which form an integral part of the law of torts, it may be difficult for the patient plaintiff to prove negligence because he may not know what happened.[217] 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*[218]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 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.[219]

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.*[220] From the provision of this section, the italicize part means that the Act recognizes that the law may be

[215] Ibekanu v Ike (1992) 6 NWLR pt 299, 287 SC.
[216] D.A. Akhabue, (n.91), 7.
[217] Ibid.
[218](1863) 2 H & C 722.
[219] See Butterfield v Forrester (1809) 11 East 60.
[220] *Italicize mine.*

an exception to the general burden of proof (*affirmanti non negante incubit probatio*).[221] 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.*[222]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.

4.7 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:[223] to wit;

a. Civil Jurisdiction
b. Criminal jurisdiction
c. The principle of *res ipsa loquitur*

a. 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*.[224] 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.[225]

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

[221] It is for he who asserts to prove.
[222] Italicize mine.
[223] Y. Olomojobi (n.7), 156.
[224] (1932) AC 562
[225] See Agbonmagbe Bank Ltd. V. CFAO Ltd (1967) NWLR 173; Abubakar v Joseph (2008) 13 NWLR (pt. 1104) 307

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 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*,[226] 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 goes beyond the purview of professional negligence and becomes a crime in

[226] (1942) 8 W.A.C.A 5, p. 8

proper terms. This principle is trite as in *Garba v University of Maduiguri*[227] 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.[228]

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*[229] where it was held as follows:

> 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*[230] 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.

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[227] (2007) 19 NSCC 306
[228] *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*
[229] (2007) All FWLR (Pt. 348) 771.
[230] (2007) All FWLR (Pt. 348) 883 at 901 C-E.

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 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.[231] Liability for the resulting damage will be occasioned between the tortfeassor and the injured party.[232] The potency of this defence was stated by the court in *Nance v British Colombian Electric Ry. Co ltd.*[233] 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.

This is based on the legal principle that one person in fault will not dispense with another's using ordinary care for himself.[234] 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 will not constitute contributory negligence. Also, the acts of children, physically challenged persons or incapacitated persons are usually not treated as contributory negligence.[235]

[231] See the English Law Reform (Contributory Negligence) Act, 1945; Evans v Bakare (1973) 3 SC 77.
[232] Pasterck v Poulton (1973) 2 All ER 74.
[233] (1951) AC 601.
[234] See Butterfield v Forrester (1809) 11 East 60.
[235] See Yachuk v Oliver Blais (1949) AC 386.

Chapter Five

Summary, Conclusions and Recommendations

5.1 Summary

Chapter One of this study appraises the general overview of medical rights of patients in Nigeria. It identifies the problems and also provides for the aim and objectives of the study.

Chapter Two discusses the opinions of scholars in relation to the subject matter and also explains different concepts associated with rights of patients and medical negligence in Nigeria. Chapter Three of this study discusses the relevant laws enacted to guide medical practitioners and health workers on what to do and what ought not to be done whenever they are treating their patients. The relevant laws protects patients from medical abuse and negligence and punishes medical practitioners who do not comply with the provisions of those laws. Also, the same chapter makes provisions for different institutions that safeguard medical profession in Nigeria.

Chapter Four of this study first and foremost, compare the incidence of medical negligence in the United Kingdom, Canada and Nigeria and submits that medical negligence in Canada and United Kingdom are more pronounced by the court and the judicial pronouncement has made the medical practitioners to be aware of how to treat their patients. It also discovers that medical 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 wilfully 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.

Chapter five makes provisions for summary of findings, conclusions and recommendations.

5.2 Conclusions

From this study, it can be seen that 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.

This study has also examined the antecedents of medical negligence in United Kingdom, Canada and also appraise legal and framework of medical negligence in Nigeria. It also discussed the options available to victims of medical negligence and defences that can avail a medical practitioner from being liable to medical negligence. It is also seen that there are more than one body saddled with distinct responsibility of ensure that medical practitioners who are duly registered are protected by law and ensure that there is no form of professional misconduct or medical negligence

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

In medical negligence, a lot of injured patients and their families in Nigeria are suffering silently by leaving the matter to God, attributing every medical adverse event in the course of treatment as 'God's Will' or believing 'It's God's Time' for a person to die while the negligent doctor(s) and/or hospitals are becoming more careless in discharging their duties, consequently causing more harm and death to their patients. This silent attitude of affected victims is caused by several reasons. The primary reason is the socioeconomic, cultural, and religious beliefs of Nigerians towards litigation (that litigation is evil and should be discouraged). Another factor is that majority of Nigerians do not know their rights. Those who know their rights and proceed to litigation have been discouraged because mostly, medical practitioners that are called to give expert opinion/evidence are usually reluctant to testify against fellow practitioners or cover-up for them which hinder prosecution of cases against them. Furthermore, the applicable laws, especially, the Code of Medical Ethics in Nigeria, and their enforcements are not very effective. Thus, there is a call on the Nigerian government to fill up the loop-holes in deciding synergizing the doctrine of *res ipsa loquitur* with medical negligent cases, accidents and vicarious liability. The loopholes to fill include the provision of legal and regulatory reforms to discourage occurrences of medical negligence. Also, the National Assembly can introduce amendments into existing laws, prioritizing timely access to needed diagnostics and rehabilitative care, and promoting continuous education and training among health practitioners. The establishment of a clearer legal framework and enforcement mechanisms can also address the issue of medical negligence in Nigeria.

It is also 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 and Canada accept cases on the basis of their winning potential and Nigeria can also adopt the same

strategy. 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.

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