AN APPRAISAL OF CONTEMPORARY ISSUES IN PROOF OF MEDICAL NEGLIGENCE IN NIGERIA

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Abstract

Medical negligence as a tort is not materially different in law from other forms of negligence. However, an oft-overlooked proposition holds that the process of proving medical negligence is the most difficult of all proves in the law of tort. Indeed, in medical practice, the existence of a legal duty of care is of the very essence and presents no difficulty. Also, that there has been a breach of that duty, may be presumed or inferred from the plaintiff injury or harm. What is however considered extremely difficult is the process of proving that the injury or harm suffered was a direct consequence of the breach of the duty owed to a patient. Litigants and their lawyers are suddenly confronted by a mirage of challenges, described as "fortress of Jericho walls" and *which they must overcome if their case is to succeed. This research therefore examines issues relating to the difficulties experienced in the process of proving medical negligence in Nigeria and the mitigating options. The study adopts a doctrinal method of study. The primary*

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and secondary sources of the material relied on were analysed through a descriptive and analytical method. The study observes that the fault-based litigating system appears to be unduly protective of the medical practitioners, to the detriment of the injured patients. Consequently, it is recommended that Nigeria should adopt approaches that can help ease the burden of proof placed on an already burden-laden patient.

Keywords: Medical, Practitioner, Negligence, Burden of Proof, Standard of Proof

1.0 Introduction

It is a settled fact that the medical profession is one of the noblest professions among all other profession and it's indispensable in today's civilized world. It is one profession whose activities touches on the lives of virtually every member of the society and the practitioners literally holds in their hands, the power of life and death.[1] With this enormous power that medical practitioner wields, comes also, enormous responsibilities on their part to exercise such powers diligently so as not to cause injury or harm to patients in their care. The sad reality however is that patients who go to hospitals for treatment in Nigeria, sometimes, end up leaving with more or different injuries than they came to the hospital with[2]. These injuries have been incurred from the negligent acts of the medical practitioner or supposed caregivers. Indeed, negligence occasioned by medical practitioners have become a very disturbing issue with increasing daily occurrence in the country.[3] Nigeria has one of the highest-ranking patient's mortality rates in the world.[4]

[1] Abatan v. Awudu (2003) 10 NWLR (Pt. 829) 451

[2] J. Imuekemhe, 'An Examination of the Disposition Of The Law To Cases Of Medical Negligence In Nigeria'. Edo University Law Journal, Vol. 1, 2018. Retrieved on April 26, 2024

[3] F. Chukwuneke 'Medical Incidents in Developing Countries: A few case studies from Nigeria' Nigerian Journal of Clinical Practice Vol.18, No.7, 2015, pp. 20-24. Retrieved on April 26, 2024

[4] https://data.unicef.org/country/nga. Retrieved on April 26, 2024

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Publicized reports of harm or injuries incurred by patients as a result of the negligent care provided by medical practitioners have raised public concerns about the state of the nation's healthcare system. In the past, citizens have always had a rather lethargic attitude towards issues of negligence by medical practitioners often resigning it to an "act of God" or "the work of the devil"[5]. The medical practitioner was seen as 'he who says or does no wrong' and so, cannot be challenged or questioned. This is no longer the case. There is now a steady rise in the volume of litigation in the field of medicine. This has been justly occasioned by the public concerns about the nation's decayed healthcare system, the ever-increasing sophistication of medical procedures, rapid access and greater awareness on the part of patients of their health and legal rights and the willingness to protect and pursue such rights. There is now more litigation consciousness among the populace.[6] Patients/victims of medical negligence or their relatives are now demanding from medical practitioners' explanations for treatments or surgeries that go awry.[7]

Despite the rise in the number of cases of medical negligence brought before the courts, the question is; how many of such litigation or claims against a medical practitioner have succeeded? There seems to be an avalanche of odds against patients/victims in achieving a successful outcome in medical negligence cases before the courts.[8] Umezulike cited by Ali,[9] described these odds as the "fortress of Jericho walls". The consequence of this wall is that while it is may be easy to identify and prove recklessness or negligent among member of other

[5] J. Imuekemhe, 'An Examination of The Disposition Of The Law To Cases Of Medical Negligence In Nigeria'. Edo University Law Journal, Vol 1, 2018. Retrieved on April 26, 2024

[6] A. Ogwomwa, 'Medical Negligence and Jurisprudence', The Nation, 13 November 2012, Retrieved from thenationonlineng.net on April 26, 2024

[4] M. Brazier and J. Miola, 'Bye-Bye Bolam: A Medical Litigation Revolution'. Medical Law Review, Vol. 8, 2000, p.86; J. Allsop and L. Mulcahy 'Maintaining Professional Identity: Medical practitioners' Response to Complaints', Sociology of Health and Illness Vol. 20, No. 6, 1998, p. 803

[8] Y. Ali, 'The Prospects of Litigation in Medical Negligence in Nigeria: An Analysis'. Retrieved from www.docpl aver.net/672198 on 11 Dec. 2023

[9] Y. Ali, 'The Prospects of Litigation in Medical Negligence in Nigeria: An Analysis'. Retrieved from www.docpl aver.net/672198 on April 26, 2024

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professions, the assessment of the quality and carefulness of the medical practitioner is usually a herculean task. The reasons for these are not farfetched; the patient may not know enough of what happened or what went wrong. Moreover, the care delivered are often carried out behind closed doors, away from public scrutiny. In addition to this, there is also the issue of colleague solidarity and conspiracy of silence that prevents medical practitioners from speaking against each other. All of these, makes it difficult to ascertain the level of skill and competence exercised,[10] or how negligence was occasioned.

The burden of proving that the medical practitioner did not exercise the appropriate of skill and competence towards a patient who he owed a duty of care and so, was in breach of that duty, and that this breach occasioned harm or injuries suffered by the patient is placed heavily on the plaintiff who may or may not even know how or when such injury occurred. By law and practice, the medical practitioner need not prove that he exercised adequate skill and competence as would be reasonably expected from a medical practitioner of his class[11]. All that is expected and mandated by law is that the plaintiff prove generally those acts or omissions of the medical practitioner that he claims amount to negligence.

This requirement of proving fault has no doubt placed a onerous burden on plaintiffs in negligence litigation, but it seems like the burden has been made more stringent overtime.[12] There are a lot of unreported medical negligence cases where the plaintiffs had failed as a result of their failure to proof their case against the Medical Practitioner. Flowing from the above, there is obviously a need to analyse the issue of proof of medical negligence in Nigeria, particular the challenges encountered by the patients in such an endearvours, while proffering some strategies

[10] E. Malenti, Law of Tort, (1st edn, Lagos, Princeton Publishing 2013). p. 264

[11] F. Tafita and F. Ajagunna, 'Accessing Justice for Medical Negligence Cases in Nigeria and the Requisite for No-Fault Compensation'. J.P.C.L. Vol. 10, No. 2, September, 2017

[12] Some of these rules and principles which have developed through judicial and sometimes established by administrative pronouncements will be highlighted in the course of discussion.

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to mitigate this. This is with a view to providing a contemporary work for lawyers and litigants on relevant avenues to aid their claims of medical negligence.

2.0 Research Methodology

In consonance with the nature of the research work and for ease of reading, this research work employs the doctrinal research method in arriving at its conclusion. Doctrinal research is seen as research into doctrines. The subject matter of this work is largely regulated by common law principles of the law of tort and also, principles of evidence as contained in the Nigerian Evidence Act, 2023. An in-depth study of the subject will be explored through data gathered from primary and secondary sources. The primary source being the relevant legislative enactments and an abundance of court's decision, referred to as case laws, while the secondary sources are the relevant works of scholars, legal books, and learned articles in journal and on the internet, relating to the subject matter. Through this means, the researcher makes an honest attempt at showcasing elaborately the various challenges confronting a victim of medical negligence, while proffering approaches that could ensure speedy, faster and less formal dispensing of justice in an event of medical negligence.

3.0 Conceptual Clarification

Medical negligence is hinged on the tortious principle of negligence and so, it is imperative to first examine the term negligence before conceptualizing medical negligence. The term negligence is derived from the Latin word, *negligentia*, literally meaning "not to pick up[13]. The term which is developed in the 19th century and now exists as a separate and independent tort, is one of the most common and most important aspect of the Law of tort.[14] One key thing to note in addressing the term is that its ordinary, everyday meaning is different from its legal meaning. The ordinary meaning of negligence, refers to

[13] M. Izzi, 'An Overview Of Medical Negligence In Nigeria'. Available at https://www.researchgate.net/publication/332291216. Retrieved on 21 April, 2024

[14] E. Schräge, 'Negligence: The Comparative Legal History of the Law of Torts (2001, Duncker und Humblot, Berlin) Comparative Studies in Continental and Anglo-American legal history; Bd. 22

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the failure to take proper care in doing something. However, the legal definition of negligence is the failure to exercise the level of care toward another person that a reasonable or prudent person would exercise under similar circumstances.[15] Thus, Alderson maintains that negligence is the omission to do something which a reasonable man, guided upon those conditions which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.[16]

Medical negligence therefore, is seen by Staunch and Wheat, as a form of negligence related with the delivery of health care services.[17] It is the failure or omission on the part of a medical practitioner, to exercise a reasonable degree of skill and care in the treatment of a patient. Halsbury's Laws of England provides that, once a person is consulted by a patient and he holds himself out as ready to give medical advice or he undertakes to treat that patient, he impliedly undertakes that he possesses the skills and knowledge and so, incurs a duty of care at that instance. In attending to the patient, he must exercise reasonable care and skill; it is immaterial that the person is rendering such service ex gratia or that he is not a registered practitioner.[18] If he fails to provide the care which is expected in such case, thus resulting in injury or death of the patient, then medical negligence has occurred.

Proof is a requirement in any criminal trial or civil case[19]. It is what demonstrates something to be real or true. Proof is the establishment of

[15] B. Wong and A. Ramirez, 'What Is Negligence? Definition & Examples'. (2024 Forbes Media LLC). Available at https://www.forbes.com/advisor/legal/personal-injury/negligence/#:~:text=Proving%20a%20negligence%20claim%20can,way%20a%20reasonable%20person%20would. Retrieved on 23 April, 2024

[16] B. Alderson, 'Medical Negligence Liability under Tort Law, Available at, http://shodganga.inflibnet.ac.in> Retrieved April 26, 2024. Also in the case of Odinaka V Moghalu (1992) 4 NWLR pi 233 @ p 15SC

[17] M. Staunch and K. Wheat, Sourcebook on Medical Law, (Cavendish Publishing Ltd., 1998) p. 275.

[18] 3rd edition (Simmons Edition) Vol. 26 article 26 P. 17)

[19] Cornel Law School, Available at https://www.law.cornell.edu/wex/proof#:~:text=Proof%20is%

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a fact by proper legal means to the satisfaction of the court and in this sense includes "disproof"[20]. A fact is proved when the court is satisfied as to its truth and the evidence by which that result is produced is called "proof".[21] The issue of proof is always key to the success of every action before a Court of law. A particular cause of action will fail to be regarded as a cause of action properly so called, if the action is not capable of being proved. Burden of proof, also known as 'onus of proof, refers to the legal obligation which rests on a party in relation to a particular issue of fact in a civil or criminal case, and which must be 'discharged', or 'satisfied', if that party is to win on the issue in question.[22] It is used to describe the duty which lies on one or other of the parties, either to establish a case or to establish the facts upon a particular issue.[23] The Evidence Act 2023 makes copious provisions on the burden of proof in cases. It provides in Section 132 that the burden of proof in a suit or proceeding, lies on that person who would fail if no evidence at all were given on either side. In civil cases, the burden of first proving existence or non-existence of a fact, lies on the plaintiff, because, it is against him that the judgment of the Court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings. The Supreme Court of Nigeria has in a plethora of cases, affirmed this position.[24]

Standard of proof refers to the degree of probability that facts must be proved to be true. This trite position was recently upheld by the Supreme

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20the%20evidence%20used, proven%20beyond%20a%20reasonable%20doubt. Retrieved 20/12/23

[20] S. Ibiama, 'Professional Negligence in Medical Practice: The Right of the Victim' (2012) available at: https://www.academia.edu/36611479/Professional_Negligence_In_Medical_Practice_The_Right_Of_The_Victim_Approved_Topic_To_Be_Undertaken_By Retrieved on 23 April, 2024

[21] Evidence Act, Section 121

[22] C. Allen, Practical Guide to Evidence, (2nd Edn, London, Cavendish Publishing Ltd., 2001)

[23] Okoye v. Nwankwo (2014) 15 NWLR (Pt. 1429) 93 S.C

[24] Onovo v. Mba (2014) 14 NWLR (Pt. 1427) 391 S.C; Okusami v. A. G., Lagos State (2015) 4 NWLR (Pt. 1449) 220 at p. 248, paras. D-E; Also Rilwan & Partners v. Skye Bank Plc. (2015) 1 NWLR (Pt. 1441) 437 (C.A)

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Court of Nigeria when the Court held that civil suits are decided on balance of probabilities; put differently, on the preponderance of evidence.[25] A civil case is said to have been proved on the preponderance of evidence when the evidence of the party on whom lies the onus of proof, is more likely to be true than that of the adverse party and that it also means that one side's position outweighs the other when all admissible evidence before the Court are put on an imaginary scale. It therefore follows that in a medical negligence suit, it is for the patient-complainant to establish his claim against the medical man and not for the medical man to prove that he acted with sufficient care and skill. If the initial burden of negligence is discharged by the claimant, it would be for the medical practitioner to substantiate his defence that there was no negligence.[26]

4.0 Acts Amounting to Medical Negligence

Acts that give rise to a claim of medical negligence are as diverse as the practice of medicine itself. There are however some negligent act or omission that recur as a result of medical practitioners' carelessness and which have been judicially noticed as acts that amount to medical negligence. They include:

i. Errors in Treating Patients

Error in the treatment of patients is the most common cause of medical negligence. This can take a multitude of forms. They may arise from the medical practitioner's lack of knowledge[27], a lack of skill in performing a particular procedure, a momentary, inadvertent slip,[28] or a conscious decision by the medical practitioner to depart from the standard

[25] Uwah v. Akpabio (2014) 7 NWLR (Pt. 1407) 472 at p. 489, paras. B-D. The position also upheld in the Court of Appeal case of Alechenu v. University of Jos (2015) 4 NWLR (Pt. 1440) 333 at p. 370, paras. B-C

[26] K. Gupta, 'Standard of Care Required in Medical Profession- A Shift from Bolam to Bolitho'- http://www.dullb.com/Downloads/Medical%20negligence%20law%20of%20torts.pdf-.
Position also held in the case of Ojo v. Gharoro (2006) 10 NWLR (Pt. 987)173 S.C; Julius Berger Nig. Plc v. Ugo (2015) LPELR-24408 (CA), p. 71, paras. C-D

[27] Reynard v. Carr (1983) 30 C.C.L.T. 42 (B.C.S.C)

[28] Gonda v. Kerbel (1982) 24 C.C.L.T. 222

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procedure normally employed in the circumstances.[29] But for liability to accrue against the medical practitioner, it must be established that the Medical practitioner had acted below the standard of a reasonable medical practitioner in the same circumstance.[30]

ii. Improper Diagnosis

A medical practitioner ought to carry out a proper diagnosis before undertaking any form of medical treatment on a patient. This is to ascertain the true status of the patient's health and to determine the best mode of treatment. The patient is entitled to a careful examination as his condition and the circumstances will permit, with the exercise of such diligence and the application of such methods of diagnosis for discovering the nature of the ailment as are usually utilized by medical men of ordinary judgment and skill as the physician.[31] Where it is shown that there was an unequivocal instance of poor diagnosis, such an act can give rise to a claim of medical negligence[32]

iii. Neglect or Abandonment

Where a medical practitioners fails to attend promptly to a patient requiring urgent attention or abandons his patients, that is, neglect them in the course of treatment; that may amount to negligence depending on the circumstances.[33] This was also found in the case of *Olowo v Nigerian Navy*[81] where a Medical Practitioner employed by the Nigerian Navy was held to be liable for failure to examine a patient who was admitted into the hospital leading to the loss of her pregnancy and loss of her womb.

iv. Failure of Communication

Failure of communication between medical practitioner and patient or

[29] Clark v. MacLennan (1983) 1 All E.R 416
[30] Kanu Okoro Ajegbu v. Dr.E.S. Etuk (1962) 6 E.N.L.R. 196.
[31] M. Crawford and R. Alan, Medical Practitioner and Patient and the Law, (5 Edn, C.V. Mosby Co., Saint Louis, 1971). P. 326.
[32] Charlsworth On Negligence, (6th Edn, London, Sweet And Maxwell) P. 755, Para 1230; University of Ilorin Teaching Hospital v Akilo [2000] FWLR Pt. 28 P. 2286.
[33] Barnett v. Chelsea and Kensington Hospital Management Committee (1969) 1 Q.B. 528. Also in, Dickson Igbokwe v. U.C.H. Board Management (1961) W.R.N.L.R. 173.

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between practitioners, may frequently be an act of medical negligence. For instance, when a medical practitioner or nurse is handing over a patient to another colleague, the standard practice is to disclose to the colleague what treatment had been administered to facilitate appropriate treatment. The appropriate thing is for the first medical practitioner to communicate directly with the second one, preferably in writing. Where this is not done and harm occurs, the medical practitioner can be held liable for negligence.[34]

v. Improper Administration of Drugs

An act of medical negligence can be inferred in situations in the choice of the drug for the patient's condition. This can be over dosage, or infections that follow injections and results from the use of unsterilized equipment, or solutions[35]

vi. Failure to Get the Consent of the Patient

Consent to medical examination and treatment by a patient is very important because, without it, the medical practitioner will not have any authority to commence any form of investigation on, or treatment of the patient. In fact, consent to medical examination and treatment is a right of a fundamental character.[36] Where a Medical practitioner fails to get consent from his patient before treating him, the medical practitioner may be liable in tort for battery, and negligence, as well as liability for professional misconduct.

5.0 An Overview of Medical Negligence Litigation in Nigeria

For practical and legal purposes, the principles underlying professional negligence is that anyone who holds himself out as having a professional skill is expected to demonstrate the level of competence associated with the proper discharge of the duties of the profession. Whereas he falls short of that and causes injuries to another, it is clear that he is not demonstrating the requisite ability and will be deemed

[34] Rule 10, Professional Conduct for Medical and Dental Practitioners

[35] University of Nigeria Teaching Hospital Management Board and others v. Hope Nnoli. (1994) 8 N.W.L.R.PT. 365, 367, at 395-6

[36] Medical and Dental Practitioners Dental Tribunal v. Okonkwo (2001) 7 NWLR (Pt. 711) 206

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liable in law. In litigating a claim of medical negligence in Nigeria, the law requires that such a tortious action must be brought before the Court by a competent party against another competent party. Any action therefore, by or against a person who is incompetent in law is void and irremediable.[37] So, there must be a competent plaintiff and a competent defendant.

The plaintiff in an action for medical negligence is primarily the patient who suffered an injury as a result of the negligent act of the Medical Practitioner. This is when he is suing in person. In a case where the injury or breach of duty of care complained against, caused the death of the patient, or the patient for whatever reason is incapable of suing, then the proper plaintiff will be the family or next of kin of the patient.[38] The Defendant is any person against whom a relief exists. In the case of medical negligence, the first proper party to be sued as the defendant, is the medical practitioner whose conduct caused the injury that the plaintiff complains of. The Medical practitioner remains personally liable despite the liability of other parties. Other parties such as the employer or hospital, who contributed in the examination and treatment from which the negligent act arose, will altogether be liable jointly and severally.[39]

Actions on medical negligence in Nigeria is fault-based. This means that, the plaintiff must establish the fault of the defendant medical practitioner. So, for the plaintiff to succeed in his claim and the medical practitioner liable in law, the plaintiff must prove certain ingredients of medical negligence[40]. This ingredients of the tort of medical negligence, are not any essentially different from the elements of the tort of

[37] D. Efevwehan, Principles of Civil Procedure in Nigeria (2nd Ed., Enugu: Snap Press Ltd., 2013) at Pg. 101

[38] Unilorin Teaching Hospital v. Abegunde (2013) LPELR-21375(CA) per Ogbuinya, J.C.A. ,P. 39, paras. A-B.

[39] J. Dada, The Law of Evidence in Nigeria, (2nd *Ed*, University of Calabar Press, Calabar, 2015) Pg. 145. Also in the cases of Nigerian Agip Oil Co. Ltd. v. Nwaketi (2012) LPELR-22873(CA); Ifeanyi Chukwu (Osondu) Ltd. v. Soleh Boneh Ltd (2000) 5 NWLR (Pt. 656) 322

[40] Ojo v. Gharoro (2006) 10 NWLR (Pt. 987)173 S.C

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negligence generally. The ingredients for the proof of negligence are as follows:

(a) That the doctor owed the patient a duty to use reasonable care in treating him or her.
(b) That the doctor failed to exercise such care, that is he was in breach of that duty.
(c) That the patient suffered damage(s) as a result of the breach.
The above position appears to be the consensus.[41] The three ingredients mentioned above are *sine qua non* to the proof of liability in an action for negligence and must be proved concurrently. This is a trite position of the law as far as the issue of prove of negligence is concerned.[42]

In litigating medical negligence in the Nigerian jurisdiction, the particulars of claim must be pleaded.[43] Pleading means a written statement of the parties which is served by each party on the other and which sets forth in a summary form, the material facts on which each relies in support of his claim or defence.[44] The law on pleadings is very strict, so that evidence on facts not pleaded before a Court go to no issue. Also, parties are bound by their pleadings and no party will be allowed to set up a case other than that which is captured in his statement of claim or defence as the case may be[45]. The law places a specific duty on the plaintiff in action for medical negligence, to specifically plead all

[41] Winfield & Jolowicz on Torts, by W.V.H. Rogers, (6th edn, Sweet & Maxwell 2006) 277; S. Olokooba and A. Ismail, 'The Professional's Duty of Care: A Diagnostic Appraisal of the Medical Practitioner's Liability of Negligence in Tort, C.J.J.I.L Vol. 3,No. 1, 2010; 108-115 at Pg. 109. Also, same position have been reaffirmed by the Supreme Court of Nigeria in plethora of cases; Ighreriniovo v. S.C.C. Nig. Ltd. & Ors (2013) LPELR-20336(S.C); Hamza v. Kure (2010) 10 NWLR (Pt. 1203) 173 S.C. The Court held that to succeed in an action for negligence, the plaintiff must show that the defendant owes him a duty of care and that he has suffered damage in consequence of the defendant's breach of duty of care towards him.
[42] Ojo v. Gharoro (2006) 10 NWLR (Pt. 987)173 S.C
[43] E. Ojukwu, & C. Ojukwu, Introduction to Civil Procedure, (3rd Ed. Abuja: Helen-Roberts Ltd., 2009) at Pg. 169
[44] Ibid
[45] Apena v. Aileru (2014) 14 NWLR (Pt. 1426) 111 (S.C)

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particulars of negligence he intends to rely on in proving his case.[46] The particulars of negligence that needs to be specifically pleaded includes date, period, place and circumstances under which the negligent act occurred. In all this, the plaintiff in a medical negligent case, needs access to his medical record. This is usually not easy as medical practitioners and hospitals tend to strongly deny this access. The only choice open for obtaining medical records is through a pre-trial discovery which commences after pleading. The current practice is for patients in medical suits to first bring claims against the medical practitioner and then attempt to obtain the medical records. The plaintiffs have very little choice but to take a "shotgun" approach in drafting their allegations of negligence and this may be detrimental to their case, as the statement of claim must be supported by as much detail as the circumstances allow. On the whole, the plaintiff must specifically itemize facts that will lead to the proof of the three ingredients of the tort of negligence discussed above.

Conclusively and most importantly, the plaintiff in an action for medical negligence is expected to through leading credible evidence and on the balance of probability, prove the existence of a duty of care and a breach of that duty which occasioned the harm or injuries by a conduct falling below the standard expected of the defendant, and a consequential damage traceable to the act or omission of the defendant[47]. This is the theoretical underpinning of the law, in a case of medical negligence. The plaintiff must by prove, establish the fault of the medical practitioner in the exercise of his duty[48]. This is accepted in the cases of presumed negligence where the applicable doctrine of *res ipsa loquitur* gives rise to an inference of negligence on the defendant's part.[49] Where a

[46] M.T.N. Communication Ltd v. Sadiku (2013) LPELR-21105(C.A); Order 25, Rule 5(1), Plateau State High Court (Civil Procedure) Rules 1987

[47] F. Emiri, Medical Law and Ethics in Nigeria (Lagos: Malthouse Press Ltd, 2012); Crocker v. Roethling (2009) 363 N.C. 140 (U.S.A)

[48] McGill v. French (1993) 333 N.C. 209; also Catherine Eagles-"Selected Evidence Issues in Medical Negligence Cases"- http://www.sog.unc.edu/files/Eagles evidenceissuesmedmalsecondfina12.pdf- Retrieved on 20th March 2024

[49] D. Louisell, and H. Williams, 'Res Ipsa Loquitur- Its Future in Medical Negligence Cases', Vol. 48, Issue 2, Califonia Law Review, 1960. Also, Plateau State Health

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defendant is not able to rebut this inference, a case of negligence is already established for the plaintiff.

It follows therefore that if the defendant successfully rebuts the inference of negligence, the onus to prove fault remains that of the plaintiff. This prove is usually a difficult task for the plaintiff.

6.0 Challenges in Proving Medical Negligence Claims in Nigeria

In the discharge of his burden of proof regarding a medical negligence claim, several obstacles stand in the way of victims. These obstacles are both procedural and substantive.

i. Experts Witness

Medical practice is very technical and so, it is not easy to assess the quality and carefulness of a medical practitioner in the performance of his duty. In proving negligence, unless the defendant admits on his own, the plaintiff will in most circumstance, rely on the testimony or opinions[50] of a qualified medical expert as an expert witness,[51] in support of his claim. So, unless the plaintiffs wishes to launch and

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Services Management Board & Anor. v. Goshwe (2012) L.P.E.L.R-9830 (S.C); F. Nwoke, Law of Torts in Nigeria (Jos: Mono Expressions Ltd, 2003) at pg. 152-157. The general and erroneous notion has been that res ipsa loquitur shifts the onus of proof to the defendant, but this has been changed by the current weight of opinions and cases which favour the view that the doctrine does not shift the onus but only raises a rebuttable inference of negligence.

[50] Opinion evidence refers to a witness's belief, thought, inference, or conclusion concerning a fact or facts (Black's Law Dictionary, 8th Ed. at Pg. 1683). The opinion of a witness, whether he is a party himself or a third person, is as a general rule of law of evidence, inadmissible. Thus Section 67 of the Evidence Act states as follows: The fact that any person is of opinion that a fact in issue, or relevant to the issue, does not exist is irrelevant to the existence of such fact except as provided in sections 68 to 76 of this Evidence Act. The above section however makes exceptions to the above rule as provided in the proviso to the section. The exception to the rule is the evidence of experts.

[51] In legal parlance, an expert is any person who is especially skilled in the field he is called upon to give an opinion. He is that person who by his evidence is able to establish that he has sufficient experience or practice in a particular sphere of profession. The decision of the court in Michael Alake v. The State (1991) 7 NWLR (Pt. 295) 567 and S.P.D.C; Nig. Ltd v. Otoko (1990) 6 NWLR (Pt. 159) 693

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advanced his claim at trial without expert medical evidence[52], he must by expert witness, establish that the injury or harm occurred because the care of the health care provider fell below the standards of practice expected of a member of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act.[53] So, in proving his case, the plaintiff is most likely, placing his fate in the hands of another (an expert witness), believing him to be even be equal to the task. This is a basic issue that differential proof in medical negligence from that in other tort cases. It places undue burden on the plaintiff.

In looking at expert witnesses, one should consider the fact that medical experts can be very expensive and beyond the means of impoverished plaintiffs. Moreover, it may be hard to find a medical practitioner willing to give evidence criticising the conduct of another medical practitioner. The culture of silence, ranging from the cooperation from those in the medical field has in various cases worked against Plaintiffs.[54] Even where the plaintiff/claimant presents a medical witness to give expert evidence, the reality is that the defendant can produce a counter expert witness to confront the expert evidence of the patient-plaintiff[55]. Thus, where the contending parties present opposing witnesses or evidence on an issue, the position of the more impressive witness will prevail. Thus, in the case of *Unilorin Teaching Hospital v*

[52]The plaintiff comes to court and gives his or her account of what occurred but fails to back up allegations of negligence with coherent evidence from a medical expert. In such instance, the courts may simple heed the exculpatory evidence inevitably provided by experts on behalf of the defendant and dismiss the claim. Abi v Central Bank of Nigeria [2012] 3 NWLR 1; Kopa v University Teaching Hospital Board of Management [2007] ZMSC 8; Edna Nyasalu v Attorney-General [1983] ZR 105.

[53] Crocker v. Roethling (2009) 363 N.C. 140 (U.S.A); Bafaro v. Dowd (2010) ONCA 188 (CanLII)

[54] A. Uwakwe, 'The Role of Medical practitioners in Medical Malpractise Claim', Vol. 4 No. 1 2017. Publication of the College of law, Babalola University.

[55]The foregoing connotes that in presentation of witnesses or adducing evidence, a party aiming to prevail needs to ensure that he presents expert or non-expert evidence that would enjoy high credibility or higher probative value with the court.

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Abegunde,[56] the Court of Appeal (Ilorin Division) found more impressive and preferable the expert evidence of the defendant's witness, a Consultant Surgeon, than the evidence offered by the plaintiff's witness, a resident medical practitioner. These realities combine to make it very difficult for plaintiffs to carry their burden of proving that a physician was negligent.

ii. Finance

Finance is an obvious yet defining factor for any victim of medical negligence. Many Nigerians struggle with poverty and resource constraints in a way that limit what they can spend on health care, let alone litigations[57]. So, another major problem a victim of medical negligence face is finance. Funds are needed to enable a plaintiff undertake legal proceedings against the medical practitioner. Judicial procedures usually require substantial sums of money to prosecute. Either way, the victim will certainly require the services not only of a legal practitioner but also of a medical practitioner as expert witness. Very often, the victims are poor, just survived a medical treatment or procedure and so, cannot shoulder the financial responsibility involved in the pursuit of their case. The indigent litigant will because of the high cost, be deprived of his rights to litigate notwithstanding the grave harm or injury that may have been done to him.

iii. Access to Medical Records

Among the procedural obstacles faced by a patient in proving his medical negligence case in Nigeria, is obtaining the relevant medical records without having to initiate court action. To prepare a medical negligence case, the party needs to obtain medical records from the hospital. In fact, whether the action of medical negligence is to be initiated will depend on the amount of information a patient is able to gather and the medical complexity of the treatment. It is impossible for

[56] Unilorin Teaching Hospital v. Abegunde (2015) 2 NWLR (Pt. 1447) 421; (2013) LPELR- 21375(CA)

[57] In 2024, over 11 percent of the world population in extreme poverty, with the poverty threshold at 2.15 U.S. dollars a day, lived in Nigeria. According to Statista. Available at https://www.statista.com/statistics/1228553/extreme-poverty-as-share-of-global-population-in-africa-by-country/

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a patient to even go about beginning to make a claim against his medical practitioner unless he can provide some particulars of misconduct. All too often such particulars can only be secured if the patient has access to his own medical records. In many jurisdictions, such as in the UK, New Zealand or USA, simplified procedures allow parties to obtain hospital records where such access is provided for under various statutory provisions.[58] But this is not so in Nigeria.

In most hospitals, a patient's medical record is seen as the property of the healthcare facility and services, as well as the medical practitioner who has written them, not to the patient. Unfortunately, these hospitals and medical practitioners are usually reluctant to produce the records if they suspect they will be used to establish errors or negligence. They sometimes fabricate excuses for not producing records, such as claiming disappearance.[59] Without proper documentation, plaintiffs will struggle to carry out their burden of proof. In principle there is no reason to deny a patient his medical records, but as the practice currently stands only the courts can compel access. Obtaining medical records is a major obstacle in proving the negligence of a medical practitioner in Nigeria.

iv. Access To Justice

Also, patients in Nigeria, often have problems with access to justice. This is one factor common to most developing countries. These jurisdictions frequently struggle with massive case backlogs, weak judicial institutions, inadequate legal infrastructure, corruption, and other problems endemic to the developing world.[60] For many of these

[58] In the UK, Statutory provisions such as the Data Protection Act 1984, Access to Health Records Act 1990, and Access to Medical Report Act 1988 and the Supreme Court Practice 1997, allows patients not only to ensure that records are in accurate form but are also relevant in the context of litigation as a means of establishing any errors and oversights during treatment. In the United States many states have enacted legislation to ensure access to health records in both the public and private sectors while in New Zealand, the Health Information Privacy Code, which came into force in 1993, provides for an enforceable right of access to medical records.

[59] N. Cortez, 'A Medical Negligence Model for Developing Countries'. (2011) 4 Drexel L Rev 417., at 44.

[60] J. Daniels and M. Trebilcock, 'The Political Economy of Rule of Law Reform in Developing Countries', 26 Mich. J. INT'L L. 99, 119 (2004); E. Davis et al., 'Implementing ADR Programs in Developing Justice Sectors: Case Studies and

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reasons, parties often prefer to settle their disputes informally.[61] Overall, then, it should not be a surprise, the claim that courts have played a limited role in influencing health care practices and aiding plaintiffs prove of medical negligence in developing countries.[62]

With all these procedural or substantive hurdles, what then can be said to be the fate of an injured patient in contemporary Nigeria?

7.0 Prospects in Proving Medical Negligence Litigation in Nigeria

Despite the measured development in litigation in Nigeria, the disposition of the law and indeed our legal system on cases of medical negligence remains ambiguous. The procedural or substantive obstacles in the way of victims trying to proof medical negligence remains enormous for victims in Nigeria. This ought not to continue. There is need and an urgency to project, promote and adopt easier, more accessible and better result yielding medium for adjudicating the grievances patients of medical negligence and either reduce or eradicate the challenges they face in proving their case in court. The following are some of the approaches:

i. No-Fault Compensation

No fault compensation generally means awarding compensation to an injured party without finding fault or negligence.[63] This system is seen as an alternative to negligence actions and is widely canvassed.[64] It obviates the need to prove that the other party was at fault (through the

Lessons Learned', 16 DISP. RESOL. mag. 16, 16 (2010).

[61] R. Cranston, 'Access to Justice in South and South-East Asia, in Good Government And Law: Legal and Institutional Reform in Developing Countries' (Julio Foundez ed., 1997).

[62] G. Bloom et al., 'Regulating Health Care Markets in China and India', HEALTH AFF. 952, 954 (2008)., at 959, at 961 (discussing differences between health care in India and China and possible approaches to health care financing in those countries).

[63] F. Tafita and F. Ajagunna, 'Accessing Justice For Medical Negligence Cases In Nigeria And The Requisite For No-Fault Compensation'. J.P.C.L. Vol. 10, No. 2, September, 2017

[64] Mason and M. Smith, Law and Medical Ethics (5th Edn. Butterworths London. 1999), p.216

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court system). It places emphasis on compensating victims for injuries or related expenses without necessary proving that another party was negligent or liable for damages. This is based on the notion that in helping the patient procure compensation for injuries, the medical practitioners accepts that they are humans too, they are not perfect, and although they are not admitting errors, they are acknowledging that mistakes can be made by anyone in their line of work. It is believed that accidents and injuries are inevitable and as such medical personnel should not be 'crucified' for events which are inevitable in the course of practising their profession.[65]

No -fault system of compensation as a medium, offers a potential and effective means of promoting patient friendly system of addressing patients' grievances. This system also satisfies would be litigants whose major desire is just to have an explanation for what went wrong. In such situations, mere apology may suffice or a simple settlement out of court may be preferred to litigation.[66] It eliminates the need to prove negligence, brings about more timely compensation, more effective processes for complaint resolution, and maintains cordial relationship between Parties. This is the practice in countries like New Zealand, France, United States[67] and the Scandinavian countries. It provides for a shift from the rule of prove and liability, as claims would be adjudicated by a special administrative agency rather than by the courts and benefits would be payable according to a schedule[68]

ii. Arbitration

[65] T. Brennan' Just Medical Practitionering: Medical Ethics in the Liberal State, (University of California Press, 1991), pp. 140- 143.
[66] T. Douglas, 'Medical Injury Compensation beyond No-fault' Medical Law Review Vol. 17 2009. Pp. 32- 36
[67] Especially, States of Florida and Virginia.
[68] P. Danzon, 'Liability for Medical Negligence', Journal of Economic Perspectives, Vol. 5, No. 3. 1999, pp.64- 65.

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Another approach that is advocated and applied to the resolution of medical negligence claims is arbitration[69]. It is a semi-judicial and less formal dispute resolution process in which a dispute is decided by a qualified and independent third party, usually called an arbitrator, who render the "arbitration award" and the award is legally binds the disputants on both sides and is enforcing in the courts.[70] It is can operated once there is an agreement between the patient and the medical profession to submit their dispute to one or more arbiters for resolution. Arbitration as a dispute-settling process is seen as a form of alternative dispute resolution (ADR) and a substitute for litigation.[71] It offers autonomy to the parties. It is relatively quicker, faster and cheaper than litigation. It is flexible, less procedural, and can be adapted to the needs of patient and medical practitioner.[72]

This prospect sounds promising and alleviate some of the difficulties faced by patients in proving the negligence of a medical practitioner. When arbitration is adopted, the condition and position of the patient can be easily be reasoned with and understood, with or without the need of an expert witness and its attendant cost. The arbiters are likely to be specially trained in the techniques of dispute resolution; have specialised knowledge in the field of medicine; the authority to make a final determination of liability and; assess damages.

iii. Public through Self-Regulation

The protection of the public against sub-standard practice which is the role of the Medical and dental Council of Nigeria (MDCN) and other bodies of medical personnel is another avenue that could even eradicate

[69] It is continuously gaining recognition in Nigeria. However, the procedure have been adopted in America for many years for the resolution of medical negligence claims. Specific medical arbitration statutes have been enacted in 11 States.

[70] J. Orojo and M. Ajomo, Law and Practice of Arbitration and Conciliation in Nigeria. (Mbeyi & Associates Nig Ltd, 1999) p.5

[71] A. RedFern and M. Hunter, Law and Practice of International Commercial Arbitration (3rd edn, Sweet & Maxwell 1999)

[72] D. Peters, Arbitration and Conciliation Act Companion. (Dee-Sage Nigeria Limited, 2006) p.368. Also in Rhodes–Vivour A.: 'Arbitration And Alternative Dispute Resolution As Instruments For Economic Reform'. A Paper delivered at the 11th Maritime Seminar for Judges, Abuja, 2010. p.

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the challenges faced by litigants in proving their medical negligence case. It is argued that these professional self-regulatory bodies will better serve their members and the public and be more effective through awareness, monitoring, investigation and laying down a complaint procedure and providing compensation for victims perhaps, through a no-fault system.

There may be need to put in place professional rules of practice that makes it incumbent upon medical practitioners, other medical personnel and hospitals to inform victims or/and relatives if there had been an act or omission on their part which may have caused injury or death to the patient, [73] and then, an administrative structure within the regulatory body that can effectively handle such matter. By doing so, there may not even be any need for a patient to go to the court or the need to prove a case against a medical practitioner. This approach can ensure that medical care and procedures are carried out with more care and sense of duty.[74] The self-regulatory bodies of the medical professionals can establish a common insurance policy to fund compensation in deserving cases.[75]

8.0 Conclusion and Recommendations

This paper has discussed the challenges and prospects of proving of medical negligence against a medical practitioner in Nigeria under the general tort law of negligence and in the light of case law. It is obvious from the research that the position and practice of the law in this area needs reform. Albeit our observation that the process and ingredients of proof of negligence against a medical practitioner seems to be relatively screwed in favour of the medical practitioner, against the injured patient who may not know enough of what happened or what went wrong. The adversarial system of litigation presents a lot of challenges to the

[73] I. Enemo, 'Medical Negligence: Liability of Health Care Providers and Hospitals'. The Nigerian Juridical Review 10 (2011 - 2012), p. 128.
[74] D. Studdert and T Brennan 'Medical Negligence.' New England Journal of Medicine Vol. 350, No.3, p286
[75] R. Mann and J. Harvard (eds), No Fault Compensation in Medicine, London, being record of proceedings of joint meeting of the Royal Society of Medicine and the British Medical Association held in January, 1989

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claimant in trying to discharge the onerous burden of prove placed upon him. From the want of an expert witness, to financial constraints, then, access to medical record and justice. In addition to the unacceptable delays, complexity and lower success rates associated with medical negligence litigation.

Thus, recognising that in every aspect of human endeavours, there is the ever-pervasive role of necessity, it is hereby presented that there is need for a paradigm shift from our adversarial and fault-based system of adjudication. New strategies which allow for out of court settlement and compensation of victims are fast gaining grounds in many jurisdictions. There is therefore a need to review the existing system of proving medical negligence, so as to accommodate more patient friendly and victim focused approaches. It is recommended that the best interest of the patient should at all times remain paramount in the consideration of the best means to redress a medical negligence claim.

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