

AN INQUIRY INTO THE NIGERIAN HEALTHCARE SYSTEM: THE ROLE OF JUDICIARY IN GUARANTEEING MEDICO-LEGAL RIGHTS OF THE HEALTH USERS*

Abstract

*The inadequacy of the healthcare sector in Nigeria has resulted in doctors and allied medical professionals involving themselves in breach of health users' medical rights due dearth of medical personnel and a lack of a conducive working environment. Even though the Constitution and the National Health Act provided for health rights and the right to seek redress in court if a health user's right is breached, most health users are not of their health rights. The judiciary's role remains unrivaled as the constitutional organ of the government that interprets the laws, settles disputes, and ensures that justice is served within the nation. The judiciary should uphold the rule of law in its dispensation of justice. A citizen whose right is violated has the right to seek redress in court. Unfortunately, technicalities like the pleading of *res ipsa loquitor*, and testimony of expert witnesses have been a clog in the wheel of justice in medical malpractice claims thereby discouraging litigants. This research considered the poor state of the Nigerian healthcare system, which may result in a breach of health users' medico-legal rights. Where there is injury, the court should step in to restore the users' rights, but technicalities should be downplayed in the medical negligence matter. It was found that most health users are ignorant of their medical rights. Hence, when their rights are violated due to the technicalities especially proof of *res ipsa loquitor* and expert witness giving evidence and the fund to invite the witness discourages the victims of medical negligence in prosecuting medical negligence matters in court. Therefore, it is recommended that health users' rights advocacy be embarked upon by Ngo's and Civil Society Organizations and the doctrine of *res ipsa loquitor* be made strict liability for medical negligence. The expert witness testimony be discountenanced and special rules of the court be applied to medical negligence matters so as to not sacrifice justice at the altar of technicalities.*

Keywords: Healthcare, Health users rights, Judiciary, Medical Negligence/malpractice.

1. Introduction

The saying "health is wealth" which is the abridged form of "the greatest wealth is health" is credited to the Roman poet Virgil¹, simply means that health is priceless. The third goal of the United Nations Sustainable Development Goals in achieving its agenda 2030 is "good health and wellbeing"² which demands compliance from all United Nations member states, of which Nigeria is a member. The Nigerian healthcare sector, though making attempts to improve faces a lot of barriers to the achievement of SDGs and Universal Health Coverage. The ineffective, corrupt healthcare sector and FGN's unwillingness to fully support our healthcare system has led to the brain drain of medical doctors who are consultants to migrate to Europe and America for greener pastures.

To achieve quality healthcare, there is a need for the patient to be aware of his/her health rights and the government should also encourage patient safety as well as patient-centered care in healthcare delivery. In the bid to seek quality healthcare in the Nigerian healthcare system, there could arise medical errors, which is tantamount to medical malpractice/negligence. Where a patient's right is breached, there is a

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¹ P V Maro, <<https://www.goodreads.com/author/show/919.Virgil>> accessed 17 September 2023.

² United Nation Development Programme(UNDP) <https://www.undp.org/sustainable-development-goals/good-health?gclid=CjwKCAjwyY6pBh_A9EiwAMzmfw_YAFo0F8bOHilzaKGz3ZiArt2fpC-S0CcbXrKqi55qb_a5s3AGxF4hoC7_z8QAvD_BwE> accessed 5 October, 2023

need to seek a remedy through redress to the court of law. At this juncture, the court comes in as an unbiased and impartial arbiter to resolve medical malpractice/negligence disputes between the parties. The cliché that the judiciary is “the last hope of the common man”, remains a rebuttable presumption in the Nigerian legal regime. The conflicting decisions of the Nigerian courts and the sacrifice of justice at the altar of technicalities have negatively affected the image of Nigeria's judicial system.³ Most Nigerians detest seeking redress in the courts including victims of medical malpractice/negligence, rather they seek Alternative Dispute Resolution Mechanisms.

The researcher shall consider the state of health in Nigeria, the roles of the court in medical malpractice/negligence litigation, the health rights of patients as enshrined in the National Health Act, 2014, the barriers to prosecuting medical malpractice cases in the Nigerian courts, the conclusion, and the recommendations.

2. The State of Healthcare in Nigeria

Statista, a global data and business intelligence platform health index ranking 2023 rated Nigeria's healthcare sector 157th out of 167 countries of the world.⁴ The 2021 Health System Sustainability Index report by the African Sustainability Index ranked Nigeria 14th among 18 African countries in Universal Health Coverage (UHC) assessed by UHC goals.⁵ The above rankings by implication is evident that Nigeria healthcare sector is facing numerous challenges including but not limited to corruption,⁶ “outbound medical tourism, deteriorating medical infrastructure, low government budget allocation, poor compensation and subsequent emigration of skilled healthcare workers.”⁷ Other challenges are the inability of the victims of medical malpractice claims to achieve access to justice in the Nigerian courts, application of technicalities and thereby defeating the course of justice. The indices above are indicative that Nigeria's Healthcare sector is grossly inadequate.

3. Health Users Rights

The 1999 Constitution of the Federal Republic of Nigeria adequately provides for the right to health and other fundamental rights in chapter 4 of the constitution. Basically, the right to life as provided in section 33 of the Constitution is interwoven with the rights to health provided in the National Health Act, 2014, since the essence of health rights is to prevent death and preserve life, and should death occur, the victim will have the right of seeking redress in court. Human rights are therefore interdependent, indivisible, and interrelated.⁸ The researcher shall limit himself to the rights in the Act.

³ M M Osuman, ‘Conflicting orders and decisions of courts on political matters’ [23 August 2022] Guardian Newspaper, <<https://guardian.ng/features/law/conflicting-orders-and-decisions-of-courts-on-political-matters/>> accessed 8 October, 2023.

⁴ Statista, ‘Health and health systems ranking of countries worldwide in 2023, by health index score’ <<https://www.statista.com/statistics/1290168/health-index-of-countries-worldwide-by-health-index-score/>> accessed 10 October, 2023; Statista is a global data and business intelligence platform.

⁵ Vanguard Newspaper, ‘Nigeria’s poor universal health coverage’ [29 March 2021] <<https://www.vanguardngr.com/2021/03/nigerias-poor-universal-health-coverage/#:~:text=Recently%20a%20first-of-its-kind%20Health%20System%20Sustainability%20index%20report,in%20maternal%20mortality%20and%20neo-natal%20mortality.>> accessed 4 October 2023

⁶ A O Adeoye, ‘Assessing the associated medical, legal, and social issues in medical tourism and its implications for Nigeria’ [2023] (45) (145) PAMJ 1.

⁷ International Trade Administration <<https://www.trade.gov/country-commercial-guides/nigeria-healthcare>> accessed 9 October, 2023.

⁸ See Vienna Declaration and Programme of Action (A/CONF.157/23), adopted by the World Conference on Human Rights, held in Vienna, 14–25 June 1993

The National Health Act, 2014⁹ being a primary legal framework on health in Nigeria in part III, provides for the rights of the health users, which was adapted from international instruments like the Universal Declaration on Human Rights (1948)¹⁰, International Covenant on Economic, Social and Cultural Rights (1966),¹¹ African Charter on Human and People's Rights (1981)¹², 1999 Constitution of the Federal Republic of Nigeria, etc. Human rights are interdependent, indivisible, and interrelated.¹³

(a) Right to Emergency Medical Treatment

The National Health Act (NHA) bestows on every Nigerian the right to access healthcare in any medical facility in Nigeria, more especially when it comes to emergency medical conditions. The Act strongly, states that emergency medical treatment is the right of all the citizens of Nigeria and there is an obligation on the part of health providers or health establishments, and all the allied medical staff to attend to such patients. Patients that fall under this category are accident victims, gunshot victims, or any other patient whether conscious or unconscious who needs emergency medical services from health establishments. In the bid to ensure that accident or gunshot victims are promptly attended to, the Compulsory Treatment and Care for Victims of Gunshot Act, 2017 was enacted by the victims.¹⁴ Better still, The NHA provides for the Basic Health Care Provision Fund (BHCPF), which will be financed from not less than 1% of the annual grant of the FGN consolidated revenue fund.¹⁵ In that circumstance, 5% of the BHCPF shall be earmarked for emergency treatment nationwide.¹⁶

Notwithstanding the above established legal framework, many Nigerians still die due to the refusal of health providers to attend to such victims of gunshots or injuries insisting that they must bring police clearance before they commence treatment. Grace Obinna was violently raped in her Ikorodu home and the private hospital she was rushed to decline to attend to her unless they present the police report. Likewise, Funmi Odusina suffered the same fate, she was rescued from drowning at Elegushi Beach Lagos and was rushed to a private hospital in Lagos, and the private hospital rejected her, she died on the way to Lagos Island General Hospital¹⁷ The most recent incidence is Mrs. Olorunfemi Greatness, who was a victim of armed robbery on 26th September 2023 was pushed out of a running vehicle and was rushed to Maitama District Hospital for treatment and was rejected by the hospital. She bled to death fright at the entrance of the emergency unit of the hospital.¹⁸

⁹ s20-30

¹⁰ Universal Declaration on Human Rights, art. 25(1) which provides inter alia rights to medical care

¹¹ International covenant on Economic, Social and cultural Rights, 1966, art. 12(1), provides that the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

¹² Art. 16(1) (2)

¹³ See Vienna Declaration and Programme of Action (A/CONF.157/23), adopted by the World Conference on Human Rights, held in Vienna, 14–25 June 1993

¹⁴ S.1 “

¹⁵ NHA s11(2) (a)

¹⁶ S11(3) (e)

¹⁷ T Ojoye, ‘No more reason for hospitals to reject the injured’ [26th June 2016] <<https://punchng.com/no-reason-hospitals-rejectinjured/#:~:text=Two%20separate%20incidents%20in%20Lagos,tradition%20has%20yet%20to%20change.>> accessed 8 October,2023

¹⁸ NA Tambe ‘Claims, counter-claim as robbery victim dies in Abuja after alleged rejection by hospital’ [1 October, 2023] <https://www.premiumtimesng.com/news/top-news/629782-claims-counter-claim-as-robbery-victim-dies-in-abuja-after-alleged-rejection-by-hospital.html> accessed 4 October 2023.

(b) Right to Full Disclosure of Patient’s State of Health

It is the right of the health user to know the relevant information about his health status and the necessary treatment to be administered.¹⁹ Disclosure of the health status of the patient should be put into consideration for the best interest of the health user.²⁰ This right also includes the range of diagnostic procedures and the treatment options available to the health user; as the benefits, risks, costs, and consequences generally associated with each option.²¹

(c) Right to Refuse Health Services

The Patient has the right to refuse medical treatment. Meanwhile, as part of disclosure of health status, the health giver should explain to the patient in the language he/she understands and in consideration of literacy the risks and obligations or resultant effects of such refusal of treatment.²²

(d) Right of Confidentiality

It is the right of the health user that all information obtained from him/her in the course of medical treatment is confidential. For no reason whatsoever should the health user divulge such information to the third party except with the consent of the patient. This right also includes information relating to the patient's health status, type of treatment undergoing, or stay in the health establishment.²³

The patient has the right to access his health records. This right is also available to health workers or any other health care providers. Hence, a health worker or any health care provider may disclose the patient’s information to any other person in the health care team of the patient for a legitimate purpose and in the best interest of the health user.²⁴

The ground upon which a healthcare giver may examine the records of the health user is, for the treatment of the user, for study, teaching, and research purposes, but each of these grounds goes with authorization of the health user for all the grounds and that of the head of the health establishments and the relevant health research ethics committee for research, teaching and study.²⁵ However, all these authorizations under the Act are waived where the identity of the health user is undisclosed.²⁶

As part of the Confidentiality right, it is the right of the health user that the person in charge of a health establishment who has the health user’s records shall ensure that the patient’s records are well protected and should set up control measures to prevent unauthorized access to those records and to the storage facility in which, or system by which, records are kept.²⁷

(e) Patient’s Right of Redress

The 1999 Constitution of the Federal Republic of Nigeria gave the court powers to determine matters relating to civil rights and obligations of the person under the constitution which may include criminal

¹⁹ NHA s23

²⁰ NHA s 23(a)

²¹ NHA s23 (c); s23(2)

²² NHA s23(1) (d)

²³ NHA s26(1)

²⁴ NHA s27

²⁵ NHA s28 (1) (a) (b)

²⁶ NHA s28(2)

²⁷ NHA s 29 (1) and (2)

matters²⁸. In line with the constitution, the National Health Act also, provides for the right of the patient to lay complaint, when any of those rights discussed above are infringed upon.²⁹

The right to seek redress could be done administratively by making a complaint to the healthcare establishment, or by filing a suit in the Court of competent jurisdiction, or by making a petition to the Medical and Dental Council of Nigeria, which is the body regulating the affairs of medical doctors and dental practitioners. In this work, the researcher will limit himself to the Court as a means of seeking redress and remedies by victims of breach of health rights by the health care providers.

4. The Role of the Judiciary in Resolving Medical Malpractice/Negligence Claims

The principal role of the judiciary is to interpret the constitution and other legislations enacted by the Legislature and apply such existing laws to individual cases, to settle disputes between private persons or between private persons and the government³⁰

The judiciary remains the cornerstone and an indispensable stakeholder in the Nigerian justice system which extends to but is not limited to resolving disputes relating to victims of medical negligence/malpractice. There is a cliché that says that the Judiciary is the last hope of the common man. This simply means that the judiciary should uphold the rule of law in its dispensation of justice. Rule of law is a legal principle which states that “all entities, including the government, must adhere to the supremacy of the law.”³¹ In other words, nobody is above the law, both the citizen and the government are under the law.

The court is the temple of justice. In this temple, there is equality before the law. The poser now is whether the Nigerian judiciary is still the hope of the common; and whether it still represents Nigerian courts still do justice to matters before them. The indices in Nigeria especially as it pertains to decisions in election petition tribunal, especially the Presidential Election Petition Tribunal, 2023 in Nigeria, in medical malpractice claims, political matters and other judgments of the courts have left many Nigerians with the contrary view that the Judiciary is still the last hope of the common man and is still the court of justice.³²

The judiciary as an arm of the government is a creation of the 1999 constitution of the Federal Republic of Nigeria, which provides that, “The judicial power of the federation shall be vested in the courts.”³³ The power vested in the courts by the constitution includes: safeguarding the rule of law and upholding the supremacy of law through interpretation of the laws, protection of the constitution, adjudication of disputes between all persons, being an unbiased arbiter by serving justice, etc.³⁴

²⁸ Constitution of the Federal Republic of Nigeria, 1999, (CFRN), s6 (6) (b)

²⁹ NHA s.30

³⁰ O O Goodluck, ‘The Judiciary As A Pivot for Good Governance’ 3 <https://nji.gov.ng/wp-content/uploads/2021/12/The-Judiciary-A-pivot-for-good-governance-by-Hon.-Justice-Goodluck.pdf> accessed 5 October 2023

³¹ Claire Gardner ‘Democracy and the Rule of Law’ [August 13, 2021], <<https://law.wm.edu/academics/intellecualife/researchcenters/postconflictjustice/internships/internship-blogs/2021/claire-gardner/democracy-and-the-rule-of-law.php>> accessed 4 October, 2023

³² The Cable, < <https://www.thecable.ng/pdp-judiciary-no-longer-last-hope-of-the-common-man#:~:text=The%20Peoples%20Democratic%20Party%20%28PDP%29%20says%20the%20judiciary,national%20executive%20committee%20%28NEC%29%20meeting%20held%20in%20Abuja.>> accessed 8 October, 2023

³³ CFRN, s6(2)

³⁴ Judiciary, 125 <https://ncert.nic.in/ncerts/l/keps206.pdf>

5. Barriers to Prosecuting Medical Malpractice Claims

(a) Lack of Awareness of Health User's Rights

Patients' knowledge of their medical rights will be disposed them to ensure that such rights are protected and not violated. On the part of the medical practitioners, awareness of their professional rights and that of their patients will make them committed to respecting the rights of their patients and avoid breach of such rights. Where the patient's rights are breached, the law comes in to protect the patient through malpractice claims and consequently smoothen the physician-patient relationship.³⁵

The most challenging circumstance in the achievement of quality healthcare is patients' ignorance of their rights, which makes them vulnerable to some medical practitioners who will take advantage of such situations to violate their medical rights.³⁶

One of the drawbacks that discourage lawyers from assisting victims of medical rights breaches in seeking remedies in court is that Nigerians are generally not *human* rights cum medical rights litigation-oriented society. This lack of medical rights awareness discourages patients from seeking redress in court, and in the alternative would hand over to God the health giver who caused injury to him or caused the death of his/her loved relative. Such patient victims of negligence often resign to fate after all "the court cannot bring back to life, their deceased relative.

(b) Ineffective Judicial System

An effective and functional judicial system must be clothed with the garb of integrity, independence, and impartiality for unimpeachable justice delivery.³⁷ Delays in the dispensation of justice in the Nigerian courts, undue interference in the judiciary by the Nigerian elites, the appointment of unqualified cum inexperienced judges, and ethnocentrism are against the principle of judicial integrity.³⁸ All these anomalies in the justice system are discouraging to patient victims of medical negligence in prosecuting their cases in Nigerian courts.

(c) Lack of Judicial Integrity

Judicial integrity is "a holistic concept that refers to the ability of the judicial system or an individual member of the judiciary to resist corruption, while fully respecting the core values of integrity."³⁹ Such values of integrity are as follows, independence, impartiality, personal integrity, propriety, equality, competence, diligence, etc. Most victims of medical negligence, would not accept that Nigerian courts are impartial due to their awful experiences in seeking redress in court. At times the court will strictly adhere to technicalities, thereby denying justice to victims of medical negligence. The inequality, incompetence, and non-diligence by the judicial officers in justice delivery have made most medical negligence litigants shy away from seeking redress in court.

³⁵ U Abugu and DC Obalum, 'An Agenda for Improving Legal Claims for Medical Malpractice in Nigeria' [2018] (14) (5) Asian Social Science 124.

³⁶ D Ojerinde, 'Many Nigerians ignorant of their health rights- Irukera' [1st April 2020] Punch Newspaper <https://punchng.com/many-nigerians-ignorant-of-their-health-rights-irukera/> accessed 7 October,2023.

³⁷ United Nations, 'Judicial Integrity' <<https://www.unodc.org/unodc/en/corruption/judicial-integrity.html>> accessed 23 May 2020

³⁸ B Olabintan, 'Osinbajo: Appointment of Judges in Nigeria is Influenced by the Elite' [8 August 2020] <<https://www.thecable.ng/osinbajo-appointment-of-judges-in-nigeria-is-influenced-by-the-elite>> accessed 18 April 2023.

³⁹ The Bangalore Principles Of Judicial Conduct: Ecosoc Resolution 2006/23, Article 11, <<https://www.unodc.org/unodc/en/corruption/judicial-integrity.html>> accessed 7 October,2023

(d) Incompetence of the Medical Negligence Litigation Counsel

Medical negligence litigation is a factual evidence-driven procedure at times laden with technical procedures. Though medical negligence litigations may arise out of tortious liability, breach of contract, and criminal negligence, its burden of proof may make it cumbersome for the inexperienced patient-litigant to get redress in his favour. Hence, a lawyer representing a medical negligence litigant must be well equipped with the technical procedures of the practice peculiar to medical negligence to properly lead the litigant in evidence so as to get justice from the court of law.

(e) Procedural Challenges of Proving Medical Negligence/Malpractice Claim in Court

Medical malpractice proceedings are very technical and are hinged on the tort of negligence, contract, and criminal law. It therefore demands that a judge must be specially trained for this noble and technical duty, otherwise, a lot of contradictory judgments may come out from the courts of coordinate jurisdiction, which diminishes the integrity of the judiciary.

Some victims of medical malpractice and negligence who sued the physicians lost their cases due to their failure to call an expert witness or plead *res ipsa loquitur* thereby leaving the court devastated. In the case of *Mrs. Felicia Osagiede Ojo v Dr. Gharoro & Ors.*,⁴⁰ the Supreme Court dismissed the appellant's case on the ground that he did not call an expert witness and improper pleading of the doctrine of *Res Ipsa Loquitur*.

(f) Medical Malpractice/Negligent Claims under Civil Proceedings**(i) Res Ipsa Loquitur**

This doctrine of *res ipsa loquitur* is an evidential rule of practice, where the burden of proof shifts to the defendant to explain what happened to counter the application of the rule by the plaintiff.⁴¹ This doctrine comes to aid the plaintiff, where it is obvious that the defendant was negligent, which resulted in an injury, and the negligence act was caused by any other person but the plaintiff, but the plaintiff could not give a reasonable explanation on the cause of the negligent act, but it is a fact that the negligent act occurred and that the defendant has the control of the cause of the injury.

It is circumstantial or indirect proof of negligence which therefore imperative that if the claimant relies on the doctrine of *res ipsa loquitur*, he needs to prove the resultant accident and injury from which the negligent actions of the respondents could be inferred.⁴² The burden of proof can only shift to the defendant for him to rebut the presumption of negligence after the plaintiff/patient has established evidence where negligence is inferred. Application of *Res Ipsa loquitur* will not be available to the plaintiff where he fails to discharge the legal duty of burden of proof imposed on him.⁴³

At times medical negligence claims fail because the plaintiff did not prove his claims for clinical negligence or tender relevant documents upon which negligence will be inferred. In *Alex Otti v Excel- c Medical Centre Limited and Anor*⁴⁴ the appellant failed to tender the report of the anal ultrasound, which exhibit D stated and the appellant did not tender any evidence to establish the injury suffered by the appellant arising from the surgery performed by the respondents based on which negligence can be inferred. The court of appeal upheld the decision of the trial court based on the preponderance of

⁴⁰ [2006] 10 NWLR (pt. 987 at 173

⁴¹ *Alex Otti v Excel- c Medical Centre Limited and Anor* (2019) NWLR (Pt. 1698) 281

⁴² *Ibid.*

⁴³ *Abi v. C.B.N.* (2012) 3 NWLR (pt. 1286) 1

⁴⁴ (2019) NWLR (Pt. 1698) 281

evidence and balance of probabilities, that the appellant did not prove his claim for clinical negligence...⁴⁵

Most victims of medical negligence claims have lost trust in the Nigerian courts, their matter was dismissed because their lawyer failed to plead the doctrine of *res ipsa loquitor*. The challenge peculiar to the doctrine of *res ipsa loquitor* is that it may not arise unless pleaded in the alternative.⁴⁶ Once the facts are pleaded and evidence leads before the court, the doctrine does not need to be specifically pleaded.⁴⁷ Hence, it is important for the lawyers handling medical malpractice matters to be acquainted with the procedures or else cause the plaintiff/patient to lose a good case.

(ii) Failure to call an Expert Witness in a Medical Negligence Claim

Claims for medical negligence often fail because the plaintiff or his counsel failed to call an expert witness, who must be a medical expert. In *Abi v CBN*⁴⁸ the appeal was not sustained inter alia because the patient relied on *res ipsa loquitor* and did not call any expert witness.

(iii) Procedural Technicalities in Medical Negligence Claims

All we have discussed above points to the application of technicality in the dispensation of justice in the Nigerian courts. A technicality arises if “a party quickly takes an immediately available opportunity, however infinitesimal it may be, to work against the merits of the opponent's case.”⁴⁹ The Supreme Court of Nigeria in the plethora of its decisions has held that the court must do substantial justice. Better still, that “substantial justice will not be sacrificed on the altar of technicality.”⁵⁰

Most medical negligence complainants often experience strong feelings of disappointment, grief, humiliation, anger, and bitterness directed towards healthcare professionals and the justice system on the belief that healthcare professionals protect each other, instead of investigating the complaint objectively, they will resort to cover the sins of their colleagues thereby leaving the plaintiff victim of negligence psychologically traumatized.⁵¹

In a nutshell, the disappointment of the complainant in pursuing medical negligence claims could be because of inadequacies of the plaintiff's counsel, who is not acquainted with medical malpractice claim procedures and thereby failed to plead *res ipsa loquitor* nor lead evidence in same or failed to call expert witness, or was not able to establish medical negligence as to infer *res ipsa loquitor*. All these legal shortcomings discourage victims of medical negligence to seek redress in court.

(iv) Unwillingness to Testify Against a Colleague Medical Expert Witness

Most cases have failed because medical experts who are medical doctors refused to testify in court against their colleagues who are facing medical malpractice/negligence trials in court. This act of do-not-testify against a colleague is in the alternative called, “conspiracy of silence” which is a tacit

⁴⁵ *Alex Otti v Excel- c Medical Centre Limited and Anor* (2019) NWLR (Pt. 1698) 281

⁴⁶ [7] *Flash Fixed Odds Ltd, v. Akatugba* (2001) 9 NWLR (Pt. 717) 46

⁴⁷ *Okeke v. Obidife* (1965) 1 All NLR 50 referred to.] (P. 279,

⁴⁸ (2012) 3 NWLR (pt. 1286) 1 (CA).

⁴⁹ *His Royal Highness Oba Samuel Adebayo Adegbola v Mr James Olatunde Idowu & Ors.*(2020) 7 NWLR (Pt. 1722) 94

⁵⁰ *Shehu Mohammed Koko v. Shehu Mohammed Bello Koko & Ors.*(2023) 13 NWLR (Pt. 1901) 249; (2018) LPELR-46333(SC)

⁵¹ A Kent, ‘Dismissing the Disgruntled: Swedish Patient Complaints Management’ [2008] [21] *Int J Health Care Qual Assur* 94.

unwritten rule operational and esoteric to medical practitioners.⁵² And with this attitude of cover-up, it will be difficult to reduce the occurrence of medical negligence in our health facilities.

(g) Difficulty in Establishing Criminal Negligence against a Doctor

One of the difficult tasks confronting litigants in prosecuting criminal medical negligence against a doctor in court is often the inability of the prosecution to establish the guilt of the medical doctor-defendant beyond reasonable doubt as is customary in criminal trials. The Criminal Code shields and purges the defendant from criminal liability once the medical treatment is performed in good faith and with reasonable care and skill⁵³.

In section 313 of the Criminal Code, the law protects the doctor against negligence claims, where he (doctor) treats a patient or conducts a surgery as a result of grievous harm inflicted on the patient by another person and the patient dies due to either the treatment or from the injury inflicted upon him by the person, the Act exonerates the doctor where he acts in good faith, but criminal liability goes to the person who caused the harm on the patient.⁵⁴

In seeking redress for gross negligence or recklessness of the medical doctor or allied medical practitioner, it becomes a herculean task or rather impossible venture to secure a judgment against the doctor on the charges of murder or culpable homicide in the event of the occurrence of death of the patient as a result of the medical negligence on the part of the doctor.⁵⁵ However, a doctor may be convicted in cases where a doctor aids suicide by procuring, counseling, or aiding another to kill himself.⁵⁶

The medical practitioner is further protected by the Code, by providing that circumstances of necessity can exculpate a medical practitioner with reasonable skill and care, who undertakes to administer surgical or medical treatment that resulted in the death or health of the patient as a result of omission or performance of his duty as a doctor.⁵⁷

The inability to establish *mens rea* (guilty intention) in medical negligence trial shields the doctor-defendants from criminal responsibility /liability for the death of a patient that occurred by accident and was not intentional.⁵⁸ Most plaintiffs find it very difficult to establish *mens rea*, where their loved ones die in the course of medical treatment, simply because the law shields the medical practitioners from criminal liability as long as the medical practitioner acted in good faith and in the best interest of the patient. Where the Plaintiff could not establish *mens rea*, the case will not be in favour of the plaintiff. Hence, the plaintiff presumes that the judge has compromised, but there are factors which could be the

⁵² *S I Salihu, 'The Need for Expert Witness in Medical Malpractice Suits and the "Conspiracy of Silence"[2019] <Journal of the Nigerian Bar Association Kano Branch 1 [https://www.researchgate.net/ publication/362986277_The_Need_for_Expert_Witness_in_Medical_Malpractice_Suits_and_the_Conspiracy_of_Silence_Journal_of_the_Nigerian_Bar_Association_Kano_Branch_2019/link/63098a5c1ddd447021102523/download](https://www.researchgate.net/publication/362986277_The_Need_for_Expert_Witness_in_Medical_Malpractice_Suits_and_the_Conspiracy_of_Silence_Journal_of_the_Nigerian_Bar_Association_Kano_Branch_2019/link/63098a5c1ddd447021102523/download)> accessed 7 October, 2023

⁵³ Criminal Code (CC) 1990, s297

⁵⁴ Criminal Code (CC), 1990 s313.

⁵⁵ B Odunsi, 'Medical Negligence and Its Litigation in Nigeria' [2023](14) (2) *Beijing Law Review*

⁵⁶ CC s326

⁵⁷ CCA s303

⁵⁸ CCA, s 24

application of technicalities by the Court, poor knowledge of medical negligence procedures on the part of the council, and failure of the Claimant to prove his case.

(h) Insufficient Law Reporting

Due to inadequate law reporting of decisions on medical malpractice/negligence claims it has not come to the consciousness of most victims of medical malpractice/negligence and even lawyers that such actions could be challenged in Court. Most negligent claims end either at the High Court of the state or the Medical and Dental Practitioners Disciplinary Tribunal and are never appealed against, thereby limiting the knowledge scope of lawyers in assisting victims of negligence based on law and procedure to get justice against the negligent medical practitioner.⁵⁹

In most cases, due to the constitution of the Disciplinary Tribunal which is more of medical practitioners, even though lawyers are appointed as assessors to advise the Tribunal on any question of law as to evidence, procedure, or any other matters specified by the rules,⁶⁰ yet most of the directions of the Tribunal are overturned due to lack of fair hearing.⁶¹ The researcher has yet to see a Law Report arising from the Tribunal where the directions/judgments of the Medical Dental Council Disciplinary Tribunal are published.

Medical malpractice law reporting is pivotal to enhancing the Nigerian justice delivery system, which will aid medical law practitioners and victims of medical malpractice through patient rights education.

(i) Lack of Resources to Prosecute Medical Negligence Claims

Another obstacle facing the victims of medical negligence/malpractice in seeking redress in the court is their inability to finance the litigation process. Litigation is not a cheap dispute resolution mechanism. Most victims of medical negligence find it very difficult to hire lawyers to represent them in court. Moreover, hiring of medical expert witnesses would be difficult for a poor victim of medical negligence in Nigeria. This is a serious challenge militating against the less privileged victims of medical malpractice. The Judiciary both the bar and bench, should encourage litigation of medical negligence claims by reducing the cost of getting justice in Nigeria.

6. Recommendations

Non-Governmental Organizations (NGOs) and Civil Society Organizations (CSOs) should embark on a health rights campaign, by educating Nigerians on their health rights and encouraging them to seek redress in court against the negligent medical practitioner when such rights are breached.

The Nigerian Judiciary should undergo some legal and policy reform to ensure that Nigerian courts are neutral and unbiased arbiter that upholds the integrity and sanctity of the courts, by doing justice rather than sacrificing justice at the altar of technicalities in handing down their judgments.

It is also necessary that adversarial system of practice should be downplayed especially as it relates to medical negligence disputes.⁶² The procedure that expert witness must testify and that doctrine of *res*

⁵⁹ Abugu and Obalum (n35)125.

⁶⁰ Medical and Dental Practitioners Act Second schedule s 15(5); item 4(2).

⁶¹ *F. C. I. Olaye v Chairman, Medical & Dental Practitioner Disciplinary Tribunal and Anor.* (1977). (pt.506)550 @ 567; *Okezie v Chairman Medical and Dental Practitioners Disciplinary Tribunal*(2010) 26 WRN,

⁶²M Tumelty, 'Plaintiff aims in medical negligence disputes: limitations of an adversarial system' [2023] (3) *Medical Law Review* 226–246.

ipsa loquitur must be pleaded and lead in evidence should be expunged from the rules of practice. Failure to call an expert witness should not be a ground for dismissal of a plaintiff's malpractice cases.⁶³ The Nigeria Criminal Code Act should undergo a reform to remove the overreaching provision that shields doctors and other medical practitioners stating that once the doctor acted in good faith and in the interest of the patient, the doctor is exculpated from a medical negligence liability.

It is therefore recommended that Alternative Dispute Resolution mechanisms of mediation and negotiation should be adopted to promote quick dispensation of justice in medical malpractice claims. There is a need to legislate strict liability for medical malpractice negligence *res ipsa loquitur*, where a needle, sponges, scalpels, scissors, clamps, forceps, retractors, needles, tubes, surgical masks or gloves, etc. are retained in the body of the plaintiff/victim. By implication, the litigant victim of negligence need not be subjected to the psychological stress of calling an expert witness, nor must *plead res ipsa loquitur* and lead evidence.⁶⁴ Otherwise, it would be a herculean task for the victim of medical negligence victim who may not be well to do to get a judgment in his/her favour.

7. Conclusion

The Nigerian healthcare sector is inadequate especially when it comes to human capital development and deteriorating infrastructure. In the bid to manage the outdated medical equipment in the medical facilities by the doctors who agreed to stay back in the country, numerous medical errors occurred. At times when such errors occur, there is a need to take action against the doctor or medical practitioner who breached that duty of care by instituting a medical malpractice/negligence claim against him.

It is only the health user who is aware of his rights that can initiate civil or criminal proceedings against a medical doctor in breach, hence the writer discussed the health user rights and the role of the judiciary above, with special attention to the application of procedural technicalities in justice delivery generally and medical malpractice/negligence in particular.

The barriers to prosecuting medical malpractice claims were also discussed with special attention to the application of technicalities, pleading of the doctrine of *res ipsa loquitur*, and the testimony of expert witnesses. The Nigerian courts should not capitalize on technicalities and thereby defeat the administration of justice to the victims of medical negligence. The researcher in his advice to the Nigerian judiciary adopts the immortal words of Lord Hewart CJ in *R v Sussex Justices* where he held ... that it is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done⁶⁵ in medical malpractice/negligent claims.

⁶³ *Ojo V. Gharoro & Ors* (2006) LPELR-2383(SC)

⁶⁴ S Olawepo and P Ordam, Nigeria: Centrality Of Expert Evidence In Proof Of Medical Negligence In Nigeria {29 March 2022} <<https://www.mondaq.com/nigeria/professional-negligence/1175866/centrality-of-expert-evidence-in-proof-of-medical-negligence-in-nigeria>> accessed 7 October,2023.

⁶⁵ *R v Sussex Justices, ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233)