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Doctor-Patient Relationship: A Basis for Liability and Burden of Proof

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Abstract

Health care system in Nigeria has recorded unimaginable failure due to a degenerate doctor-patient relationship among other reasons. This work looks at doctor-patient's relationships in Nigeria as it relates to health care provision. The study identifies the duties of these persons and extends its scope to other health care providers in the health industry. The study highlights the liabilities of both the doctors and the patients in the health industry as well as showcases the kind of remedies available where in breach of their duties as a result of poor communication. The methodology used in the work is the doctrinal research method. The doctrinal method of research introduces into the search: books, legal propositions, doctrines and statutes, etc, while relying on the physical library and the internet. The study discovered that many Nigerians are not aware that health care providers could be held liable for medical negligence. The research was able to establish that the relationship between patient, doctors and other health givers is central in providing health care services globally. Thus, the research recommended the creation of awareness on this after sufficiently highlighting the remedies available when in breach of same.

Key Words: Doctor-patient relationship, liabilities, breaches, remedies

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INTRODUCTION

Many patients in Nigeria do not know their rights and many have limited knowledge on the subject matter of their rights. If those patients become better informed of their rights and the reality of their taking out successful law suits against negligent health care providers, the quality of health care in Nigeria is likely to improve. The provision of medical services brings together the doctor, patient and at least the relatives or the friends or both of the patients concerned with the relief of his illness. We believe life is God given as such a doctor figure in the scheme of God as he stands to carry out his command. A patient generally approaches a hospital/doctor based on its/his reputation. Therefore, it is expected that a doctor carry out necessary investigation or seeks a report from the patient.

The health care system in Nigeria has recorded unimaginable and unsatisfactory performance in quality delivery for a very long time. Medical services are still not accessible to many people, especially the poor. When accessed, patients receive sub-standard care in many cases due to the negligence on the part of one health care provider or another. On the other hand, when services are unaffordable, the patients go to quacks that may provide cheaper services, while causing greater harm or damage to the injured patients and their families. Generally, negligence is a breach of a legal duty to take care, which results in damage to the claimant[1]. Professional medical negligence or malpractice as it is often called has been on the increase and there is an urgent need to address the issue in terms of attitude of law towards medical practice so as to protect the patient, as well as make liable to punishment any medical personnel who negligently cause harm or injury to a patient. These health care providers need to be brought to order, especially since many helpless victims have been sent to their early graves as a result of medical negligence and to also revive the confidence of patients in the once highly revered medical profession. Today most people who go to the hospital for treatment

[1] A.S Hornby, Oxford Advanced Learners Dictionary of Current English (7th Ed.)p.891

or medical advice tend to do so with some level of pessimism in the face of rising cases of medical negligence in our dear country Nigeria. There exist laws to regulate human conduct which includes medical practice, the law is formulated to protect people's rights and to make sure that certain basic rules of social conduct are complied with. For instance, the National Health Act was formulated to provide a framework for the regulation, development and management of a national health system and set standards for rendering health services in the federation. It is in the light of this that the medical profession, like any other profession has become more open to legal scrutiny.

As a result of the poor level of awareness or enlightenment in Nigeria as to the rights of victims in the event of medical negligence and other professional misconduct and sometimes for some other reasons, most victims of medical negligence do not go to court to seek redress which has contributed to the rise in cases of medical negligence. Applying the neighbourhood test, there is no gain saying the fact that the doctor or any other health professional in a health facility is a very close neighbour of the patient who represents himself to the health facility to whom the doctor and other health personnel owes a duty of care.

The Code of Medical Ethics in Nigeria provides instances where a medical practitioner can be said to be guilty of medical negligence and such instances could be through an act or an omission. The majority of medical negligence or malpractice cases are not intended, but due to circumstances things could go wrong. Once it is established that another health worker of the same qualification would not have made such a mistake in the same situation then a breach of duty has taken place. Since some of these mistakes can have devastating consequences on the victims, the practitioner needs to be checked by both his professional disciplinary body and the courts. A medical doctor who performs a surgery and negligently leaves scissors in the patient's abdomen, thereby causing the death of the patient, may be sued in a civil action for damages and he may also be prosecuted, if found guilty, be convicted for committing the crime of manslaughter. In view of the above, and using the doctrinal research method, this

research seeks to answer whether doctor-patient relations can bring liability, and if patients who suffer injury from doctors' relationship can or do institute legal action against doctors. The doctor/patient relationship is one of the most unique and privileged relation based on the mutual trust and faith.

DOCTOR-PATIENT RELATIONSHIP

The doctor-patient relationship is a central part of health care and the practice of medicine. The doctor-patient relationship forms one of the foundations of contemporary medical ethics. The relationship between a physician and his or her patient is created when the patient knowingly seeks the services of the physician and the physician knowingly accepts him or her as a patient.[2] The relationship is consensual and mutual and often described as "contractual"[3]. Once created, the relationship imposes legal obligations and duties. A patient must have confidence in the competence of their physician and must feel that they can confide in him or her. For most physicians, the establishment of good rapport with a patient is important. Some medical specialists such as psychiatry and family medicine emphasize the physician-patient relationship more than others such as pathology or radiology which has very little contact with patients.

The quality of the patient-physician relationship is important to both parties. The doctor and patient's values and perspectives about disease, life and time available play a role in building up this relationship. A strong relationship between the doctor and patient will lead to frequent, quality information about the patient's diseases and better health care for the patient and their family. Enhancing the accuracy of the diagnosis and increasing the patient's knowledge about the diseases all come with a good relationship between the doctor and the patient. Where such a relationship is poor, the

[2] Carol A. Schwab 'Legal Issues in Health Care' *A guide for Health Care Providers* [2007] (1). <http://info.searchall.com/sarmg2.b/search/web?q=doctor+patient+relationships> Accessed 14/08/2018

[3] J.A Dada, Legal Aspects of Medical Pratice in Nigeria (1st edn, University of Calabar Press, 2002) p.34

physician's ability to make a full assessment is compromised and the patient is more likely to distrust the diagnosis and proposed treatment, causing decreased compliance to actually follow the medical advice which results in bad health outcomes. In these circumstances and also in cases where there is genuine divergence of medical opinions, a second opinion from another physician may be sought or the patient may choose to go to another physician that they trust more.

For a contract to be valid in law, there must be an offer and acceptance together with consideration. However, in medicine, there is little guidance to be found in law as to when the contract between a doctor and a patient is formed. The general consensus is that the offer could be found in the patient's request for treatment and the acceptance in the doctor's commencement of care.[4] The court found in the case of *Banbury v Bank* of Montreal that the patient's submission to treatment is sufficient consideration for the doctor's services.[5] The terms of a contract between a doctor and a patient may contain express and implied terms. A consent form is an example of an agreement containing express terms. There are, of course, limits to what the parties may purport to agree to do that would be regarded as contrary to public policy, for example, selling of an organ.[6]

In every contract between a professional man and his client, there is always an implied term that the professional will use reasonable care and skill in discharging his obligations to his client with whom he has contracted to carry out certain treatment. The law does not usually imply a warranty that the doctor will achieve the desired result, that is, a guarantee of success. Nonetheless, the doctor is required to use reasonable care and skill in undertaking the treatment of his patient. Thus, the surgeon does not warrant that he will cure the patient just

[4] Giwa Osagie and Abubakar Sadiq Ogwuche (eds) *Compendium of Medical Law Under the Commonwealth & United States Legal Systems with treatise on Assisted Conception* (Maiyati Chambers 2006)p.
[5] [1918] AC 626.
[6] Ibid.

as the lawyer does not warrant that he will win the case.[7] In some jurisdictions however, guarantee of success may be implied in the contractual relationship between a doctor and a patient. Thus, when a doctor has guaranteed a particular result and he has failed to achieve it, the patient may sue for breach of contract.[8] In the Canadian case of *Lafleur v Cornelis*[9], the defendant, a cosmetic surgeon performed a procedure to reduce the size of the plaintiff's nose. He failed to inform her that there was a 10% risk of scarring. She, in fact was scarred. In succeeding in an action in negligence, the plaintiff established a breach of contract. The court found in the above case that it was not the kind of a contract which the defendant entered into with the plaintiff. The patient told the defendant surgeon what she wanted, namely smaller nose. The defendant drew a sketch on his notes to show the changes he would make if the plaintiff paid him a fee of S600.00. There was no misunderstanding whatever. Both parties were at idem as to what was to be done. Negligence is not a factor in a straight breach of contract action. The court thus held that the parties made a contract and the defendant breached it, leaving the plaintiff with a scarred nose.

Doctor's Duties to the Patient

Doctors and patients must of necessity relate cooperatively with each other to facilitate a congenial environment for optimal healthcare delivery. The principles of practice, in turn, ground the specific duties of the individual health care provider. Patients trust their health care providers to be clinically competent in all areas of their practice. However, competence is more than just clinical skills and knowledge, it is also practising safely and effectively. Safe and effective care is achieved when physicians know about and abide by their professional obligations and are competent as communicators, collaborators, advocators and managers.[10] It is expected that throughout a

[7] Ibid.
[8] Ibid.
[9] [1979] 28 NBR (2d) 569.
[10] Principles of Practice and Duties of Physicians '*The Practice Guard*' <www.cpso.on.ca/Publications/The Practice-Guide-Me....> Accessed 8/16/2018.

physician's career he or she will maintain his or her competence to ensure that patients receive the best care possible. Duties reflect the profession's values and demonstrate the principles of practice in action.

The doctor-patient relationship is the foundation of the practice of medicine. It reflects the values of compassion, service, altruism and trustworthiness is the cornerstone of the doctor-patient relationship, without trust a good doctor-patient relationship cannot exist. Physicians have a fiduciary duty to their patients because the balance of knowledge and information favours the physician, patients are reliant on their physicians and may be vulnerable. The patient must always be confident that the physician has put the needs of the patient first. This principle should inform all aspects of the physician's practice.[11] Health care providers are expected to make their patient's needs the first priority, but accomplishing this requires a broader focus than the direct physician-patient relationship. In order to meet individual patient needs, physicians should consider their contributions to their individual patients, but also to their own practice, the community and the health care system. Physicians hold a respected position in society, and in return, they have responsibilities. Physicians should never forget that their primary responsibility is to the patient standing before them, either individually or collectively.

Health care providers have many duties towards their patients. Their responsibilities cover their own actions, as well as orders they give to their assistants, such as nurses, medical students and residents.[12] Some of the duties of health care providers are:

(i) **Obligation to diagnose and treat patients**: health care providers have an obligation of means toward their patients, not an obligation of result. This means that they have to take appropriate steps available to make the right diagnoses,

[11] Ibid.

[12] The Duties of Doctors Towards Patients '*Journal of educaloi*' <www.educaloi.qc.ca/en/capsules/duties-doctors-towards-patients>Accessed 8/16/2018.

provide treatment and follow-up on their patient's progress. Health care providers must base their actions on up-to-date scientific information and use recognized treatments in the right way. They must treat their patients attentively and conscientiously. Health care providers must recognize their own limits, in case of any doubt; they must get information from other family members or people.

Their duties to treat patients include the duty to:

(a) Diagnosis;

(b) Tell patients about the advantages, disadvantages, risks and alternatives regarding a proposed treatment or operation and

(c) Provide adequate follow-up to the patient within a reasonable time.[13]

(ii) **Duty to provide information:** Health care providers must give their patients all the information they need to make free and informed decisions. They must also inform their patients of the following:

(a) Diagnosis;

(b) Nature, goal and seriousness of the treatment;

(c) Prognosis and risks of the therapy;

(d) Other treatment options available if any.

Health care provider's duty to provide information also includes answering patient's questions. They must also explain the chances of success and the risks of failure of the suggested treatment, keeping in mind the patient's specific condition. They must also inform their patients about the possible negative effects of a treatment. However, it is impossible for a doctor to talk about all of the possible risks, doctors must tell their patients about the foreseeable risks, in other words the risks that are most likely to occur. The extent

[13] For example, after a treatment, a doctor must provide the medical follow-up required by the patient's state of health or at least make sure that a colleague or other professional follow up.

of the duty to provide information depends on the circumstances and the patient in question.[14]

(iii) **Duty to make sure the patient gives free and informed consent:** The reason behind the duty of health care providers to provide information to patients is to give patients all the information they need to make free and informed decisions with full knowledge of the facts about the treatment and care offered. The duty to get the consent of patients is a continuous process. This is why patients must be kept informed about any new information about their state of health and the treatments they are receiving.

(iv) **Duty to respect confidentiality:** Health care providers have a duty to respect their patient's confidentiality. This is sometimes called the duty of professional secrecy. This duty covers both the information patients tell their doctors and any facts doctors discover about their patients as part of the doctor-patient relationship. Professional secrecy belongs to the patient, not the health care provider. Health care providers cannot reveal what their patients tell them, unless their patients waive the confidentiality of the information or if the law allows it.[15]

Patient's Duties to the Doctor

The partnership of health care requires that patients or their families/surrogates take part in their care. The effectiveness of care and patient satisfaction with the treatment depends, in part, on the patient fulfilling certain responsibilities.[16] Some of the duties of patients are:

[14] For some types of treatment, Doctors are required to give more complete and specific information about the risks. This is the case, for example, with purely experimental treatments as well as treatments that are not aimed at curing an illness or injury, like some types of plastic surgery. In these cases, doctors must tell patients about all possible and rare risks.

[15] For example, the Public Health Act says that certain diseases must be reported to public health agencies.

[16] Dada (n50)

(i) Patients are responsible for providing information about past illness, hospitalizations, medications and other matters related to health status. To participate effectively in decision making, patients are responsible for asking for additional information or explanation about their health status or treatment when they do not fully understand information and instructions given by the Doctor;

(ii) Patients are responsible for ensuring that the health care institution has a copy of their written advance directive if they have one;

(iii) Patients are responsible for telling their health care providers and other caregivers if they expect problems in following prescribed treatment;

(iv) Patients should be aware of the hospital's duty to be reasonably efficient and fair in providing care to other patients and the community. The hospital's rules and regulations are intended to help the hospital meet this responsibility;

(v) Patients are responsible for giving necessary information for insurance claims and for working with the hospital to make payment arrangements when necessary;[17]

(vi) Patients should comply with his clinical management and medication unless he has good reason to think that these have not been properly arrived at;[18]

(vii) The patient also has a duty to be courteous and tolerant when attending healthcare institutions, including accident and emergency departments as part of taking responsibility for the reasonableness of his own expectations of care.[19]

DUTY OF CARE

Doctor-patient relationship is well established as one where a duty of care is owed. If a doctor holds himself out as possessing special skill

[17] Ibid.

[18] H.M Evans 'Do patients have duty?' *Journal of Medical Ethics*. [2007] (8) (12) 689-694. <www.ncbi.nlm.nih.gov/pmc/articles/PMC2598206/> Accessed 8/19/2018.

[19] Ibid.

and knowledge and he is consulted as possessing such skill and knowledge by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment.[20] If he accepts the responsibility and undertakes the treatment and the patients submits to his discretion and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No contractual relationship is necessary, nor is it necessary that the service be rendered for reward.[21] It is not for every careless act that a man may be held liable in law nor even for every careless act that causes damage. He will only be liable in Negligence if he is under Legal Duty to take care.[22] Aside physicians there are a number of health care providers who owe patients duty of care. These include Hospitals, Nurses, Physiotherapists, Chiropractors, Dentists and allied professionals.

All health care providers owe duty of care to their patients in every professional dealing, the First High Court of Australia in the case of *Roger v Whitaker*,[23] defined duty of care as the law which impose on a medical practitioner a duty to use reasonable care and skill required is that of the ordinary skilled person exercising and professing to have that special skill. While there are different levels of duty and situations where a person does not have a duty to another, usually the health care provider has a duty to his patient. All professional health care providers who have a relationship with a patient have a duty to that patient. The patient/health care provider relationship is often established when the doctor, nurse, etc. accept to treat the patient. The health care provider has a duty to use established standards of care when treating a patient. A health care provider is held to a standard of other health care providers with similar education and in a similar situation.

[20] Osagie and Ogwuche (n 15)
[21] Ibid.
[22] J.A Dada, *Legal Aspects of Medical Pratice in Nigeria* (1st edn, University of Calabar Press, 2002)p.45
[23] (1992) 175 CLR 479 at 483.p.

However, a medical practitioner does not owe a duty of care to anyone who needs medical aid or who can be reasonably assisted. For instance, a doctor who comes to a scene of an accident and refuse to administer first aid to the injured victim or victims incurs no liability because no duty is owed to the injured victim or victims. Once a doctor undertakes to treat the patient, whether or not there was an agreement between them, a duty arises. The doctor must exercise reasonable skill and care in treating the patient.

The case of *Donoghue v Stevenson*[24] illustrates the law of Negligence, laying the foundations of the fault principle. In this case, Donoghue drank ginger beer given to her by a friend who bought it from a shop. A manufacturer, under Stevenson in Scotland supplied the beer. While drinking the beer, Ms Donoghue discovered the remains of an allegedly decomposed slug. She then sued Stevenson, though there was no relationship of contract as the friend had made the payment. As there was no contract, the doctrine of privity prevented a direct action against the manufacturer. Lord Atkins interpreted the biblical passages to 'Love thy Neighbour' as the legal requirement 'not to harm thy neighbour'. He then went on to define Neighbour as persons who are so closely and directly affected by my act that I ought to reasonably have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called in question. Reasonably foreseeable harm must be compensated. This is the first principle of negligence. A medical practitioner, whether as a doctor in a private or public hospital, and whether that Hospital is in his professional capacity, owes a duty of care to the patient to use caution in undertaking treatment on any patient. In *Barnett v Chelsea and Kensington Hospital Management committee*[25] the three security guards started vomiting after drinking tea. The three men approached the defendant's hospital for treatment. The nurse telephoned the doctor who is a casualty officer. The doctor without seeing them, advised them to go home and see their own doctors. The Court held that there was a necessary undertaking on the part of the doctor such

[24] (1932) A. C 532.
[25] (1969) 2 All ER 118 Per McNair J.

that he had thereafter to behave reasonably. It further held that the hospital shall have duty of care to the patient in the following:

a. Selection of competent and qualified medical practitioner and other supporting staffs;
b. Instruction and supervision of the employees;
c. Provisions of proper facilities and equipment and
d. Establishment of systems necessary to safe operation of the hospital.

The standard of care required of the hospital is that, the hospital has to carry out the above duties as competent as the reasonable hospital in the circumstances and even if found substandard.[26]

BREACH OF DUTY OF CARE

The term breach of duty only comes in particular where such duty exist on the side of the defendant who owe a duty of care to the plaintiff. Consequent upon which he had breached such duty thereby giving to the plaintiff to sue the defendant for breach which as a result caused the plaintiff damage.[27] The defendant must not only owe the plaintiff a duty of care, he must also be in breach of that duty. But, what constitutes a breach of duty? Perhaps the answer to the question can be found in the statement of Alderson B. in *Blyth v Brimmgham Water Works Co*[28] where he stated that:

> Negligence is the omission to do something which a reasonable man, guided upon such considerations which ordinarily regulate conduct of human affair, would do, or doing something which a prudent and reasonable man would not do.

Health care providers will be in breach of duty owed to a patient if the Health care provider fails to exercise the degree of care which the law requires. This at once raises the question: What standard of care must a doctor exhibit in treating a patient? The answer must be provided in

[26] I. Kennedy and A. Grubb, *Medical Law: Text with materials* (2nd edn, London Butherworth & Co Publishing Ltd 1994) 397-398
[27] Nwoke (n 14)
[28] (1859) 11 Exch. 781 at 784

general terms for cases are rarely alike. Differences in time, place, circumstances and facilities may affect the standard. More efficient medical service may be expected in a modern well-equipped hospital than in a village medical Centre. Roadside medical aid given to an accident victim may not conform to the same standard as treatment given in a modern hospital.[29] A health care provider who undertakes to administer medical treatment to a patient must exercise a reasonable amount of skill, care and judgment. The law does not require a doctor to attain the highest nor the lowest standard. It is sufficient if the doctor exhibits the degree of care, skill and judgment which an average doctor of that experience is placed in the same circumstances would show. This standard will of course vary according to the skill expected of the individual doctor. A house officer is not expected to show the same standard of skill and care as a consultant working in a special area.[30] If a health care provider holds out to a patient as possessing special skill and knowledge in a particular field of medicine or surgery, the health care provider must exercise the same degree of care and skill as doctors who generally practice in that field. This is particularly relevant in the case of a doctor who runs a private hospital. If such a doctor, being, for example, an obstetrician, undertakes a complicated cardiac surgery when the patient could have been referred to a cardiac surgeon, that obstetrician must conform to the standard of the cardiac surgeon. If the obstetrician does not, then it is negligent to undertake the treatment at all knowing that as an obstetrician he does not possess the special skill and facilities required for cardiac surgery. On the other hand, if in an emergency or during a hospital strike, circumstances compel a doctor to render medical service in an area outside the doctor's specialty, the law will not require the doctor to conform to the standard of specialists in that area of medicine, but to the standard of an average doctor of similar experience working in similar circumstances.[31]

Another aspect of medical negligence as a result of breach of duty of care may be seen when diagnostic error are made. These errors arise

[29] Umerah (n 11)
[30] Ibid.
[31] Ibid.

when inadequate or incorrect medical history is given or when examining a patient. When there is failure to spot the problem of the illness. Medical negligence can occur when there is failure to conduct test or refer a patient to a specialist. It is important to know the history of a patient *before* embarking on a treatment. In the case of *Chinkeow v Government of Malaysia*[32], a doctor failed to enquire into the medical history of the patient administering penicillin injection and the patient died from an allergic reaction of the drug. The doctor was aware of the remote possibility of danger of the drug but nevertheless carried on with his normal practice without making any inquiry.

In a situation where a doctor is unable to diagnose or advice appropriately or refer the patient to a specialist, where he attempts to diagnose or treat the patient himself, he is in effect undertaking work beyond his competence and he will be held liable if harm result. Negligence can occur during operation. The danger of swabs or surgical instrument being left inside the patient body at the end of an operation is clearly an act which must be prevented. Where after an operation a swab is left in the body of the patient, the doctor will be liable for negligence or at the process of the operation the patient suffer more harm than correction, the doctor will be liable. In the case of *Miss Felicia Osagiade Ojo v Dr Ghanovo & UBTH Management Board,*[33] the plaintiff's claim arose from a surgical operation performed on her by the defendants. The operation was designed to correct a certain medical condition, at the end of it, one of the surgical needles used in the operation got broken and the broken part could not be located or retrieved and it was consequently left inside the plaintiff. The plaintiff said that after the surgery, she had serious pain in her abdomen and vigina which she complained to the 1st defendant who ascribed the pains to the stitches on the site of the operation wound. Four days later when the pains could not subside, the 1st defendant ordered for an X-ray examination. The plaintiff said she had two X-rays and the X-rays confirmed that there was a broken needle

[32] (1967) 1 W.L.R 813
[33](2006) All FWLR (Pt 316) 197.

in her stomach which was not there before the operation. The plaintiff said the 1st and 3rd defendants informed her that due to the fresh wounds from the surgical operation, could not immediately conduct another surgical operation to recover the needle and also that the 1st and 3rd defendants did not tell her that they left anything behind in her stomach. The plaintiff gave evidence that she saw another gynaecologist who informed her that judging from the way she was operated upon, she would be unable to have a child. The defendants admitted the broken needle in her stomach but said the plaintiff was informed after the first operation. The defendants admitted also that nowadays sub-standard needles are being used and that such needles break easily during operations. He denied that the plaintiff could not have any child because of the broken needle in her stomach, that where the needle was located is in the anterior abdominal wall and there was no relationship with pregnancy. Certain legal questions arose, since the plaintiff pleaded particulars of negligence. Thus, in determining whether in a particular circumstance a duty of care is breached or not, the test is whether the standard of care exhibited by the defendant fell short of the one expected of a reasonable and prudent man.

PROVING MEDICAL NEGLIGENCE

The burden of proving negligence ordinarily rests on the plaintiff, for he who alleges must prove.[34] He must not only show that the defendant owes him a duty of care, but also that the duty was breached as a result of which he suffered foreseeable damage. This he can do by adducing legally admissible evidence. To prove medical negligence the patient (plaintiff) must lead medical evidence sufficient to satisfy the burden of proof. In most cases he will need to rely on the evidence of another health care provider (Medical Doctor) against his co-Doctor (Defendant). The practical implication of the foregoing is that medical negligence is not established merely because a breach of duty occurred. Proof that the breach caused a particular damage is absolutely imperative and the burden of doing this is not a child's

[34] Nwoke (n 14)

play.[35] This point is well illustrated in the case of *Ojo v Ghanovo*[36] where the appellant had a surgical operation for the removal of growth in her fallopian tube. She has been unable to get pregnant. It was medically ascertained that the removal of the growth might make it possible for her to have a pregnancy. The surgical procedure was done by a doctor, the 1st respondent, who was assisted by a nurse, the 3rd respondent. The case of the appellant was that in the course of the operation, the respondents negligently left in her womb a broken needle as a result of which she experienced enormous pain for which she claimed damages in this action. In dismissing her appeal, for failing to prove her case, Tobi J.S.C made a very illuminating pronouncement which we consider fitting for practical purposes to reproduce as follows:

> The only witness who gave evidence for the appellant is the appellant herself. She did not call any expert witness to give evidence and so her evidence had to struggle for the first place with the expert evidence of the three witnesses for the respondents. One other aspect that should have determined the level of negligence on the part of the repondents was evidence on the size of the piece of the needle left in her abdomen. No evidence was led on that and the party who ought to have led evidence on that was the appellant.

In most cases, it may not be only inconvenient but extremely difficult, if not impossible for the plaintiff to establish that the medical practitioner was negligent. For instance, how would the plaintiff (patient) who was unconscious during an operation establish negligence on the part of the surgeon and the theatre nurse who retained object in his (patient's) abdomen? To prevent this herculean task which may arise by insisting that the plantiff must prove the facts of negligence, an exception has been introduced aimed at shifting the onus on the plaintiff to the defendant to show either that the accident was due to a specific cause which did not involve negligence on his

[35] Dada (n 50)
[36] (2006) All FWLR (Pt 316) 197.

part or that he had used reasonable care and skill in the matter. This excpetion is expressed in the latin maxim *res ipsa loquitur,* which literally means, "the thing speaks for itself". This doctrine was laid down in the case of *Scott v London & St. Kathrines Docks Co.*[37] where it was held as follows:

> There must be reasonable evidence of negligence. But where (the treatment of the plaintiff) is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of (the treatment) does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of an explanation from the defendant that the accident arose from want of care.

Unfortunately courts within the common law system are often reluctant to apply the principle of *res ipsa loquitur* in medical negligence. *Res ipsa* is part of circumstantial evidence and it applies where a plaintiff prove facts which raises an inference of negligence in the absence of explanation. It throws the burden on the defendant to displace the prima facie interference, even though there is no onus on him to establish the correctness of his explanation.[38] The doctrine does not shift the burden of proof to the defendant; it only raises an inference of negligence on his part. If he cannot rebut the inference, the plaintiff will be treated as having established his claim for negligence. *Res ipsa* thus makes it easier for a patient to succeed. It will only applies where (i) there is no evidence as to how or why an accident occurred, (ii) the accident must be such that it would not occur without negligence and (iii) the defendant must be in control of or linked to the situation either personally or vicariously. It only applies where the plaintiff is unable to identify the precise nature of the negligence which caused his injury and the defendant offers no explanation as to how the injury occurs. Usually, the injury should be

[37] (1865) 159 E.R 665.
[38] Emiri (n 8)

of such a nature that does not normally happen in the circumstances unless there is negligence.[39]

BURDEN OF PROOF IN MEDICAL NEGLIGENCE

As stated in the earlier chapter, the onus is on the plaintiff to establish the medical negligence. in the case of *George Abi v C.B.N*,[40]the appellant was diagnosed with meningitis and was given gentamycin. The side effect was not pleasant but it amounted to a doctor balancing the risk. The appellant had the duty to establish want of care, that a reasonable person in that profession would not have given him that drug. If he had adduced uncontradicted evidence that the 3rd respondent's prescription of drugs including gentamycin and the administration of the drug by the staff of the hospital fell short of the standard of reasonably skillful medical man, then he would have discharged the burden on him. Section 131 (1) of the evidence Act[41] provides: "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts shall 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. In medical practice, the existence of a legal duty of care is of the very essence and presents no difficulty. The defendant is not required to prove that he exercised such skill and competence as it would be reasonable to expect from a medical practitioner of his class (that he was not in fact negligent), the law will presume this. The onus of proof lies on the plaintiff, the burden is not as heavy as consideration of the criteria of proof would seem to indicate.

CONCLUSION

The Doctor patient relationship is the basis of liability of such a doctor to the patient. When there is no relationship between a doctor and a patient there can be no liability. This work has revealed that the moment the doctor has contact with a patient, there is an

[39] Ibid.
[40] (2012) 3 NWLR (Pt.1280)
[41] Evidence Act Cap E.14 2011.

understanding that the doctor owes a duty of care to the patient as the patient has reposed some level of confidence on such a doctor believing that the doctor has a solution to his/her problems. One cannot wish away this relationship especially when some negative thing happens. A doctor can be held liable for not treating or giving the patient the right advice as the case may be.

We recommend that both patients and doctors be enlightened on the rights and duties to each other in their relationship as to avoid some of the issues that may arise as a result of their relationship. The liabilities of the doctors especially should be made open to patients especially those who are less privileged. Nigeria being a developing country has her major population living in the rural area where things are difficult and some may never know of their rights unless enlightened by government or some non-governmental organisation. We believe that if both parties know their rights, duties and responsibilities it will go to bring about diligence on all sides.[42]

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