

PHYSICIANS AND WRONG DIAGNOSIS OF PATIENTS: AN ASSESSMENT OF LEGAL DUTIES AND LIABILITIES IN NIGERIA¹

Abstract

Scenarios of medical mishandling have been on the continuous increase in Nigeria, notwithstanding the extent of meticulousness ethically expected of medical personnel. Diseases when wrongly diagnosed or poorly managed endanger and waste human lives causing loss of confidence in the medical profession. It is on this premise that this paper examines the legal duties that physicians owe towards their patients and society's willingness to challenge medical mishandlings in the event of harm occurring from wrong diagnosis. This paper places reliance on the content analysis of various primary and secondary sources of law. It found that religious/cultural beliefs and high cost of litigation are major factors responsible for peoples' willingness to accept negligent acts as a matter of fate and therefore overlook it. The study recommends that increased public enlightenment on citizen's right of redress should be encouraged. Adequate sensitization and provision of necessary equipment for medical personnel, especially those in public hospitals is suggested. The paper concludes that there is need to have Civil Liability Act in Nigeria that will accommodate less stringent proof of negligence instead of continued reliance being placed on common law rules.

Key words: *Diagnosis, Wrong diagnosis, Medical Practice, Duty of Care and Negligence*

1. Introduction

The issue of wrong diagnosis leading to wrong administering of treatment which often causes complication or death of patients has become rampant in Nigeria today. The most vulnerable are the less privileged, the illiterates and the destitute because medical treatment is mostly sought abroad by the rich and influential ones in the country. Most of these incidents of wrong diagnosis and lackadaisical attitude towards work by the medical practitioners have resulted in premature deaths, avoidable injuries and untold hardship to the victims and their loved ones.²

Medical mishandling which may be in form of wrong diagnosis, defective treatment and dereliction of required duty to care of medical practitioners have been on the continuous increase in Nigeria. It is however unfortunate that cases on medical negligence are rare in Nigeria and this has contributed to having few judicial pronouncements on liabilities of medical practitioners.³ The inability of patients to realize the legal consequences and remedies available to them in the event of damages or injury caused through negligence of physicians could be traced to the religious and cultural beliefs of accepting fate. However, in actual fact, the doctor could have averted such injury if he has applied the necessary duty of care, diligence, skill and required knowledge. Economic factor in form of cost of litigation is another reason why negligence is being overlooked.

In line with the above, there is need to examine medical negligence generally and how it specifically relates with diagnosis and the required duty of care expected of physicians in dealing with patients. The physician-patient relationship will equally form a discussion in this paper. Legal rights of patients and duty of care on the part of health care providers will be considered. Liabilities of physicians in Nigeria, civil or criminal, and the issue of causation will be examined. It is noted that the escalating rate of medical negligence has been addressed by several authors but little attention is being paid to the factors responsible for the failure of victims to challenge such malpractices through legal actions. There is

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² G. Kodilinye, *Nigeria Law of Tort*, (Spectrum Law Publishing, Ibadan, 1990) p.229

³ A. T. Shehu, 'Medical Practice and Medical Negligence: Wherewithal in Nigeria,' (2013) *Nigerian Journal of Food, Drug and Health Law*, Vol. 6, No. 1

therefore the need to encourage victims and their families to stand up for their rights in order to caution physicians and paramedics to abide by their professional ethics, thereby making medical practice in the country safe and reliable.

The paper concludes that, as a result of religious and social-cultural beliefs, injuries resulting from medical malpractice are accepted as part of destiny. Hence, medical mishandlings are often unchallenged. Other factors like poverty, bureaucracy and low level of public awareness constitute major reasons why medical negligence is often overlooked. The paper recommends increased public enlightenment on peoples' right of redress and provision of more flexible legislation that requires less strict proof of negligence.

2. Incidents of Diagnostic Error

Despite the provision of the Constitution⁴ and the existence of several other laws and regulatory body⁵ that require medical personnel to deliver health care services with requisite skill, safety and necessary ethical standards, incidents of medical negligence in form of wrong diagnosis and nonchalant attitude in respect of expected duty of care have continuously increased in Nigeria over years. Wrong diagnosis is one that is different from the ailment that the patient is suffering from. It occurs when medical advice is sought for a condition and it is incorrectly diagnosed.⁶ Wrong diagnosis has become rampant in the medical profession which needs urgent attention. Some of the causes of wrong diagnosis inter alia are lack of expertise either on the part of the physicians or the paramedical team, use of obsolete equipment, wrong interpretation of results and failure to monitor the patient's health condition. Wrong diagnosis of a disease will lead to wrong treatment and may either cause serious or irreversible damage in the patient or death which if established amounts to negligence.

It saddens the heart that most cases of wrong diagnosis are unreported. For instance, a woman named Trisha, aged 52 years in whose torso a golf ball-size lump was found⁷ approached a doctor who directed her to a surgeon. The surgeon removed the torso and sent it to the laboratory for examination. The result diagnosed her to be having a very rare cancer called "subcutaneous panniculitis-like T-cell lymphoma (SPTCL)."⁸ Trisha later realized that it was a terminal fast-acting disease.⁹ She was advised to see an oncologist.¹⁰ The doctor further advised her that without chemotherapy she would be dead by the end of that year. She asked about the possibility of the laboratory results being wrong; the doctor replied that, it is impossible for two independent laboratories to give wrong results. She insisted on having another oncologist for a second opinion.¹¹ The new oncologist read carefully the records and none of the reports confirmed a diagnosis for SPTCL exactly. One of the reports used the wordings, "most suspicious for," and the other read, "most consistent with." Neither one of them was precise about the diagnosis. However, the second laboratory report further stated that the lump biopsy should be sent for further tests called "clonality". Clonality determines if all abnormal cells are coming from a single clone. If the result of clonality is positive, it is strongly suggestive of cancer. When this test was carried out on her,¹² it was negative. It was confirmed that she does not have cancer as earlier suggested and the correct diagnosis was 'Panniculitis,' an inflammation of fat cells.¹³

⁴ See 1999 Constitution of FRN s. 33 (1), which says "Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria"

⁵ See the Medical and Dental Practitioners Act (Cap M8) Laws of the Federation of Nigeria, 2010

⁶ See patients.about.com/od/misdiagnosis/a/misdiagnosis.htm. Accessed March 19, 2016

⁷ Torso is the main part of the body, not including the head, arms or legs.

⁸ The experiment was reported to have been carried out by two standard laboratory

⁹ The longest anyone with SPTCL seemed to live was a couple of years, regardless of whether or not they received any treatment.

¹⁰ An oncologist is a person that specializes in the treatment of tumours in the body.

¹¹ She was refused, though depressed but did not relent in getting a second opinion from an oncologist. A friend of her at a party introduced her to another oncologist who requested for all her records.

¹² By the new oncologist

¹³ T. Trisha 'A Story of Mis-diagnosis' Patient Empowerment Expert, patients.about.com/od/misdiagnosis/a/htm. Accessed March 19, 2016.

From the above narration, if she has been treated with chemotherapy, the doctors will simply claim that she has been cured of a disease she never had. More-so, if she loses her life in the cause of her treatment, the doctors, patients and their families would resolve that it is fate and not negligence. It is important to point out that the rate at which issues of medical negligence in form of wrong diagnosis are been left unchallenged in the society today needs exigent address; otherwise irreversible loss will be the order of the day.

3. Medical Negligence in General

Negligence means conduct that falls below the standards of behaviour established by law for the protection of others against unreasonable risk of harm.¹⁴ A person has acted negligently if he or she has departed from the conduct expected of a reasonably prudent person acting under similar circumstances.¹⁵ Medical negligence on the other hand means improper, unskilled or careless treatment of a patient by a physician, dentist, nurse, pharmacist or other health care professional.¹⁶ The concept of negligence was developed under English law.¹⁷ English common law had long imposed liability for the wrongful acts of others long before the emergence of negligence in the eighteenth Century. Another important concept that developed at this time was 'legal liability for a failure to act.'¹⁸ Originally, liability for failing to act was imposed on those who undertook to perform some service and breached a promise to exercise care or skill in performing that service. Gradually, the law began to imply promise to exercise care or skill in the performance of certain services.¹⁹ This promise to exercise care, whether express or implied, forms the origins of the modern concept of "duty."²⁰

It is however a well-known principle of law that medical practitioners owe a broad duty of care to patients. The duty encompasses all aspects of their role and requires practitioners to take reasonable care in the provision of diagnosis, treatment, information and advice.²¹ It is therefore required of physicians to take all reasonable care in diagnosis and treatment of patients, meaning that an uncompromising obligation is imposed upon medical practitioners to disclose all material risks to a patient as regards his health.²² Consequently, the civil liability of a medical practitioner does not only depend on the concept of 'duty' to the patients, but also include the concept of 'skill' and 'knowledge'.²³ Whenever a person is by circumstances placed in a position with regard to another that everyone of ordinary sense would recognize that if he did not use ordinary care and skill in his conduct would cause danger of injury to the person, duty arises to use ordinary care and skill to avoid the danger.²⁴ The issue of establishing negligence should no longer be based on common law rules. Rather, a more suitable procedure should be encouraged. To this end, the general approach to the rule of duty is not an exception to medical profession.²⁵ Duty of care may therefore be considered as a ratification of the social contract, the unspoken responsibilities believed by individuals towards others within society.²⁶ Lives of people are involved; any slightest mistake or omission by a doctor or paramedical on a patient may result in loss of life or permanent disability. Therefore, physician owes duty of care to patients and will be held

¹⁴ Available at http://legal-dictionary.thefreedictionary.com/negligence". Accessed March 19, 2016

¹⁵ *ibid*

¹⁶ See [legal-dictionary.thefreedictionary.com](http://legal-dictionary.thefreedictionary.com/medical+negligence), available at <http://legal-dictionary.thefreedictionary.com/medical+negligence>. Accessed March 19, 2016

¹⁷ See the case of *Winterbotton v. Wright* (1842)

¹⁸ *ibid*

¹⁹ It brings about hardship in product liability cases.

²⁰ This common law position was established in the following cases; *Heaven v. Pender* (1883), *MacPherson v. Buick Motor Co.* (1916) and *Donoghue v. Stevenson* (1932), See also, Marsh and Soulsby, *Business Law* (1994), Stanley Thornes (Publishers Ltd), Ellenborough House, Wellington Street, United Kingdom.

²¹ See *Rogers v. Whitaker* (1992) 175 CLR 479, 483 (Mason CJ, Brennan, Dawson, Toohey and Mc Hugh JJ), 492 (Gaudron J)

²² See the case of *Rogers v. Whitaker, supra*.

²³ The 'duty' as a basis for civil liability was first enunciated by Brett, M. R. in *Heaven v. Pender* (1883) 11Q. B 503 at 509

²⁴ *Heaven v. Pender, supra*

²⁵ See *Donoghue v. Stevenson* (1932) A. C. 562

²⁶ Lord Atkins in the case of *Donoghue v. Stevenson*

accountable for negligent consequence in discharging this duty. Since the first element that must be established to proceed with an action in negligence is whether duty of care exists or not.

It is important to point out that in order to institute medical negligence claim, a patient who alleges that a medical practitioner is liable must establish that the duty owed was breached and that the harm sustained was caused by that breach. If the breach is established, liability arises. However, unlimited liability cannot be imposed on medical doctors simply because the duty of care exists.²⁷ If it is established that the doctor took every possible precaution and exceeded what would have been done by any reasonable person, yet the patient was injured, then the duty of care has not been breached.²⁸ The House of Lords in England found in the judgments of *Caparo Industries v. Dickman*²⁹ these three-part tests to establish a duty of care thus:

- (i) Harm must be a “reasonably foreseeable” result of the defendant’s conduct;
- (ii) A relationship of “proximity” must exist between the defendant and the claimant; and
- (iii) It must be “fair and reasonable” to impose.

As much as reasonable duty of care is expected from a physician, punishment will not be imposed if such care had been exercised and yet error occurred. But where there is deviation from the applicable standard of care and the patient is injured, the physician will be held liable for medical negligence. Negligence can exist in the diagnosis and treatment of a patient; therefore a physician is expected to use the same degree of care in diagnosis and treatment.³⁰

In summary, a breach of professional duty of skill and care, or their improper performance by a physician constitutes actionable malpractice. Once a person holds himself out as ready to give medical advice or treatment, he impliedly undertakes that he possesses skill and knowledge for the purpose.³¹ He therefore owes a duty of care to any patient who consults him and a breach of such duty is purely a tort to the patient.³² He owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary, nor is it necessary that the service be rendered for reward.³³ The law requires a fair and reasonable standard of care and competence.³⁴

4. Physician-Patient Relationship

The doctor–patient relationship has been and remains the bedrock of care.³⁵ It guides decision making in health care provisions. The relationship could be defined as a consensual relationship in which the patient knowingly seeks the physicians assistance and in which the physician knowingly accepts the person as a patient.³⁶ Once a doctor agrees to treat a patient, regardless of non-existence of a written contract, there is an implied duty of care. Therefore, any omission to use reasonable care and diligence in the treatment of a patient or to discover the patient’s problem will lead to misdiagnosis and its end result is that the physician will be liable.³⁷ The relationship therefore directly determines the quality and totality of the outcome of the expected treatment. A series of organizational factors also affects the

²⁷ There must be some reasonable liability limit to the duty of care- See the case of *Ultramares Corporation v. Touche*, 255 N. Y. 170, 174 N. E. 441 (1931)

²⁸ The leading judicial test for a duty of care in England was found in the judgments of *Caparo Industries v. Dickman* (1990) 2 AC 605.

²⁹ *Supra*

³⁰ See the case of *Rees v. Roderiques*, 101 Nev. 302, 304 (Nev. 1985)

³¹ See *Halsbury’s Laws of England* (Fourth Edition), Vol. 30, p 37.

³² *Ibid*, para 34 (note 19)

³³ See the case of *R v. Bateman* (1925) LJKB 791 at 794

³⁴ *ibid*

³⁵ It is the medium in which data are gathered, diagnoses and plans are made, compliance is accomplished, and also healing and support are provided.

³⁶ See the case of *QT Inc. v. Mayo Clinic Jacksonville*, 2006 U.S. Dist. Lexis 33668 (N. D. Ill. May 15, 2016)

³⁷ See the case of *Rees v. Roderiques, supra*.

doctor-patient relationship,³⁸ among which are accessibility of personnel, both administrative and clinical, and their courtesy level which provides a sense that patients are important and respected. The waiting time and personal comfort of patients equally matter in determining the relationship to be built.

The relationship between physician and patient could also be regarded as fiduciary, in which mutual trust and confidence are essential.³⁹ Physicians are expected and required to act in their patient's interests, even when those interests may conflict with their own.⁴⁰ Among the obligations of a physician's duty of care are the obligation to fully inform the patient of his or her condition; to continue to provide for medical care once the physician-patient relationship has been established; to refer the patient to a specialist, if necessary and to obtain the patient's informed consent to the medical treatment or operation; and to disclose any risk that the patient may likely encounter.⁴¹ To this end, a patient must have confidence in the competence of his/her physician. We have moved from the era of "doctor always knows best," to the idea that patients must have a choice in the provision of their care and be given the right to provide informed consent to medical procedures.⁴²

As members of a self-regulated profession,⁴³ physicians have ethical responsibilities to their patients, to the society, to the profession and to themselves.⁴⁴ The duties and responsibilities of medical doctors cover not only their own actions but include instructions given to their subordinates. Among the duties of physicians are examined below.

Duty to diagnose and treat patients

Legally and morally, doctors have the duty to possess the required medical knowledge and the obligation to take appropriate steps available to make the right diagnosis, provide treatment and follow-up on their patients' progress. They must base their actions on up-to-date scientific information and use recognized treatments in the right way.⁴⁵ Physicians must treat their patients attentively and meticulously. Patients are to be referred to specialist where necessary and ensure that right medication is prescribed. Physicians are to tell patients about the advantages, disadvantages, risks and alternatives regarding a proposed treatment or operation.⁴⁶ All in all, doctors must provide adequate follow-up to the patients within reasonable time.

Duty to provide information

Doctors must give either the patients, the people who make decision on their behalf or parents of a patient under 14 years of age all the information they need to make free and informed decisions. Doctors must tell their patients about their diagnosis, nature, goal and seriousness of the treatment, risks of the treatment and other treatment options.⁴⁷ It is equally the responsibility of a doctor to answer all patients' questions. Physicians must explain the chances of success and risk of failure of the suggested treatment,

³⁸ The availability of nurses and doctors contribute to a sense of security and the manner in which they attend to patient determines the confidence in patient-doctor relationship.

³⁹ Available at <http://uslegal.com>

⁴⁰ M. Rodwin, 'Medicine Money and Morals: Physician's Conflict of Interest.' (1993) New York, NY: Oxford University Press

⁴¹ L. MaryJo, and B. Wylie, 'Physician-Patient Relationship' *Ethics in Medicine*, University of Washington School of Medicine, 2014, available at <http://depts.washington.edu/bioethx/topics/physpt.html>, accessed on March 24, 2016.

⁴² See "Balint in a Nutshell"- International Balint Federation, 2007. Accessed on March 26, 2016, See also, "Restructuring Informed Consent: Legal Therapy for the Doctor-Patient Relationship" *The Yale Law Journal*, 79 (8): 1533-1576, 1970.

⁴³ *Ibid*; See also, S.K Gyoh "Malpractice and Medico-Legal Issues" (2005) *Annals of Ibadan Postgraduate Medicine*, vol 3(1)

⁴⁴ E. Cara, 'Physicians' Legal Duty of Care and Legal Right to Refuse to work during a Pandemic,' February 9, 2010, *Canadian Medical Association Journal (CMAJ)*, available at www.cmaj.ca, accessed on March 27, 2016.

⁴⁵ *ibid*

⁴⁶ See the cases of *Wallace v. Kam* (2013) 250 CLR, *Rogers v. Whitaker* (1992) CLR 479, 483.

⁴⁷ *Wallace v. Kam, supra*.

keeping in mind the patients' specific condition.⁴⁸ Patients must also be informed of possible negative effects of a treatment. It should be noted that the extent of the duty to provide information depends on the circumstances and the patient in question.⁴⁹

Duty to ensure that the patient gives free and informed consent

The reason behind the duty of doctors 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. When a patient agrees to treatment or care, this is called consent. However, the duty to get consent of patients is a continuous process and that is why patients must be kept informed about any new information about their states of health and the treatments they are receiving.

Duty to respect confidentiality

Physicians have a duty to respect their patients' confidentiality. This duty is sometimes called the duty of professional secrecy. This duty covers both the information patients tell their doctors and any fact doctors discover about their patients as part of the doctor-patient relationship. Doctors hardly reveal what their patients tell them, unless the patients waive the confidentiality of the information or if the law allows it.⁵⁰ Also, doctors can reveal some confidential information when they have very important and fair reasons to do so and these reasons relate to the health or safety of the patient or people close to the patients.⁵¹

Rights of patients have been extensively examined. However, physicians equally have some legal rights which are, amongst others, right to refuse to work in an unsafe environment,⁵² right during pandemic,⁵³ right to life, that is, right not to be placed in disproportional life threatening situations,⁵⁴ right to privacy,⁵⁵ right to freedom and security of person,⁵⁶ right not to be unfairly discriminated against by patient, medical scheme, medical school and government, right to fair labour practices.⁵⁷ Finally, doctors have right to work in an environment that is not hostile in terms of sex, race or any other ground.

5. Duty of Care and Medical Ethics in Nigeria

Considering the frequency of incidents of medical negligence in Nigeria, the question which occurs to an average person is "what is the duty of care expected of medical practitioners as dictated by the medical ethics and what sanction is stipulated for medical malpractice in Nigeria?" "Medical ethics" are unwritten rules and regulations which guide doctor-patient relationship forming the basis upon which the Medical and Dental Council of Nigeria (MDCN) expect all registered doctors and dental surgeons to practice. The MDCN is a statutory body established to regulate medical practice in Nigeria. The body specifies guidelines to be followed by doctors in attending to patients in order to safeguard public interest. It applies to doctors strictly since professionally, a medical doctor is held liable in the event of medical negligence. This is because a doctor has the discretion to select the team of paramedics who are competent to provide requisite investigative, dispensary, curative and other subsidiary services in the course of attending to patients. There is a presumed unwritten contract between the doctor and

⁴⁸ It is impossible for a doctor to talk about all of the possible risks, doctors must tell their patients about the foreseeable risks, that is, risks that are most likely to occur. Doctors must also tell patients about any rare risk that could have serious consequences- see the case of *Wallace v. Kam*, *supra*.

⁴⁹ Peculiarities of patients have to be taken into consideration. For instance, all possible risks should not be disclosed to patients that cannot contain shock or underage but in cases like plastic surgery, doctors must tell the patient all possible and rare risks.

⁵⁰ For instance, there are certain diseases that must be reported to Public Health Agencies.

⁵¹ See the *Duties of Doctors towards patients*, available at <https://www.educaloi.qc.ca/en/capsules/duties-doctors-towards-patients>. Accessed on March 28, 2016

⁵² For instance, during war or spread of diseases

⁵³ Pandemic means the spread of diseases over a whole country or the world.

⁵⁴ As guaranteed in the 1999 Constitution of the federal Republic of Nigeria, Chapter 4

⁵⁵ This includes protection of personal information, communication, family and property.

⁵⁶ That is right to be free from violence

⁵⁷ This includes fair dispensations of overtime, leave and working conditions and the right to have their grievances taken up at appropriate forum.

the patient once the doctor agrees to carry-out the treatment. The MDCN implements the various statutes⁵⁸ that are applicable for regulation of medical practice in the country,⁵⁹ and enforces specified and professional ethics expected of medical practitioners. The body also registers and screens competent doctors and dental surgeons. The Council tries registered medical doctors in the event of being accused of professional malpractice. Also, in the course of trial, the Council will ascertain whether the accused doctor has indeed failed to exercise dexterity and diligence expected of a competent medical practitioner in the circumstances. This is to secure confidence of medical practitioner against threat of being charged to court upon committing the slightest error, since registration with the Council grants members legal right to practice. However, in the case of doctors and surgeons who are not registered with the MDCN, they are charged to court for any form of malpractice they commit.

Based on the dictates of medical ethics, a registered medical doctor/surgeon is expected to prioritize treatment of patients without being selective about whom to treat in emergency situations, give patient accurate information about their health status in clear layman language and respect patient's choice of treatment. They are also expected to collaborate with colleagues and qualified paramedics to render best services to patients and disclose to the Council a colleague's behavior that is capable of putting patients at risk. Hence, a doctor/surgeon will be liable for professional misconduct where he commits an avoidable act or omission that is expressly against principles of good practice which puts a patient's health at risk.⁶⁰

In view of the above, any act or omission that amounts to negligence causing harm to a patient will be tantamount to malpractice.⁶¹ The MDCN rule of professional conduct describes malpractice as failure to implore expected dexterity and accepted standards required of registered members and recognized by the MDCN. In order to assist young graduates to acquire necessary practice skill, the residency program was introduced as an avenue to gain experience necessary to improve and standardize their practice between a period of five and ten years. To prevent medical malpractice, a doctor is expected to be extremely meticulous in diagnosis by taking detailed medical history of the patient and avoiding any form of guess work. A doctor/dental surgeon will be considered as being negligent by the MDCN where there is failure to attend to patients promptly, inadequate clinical assessment of patients, misdiagnosis of an obvious ailment, failure to advise patients on the risks of an operation, makes obvious mistake or causes his paramedics to act in a manner detrimental to a patient.⁶²

6. Liability for Medical Malpractice in Nigeria

An act of medical malpractice may be challenged before a law court or before the MDCN depending on the liability resulting therefrom. Liability for medical malpractice strictly depends on the extent of the effect of such malpractice. Where death or serious bodily harm has occurred, an action for criminal liability may be commenced before a law court by the state against the medical personnel in question. However, where medical malpractice amounts to a civil wrong, a civil action may be initiated before the court by a patient who has suffered one form of injury or the other, or by patient's personal representative. A disciplinary action before the MDCN may also be commenced by the patient, his family or his personal representative to challenge a civil wrong.

6.1. Criminal Liability

Criminal liability for medical malpractice may arise both in the Northern part of the country as provided by the Penal Code that is applicable in that region and in the southern part of the country where the Criminal Code is applicable. Criminal liability may arise under the following headings:

⁵⁸Medical and Dental Practitioner Act 2004 Cap M8 LFN.

⁵⁹ Rules of Professional Conduct for Medical and Dental Practitioners 1995.

⁶⁰ Code of Medical Ethics in Nigeria, (revised edition, 2004)

⁶¹ *Lawson v. Sitre and Mati* (1932) 11 NLR 113, which follows the English decision in *Cashdy v. Minister of Health* (1921) 2 K.B 343

⁶² S.K Gyoh "Malpractice and Medico-Legal Issues" (2005) *Annals of Ibadan Postgraduate Medicine*, vol 3(1)

Culpable homicide punishable with death/ Murder

Homicide is the killing of one person by another.⁶³ This may be done lawfully with the authorization of the state or in circumstances permissible by the law⁶⁴ and may also be done unlawfully in situations not exempted by law.⁶⁵ Homicide is the unlawful killing of one person by another in circumstances listed under the applicable laws.⁶⁶ The Criminal Code describes it as murder⁶⁷ while the Penal Code describes it as culpable homicide punishable with death⁶⁸. To succeed in an action for murder, the prosecutor must establish the physical element of the crime "*actus reus*", that is, an act done or omission to do an act by the accused which caused the death of the victim.⁶⁹ He must also prove "*mens rea*" which is the mental element that is the intention to kill or cause grievous bodily harm. Thus, if a person who is fully conscious of the possible danger involved exposes another person to harm which causes death, the perpetrator is guilty of murder even if the resultant consequences were unintended.⁷⁰ There is the legal presumption that a man intends the natural and possible repercussions of his action.

In addition, to succeed in an action for murder, the prosecution must prove that death of a human being has occurred as a result of an act done by the accused person, with the intention of causing death, and with full knowledge that death or grievous bodily harm are the likely consequences of his action.⁷¹ The prosecution is permanently charged with the obligation to prove all the above mentioned elements of murder and the standard of proof is 'beyond reasonable doubt'. This proof may be established using direct or circumstantial evidence.⁷²

To obtain a murder conviction against a doctor for medical malpractice, the prosecutor must establish that the doctor had intention to cause death or grievous bodily harm, by doing an act that is likely to endanger human life with the aim of achieving illegal purpose. It is difficult to find cases where medical negligence has led to murder conviction. However, where breach of duty of care leading to the death of a patient can be traced to a doctors' deliberate carelessness, such a doctor may be convicted for the murder of the patient in question. For instance, incidents of medical malpractice such as wrong diagnosis, misdiagnosis, delayed diagnosis, surgical mistakes, failure to follow up treatment, and use of out-dated procedure or drugs which leads to the death of a patient may lead to murder conviction for the doctor responsible.

Similarly, where a doctor fails to consult the services of a specialist necessary for the success of a medical procedure resulting in the death of the patient, a murder conviction may be obtained against the doctor depending on the prosecutor's ability to establish the elements of murder. In the case of *Okezie v Chairman Medical and Dental Practitioners' Disciplinary Tribunal (MDPDT)*⁷³ where Dr Okezie, a specialist obstetrician and gynecologist conducted a cesarean operation in an unregistered institution, without the services of an anesthetist and without putting on ground necessary equipment like oxygen and cross matched blood as a result of which the patient's life was lost, the decision of the tribunal that suspended the doctor was later set aside by the Court of Appeal on grounds of lacking fairness.

A situation where murder conviction against a doctor might succeed in Nigeria is a case of 'Euthanasia'. Euthanasia or 'mercy killing'⁷⁴ is the practice of medically causing the death of a person who suffers from a painful and incurable disease. Euthanasia is expressly prohibited under the Nigerian laws

⁶³ B. A. Garner (ed), *Black's Law Dictionary*, page 802.

⁶⁴ Criminal Code s. 306

⁶⁵ Criminal Code s. 315, Penal Code s. 220

⁶⁶ Criminal Code s. 316

⁶⁷ *ibid*

⁶⁸ Penal Code s. 221

⁶⁹ *R. v. Nwaoko (1939) 5 W.A.C.A. 120.Cf.*

⁷⁰ *Hyam v D.P.P [1974] 2 ALL E.R. 41*

⁷¹ *Musa v State (2009) 15 NWLR (pt 1165) 467 at 498*

⁷² Evidence Act s. 135(1)

⁷³ (2010) 26 WRN

⁷⁴ <http://www.merriam-webster.com/dictionary/mercy%20killing>

regardless of obtaining the patient's consent. The Nigerian Constitution upholds every citizen's right to life.⁷⁵ Besides prohibiting the unlawful killing of one person by another, the law clearly states that the fact that a person's consent was obtained to carry out a killing does not excuse criminal liability.⁷⁶ The law further precludes a sick person from requesting anybody to facilitate his death.⁷⁷ Thus, administration of euthanasia may lead to conviction of the doctor responsible, thereby liable to the maximum penalty which is death sentence.⁷⁸

Culpable Homicide not Punishable with Death/Manslaughter

Manslaughter or culpable homicide not punishable with death is a criminal offence that is committed when a person unlawfully kills another person in circumstances that do not amount to murder,⁷⁹ whether voluntarily or involuntarily. Voluntary manslaughter arises where a person deliberately kills another person as a result of provocation and the crime ceases to be murder because of the defense of provocation. On the other hand, manslaughter is said to be involuntary where death or grievous bodily harm occurs accidentally, without an intention to commit the crime on the part of the accused.

In cases of medical malpractice, the court often invokes section 303 of the Criminal Code which obligates anyone undertaking medical or surgical treatment to possess requisite skill and use reasonable care except in cases of necessity. A breach of the expected duty of care renders the person liable for any harm resulting from the breach. A medical doctor can be said to have committed manslaughter when the death of a patient is caused through sheer carelessness or by acting in a negligent manner. This is ascertainable when the doctor's act falls short of what is expected to be done by an average reasonable doctor confronted with a similar scenario. What amounts to medical malpractice or negligence is however subject to the facts of a particular case, provided that a breach of duty of care is in existence, the breach resulting from negligence which caused death. In a case where a doctor administered sobita injection which requires extreme caution as an overdose may cause stomatitis which if not well handled may lead to death, upon taking the injection, nine children developed symptoms of overdose (stomatitis) and one of them died. The doctor was convicted for manslaughter. His appeal against the decision of the trial court was dismissed and his conviction upheld.⁸⁰ Thus, to be guilty of manslaughter, the negligent act must have resulted from an extremely careless conduct of the accused person.⁸¹

6.2. Civil Liability

A civil action for medical negligence may be instituted against a doctor where there is failure to take reasonable care and precaution in treating a patient, consequent upon which the patient suffers bodily or mental harm. Where a medical doctor attends to a patient negligently causing harm which is otherwise avoidable, the patient can institute an action for negligence against the doctor claiming compensation for the bodily, mental or psychological harm suffered. Compensation may also be claimed for the medical expenses incurred. Similar to any other action for negligence, to succeed in an action for medical negligence, the patient must prove the following⁸²:

1. That a legal duty of care is owed by the doctor to the patient to take reasonable care and attention in treating the patient;
2. That the doctor failed to exercise such reasonable care as expected; and
3. That as a result of the doctor's breach of duty of care, the patient has suffered harm.

Hence, legal duty of care is said to exist where the law expects one party to take precaution in dealing with the other party to prevent occurrence of damage as from carelessness. This was stated by Lord

⁷⁵Section 33(1), 1999 Constitution of the Federal Republic of Nigeria

⁷⁶ Section 299, Criminal Code, LFN 2004

⁷⁷ Section 325, Criminal Code, LFN 2004

⁷⁸ Section 319, Criminal Code, LFN 2004

⁷⁹ Section 317, Criminal Code, LFN 2004

⁸⁰ *R v Akerele* (1941) 7, W.A.C.A, 50

⁸¹ *R v Omenibu* (1963) 7 E.R.N.L.R. 134

⁸² *Clark v. MacLennan* (1983) 1 A QE 416

Atkin in *Donoghue v Stevenson*⁸³ where the neighbor principle was established. He stated that reasonable care should be taken to avoid injury to one's neighbor. A neighbor in law is anyone closely affected by your conduct, and whom you should reasonably foresee might be injured by it. For several years, the neighbor principle was applied as a yardstick for determining existence of duty of care. Duty of care may also exist where a purely financial loss or physical injury has been suffered as seen in *Smith v Eric S. Bush*⁸⁴ where a surveyor who gave an erroneous survey report was said to be liable to the buyer.

Generally, to succeed in an action for negligence, the plaintiff must not only prove that a duty of care exists, which is owed to him, but must also establish that such duty has been breached by the defendant through his action or conduct. The yardsticks for measuring the defendant's conduct will be that of a "reasonable man." It will be assumed that negligence exists if the defendant's action is not reasonable in the circumstances. Reasonability will be determined based on the peculiar circumstances of the case putting into consideration factors like the degree of risk involved as the greater the risk the higher the level of care expected of the defendant. On a general note, greater care is to be exercised when dealing with vulnerable persons like children and blind people. In the case of *Paris v Stepney Borough Council* where an employee with only one good eye was employed for a job which endangers the eye from metal fragments and goggles were not provided for him. The employer was held to have acted unreasonably and negligently for failure to take extra precautions.

In an action for medical negligence, the plaintiff must prove^{85,86} that the doctor failed to exercise the degree of care legally expected which a reasonable doctor would have exercised in the circumstances, as a result of which the plaintiff has suffered physical, mental or psychological harm. However, a civil action for medical negligence will fail where the doctor has implored the degree of care and skill that a reasonable doctor of similar training would have used in the circumstances. Similarly, failure of an operation, judgment error or mistake will not be sufficient to sustain an action for negligence provided such a failure is not traceable to the doctor's carelessness.⁸⁷

To succeed in an action for negligence, the damage done must be the direct effect of the defendant's breach of duty of care owed to the plaintiff. Action for negligence will fail where the damage is so remote that a reasonable man would not have foreseen it as the possible consequence of the defendant's action.⁸⁸ The plaintiff must prove that he has suffered loss as a consequence of the defendant's breach of duty of care owed to him; such loss may be in form of property damage, personal injury or financial loss as the case may be. The damage amounting to negligence for which the plaintiff may obtain compensation has also been extended to include nervous shock causing physical or mental illness, bodily harm, financial or economic loss causing physical harm, compensation for medical expenses, income loss and property damage which results in financial loss.

Thus, in an action for medical negligence, the plaintiff must prove that the doctor's negligence has led to the harm suffered by him. Where the harm suffered is not directly traceable to the doctor's negligence, or the harm would have occurred independent of the negligent act committed by the doctor, action for medical negligence will fail. Also, where the cause of damage is remote and not directly traceable to the defendant, action for negligence may fail. This was reflected in *D & F Estates Ltd v Church Commissioners* where a tenant sued for negligent plastering of a block of flats years after the construction and after the premises have been occupied by several occupants. It was held by the House of Lords that since there is no connection between the present tenants and the builders, they cannot recover damage for the cost of repairing the defects. There are situations where the most probable cause

⁸³ [1932] AC 562

⁸⁴ [1989] 2 ALL ER 514

⁸⁵ Section 38 Evidence Act

⁸⁶ Section 38 Evidence Act

⁸⁷ *Ojo v Gharoro* (2006) 10 NWLR pt 987

⁸⁸ D.A Akhabue 'NEGLIGENCE IN NIGERIA-Not at claimant's beck and call'(2012) *International Journal of Law and Jurisprudence Studies* (voll) 6

of accident is within the knowledge of the defendant. Here the court may rely on the maxim *res ipsa loquitur* (the thing speaks for itself) unless the defendant presents a reasonable explanation to the contrary. Here the onus of proof shifts to the defendant who must establish that he did not act negligently, as seen in the case of *Richley v Faul*⁸⁹ where in an accident scene, the defendant's car switched lanes and collided with the plaintiff's car on the wrong side of the road. The maxim was implored and the court held that the scene was sufficient proof of negligent driving.

7. Conclusion

This article examined medical malpractice, the incidents of diagnostic error and duty of care owed to patients by medical practitioners, liability for the breach of such duties and the reasons for the general reluctance of the people to challenge medical mishandlings in the society. The physician-patient relationship was equally examined. Incidents of medical mishandling have continued to be on the increase as experienced in a typical developing country where population increase out-pace provision of basic amenities. Despite the existence of private hospitals, health care facilities are fewer in number than the population, and when hospitals exist the doctors often have a heavy workload to contend with, hence human life is continuously put at risk. In any case, to suppress the high rate of medical malpractice, it is important for the society to realize the importance of holding negligent doctors liable for professional malpractices, in order to achieve the end of deterrence and thus make medical practice in the country safe and reliable for all. It is also crucial for the populace to take cognizance of their fundamental rights as protected by the constitution including right to life, and how those rights can be adequately enforced. This will increase consciousness on the need to preserve such rights.

There is therefore need to put in place specific and flexible legislation to establish the offence of medical negligence as a codified law that will address the subject matter. Civil Liability Act as obtainable in some jurisdictions should therefore be encouraged in Nigeria. Another way to curb this incessant occurrence of wrong diagnosis is for the regulatory bodies to be more proactive in uncovering negligent practices by weeding out unskilled physicians. However, we still maintain that medical malpractice in form of wrong diagnosis amounts to more than human mistake which calls for criminal sanctions wherever it is necessary. The Medical and Dental Council of Nigeria should specify the expected standards for an ideal hospital environment, equipment and facilities. Government should be actively involved in periodic inspection of such standards and should not hesitate to seal up hospitals that fail to meet up with the specified standards. It is also suggested that Government should invest in standardizing general hospitals across the country by obtaining necessary equipment and organizing periodic training for doctors in the public hospitals. The standard of medical practice should be uplifted and made commensurate with international best practice. Finally, practicing without the necessary professional qualification should also be criminalized.

⁸⁹ [1965] 3 ALL ER 109