Law and Medicine: a meeting point

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Viewpoint

ABSTRACT
Medicine and law have been related from the earliest times but their interface has accelerated over time with the expansion of knowledge, science, politics and enlightenment of societies. While medicine focuses on the preservation of life through the study and knowledge of the human body, procedures, and therapies, law preserves life's liberties and decisions through an understanding and application of the laws around us.

Medicine and law intersect in a number of ways: controversially in some instances such as legality of abortions, same sex relationships and euthanasia; supportive in the instances of providing expert evidence in criminal and civil cases (forensic medicine); and functionally through legislations such that the law is required to regulate medical practice and associated litigations.

As science and technology continue to evolve and regulations increase, the interface of law and medicine will continue to deepen. There are intersections where both professions advocate the same position, but may still run on parallel lanes in some instances although it is evident that the lanes are inching closer. Medicine comes to the aid of law in the administration of justice through forensic medical science; law comes to the aid of medical science and practitioners to define the extent of liability, standard of care and protection of societal norms.

Keywords: Law, medicine, abortion, euthanasia, same sex relationships, forensic medicine

Running title: Where Law & Medicine meet

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Droit et de la médecine: un point de rencontre

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RÉSUMÉ

Médecine et le droit ont été liés depuis les temps les plus reculés, mais leur interface a accéléré au fil du temps avec l'expansion de la connaissance, de la science, de la politique et des lumières des sociétés. Tandis que la médecine se concentre sur la préservation de la vie à travers l'étude et la connaissance du corps humain, des procédures, et des thérapies, loi préserve la vie de libertés civiles et des décisions par une meilleure compréhension et application des lois autour de nous.
Médecine et le droit se croisent dans un certain nombre de moyens: controversé dans certains cas tels que légalité de l'avortement, les unions de conjoints de même sexe et l'euthanasie; favorable dans le cas de fournir des témoignages d'experts dans les affaires civiles et pénales (médecine légale); et fonctionnellement par législations telles que la loi est nécessaire pour réglementer l'exercice de la médecine et les litiges.
Au fur et à mesure que la science et la technologie continuent d'évoluer et de règlements augmentation, l'interface du droit et de la médecine vont continuer à s'intensifier. Il y a les intersections où les deux professions prônent la même position, mais peut toujours exécuter sur voies parallèles dans certains cas mais il est évident que les voies sont rapprocher un peu plus. Médecine vient en aide de droit dans l'administration de la justice par forensic sciences médicales; droit à l'aide de la science médicale et les praticiens pour définir l'étendue de la responsabilité, de soins et de protection des normes sociétales.

Mots clés: droit, médecine, l'avortement, l'euthanasie, les unions de conjoints de même sexe, médecine légale

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Historical Background

According to the Encyclopedia of Ancient History, Medicine is the science and the art of healing. It encompasses a variety of health care practices evolved to maintain and restore health by the prevention and treatment of illness. In the dateless past, the practice of medicine was an art. In the vast abyss of human experience pre-dating 500BC, medicine was heavily influenced and largely fixed in the sometimes odious phenomenon of the supernatural. Spells, cauldrons and sometimes exorcism largely characterized the practice (if it could be so called at that time). What we now know as contemporary medical practice started evolving post 500BC as a science, not because its practitioners lost the art of it, but because of increase in knowledge, discoveries, and the evolution of science. Today, medical science can best be described as both an art and a science. It is an art as the skill of the practitioner, particularly in the manipulation of surgical procedures in ways best imagined than experienced, undoubtedly plays a major role in the practice of medicine and provision of medical care. The science of medicine has however complemented the art of the practitioner with various discoveries in pharmaceutical development, technological innovations, improved clinical and diagnostic processes, etc.; all of which in their operations create other levels of legal relations with patients, regulators of the industry, inventors of the processes, the practitioner himself and acceptable societal norms, culture and practice.

It is this interface that squarely puts medicine and the law in direct contact, but not necessarily in conflict. Law can equally trace its roots to a similar age but with a different evolution story. It is said that the oldest profession in the world is 'prostitution'. This is because it was prostitution that was said to have created the now acceptable practice of 'exchange of goods and services'. While we are not contesting pride of place with the so called 'oldest profession of ages', Law and Medicine have no doubt had an interface from its earliest days. According to Cyril Wecht (MD), JD in his article, 'The History of Legal Medicine'(1), “Medicine and law have been related from the earliest times. The bonds that first united them were religion, superstition, and magic. The functions of the physician and the jurist were united in the priest, the intermediary between God and man. In early civilizations, primitive legal codes, religious doctrines, and social precepts were often ill distinguished, and laws with a medical content were often found within their context. Ecclesiastical courts and canon law were concerned with much that related not only to religious matters, but also to medicine—for example, impotence, divorce, sterility, pregnancy, abortion, period of gestation, and sexual deviations. The oldest of these written records, the Code of Hammurabi, includes legislation pertaining to the practice of medicine, dating back to the year 2200 B.C. It covered the topic of medical malpractice and set out for the first time the concept of civil and criminal liability for improper and negligent medical care. Penalties ranged from monetary compensation to cutting off the surgeon's hand. Fees also were fixed. The Code discussed various diseases of a slave that would invalidate a contract. Also included were references to incest, adultery, and rape. In ancient Egypt, the acts of the medical man were circumscribed by law. Stab wounds were differentiated in the 17th century B.C. The Egyptians had a thorough knowledge of poisons. There is evidence that priests made determinations regarding the cause of death and whether it was natural or not.

The Chinese published information about poisons, including arsenic and opium since 3000 years B.C. In ancient Persia, wounds were put into one of seven classes, ranging from simple to mortal. In ancient Greece, there was knowledge of poisons and

laws against abortions. However, autopsies were not performed, since a dead body was then regarded as sacred.

In Rome in 600 years B.C., a law was passed requiring that a woman who died in confinement should be immediately "opened" to save the child, while the investigators of murder were usually selected from the citizenry. When Julius Caesar was assassinated in 44 B.C. (March 15), the physician, Antistius examined his body and concluded that only one of the 23 stab wounds was mortal."

This interface of law and medicine was to accelerate in later years with expansion of knowledge, science, politics and enlightenment of societies up to our contemporary times.

The interface of Law and Medicine

While medicine focuses on the preservation of life through the study and knowledge of the human body, procedures, and therapies, law preserves life's liberties and decisions through an understanding and application of the laws around us. While both professions are indeed distinct and separate in their respective methods and practice, this presentation will attempt to explore the various intersections where the two professions meet and the influence one exerts on the other. Let me state quickly that legal practice and medicine, as diverse as they appear to be do intersect and complement each other in many ways. This presentation will strive to highlight such areas of interface in the practice of the respective professions, regulation of societal norms of behaviors and upholding standards, etc. While new discoveries in health and medicine have undoubtedly urged laws to advance, law in certain respects has also constrained medicine and its practice from running ahead of itself. For example stem cell research and genetics has produced a number of cloned animals including the famous Calf, "Gene", the first cloned calf in the world born on February 7, 1997 at the American Breeders Service facilities in Wisconsin, USA. The increasing attempt of medical science and biotechnology to produce a cloned human is however still facing resistance in many nations by legislation that either limits the quantity of embryos available for such research or outrightly banning the practice. This paper will discuss areas where law has exerted some influence and relevance on the evolution of medical science and vice versa. Such areas include commonly agreeable subjects like expert evidence, medical malpractice, rape, counterfeit drugs, consent, etc, to contentious areas like abortion, euthanasia, and same sex relationships, among others.

Law, Medicine and Abortion

One area in which law and medicine intersect in controversial terms is in respect of abortions. While some countries allow regulated access to abortions, this tolerance, howbeit limited, does not operate in Nigeria as the law describes abortions as illegal, and procuring or assisting someone in procuring an abortion is an offence.

The medical questions that arise in determining the illegality or otherwise of abortions are:

- Is abortion tantamount to murder?
- Is an unborn child a person within the ambit of our criminal laws that forbids the intentional killing of a person?
- If the unborn child is a person, at what stage of the development of the foetus did it become a person? At fertilization, or in the first trimester, second trimester, or third trimester?

These questions do not come with ready answers as there are various arguments on either side of the divide. In the celebrated 1973 case of **ROE V WADE (2)**, the United States Supreme Court in this landmark decision ruled unconstitutional a Texas State law that banned abortions except to save the life of the mother. It was held that the states

were forbidden from outlawing or regulating any aspect of abortion performed during the first trimester of pregnancy, and could only enact abortion regulations reasonably related to maternal health in the second and third trimesters, and could only enact abortion laws protecting the life of the foetus only in the third trimester, and even then, an exception had to be made to protect the life of the mother. Controversial from the moment the decision was handed down by a majority decision of seven Justices to two, ROE V WADE set the stage for a vigorous discourse that has continued on the subject over the last 40 years of the decision. The Supreme Court by that decision had clearly delved to medical science to interalia, recognize that a foetus could only be assumed to have a somewhat legal personality in the third trimester of pregnancy and could then only be aborted if it posed a grave risk to the life of the mother. It emphatically barred States from enacting abortion laws regulating any aspect of abortion performed during the first trimester, thus a foetus in its first trimester in that jurisdiction is capable of being aborted at Will without criminal consequence. The court argued that "pre-natal life was not within the definition of persons as used and protected in the United States Constitution and that America's criminal and civil laws only sometimes regard fetuses as persons deserving protection. Culturally, while some groups regard fetuses as people deserving full rights, no consensus exists". The Court ruled that "Texas was thus taking one "view" of many. Protecting all fetuses under this contentious 'view' of prenatal life was not sufficiently important to justify the state's banning of almost all abortions".

Whereas The Pro-life school of thought in medical science postulate that life is formed upon conception irrespective of the viability of the fertilized egg, the Pro-choice proponents contend that pro-lifers are assuming the very point that requires proving thereby committing the logical fallacy of begging the question. Unfortunately, biology, law, medicine, philosophy nor theology have no consensus on the issue, and neither does society, leaving the subject as more of a moral question. In ROE V WADE, law tried to regulate medical science, but it has in reality remained more of a moral question, and even though it has held for over 40 years in the United States, other more conservative nations have remained on the opposite side of the case, while the American populace remain divided by it socially, morally, and politically.

The Nigerian Criminal Code Act at section 228 outlaws abortions stating that:

> *"Any person who, with intent to procure a miscarriage of a woman whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a felony, and is liable to imprisonment for fourteen years"(3).*

Section 229 states that:

> *"Any woman who, with intent to procure her own miscarriage, whether she is or is not with child, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, is guilty of a felony, and is liable to imprisonment for seven years" (4).*

The first section focuses on those who perform the procedure, usually medical practitioners, while the second section reproduced above focuses on the patient that submits to abortion. Therefore, although sought voluntarily by the pregnant patient, a medical practitioner who fulfills the patient's wish is open to greater liability than that of the person who actually procures the abortion. Furthermore, the liability under the Criminal Code for abortions is not limited to the medical practitioner, but also arguably extends to nurses and pharmacists as it reads at section 230:

> *"Any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or is not with child, is guilty of a felony, and is liable to imprisonment for three years" (5).*

Although strict, the law also acknowledges that in certain situations, an abortion may be needed to save the life of the mother. The law provides that

> *"a person is not criminally responsible for performing in good faith and with reasonable care and skill, a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case" (6).*

This position was further confirmed in the English case of **Rex v. Bourne** which held that an abortion performed to preserve the health of the mother was legal (7). While this is an exception to the general rule, many are prone to argue that although law and medicine have a role to play in this area, law does not present the true state of what is happening medically. While I may not know if the Nigerian Medical Association has proposed a medical argument of any sort on this discourse, it appears the Law is holding sway in Nigeria for now. In 1982, the Society of Gynecologists and Obstetricians of Nigeria proposed legislation that would liberalize abortion law in Nigeria to the National Assembly (8). The proposed legislation would have permitted access to abortions if two medical practitioners certified that the pregnancy would involve risk to the life of a pregnant woman, or of injury to her physical and mental health or to any existing children in her family greater than if the pregnancy were terminated. Abortions would have also been allowed if there was a substantial risk that the child, if born, would be seriously handicapped". Abortions performed on these expanded grounds could have been carried out only in the first 12 weeks of pregnancy, except to save the life of the woman, while the Bill allowed for medical practitioners to decline performing an abortion due to his conscience. This legislation was however vehemently opposed by religious leaders and the National Council of Women's Societies of Nigeria who believed the legislation would promote illicit sexual behaviour. While the law on abortion in Nigeria however remains unchanged till date, it appears that in other jurisdictions, the law appears to have run ahead of medical science in the field of abortion.

Law, Medicine and the Incidence of Same Sex Relationships

Another brewing issue centers on legal interpretations, given to evolving medical arguments, on the issue of the legality (or otherwise) of same sex relationships. Historically, same sex practices had existed even from biblical days from the reported orgies of Sodom and Gomorrah (9). Whereas it had remained in the shadows as a secret indulgence of those who practiced it, contemporary medical interpretations seem to have thrust the issue into global consciousness elevating the practice to the level of fundamental human rights. The 1948 Universal Declaration of Human and Peoples' Rights which has formed the bedrock of fundamental right provisions in most constitutions globally recognizes the inalienable rights inherent in a person to include the right to life, freedom of speech, security, dignity of the person, freedom of religion, association, freedom from discrimination, equality before the law, access to justice, etc. For proponents of same sex relationships, the argument remains that any legislation banning such constitutes discrimination against that person by virtue of his /her sexual orientation, and it was indeed medical science that supplied the weaponry for the argument by postulating that homosexuality is a genetic issue. Simply

put medical science has postulated that homosexuality is not a matter of choice, you are simply born with it hence a man ought not be discriminated against by virtue of the natural sexual orientation he is born with in like manner as a person has no control as to whether he/she is born male, female, Caucasian or coloured, Hausa, Ibo or Yoruba. The growing acceptance of this argument is what has elevated the same sex relationship argument to becoming a fundamental human right argument rather than a personally desired sexual orientation other schools of opinion regard the practice as. Here, the law in some countries particularly in the west seems to have concluded that homosexuality is not a matter of choice, you are simply born with it. In the 1990s, the American geneticist Dean Hamer identified an area that appeared to influence male sexuality on the X chromosome, which men inherit from their mothers. However, the results have remained controversial. The latest research seems to confirm that this region on the X chromosome, known as Xq28, is more likely to be shared by the gay pairs of brothers than by the brothers and their other siblings. The study also identified a second genetic region, on Chromosome 8, which also appeared to predict whether a man would be homosexual. However, while the pairs of brothers shared gene variants in these regions, there were not individual genes that stood out across all the participants in the study. The findings suggested that overall, a man's sexuality depends about 30 to 40 per cent on genetic factors, while the rest depends on environmental factors (10).

On the other hand, opponents of this argument have argued that homosexuality is more of a choice than a genetic result. Indeed the admittance by the genetic proponents that genes only play a 30% to 40% role in influencing homosexuality in a person shows that homosexuality may be more of choice than a genetic issue. Whereas there is no known judicial pronouncement on this matter in our jurisdiction at the moment to test the credibility of the expertise and medical correctness of the Gay right proponents, I am sure that in the not too distant future Nigerian courts will be invited to decide one way or another on the legality of the new Anti Gay legislation recently signed into law by the President.

An argument scarcely considered is the sociological suggestion of a third possibility that homosexual feelings may originate from factors in a child's development. Some psychologists for instance, believe that areas of the brain controlling sexual desire may be affected by hormone irregularities while the child is still in the womb. Other psychologists believe that a homosexual orientation may result from failing to identify properly with other members of the same sex or with the parent of the same sex. Almost all of these theories agree that a person's sexual orientation is set by an early age (about 3 or 4 years old). It is possible, then, that a person could be gay because of something that is neither genetic nor a choice.

Again, it is important to recognize that this is not an "either/or" issue; multiple factors may be involved. Many psychologists now use the term "homosexualities" to mean that different situations and combinations of factors may all lead to the same conclusion (feelings of attraction towards the same sex), but in different ways. Genetic factors, developmental factors, and personal choices may each play a part in a person's developing sexuality, and for some people, certain factors may have more weight than others. Of course, this is only a theory and may not be true at all. Still, it is worth considering.

Before leaving this point, I want to emphasize that these theories seek to explain why a person would feel *attracted* to members of the same sex. A person's sexual *acts* are always within the realm of choice, except for cases of being raped or molested (11)

Whichever side of the coin you belong, not necessarily by your own sexual orientation, but by your intellectual or research conclusions, it is clear that this is one area where medicine appears to want to run ahead of the law and compel the law to agree with its controversial findings.

Euthanasia

"My aim in helping the patient was not to cause death. My aim was to end suffering. It's got to be decriminalized". The above quote was by Dr. Jack Kevorkian, an American doctor that earned himself the nickname of Dr. Death after being arrested and convicted for second degree murder for his role in numerous assisted suicides, which he claimed to total at least 130.This topic has captivated many minds as the question of whether doctors should be permitted by medical ethics, standards, and laws to end the suffering of a patient by ending the patient's life is debated around the world.

Euthanasia, commonly called 'mercy killing' is the procurement of death or assisted suicides for a person in order to put the victim out of his/her pain or torture being experienced by reason of a medical condition. The Hippocratic oath sworn to by doctors at their induction states interalia that as a Doctor, " *…I will give no deadly medicine to any one if asked, nor suggest any such counsel; and similarly I will not give a woman an aid to cause an abortion, but I will preserve the purity of my life and my arts…*" It therefore appears a misnomer for medical science to seek to justify a practice that it forbids by the very oath taken by its members. Medical science has over the years posited that there are instances when a person, although on life support equipment is medically pronounced technically dead and keeping such on life support does the patient, his family and resources of the State more harm than good. Nevertheless the question that begs to be answered is at what point can a person be legally pronounced dead? Is it when he is brain dead as posited in **The Terri Schiavo case? (12)** .This was a legal struggle involving prolonged life support in the United States that lasted from 1990 to 2005. The issue was whether to carry out the decision of the husband of Teresa Marie "Terri" Schiavo to terminate life support for her. Terri was diagnosed by doctors as being in a persistent vegetative state (i.e. brain dead). The highly publicized and prolonged series of legal challenges presented by her parents and by state and federal legislative intervention effected a seven-year delay before life support finally was terminated. On the other hand, should a man be pronounced dead only when his heart stops beating even though there is still a pulse, or is it when the patient has no heart beat and pulse that he is certified dead?

The common procedure in medical practice with respect to the death of any patient is that the doctor upon being certified that the patient is no more showing any sign of life will formally certify the patient dead, and it is only at this point that a death certificate certifying cause and time of death is issued. May I submit that this procedure in itself defeats the postulation that a brain dead victim ought to be treated as dead and inferring that 'pulling the plug' on such a patient ought not to be treated as an offence. In the Terri Schiavo case, Terri Schiavo collapsed in her St. Petersburg, Florida, home after a full cardiac arrest on February 25, 1990. She suffered massive brain damage due to lack of oxygen and, after two and a half months in a coma, her diagnosis was changed to vegetative state. For the next few years doctors attempted speech and physical therapy and other experimental therapy, hoping to return her to a state of awareness. In 1998 Schiavo's husband, Michael, petitioned the Sixth Circuit Court of Florida (Pinellas County), to remove her feeding tube pursuant to Florida Statutes Section 765.401(3) (13). He was opposed by Terri's parents, Robert and Mary Schindler, who argued that she was conscious. The court determined that she would not wish to continue life-prolonging measures, and on April 24, 2001, her feeding

tube was removed for the first time, only to be reinserted several days later. On February 25, 2005, a Pinellas County judge ordered the removal of Terri Schiavo's feeding tube. Several appeals and federal government intervention followed, which included U.S. President George W. Bush returning to Washington D.C. to sign legislation designed to keep her alive. After all attempts at appeals through the federal court system upheld the original decision to remove the feeding tube, staff at the Pinellas Park hospice facility where Terri was being cared for disconnected the feeding tube on March 18, 2005, and she died on March 31, 2005. In all, the Schiavo case involved 14 appeals and numerous motions, petitions, and hearings in the Florida courts; five suits in federal district court; Florida legislation struck down by the Supreme Court of Florida; federal legislation (the Palm Sunday Compromise); and four denials of *certiorari* from the Supreme Court of the United States. Clearly the law of the State of Florida has gone ahead to consider the benefit of keeping a person on life support against the inferred claim that the victim would not have wished to live in that state, rather than the need to simply preserve life. Even in the Terri Schiavo case, a death certificate only issued after being certified dead on March 31, 2005 and not in her vegetative state. When addressing euthanasia under Nigerian law, the starting point is the Constitution of the Federal Republic of Nigeria which states that:

> *"(1) 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" (14).*

As the law currently stands, it is only through being found guilty of offences that carry the death penalty that one can be deprived of life. Regardless of how much pain a patient is visibly in, alleviating the suffering of the patient with death is not an exception under our constitution to the citizen's right to life (15). Therefore, any medical practitioner assisting a patient to end his/her own life will not be seen as committing an act of compassion, but as causing the death of another person, thereby committing the offence of murder. This position is supported by the Criminal Code Act which reads as follows:

> *" A person who does any act or makes any omission which hastens the death of another person who, when the act is done or the omission is made, is labouring under some disorder or disease arising from another cause, is deemed to have killed that other person" (16).*
>
> "*It is unlawful to kill any person unless such killing is authorized or justified or excused by law"(*17*).*

The position of the Law in Nigeria on euthanasia is similar to the Code of Conduct of Medical and Dental Practitioners which states that the oath taken by all medical practitioners is based on saving the life of the patient (18) and not allowing or aiding them to end it. It is for this reason that the doctor would be found in breach of this code of conduct for doing one of the following things: terminating a patient's life by administering drugs even at the patient's request, enabling the patient to terminate their life by prescribing the drugs, terminating the patient's life by administering drugs even at the patient's request, or without their request if you think it is for the best (19). This informs the decision of the United States Court convicting the personal physician to the late pop music star Michael Jackson (Dr Conrad Murray) for administering a dose of 'Propofol' among other anti-anxiety drugs which was said to have caused the death of the late music star. Defense arguments that the said drug had been previously and regularly administered on the deceased who even had a personal stash of same in his home was no defense.

Both the law and the Code of Conduct rules are against medical practitioners

assisting individuals to take their own life. It is worthy to note that while the punishment under the Code of Conduct will either be suspension or removal from the register, from a legal standpoint, such a person may still be found guilty of murder. We can therefore say law and medical science agrees that it is not the place of any man to play God by certifying any one is incapable of any form of recovery as to justify mercy killing, irrespective of the certainty of imminent death and protracted agony. After all, we still believe in miracles. Recently a man certified dead and taken to the morgue in the State of Mississippi in the Uniuted States of America, was reported to have woken up in the morgue as he was being prepared for embalmment (20).

Rape

"*It is against the laws of all human beings and it is against God and the State. Such (underage) girls and indeed all females of whatever age need to be protected against callous acts of criminally likeminded people of the appellant's class. I wish the punishment was heavier so as to serve as a deterrent" (21).*

These were the resounding words of the Supreme Court of Nigeria to underscore the barbaric and animalistic nature of the offence called rape. Rape, and defilement are becoming increasingly common in our society in recent years thus emphasizing the urgent need to effectively address the decaying societal norms and state of impunity in all facets of our societal life.

The offence of rape is the unlawful carnal knowledge of a woman or girl without her consent or if consent was obtained through force or fraudulent representation (22). In order for rape to be proved in the court of law, the following must be proved: that the accused had sexual intercourse with the complainant, that the act of sexual intercourse was done without her consent or that the consent was obtained by fraud, force, threat, intimidation, deceit or impersonation, that the complainant was not the wife of the accused, that the accused had the intention to have sexual intercourse with the complainant without her consent or that the accused acted recklessly not caring whether the complainant consented or not, and that there was penetration (23). Of the abovementioned ingredients, it was held that the most essential aspect of this crime is penetration which is deemed complete when the penis enters the vagina, no matter how slight that entering is. Neither an ejaculation or emission (24), nor a ruptured hymen (25) is necessary.

The ingredients above allude to the fact that it is not enough for a victim to state that she was raped, there must be a trial to this effect where the State brings criminal charges against the accused person and proves that the complainant was raped. Although it is an established principle in criminal law that corroboration (defined as independent testimony, direct, or circumstantial which confirms in some material particular not only that an offence has been committed but that the accused person committed it (26)) of evidence of the complainant in a rape case is not a statutory requirement, it is, in practice always looked for (27). The reason that it is unsafe to convict the accused person on the uncorroborated testimony of the complainant (28) is because before an individual is deprived of his constitutional right to liberty, through imprisonment, there must be ample proof beyond reasonable doubt to support the position advanced by the prosecution.

Corroboration in rape cases is evidence that shows that the story of the prosecution that the accused committed the rape is true (29). Any evidence that will serve as corroboration must not be flawed, doubtful, or discredited (30). One type of evidence often used by courts as corroboration is medical evidence, which highlights another area where law and medicine meet.

The medical evidence in rape cases usually consists of a report of a medical examination

of the victim by a physician to show injury to the private part or other parts of the body of the victim which may have been occasioned in a struggle. During the trial, the medical practitioner that performed the examination and prepared such report will by evidence demonstrate the rape committed and try to link the accused person to the committed act. Although medical practitioners often play a central role in rape cases as their evidence usually proves the important requirement of penetration, it must be noted that in some cases, this may not be enough. What the law requires is that the evidence shows that the accused person penetrated the complainant. Therefore if there is a situation where penetration is proved, but the evidence linking the accused person to that act is weak, it is unlikely that a conviction will be secured. It is the likelihood of this omission at trial that improvement in medical science has come to fill with the introduction of Deoxyribonucleic Acid (DNA) evidence as admissible evidence that conclusively proves a nexus between an accused and an act where the DNA samples linked to the offence matches that of the accused. Preserving DNA evidence is a key tool for law enforcement's investigation and prosecution of a sexual assault case. It is used to prove that a sexual assault occurred and to show that the defendant is the source of biological material left on the victim's body (31). See the case of **UDAY V. STATE OF CHANDHIGARH (32).** Forensic analysis of hair follicles, saliva, semen, and blood samples have become admissible in law as expert evidence to ground convictions in rape cases and if properly demonstrated before Nigerian courts, will assist immensely in prosecution of rape cases. Nevertheless, a good number of cases go unprosecuted because the available science already perfected in other jurisdictions, remain largely unused in Nigeria. The marriage of medicine and the law in forensic analysis has been established over a long list of cases, but the limited or non-availability of the science and technology in Nigeria continues to frustrate its application in Nigeria. We do hope that the Colleges of medicine and our governments at all levels will deepen this knowledge that is already in the public domain and no longer exclusive and make its application available to legal practice in Nigeria to facilitate the administration of justice.

Expert Evidence

An extension of the last discourse on rape is the general applicability of expert evidence before our courts in various cases. Criminal and Civil cases depending on the subject of dispute sometimes demand specialized knowledge of a science or an art, or other specialized field. The DNA discovery has revolutionized the field with increasing use of DNA evidence in criminal prosecutions across the developed world.

When the court has to form an opinion upon a point of foreign law, customary law or when any custom, or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, customary law or custom, or science or art, or in questions as to identity of handwriting or finger impressions, are admissible.

Persons so specially skilled .....are called experts (33).

When lawyers are presented with the need to explain and tender forensic or medical evidence, specialist medical practitioners take part in court proceedings as expert witnesses as they have special skills in the relevant field in which evidence is required. Expert opinions are relevant in both criminal and civil cases. It is however pertinent to note that where expert opinion is required to substantiate a fact, it is the special qualification, training and skills of the expert in the particular field of discipline that makes him believable, and his evidence admissible, not just evidence of a professional in the same field with general knowledge. See the case of **SEISMOGRAPH SERVICES LTD V OGBENI (34).** Thus, a general medical

practitioner (commonly called a GP) can hardly be regarded as an expert to give evidence of the cause of death of a victim in a murder case when a Pathologist is better qualified, nor can the GP give admissible expert evidence in a rape case, not being a qualified Gynecologist. Even if he manages to so testify, his evidence may not withstand the heat of rigorous cross-examination.

The medical practitioner or forensic analyst must state his training and qualification, describing himself as specially skilled in that particular field in question (35), the reasons for his opinion, and in most cases, the opinion given must relate specifically to his expertise and should not deviate. The opposing counsel is likely to ask questions to discredit his qualifications, provide evidence of contrary expert opinions available from other qualified experts in the same field, or even show conflicting opinion the testifying expert practitioner had previously given either in a previous publication, or forum on the same subject. Medicine and law clearly work in sync in such circumstances where expert medical evidence is required in proof of a fact in issue

It must be remembered that although a medical practitioner or forensic analyst may present himself as an expert, it is for the Judge to decide whether or not the expert has actually demonstrated special knowledge about the matter he was called upon to testify on, and the basis of such determination is the 'demonstrated' knowledge and experience of the witness (36), not the theoretical knowledge of the witness. Expertise theorized, and not demonstrated relating same to the facts of the case at hand is seen in law as documentary hearsay and unreliable. See the case of **ATTORNEY GENERAL OF OYO STATE V FAIRLAKES HOTELS LTD (37).** Therefore, the individual practitioner must ensure he/she is actually qualified and knowledgeable in the field in which he will be giving evidence.

Professional Regulations under the Medical and Dental Practitioners Act

Permit me to selfishly state that irrespective of the opening argument as to which profession preceded the other between Medicine or Law, the regulation of the medical profession, and indeed any of the other professions is hardly possible without the instrumentality of law. The Medical and Dental Practitioners' Act (38) is the law establishing the Medical and Dental Council of Nigeria for the registration of medical practitioners and dental surgeons and to provide for a Disciplinary Tribunal for the discipline of members.

Another way that law and medicine intersect is through the legislation that regulates the medical profession. This legislation creates the Medical and Dental Council of Nigeria which is responsible for determining the maintenance of standards of the practitioners. Its functions include establishing and maintaining the register, reviewing and preparing the Code of Conduct supervising alternative medicine, regulating the operation of clinical laboratory practice in the field of pathology, and other functions which would enable it to comply with the Act (39).

This Council is composed of representatives from the Federal and State Ministries of Health, Colleges, Universities, alternative medicine practitioners, pathologists, and the Armed Forces Medical Services (40).

In addition to the Council, the Act also established the Medical and Dental Disciplinary Tribunal and a Medical and Dental Practitioners Investigation Panel (41). The Medical and Practitioners Investigation Panel, consisting of fifteen members, at least three of which are dental surgeons (42), which shall be charged with the duty of considering and determining any case referred to it by the Panel. The Panel is tasked with conducting preliminary investigations into any case where it is alleged that a registered practitioner has misbehaved in his capacity as a medical practitioner. The Panel

can compel any person by subpoena to give evidence before it and upon hearing the case, make a decision of conditional registration, or refer the matter to the Disciplinary Tribunal, which comprises of the Chairman of the Council and at least ten other practitioners, at least two of which must be dental surgeons (43).

Where a registered person is adjudged by the Disciplinary Tribunal to be guilty of infamous conduct in any professional respect or is convicted by any Court of Law or Tribunal in Nigeria or elsewhere having power to impose imprisonment, for an offence (whether or not an offence punishable with imprisonment) which in the opinion of the Disciplinary Tribunal is incompatible with the status of a medical practitioner or dental surgeon, or the Disciplinary Tribunal is satisfied that the name of any person has been fraudulently registered, the Disciplinary Tribunal may impose one of the penalties it thinks fit (44). The penalties include ordering the Registrar to strike the person's name off the relevant register or registers, suspending the person from practice by ordering him not to engage in practice as medical practitioner or dental surgeon for a given period, or reprimanding and admonishing that person (45).

The Tribunal is not permitted to defer any decision for a period exceeding two years (46) and after such a decision is given the aggrieved medical practitioner can appeal within 28 days to the Court of Appeal with the Tribunal as the respondent (47). The decision of the Tribunal will only take affect where no appeal under this section is brought against the direction within the time allowed for the appeal (48).

The Act also creates offences which carry the punishment of a fine, imprisonment, or both. If any person who is not a registered medical practitioner or dental surgeon, for, or in expectation of reward, practices or holds himself out to practice as a medical practitioner or dental surgeon, takes or uses the title of physician, surgeon, doctor or licentiate of medicine, or without reasonable excuse takes or uses any name, title addition or description implying that he is authorized by law to practice as a medical practitioner or dental surgeon he shall be guilty of an offence (49).

Clearly the practice of Medicine recognizes it needs the instrumentality of law to govern it either by its code of conduct, or prescribed standards and qualification. Indeed we can say without any fear of contradiction that Law remains the father of all professions, including medicine.

Medical Negligence

It is also law that governs the standard of liability occasioned by a medical practitioner's breach of a duty of care to his/her patient. The increasing incidence of medical malpractice in our country calls for concern with the effectiveness of regulation. No medical institution is spared from the growing cases of malpractice reported by victims. It ranges from negligent patient handling, to faulty medical procedures, exposure of patients to medical risks, unreported drug allergies and side effects, etc. Such malpractice may indeed sometimes be criminal in nature. Under our criminal code,

> *"It is the duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any other person, or to do any other lawful act which is or may be dangerous to human life or health, to have reasonable skill and to use reasonable care in doing such act; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to observe or perform that duty" (50).*

Doctors must ensure that they exercise the utmost professional conduct and care when treating patients and act in accordance with sound medical practice as a failure to do so can lead to an action for medical negligence.

Negligence is "the omission to do something, which a reasonable man guided by those considerations that ordinarily regulate the conduct of human affairs, would do or doing something, which a prudent and reasonable man in similar circumstances would not do" (51). The foundation of negligence is that an individual has failed to exercise the required standard duty of care which has resulted in harm and/or damage to the individual.

Duty of care is "whether as between the alleged wrong doer and the person who suffered damage, there is sufficient relationship of proximity such that in the reasonable contemplation of the former, carelessness on his part may likely cause damage to the latter" (52). Ordinarily in negligence cases, the standard of care is viewed objectively from the position of an average reasonable person involved in that situation. The standard is however raised or varied when the person in question has a particular skill, a category which medical practitioners fall into. When an individual exhibits a specific skill or knowledge, the standard of care applied to such, like medical practitioners is that of another medical practitioner and not that of an ordinary person.

While a medical practitioner has an obligation to exercise the requisite duty of care, if something goes wrong, it is not enough for the patient to claim that the medical practitioner attending to him was negligent. The claimant must not only establish that he was owed a duty of care, but must also prove that the doctor in question is in breach of this duty of care by being negligent in his care. For example, if the practitioner did not act in accordance with the accepted practice for the treatment or procedure in question through direct evidence and this act or omission caused him damage. The case of **ABI V CENTRAL BANK OF NIGERIA (53)**, illustrates the current position on medical negligence. Mr. George Abi was an employee of the Central Bank of Nigeria. He fell ill on 26th February, 2001 and was admitted to Abuja Clinics where he alleged that Dr. Etinam Udom negligently diagnosed, prescribed and administered to him various drugs including gentamycin which made him permanently deaf. In support of his case, the claimant, George Abi, tendered two documents, Exhibit B, a reference form from the 1st respondent's staff clinic issued on 2nd May, 2001 by a doctor, whose name was not stated referring Mr. George Abi to Lagoon Hospital Lagos, and Exhibit B1 a staff referral form issued by a Dr. Ndamusa.

Although he tendered these documents, the claimant did not provide oral evidence to establish the importance of the documents nor did he call any expert witness to show that the administration of gentamycin by the doctor resulted in his deafness. Central Bank of Nigeria in its defence stated that Mr. George Abi was diagnosed with cerebrospinal meningitis and was admitted to Abuja Clinics and during the course of his treatment he developed cerebrospinal meningitis complications including loss of hearing, incoherent speech and loss of balance. Mr. Abi was discharged and the Central Bank sent him to Lagoon Hospital Lagos for a second opinion because of his lack of hearing. Expert witnesses for Abuja Clinics and Dr. E Udom testified that the profound sensory nasal and hearing loss was the commonest complication of meningitis. The trial court held Mr. George Abi failed to prove his case and dismissed the suit. On appeal, the Court of Appeal stated that a doctor is not negligent if he exercises the ordinary skill of an ordinary competent man professing to have that special skill. Furthermore, in a medical negligence claim, the burden is on the plaintiff, the person alleging the medical negligence, to show that medical negligence took place. Nwodo JCA said,

> *"What [Mr. George Abi] needed was to call an expert skilled medical witness to testify on whether the prescription of gentamycin in the circumstance of the health condition of [Mr. George Abi] of Mr. George*

> *Abi was right and whether it did cause Mr. George Abi to become deaf, and whether a reasonable medical mind will say there was a mistake. The failure of the Mr. George Abi to call an expert witness affected the claim. There must be evidence to show that Mr. George Abi became deaf due to lack of diligence in prescription, administration and consumption of the drugs, in particular gentamycin. In most cases, drug manufacturers will clearly state its side effects on the packets bought from the pharmacy but when administered in hospital, the patient hardly has the opportunity to know the side effects unless told. It is only a reasonable/responsible medical expert in the field of medicine that can explain medically in evidence the benefit and risk of the drug for the judge to assess and weigh between two doctors' evidence. The presumption is that a judge is not a medical doctor, he can only assess evidence presented before him"* (54).

The above extraction perfectly encapsulates the burden that a patient must discharge to the court in medical malpractice cases. It is not enough to show that you have been affected by the actions of the doctor. The patient must bring his own expert witness (usually another doctor) to show that the actions taken by the infringing doctor caused the damage and the actions were negligent or against the current standard/practice. The burden is not always easy. The Court of Appeal once remarked that:

> *"The law is unfair on a patient who walked into hospital for treatment and gets injured. The unfairness is based on the burden placed on the patient to prove negligence where all indication is that there was fault somewhere along the line of care"* (55).

It is said that 'dogs do not eat dogs'. From my experience, it is not common to find a Doctor willing to testify against his professional colleague who is being sued for professional negligence. Perhaps because of our closely knit societal relationships, you are more likely to have emissaries sent to you pleading for forgiveness than have medical colleagues rise to stand in support of a patient against a professional colleague. I must confess that I have not been immune to medical malpractice and negligence as my wife experienced many near mishaps in our child bearing days from Doctors in one of our foremost Teaching hospitals in Nigeria. All we got was a rude apology in spite of the high risk my wife's life was put. The culture of silence in medical malpractice complaints creates an impossible hurdle for patients to overcome as it is expensive, medical records are sometimes tampered with, and more importantly, getting a professional colleague to offer expert testimony to establish whether a reasonable person in the position of the doctor would have made the same diagnosis, treatment or procedure adopted remains a 'hard sell'.

Although the patient may find it difficult to establish his case before the court of law, medical practitioners should not believe that there is no recourse as patients can also bring a complaint before the Medical and Dental Practitioners Disciplinary Panel for professional negligence and depending on the record of the medical practitioner, punishments as stated above include admonishment, suspension, or striking off a name from a register. Furthermore the Code provides that any person who is rash or negligent while giving medical or surgical treatment to any person whom he has undertaken to treat, is guilty of a misdemeanor and is liable to imprisonment for one year (56).

Consent for Medical Procedures

The Rules of Professional Conduct of Medical and Dental Practitioners stipulates that where procedures require consent, it must be obtained from the patient, if unconscious or mentally impaired, then from

next-of-kin or if that individual is unavailable then from the most senior Doctor at the hospital (57). In addition to consent, where the procedure results in permanent changes or is difficult to reverse, the patient must be given counseling, the time to understand his condition, the options available, and the consequence of the options available. By this method, medicine and medical practice acknowledges the right of an individual over his body as what would ordinarily amount to assault becomes a comprehensive investigation and in most cases procedure. Although medical practitioners often act on verbal consent, the Code of Conduct requires a written consent. While it may be viewed as excess paperwork, forms such as this provide a layer of protection to the medical practitioner when subsequent litigation or queries arise.

Another meeting point between law and health is what happens when a patient refuses to give his or her consent for a procedure that although life saving, or preserving, requires their consent. Rule 39 of the Rules of Professional Conduct of Medical and Dental Practitioners, provides that where it seems that an individual is refusing to give their consent, it is the duty of the medical practitioner to decide whether he can manage the patient without circumventing the lack of consent, then he should continue. However, if he cannot give that treatment he is to withdraw treatment and refer the patient to another hospital that is able to take on the matter (58).

In the case of **ESABUNOR V FAWEYA** (59), the court held that;

"From the history of this case, I entertain no doubt in my mind that the lower court was right when it refused to grant the application for an order of certiorari. The 2nd appellant's religious belief had no bearing in the wanton dissipation of the 1st appellant's life. Clearly the 1st appellant being an infant, was incapable of giving consent to die on account of the religious belief of the 2nd appellant. The 2nd appellant's desire to sacrifice the appellant's life is an illegal and despicable act, which must be condemned in the strongest terms" (60).

The patient was born on the 19th April, 1997 at Chevron Clinic, Lekki Penisula, Lagos but subsequently began suffering from severe infection which led to a severe shortage of blood in his body. He was first treated with antibiotics then oxygen therapy, but when the procedures proved ineffective and it was determined a blood transfusion was needed. The baby's mother withheld consent on the ground that she is a Jehovah Witness adherent and it was against her religion to consent to blood transfusion. The management of the hospital informed the police and Superintendent of Police, D. Yakubu on behalf of the Commissioner of Police, Lagos State on behalf of the Nigerian police applied to M. Olokola Esq for an order authorizing the hospital to do everything possible to save the patient's life. The order was obtained and carried out.

After the procedure was carried out, the patient's mother and relative brought an action to set aside the order permitting the blood transfusion to take place but it was refused on the basis that the order has already been carried out. The mother and relative then brought an application to quash the proceeding of the Magistrate Court, and claimed N10,000,000.00 (Ten Million Naira) damages against the respondents for unlawfully injecting or transfusing blood into his body without his consent and his mother claimed N5,000,000.00 (Five Million Naira) for denial of parental rights. The reliefs were dismissed by the High Court. The appellants then appealed to the Court of Appeal which held that the aim of the medical profession in Nigeria is the preservation of life, and although every person is entitled to freedom of religion, the religion of the person cannot interfere with this aim. The actions of the police by seeking the order was to prevent a crime from taking place which is within their duties as police. Although every person is entitled to the right to choose their religion that right exists to the extent that it does not

impinge on the right of others or put society in jeopardy. It was for this reason that the lack of consent was overridden by the court on the grounds of public interest as a child could not state that he was giving his consent to die due to religious beliefs that he was not yet aware of.

Similarly, in the case of **MEDICAL AND DENTAL PRACTITIONERS DISCIPLINARY TRIBUNAL V OKONKWO (61)**, the patient, Mrs. Martha Okorie gave birth on 29th July 1991 and was admitted to Kenayo Hospital for 9 days from 8th August to 17th August, 1991 due to difficulty in walking and pain in her pubic area. She was diagnosed with an ailment that required a blood transfusion but both the patient and her husband refused on the grounds of their religion. The doctor seeing them, Dr. Okafor, discharged the patient and gave her a document:

"To whom it may concern: Re: Martha Okorie, The patient and her husband strongly refused blood transfusion despite appeals, explanations and even threats that she may die. The husband rather asked for his wife to be discharged and he took her away on 17/8/91."After leaving Kenayo Hospital, she was taken to Jeno Hospital by her husband on 17th August 1991 with the above note, a written declaration which gave the medical directive that she does not want a blood transfusion on the basis of her religious belief which was attested to by her husband and uncle and a further release from liability from Mr. Okorie (her husband). The new doctor (Dr Okonkwo) then proceeded to treat the patient without blood transfusion but the patient died on 22nd August, 2013. Due to a complaint filed by the deceased's mother and relative, Dr. Okonkwo was charged before the Tribunal for attending to the patient in a negligent manner punishable under section 16 and acting contrary to his oath as a medical practitioner also punishable under section 16 of the Act. Dr. Okonkwo was not criticized for holding his religious beliefs and for respecting the wishes of the other individual but for holding onto the patient knowing that the patient could not be treated in the correct manner after withholding consent.

The Tribunal held that Dr. Okonkwo was guilty of the charges and suspended the doctor for a period of 6 months on each charge to run concurrently. Dr. Okonkwo, successfully appealed this judgment of the Tribunal at the Court of Appeal. The Tribunal then appealed to the Supreme Court who dismissed the appeal by the Tribunal. The Supreme Court held that each person is entitled to the right to practice religious beliefs and privacy so long as it does not impinge on the rights of others. Therefore, a patient, no matter how foolish it may seem may refuse to give consent on the ground of their religious belief. The only entity that can override that consent or lack thereof is the court who has the opportunity to weigh both aspects of the case. If the patient withholds consent, the doctor cannot force it upon him, nor force him out of the clinic. The decision at that point is, according to the court, a question of personal attitude and not professional ethics. As a result, the doctor behaved in the appropriate manner and the appeal by the Tribunal was dismissed.

The two above cases discuss the same issue of consent. While the latter case emphasizes that the patient has the right to decide whether to give consent and that a doctor can neither force the consent on the patient nor force the patient out of the hospital, the earlier case highlights the fact that there are times when if consent is withheld, the courts can overrule withheld consent and order that the procedure be carried out. The main difference between the two cases is that while the first case dealt with a parent's beliefs which endangered the life of her child, the second case's lack of consent was by an adult who is deemed to have the sound mind to understand the ramifications of her actions. Again, law applying the mischief rule of interpretation rescues medical science from its sometimes narrow interpretation of its code of conduct.

CONCLUSION

This paper is not exhaustive, and indeed cannot be, because as science and technology continue to evolve and regulation increases, the interface of law and medicine will equally continue to deepen. From our discourse it is apparent that there are intersections where law and medicine advocate the same position (e.g the acceptance of DNA evidence in cases), but there are other times when the law and medical science may still be running on parallel lanes. One thing is however clear, and that is the fact that even where law and medicine are yet to align on peculiar issues (e.g. Consent) the lanes are inching closer. As medicine has come to the aid of law in the administration of justice through forensic medical science, so also has law come to the aid of medical science and practitioners to define the extent of liability, standard of care and protection of societal norms. It is my hope that this paper proves to be a catalyst that will help this audience explore even closer cooperative use of law and medicine in shaping acceptable societal and medical standards of operations, to enable us begin to view law and medicine not as completely different areas of study, but as areas that often work hand-in-hand.

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Conflict of Interest:

The author declares no conflict of interest.

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