

## **MEDICAL MALPRACTICE AND NEGLIGENCE IN NIGERIA: HUMAN RIGHTS ENFORCEMENT AS A REMEDY\***

### **Abstract**

*Medical malpractice occurs when a health care professional or provider neglects to provide appropriate treatment, omits to take an appropriate action, fails to follow proper standard of care or gives substandard treatment that causes harm, injury, or death to a patient. It has an element of intent that medical negligence does not have. The Constitution of Nigeria recognises protection of human life as a human right and also right to adequate health care are also envisaged under the National Health Act 2014. One of the ways the right can be breached is by medical malpractice or negligence of a medical practitioner. This act has become so rampant, living the victims to traditionally seek redress by civil proceedings, using the writ. Unfortunately, it is most times difficult to succeed in medical negligence or malpractice using the writ, because the medical practitioner performs his duties behind closed doors; the victims most times are unconscious or may not really see, understand or have knowledge of what is going on to aid in their evidence. Also, medical issues are highly technical, which would require the testimony of an expert and most times experts are not willing to testify against their fellow colleagues. The study has taken a critical appraisal of human right enforcement as a better remedy of victims of medical malpractice or negligence and found out that it is speedier, less cumbersome, less expensive and brings the culprits to book. The work discusses medical negligence, its proof and challenges. The work looked at the relevant fundamental rights as they relate to medical negligence/malpractice. The study recommended that human right enforcement provides a better alternative to actions on medical negligence/malpractice precisely because the breach or likelihood of any breach of the right to life or the dignity of human person is not subjected to the rigours of proving medical negligence, but on the threat made to the human life or the loss of it.*

**Keywords:** Medical Practitioner, Medical Negligence, Medical Malpractice, Human Right, Fundamental Right Enforcement

### **1. Introduction**

One of the basic necessities of life is good health. Indubitably, health is wealth and there is obvious necessity for human survival through access to adequate food, shelter and healthcare<sup>1</sup>. This is why health services are considered essential to mankind and health is a basic human right. The Constitution of Nigeria<sup>2</sup> in order to safeguard its citizens has brought up numerous rights, which one of them is right to life, which encompasses health. There is considerable evidence that the provision of healthcare in Nigeria suffers from serious deficiencies, despite technological advancement which has led to the use of sophisticated medical equipment in the treatment of diseases and illnesses, yet mortality rates are striking high and this mostly is as a result of medical negligence or malpractice by a medical practitioner. There is evidence of failure to provide safe care for patients by reasons of poor decisions, leaving patients in the hands of apprentices who are lacking in experience, misdiagnosis, improper medication, inefficiencies and outright negligence of medical practitioners. And the outcome of such malpractice or negligence is injury, disability and even death. And the victims of such negligence typically seek redress in a court of law under medical negligence through that offered by tort law, which most times seems impossible because of several reasons like difficulty of adducing expert evidence, because most times it is very hard to find expert witness who are willing to testify that the practices adopted by their Nigerian colleagues should be stigmatised, expert witness could be expensive, the test for determining medical negligence is not easy, delay in justice, its cumbersome, lack of adequate compensation and difficulties in regards to proof and causation. This study discusses medical negligence/malpractice and human right as a better alternative to medical negligence/malpractice.

\*By **Beatrice Nkechi OKPALAOBI, PhD**, Professor of Law and Sub-Dean, School of Postgraduate Studies Unit, Faculty of Law, Nnamdi Azikiwe Awka Nigeria. E-mail: bn.okpalaobi@unizik.edu.ng. Phone Number: 08034700544; and

\***Chino Nnenne NZEWI, LLM Candidate**, Faculty of Law, Nnamdi Azikiwe University, Awka, Nigeria. E-mail: chinowiweanzewi@gmail.com, Phone Number: 07039276645.

<sup>1</sup> EN, Chegwe, 'Legalism and Realisation of the Right to Life', *Nigeria Journal of Public Law*, vol 2, No. 1, 2009, 226-243, 226.

<sup>2</sup>Constitution of the Federal Republic of Nigeria 1999 (as amended)

## 2. Clarification of Terms

### Medical practitioner

Medical practitioner is a person who holds a valid registration from the Medical Council of any State or State Government and is thereby entitled to practice medicine within its jurisdiction, and is acting within its scope and jurisdiction of license<sup>3</sup>. He is a person who is skilled in the science of medicine. They include doctors, nurses, ophthalmologists, physiologists, physiotherapists, dentists, pharmacists, laboratory scientists, radiologists, and a host of others<sup>4</sup>.

### Medical Malpractice

Medical malpractice is when a medical professional knowingly didn't follow through with the proper standard of care. That is not to say there was malicious intent to cause harm, but causes harm that the doctor or nurse knew could have been prevented if alternative measures were taken. Some examples of medical malpractice include the wrong procedure being performed, patient suicide, surgery performed on the wrong body part, and typically any type of event that should never take place in a medical facility under any circumstance.

### Medical Negligence

Medical negligence is a breach of duty of care by a person in the medical profession to a patient, which results in damage to the patient. Medical negligence happens when a doctor causes harm to a patient unknowingly, either through simple ignorance or failing to take action where it is needed or where necessary. Thus, Medical negligence is said to have occurred where a person in the medical profession is in breach of his duty of care to a patient which results in actual injury to the patient. Medical professionals, for instance, may be negligent in the course of discharging their duties by failing to adhere strictly to their professional code of Conduct. From a medical viewpoint, professional negligence means the failure, on the part of a medical practitioner, to exercise a reasonable degree of care in treatment of a patient<sup>5</sup>. If a medical doctor falls grossly below the standard which is expected from him in treating a patient, then he becomes liable<sup>6</sup>. Therefore, both civil and criminal proceedings may be taken out against such negligent health care provider for the same wrongful act. In law, a plaintiff must establish three elements in order to succeed in an action for medical negligence. The elements are:

- i. There is a duty of care on the medical practitioner to use his best skill and expertise on the patient.
- ii. A breach of that duty by the medical practitioner must exist to establish liability
- iii. Damage caused as a result of the breach of that duty; and actual damage suffered was reasonably foreseeable.<sup>7</sup>

### Duty of Care

Duty of Care refers to a legal relationship arising from a standard of care, the violation of which subjects the actor to liability<sup>8</sup>. Thus, if he undertakes to care for, or treat a patient, whether there is an agreement between them or not, he owes that patient a duty of care.

A health care provider owes a duty to a patient. in *R v Bateman*<sup>9</sup> the court explained that:

...if a person holds himself out as possessing special skill and knowledge and he is consulted, as possessing such skill and knowledge, by or on behalf of a patient or client, he owes a duty to the patient or client to use due caution, diligence, care, knowledge and skill in administering treatment...

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<sup>3</sup> Law Insider Dictionary <https://www.lawinsider.com> (accesses 2<sup>nd</sup> April 2021)

<sup>4</sup> IP Enemuo, 'Medical Negligence: Liability of Healthcare Providers and Hospitals', (2011-2012) 10 *Nig. JR*, 112-113.

<sup>5</sup> BA Garner (ed), *Black's Law Dictionary*, (9<sup>th</sup> ed, Minnesota: The West Publishing Company, 2009), p. 3283

<sup>6</sup> L Kumar, Bk Bastia, 'Medical negligence- Meaning and scope in India' *Journal of the Nepal Medical Association* 51 (181) p. 49-52 March 2011.

<sup>7</sup> RAM Smith, *Law and Medical Ethics*, (London: Butterworth and Co. Publishing Ltd., 1983), 130.

<sup>8</sup> BA Garner, *op cit.*, 1536

<sup>9</sup> [(1935) 94 K.B. 791.

Therefore, where a patient relies on the skill and knowledge of a provider with respect to his/her health, a duty of care arises. Medical practitioners in their professional capacity therefore owe a duty of care to patients to apply caution when administering treatment<sup>10</sup>. He does not owe a duty of care to anyone who needs aid and who can be reasonably assisted<sup>11</sup>. They must exhibit the standard degree of care and competence in treating his patient; otherwise, he will be liable for medical negligence. A medical practitioner is expected to conform to a certain degree of reasonable and ordinary standard of care. In *R v Bateman*, McNair, J, stated that the jury should not expect the highest standard nor should they be content with a very low standard. The doctor should show a reasonable degree of diligence, care skill and caution in giving treatment.

### ***Breach of Duty of Care***

The second element of the tort of negligence is the misconduct itself, the defendants' improper act of omission. Normally referred to as the defendant's breach of duty, this element implies the pre-existence of a standard of proper care to avoid exposing other persons and their property to undue risks or harm. Breach of duty means that a defendant's conduct fell below the required standard expected of him. A health care provider will be in breach of the duty he owes a patient or client if he fails to exercise the standard or care, which the law expects of him. For the health care provider, the standard is that of the ordinary, reasonable health care provider with the skill of the defendant. For a medical practitioner to be liable in negligence, the plaintiff must not only establish the existence of duty of care he must show that a breach of that duty has occurred. The law neither requires the doctor to attain the highest nor the lowest standard. It is therefore sufficient if the doctor exhibits the degree of care, skill and judgment which an average doctor of that experience, placed in the same circumstances, would show<sup>12</sup>. In the case of *Warnock v Kraft*<sup>13</sup> it was explained that: 'a doctor in a small community or village not having the same opportunity and resources or keeping abreast of the advances in his profession, should not be held to the same standard of care and skill as that employed by physicians and surgeons in large cities.

In every case, the law requires that the health care provider's conduct must not fall below expectation or standard. Therefore, he must always act like a reasonable, skilful and competent provider in order to avoid liability<sup>14</sup>.

### ***Damages***

Injury is the harm or the damage that a defendant suffered from the breach alleged. A claimant must prove that he has suffered an injury which injury must flow directly from the action of the defendant. Proof of actual injury is the justification for a claim for damages in an action for negligence. For a defendant to be held liable, the plaintiff must prove that the defendant owed a duty of care and has breached the duty<sup>15</sup>. Put simply, the damage suffered must be the natural consequence of the wrongful act of the defendant. This was noted by Lord Macmillian: The law takes no cognizance of carelessness in the abstract. The cardinal principle of liability is that the party complained of should owe the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of duty<sup>16</sup>.

Any of the forgoing damages may be imposed if a plaintiff succeeds in a suit for negligence. Depending on the facts of the case, these damages may be for direct and immediate harms, such as physical injuries, medical expenses, and lost pay and benefits, or for intangible harms such as loss of privacy, injury to reputation and emotional distress. In cases where the defendant's behaviour is particularly bad, injured victims may also be awarded punitive damages. Punitive damages are not intended to compensate tort

<sup>10</sup> *R v Bateman* [1925] 94 LJK791 (CCA)

<sup>11</sup> CO, Okonkwo, 'Medical Negligence and the Legal Implications' cited in B. C. Umerah, *Medical Practice and the Law in Nigeria* (Nigeria: Longman Nigeria Ltd., 1989), p. 123

<sup>12</sup> *Lamphier v Phipos* (1838) 8 C & P 475

<sup>13</sup> (1938) 85 p. 2nd 505 in Susu, p. 156.

<sup>14</sup> IP Enemo, 'Medical Negligence: Liability of Healthcare Providers and Hospitals', (2011-22012) 10 *op cit*, 112-113

<sup>15</sup> *NEPA v Role* (1987) 2NWLR (Pt. 5) 179

<sup>16</sup> *Donoghue v Stevenson*, *op. cit*

victims for their losses; instead, they are designed to punish flagrant wrongdoers and to deter them and others from engaging in similar conduct in the future.

### 3. Proof of Medical Negligence

#### Causation

Causation is the basis of any proof of negligence. It is predicated on causality and causality is the principle of causal relationship that is the relationship between cause and effect<sup>17</sup>. Causation is concerned with the question whether damages may be recovered from the defendant for particular items of the plaintiff's loss. Discussing causation, Enemo notes that: The most important thing here is to discover whether the defendant's breach of duty as a matter of fact caused the damage that he will be liable to the plaintiff<sup>18</sup>. In *Guaranty Trust Bank v Oyewole & Anor*<sup>19</sup> the Court of Appeal held that if the plaintiff is not able to show that the accident was solely caused by the negligence of the defendant, plaintiff cannot get judgment. This means that from the circumstances and facts of the case, there is a possibility that the accident might have been caused by the carelessness or certain blemished act of the deceased. To demonstrate causation in tort Law, the claimant must establish that the loss he has suffered was caused by the defendant. In most cases a simple application of the 'but for' test will resolve the question of causation in tort Law; that is, but for the defendants actions, would the claimant have suffered the loss? If no, the defendant is not liable. If yes, the defendant is liable.

#### *Res Ipsa Loquitur*

*Res ipsa loquitur* is a Latin phrase which means 'the thing speaks for itself,' is a legal theory wherein the facts and circumstances surrounding an injury allow the court to presume that negligence has occurred. The burden of proving negligence rests with the plaintiff, and if, at the conclusion of evidence, it has not been proven on a balance of probabilities, that the defendant was negligent, the plaintiff's case fails<sup>20</sup>. Justice would not be done if the plaintiff is allowed to go without a remedy because of the difficulties encountered in proving his case. Though the plaintiff may not be in a position to locate the exact act or omission that caused the injury, and the defendant alone may know, the plaintiff is assisted by the doctrine of *res ipsa loquitur*<sup>21</sup>. However, under *res ipsa loquitur*, the defendant's negligence may be presumed and thus does not need be proven<sup>22</sup>. The elements of *res ipsa loquitur* are:

- 1) The defendant was in exclusive control of the situation or instrument that caused the injury;
- 2) The injury would not have ordinarily occurred but for the defendant's negligence; and
- 3) The plaintiff's injury was not due to his own action or contribution<sup>23</sup>.

If these elements are met, the burden shifts to the defendant to show that he is liable.

*Res ipsa loquitur* typically arises in cases where the negligent act is so obvious that there is no need for evidence of what happened. What must have happened is apparent from the surrounding circumstances. A vital principle in proving medical negligence is by the plea of the doctrine of *Res ipsa loquitur*. In pleading *res ipsa loquitur*, the circumstances giving rise to the injury must be such as to lie exclusively within the defendant's knowledge<sup>24</sup>. *The Supreme Court in Ojo v G Haroro*<sup>25</sup> held that the doctrine will not apply when, a plaintiff, in relying on the doctrine of *Res ipsa loquitur*, merely proves that an accident and injury occurred and asks the court to infer that the defendant was negligent in his act. If there is evidence of how the occurrence took place, then reliance on *res ipsa loquitur* will be improper and inappropriate. The question of the defendant's negligence must be determined based on available evidence. This means that the doctrine of *Res ipsa loquitur* is not meant to supplement inconclusive evidence of negligence on the part of a plaintiff. Rather it is meant to apply where there is no other

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<sup>17</sup> BA Garner, *op. cit* p 233.

<sup>18</sup> I P Enemo, *Notes on the Law of Torts*, (Onitsha: Syscom Ltd, 1998), p. 52.

<sup>19</sup> (2014) 15 WRN 162

<sup>20</sup> *Adeoshun v Adisa* [1986] 5 NWLR (Pt. 40) p. 225

<sup>21</sup> I P Enemo 'Liability of Health Care Providers and Hospitals' (2011-2012) vol 10, *Medical Negligence 10 Nig. J. R*

<sup>22</sup> *Read v. S. Pine Elec. Power Asso*, (1987) 515 So. 2d 916.

<sup>23</sup> *Cooper v. Public Belt R.R.*, 776 So. 2d 639 (La. Ct. App. 4th Cir. 2000).

<sup>24</sup> *Fowler v Harper*, 'Effect of Doctrine of *Res Ipsa Loquitur*', (With FE Heckel), 22 *Illinois Law Review* 724 (1928)

<sup>25</sup> (2006) 10 NWLR (Pt 987) SC 173

proof of negligence than the accident itself. *Res ipsa loquitur* has been applied in the following cases In *Cassidy v Ministry of Health*<sup>26</sup> where there was a minor operation on the third and fourth fingers of one hand. Of who when the bandages were removed, the whole hand was found to be useless. The trial court upheld the trial judge's ruling that the onus was on doctor to provide an adequate explanation of this occurrence, and that in the absence of any such explanation negligence on the part of some member of the surgical team (all of whom were hospital employees) could be presumed. Also, this can be seen in the case of *Fish v Kapur*<sup>27</sup>, where a dental extraction resulted in a jaw fracture, it was also held that the onus was on the doctor to prove.

#### 4. Challenges

##### The Unwillingness of Medical Experts to Testify

Medical negligence cases are difficult to prove in Nigeria due to a plethora of reasons, ranging from ignorance to reluctance in pursuing rights, but ultimately because of the unwillingness of medical practitioners to testify against their fellow practitioners to corroborate the facts<sup>28</sup>. This makes it difficult to proceed with medical negligence cases considering the huge investment needed to prosecute the case. To prevail in a medical negligence/malpractice case, the claimant and his/her counsel must prove, through expert medical testimony, that the injury or death was caused by medical negligence/malpractice. Many physicians are unwilling to even review a potential claim for a patients counsel and even fewer are willing to testify at trial that another physician was negligent. This is because medical practitioners are familiar with each other and due to peer pressure; they would be discouraged from testifying against each other. It becomes often necessary to find a foreign physician willing to serve as expert. This makes the cost of obtaining expert testimony quite expensive<sup>29</sup>. The claimant must present reputable expert testimony to even have a chance of prevailing because the claimant has the burden of proof<sup>30</sup> in a medical negligence case.

##### High Cost of Litigation

Conflicts are part and parcel of every society as human's socio-economic and political intercourse is bound to generate frictions. Law is enthroned as an instrument of social engineering to balance the conflicting interests and produce redress for the members of the society. Law is therefore seen as a preserver of sanity in the society which dissuades aggressions, self-help and anarchy<sup>31</sup>. the cost of access to the Nigerians courts has always been high, but the situations seem to be deteriorating as the costs has steadily increased There are thousands of awaiting trial inmate across Nigerian prisons and police cells which detention was solely as a result of access to legal representation. Litigation has the potential to result in considerable expenditure for parties. Solicitors face substantial difficulty in preparing costs estimates because, by its very nature, Litigation can be unpredictable. Indeed, costs estimate prepared at the beginning of a case can quickly become out of date as certain events begin to unfold, for instance, disclosures could become more complex, and the case may require plenty exchange of correspondence; extra witness may become necessary or the parties may need to make additional applications to court<sup>32</sup>. Most litigants avoid seeking justice because of the high cost of litigation.

#### 5. Human Rights Enforcement as a Panacea in Dealing with Medical Negligence

Human rights are the rights of humans<sup>33</sup>. It is a special class of rights that one has simply because one is human being. The concept of human rights involves intertwined relationships. The first relationship

<sup>26</sup> (1951) 1 ALL ER 574, CA

<sup>27</sup> [1948] 2 All E. R. 176

<sup>28</sup> IP Enemo, 'Medical Negligence: Liability of Health Care Provider and Hospitals' 10 *Nig. JR* (2011-2012), 126.

<sup>29</sup> EM Moen and PW Chemnick, 'The Truth about Medical Negligence Claims', <<http://cmglaw.com/Article/2010/01/The-Truth-About-Medical-Negligence-Claims>> (Accessed 8<sup>th</sup> May 2021)

<sup>30</sup> (1961) 105 SJ 257 1008

<sup>31</sup> K Ketefe,, 'Legal Fees, Charges on the increase- Lawyers', National Mirror,

<http://nationalmirroronline.net/new/litigants-groan-under-high-cost-of-justice/> (Accessed April 2021).

<sup>32</sup> 'Litigation Costs: Recent Development', <http://www.legal500.com/c/nigeria/developments/3632> (Accessed 8 April, 2021)

<sup>33</sup>J Donelly, 'The Concept of Human Right's', *Indonesian Journal of International and Comparative Law*, ISSN: 2338-7602; E-ISSN:2338-770X, 78

is that between the State and individuals within its jurisdictions; the second relationship is among individuals themselves governed by the state and the third relationship is between the State and the international community. The promotion and protection of human dignity is an irrevocable responsibility of every state as well as a non-State entity. Basically, there are two main levels of enforcement, namely at the national levels through the domestic courts or national human rights institutions. In *Ransome-Kuti v. A. G. of Federation*<sup>34</sup>, Kayode Eso, JSC held, emphasizing the status and position of human rights. He authoritatively maintained of the rights as being that: Which stands above the ordinary laws of the land and which in fact is antecedent to the political society. It is a primary pre-condition to civilized existence and what has been done by our constitution, is to have these rights enshrined in the constitution so that the rights could be immutable to the extent of the immutability of the constitution itself. Also in 1989, Kayode Eso, JSC, again remarked in *Saude v. Abdullahi*<sup>35</sup>, taking a stance he described as multicausal; neo-earthly, neo-divine of human rights. He said that human rights are not just mere rights. They are fundamental. They belong to the citizen. These rights have always existed even before orderliness prescribed rules for the manner they are to be sought. It is the entrenchment of the rights in the constitution of a state that described human rights as being fundamental, and gives them the status of being not only legal rights but rights of constitutional dimension. Human Rights that are enforceable in law through the domestic court are those rights which are recognized by law as fundamental rights as distinguished from mere aspirations or individuals ideas of rights. Nations always find reasons to obey and comply with international human rights and often proceed, through constitutional processes, to internalise these norms of international human rights law as domestic law. One of such metamorphosis in Nigeria is the fundamental Rights (Enforcement Procedure) Rules (2004). This rule has been passed to ease the enforcement of human rights in Nigeria. It is on this premise that the researcher argues that relying on human rights enforcements may address the complex issues of proving medical negligence/malpractice in Nigeria.

## 6. Relevant Fundamental Rights under the 1999 Constitution

The law sets out some human rights which are guaranteed absolutely under the constitution and are enjoyed by citizens of a nation. To this end, Chapter IV of the constitution of the Federal Republic of Nigeria 1999 recognises the fundamental rights of all citizens in Nigeria, which are categorized as first-generation rights. Chapter II of the Constitution guarantees the second generation of rights, which are not absolute but may be justiciable. The right to health falls under this category. However, this chapter is non-justiciable by virtue of section 6 (6) (c) of the same constitution. The relevant rights to the current discourse are:

- a. Right to Life: Section 33 of the 1999 Nigerian Constitution provides for the right to life and states further that 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. The effect of this Provision is that everyone including a patient has a right to life and the section imposes a duty on everyone, including the health care provider to take reasonable/absolute care when treating the patient and must ensure that death does not result as a consequence of such treatment. In this wise, a patient must not be subjected to medical experiment with the resultant effect of causing death of the patient.
- b. Right to the Dignity of Human Person: Section 34 of the Nigerian Constitution provides that every individual is entitled to respect of the dignity of his person and accordingly, no person shall be subjected to torture or to inhuman or degrading treatment<sup>36</sup>. The importance of the right to human dignity and its central place in the Constitution must be emphasized. Like the right to life, the right to dignity is equally important. The right to dignity is an acknowledgment of the intrinsic worth of human beings, human beings are entitled to be treated as worthy of respect and concern. This right is therefore the foundation of many of the other constitutional rights<sup>37</sup>. The right to dignity also imposes a duty on the health care officer to respect the worth and

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<sup>34</sup>(1985) 2 NWLR Pt 6, P. 211.

<sup>35</sup> (1989) 4 NWLR pt 116, P.389 at 418.

<sup>36</sup> Section 34(1) (a) of the 199 Nigerian Constitution.

<sup>37</sup> See *S v Makwanyane* 1995 (3) SA 391 (CC) para 144

person of his patient; his person must be respected and must not be treated in a cruel, inhuman or degrading manner.

- c. Right to Health: Chapter II of the Constitution of the Federal Republic of Nigeria (CFRN) 1999 contains the political, economic, social, cultural and developmental rights of the citizens. However, this chapter is non-justiciable by virtue of section 6 (6) (c) of the same constitution. Furthermore, in *A.G. Ondo State v A.G. Fed*<sup>38</sup>. Therefore, non-justiciable simply means inability of any Court of Law to try any matter even where real interest and rights are being infringed. A right is said to be justiciable when a judge can consider this right in a concrete set of circumstances and when this consideration can result in the further determination of this right's significance<sup>39</sup>. But a citizen whose right to health has been breached can come under the African Charter of Human and People's Right because it is now domesticated in our Laws.
- d. Right to freedom of Discrimination: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status<sup>40</sup>. No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.<sup>41</sup> Freedom of discrimination means access to health care. Entitlements for achieving this access, is prohibited on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability. An important aspect of this right is the prevailing prejudice against HIV-positive and covid 19 patients in the hospital.
- e. Right to Privacy and confidentiality: A patient's right to privacy involves the confidentiality of information related to the patient and bodily privacy of the patient. Confidentiality and privacy are vital for establishing and maintaining an effective and respectful clinical relationship. The right to privacy constitutes a social merit as it encourages the explicit discussion of health-related problems between clinicians and patients. Privacy requires physicians to keep confidential information that patients provide or they obtain in their professional interaction with patients. Privacy is important as it provides a secure environment for patients where they receive medical care and provide complete and accurate information, and which reinforces confidence in health care and emphasizes the importance of respect for patient autonomy.
- f. Right to personal Liberty: The right to personal liberty is essential in any democratic society. According to His lordship, Justice Oputa, says that personal liberty implies freedom from external coercion in the use of one's good or faculties. It is the status of not being the property or chattel of another<sup>42</sup>. According to the father of rule of law, A.V. Dicey, says personal liberty is the right not to be subject to imprisonment, arrest and any other physical coercion in any manner that does not admit of legal justification<sup>43</sup>. Also Section 35[1] of the 1999 Constitution (as amended) of the Federal Republic of Nigeria says, Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law. This right to liberty is most time breached when Patients are detained in hospitals for their inability to pay bills. When a patient fails to clear his medical bills, the hospital should not detain him since the hospital is not a gazette detention centre but can use legal means to recover the outstanding bill. It is a trite principle of our law that a person cannot be a judge in his own case which is represented in the Latin maxim *Nemo judex in causa sua*. The right to personal liberty is one of the most central human rights as it is connected to the essentialist rudiments of an individual's physical freedom. The right to liberty requires that the arrest or detention of an individual must be in accordance to the law.

<sup>38</sup> (2002) 9 NWLR (pt 772)

<sup>39</sup> See generally K Arambulo, *Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights* edited by Isfahan Merali and Valerie Oosterveld. Philadelphia: University of Pennsylvania Press (Pennsylvania Studies in Human Rights), 2001, pp. 280

<sup>40</sup> Article 2 of the Universal Declaration of Human Right.

<sup>41</sup> Section 42(2), of the 1999 Constitution of the Republic of Nigeria

<sup>42</sup> In a paper entitled 'Human Rights in the Legal and Political Culture of Nigeria' delivered at the 2nd Idigbe Memorial Lecture at the University of Benin on 28th November, 1986.

<sup>43</sup> cited in *Oba Gabriel Orogie v. A.G.Ondo State* [1982], 3 NCLR, 349 per Justice Orojo

### 7. The National Health Act 2014

Nigeria's National Health Act 2014 (NHA 2014) was signed into law by former President Goodluck Jonathan on October 31, 2014. It provides a legal framework for the regulation, development, and management of Nigeria's Health System. The NHA is committed to ensuring availability in sufficient number of functioning public health facilities in Nigeria, as well as complementary goods and services<sup>44</sup>. To achieve this, the NHA seeks to partner with public and private health establishments in the delivery of health services. These goods and services are also by the NHA, accessible to everyone without discrimination. The NHA also has in place a mechanism through which a person who is dissatisfied with the quality of services received at a health facility may lodge a complaint and have the complaint investigated. Where it is not properly handled, the matter can proceed to court for adequate remedy.

### 8. Relevance in Medical Cases

In recent years, there have been rapid developments in international law with respect to the normative definition of the right to health, which includes both health care and healthy conditions. These norms offer a framework that shifts the analysis of health issues from questions of quality of care to matters of social justice<sup>45</sup>. This right has developed so rapidly under international law, and its normative clarification has significant conceptual and practical implications for health policy across the world<sup>46</sup>. This right to adequate health care is therefore a recognized human right in Nigeria as it is derivable both from the Fundamental Rights Chapter<sup>47</sup>, and is envisaged under the National Health Act 2014. It must be borne in mind that the FREP Rules 2009 has expanded the scope of Legal instruments that can be relied on or cited in cases of fundamental rights enforcement<sup>48</sup>. It is expected that patients whose rights have been violated by medical practitioners can seek redress through fundamental rights enforcement under the rules, as an alternative to civil claims under tort or contract. The question now is which fundamental right under the 1999 Constitution will effectively assist victims of medical negligence to enforce their rights via the FREP Rules 2009? There is no doubt that if the medical treatment occasions death, the right to life will immediately take the front burner. Once a plaintiff in a case of medical misconduct which leads to death can show *res ipsa loquitur* on medical negligence for instance, such plaintiff can as well file an application to enforce the deceased fundamental rights to life under section 33 of the 1999 Constitution. In such application, medical evidence will be unnecessary. In *Ben v State*<sup>49</sup> the Supreme Court held that: 'Where a man is attacked with a lethal weapon and dies on the spot, cause of death can properly be inferred that the wound inflicted caused the death. In other words, where the cause of death is obvious, medical evidence ceases to be of any practical or legal necessity where death is instantaneous or nearly so'. In *Okezie v Chairman Medical & Dental Practitioners Disciplinary Tribunal (MDPDT)*, Dr Okeize a registered specialist Obstetrician and Gynaecologist and Lecturer at University of Nigeria Teaching Hospital Enugu was found guilty of infamous conduct and gross professional negligence in 2001. He was suspended for practices for six months for losing his patient (Mrs Obieke) after a caesarian operation. Consequently, the husband (on behalf of his wife) under the provisions of the FREP Rules 2009 section 33 of the 1999 constitution can effectively commence the enforcement of his wife's fundamental right to life against the hospital. This will be successfully done without confronting the obstacle of *locus standi*. The law have equally made it possible for the constitutional right to life of a deceased person to be enforced by his dependants. Furthermore section 34 (1) (a) of the 1999 constitution has provisions against degrading or inhuman treatment. It is indeed inhuman for a medical doctor to forget swabs in the body of patient after an abdominal operation<sup>50</sup>. It will be also be inhuman for a dentist to occasion jaw fracture for a patient while carrying out a dental

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<sup>44</sup> National Health Act 2014, s.2

<sup>45</sup> A E Yamin, 'Right to Health under International Law and its Relevance in the United States', *Am J, Public Health*, vol. 95(7) 2005.

<sup>46</sup> *Ibid*, 304

<sup>47</sup> Constitution of the Federal Republic of Nigeria 1999 (as amended) ss. 33(1) and 34(1).

<sup>48</sup> Fundamental Rights (Enforcement Procedure) Rules 2009, Preamble, paras. 3(a) and (b)

<sup>49</sup> (2006) 16 NWLR (Pt 1006) 582.

<sup>50</sup> In *Mahone v Osborne* (1939) 2 KB 14

extraction<sup>51</sup>. In *Cassidy v Ministry of Health*<sup>52</sup> the plaintiff entered a hospital to be cured of two stiff fingers but ended up after treatment with four stiff fingers and consequently lost the use of his left hand. These are instances of the inhuman and degrading treatment which can still be accommodated under section 34(1)(a) of the 1999 Constitution and for which the right to health, under the FREP Rules 2009 can institute and get speedy justice. Also, a victim of medical negligence/malpractice can also come under the African Charter of Human and Peoples Right; it has now been domesticated in our law. Also, a person, who has been detained in the hospital for hospital bill, can also come under FREPR 2009 because there is a breach of his right to liberty. A victim of any terminal illness who has been refused treatment by any hospital can also come under fundamental right enforcement procedure rule, for being discriminated against. Once confidential information given to a doctor by a patient is no longer confidential, then the citizen's fundamental right to privacy and confidentiality has been breached, the patient can also bring up a fundamental right action under the fundamental right enforcement procedure rule. Therefore, patients who suffer any of the categories of injuries mentioned in the foregoing may apply to enforce their rights through the Human Right Enforcement procedures instead of through civil actions under negligence. The advantage of doing this is that it will remove the need to search for medical experts as witnesses which in most cases is difficult to get. It will also ensure that the matter is quickly heard and resolved since it will be battled strictly through affidavit evidence. There will be no room for technicalities and because it is a fundamental rights issue, the matter will be dispensed with speedily.

#### **10. Conclusion and Recommendations**

A doctor-patient relationship is a complex one. The doctor owes the patient a duty of care and where there is a breach of this duty, there is a breach of trust and confidence. When this duty imposed by law is breached, it is assumed that injury has been visited upon a patient in the hands of a medical practitioner, whose ultimate duty is to provide relief or safety. It is however regrettable that most Nigerians are unaware of their rights, or the attendant duty imposed by law on medical practitioners, in a doctor-patient relationship. This lack of awareness has left them vulnerable to unethical practices and created a situation where they do not enforce their rights when breached, either as a result of ignorance or general reluctance to enforce same.

The following recommendations are made. Medical negligence/malpractice, which could be in form of wrong diagnoses, defective treatment and dereliction of required duty of care from medical practitioners have continued to increase in Nigeria. This paper therefore posits that proving medical negligence/malpractice by way of human right enforcement is a way forward. It is glaring that reliance on common law is not effective in securing legal redress for victims of medical malpractice especially in Nigeria. The law should also provide stiffer punishments for such guilty medical practitioners who take advantage of the vulnerable patients. Such a step would promote a better and safer health care delivery system in Nigeria and would deter other medical practitioners from committing the same act and they would be more serious with their job. Legal practitioners engaged in medical malpractice cases should adopt the enforcement of fundamental rights as an alternative approach to legal redress. This will ensure accelerated hearing of the case. It will also help the legal practitioner to circumvent the problem of refusal of medical practitioner to testify against a colleague or a prolonged suit. There should also be a reposition of chapter 11 of the 1999 constitution not being justiciable. Many medical practitioners are hiding under this section to continue with their negligent act. If this chapter becomes justiciable the country would have better medical services. Also section 33 (2) (a) of the right to life under the 1999 constitution which give persons the right to take another person's life in defence to property should be reviewed. Life is precious and more importance to be compared with losing it to property.

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<sup>51</sup> *Fish v Kapur* (1948) 2 All ER 176

<sup>52</sup> (1951) 2 KB 343.