

## A DISCOURSE ON THE VIOLATION OF THE RIGHT TO LIBERTY OF PATIENTS DUE TO MEDICAL NEGLIGENCE ERROR AND MALPRACTICE IN NIGERIA\*

### Abstract

The Nigerian medical system on which a large percentage of Nigerians depend for healthcare is bedeviled with numerous challenges which cause systemic dysfunction and inefficiencies for safe quality healthcare delivery. This problem worsens with the incidents of medical negligence, error and malpractice which are caused by medical practitioners on the one hand and government on the other through institutional weaknesses with the consequences for patients amounting to the violation of the right to liberty. As regards Nigerian medical professionals, the occurrence of harm to patients is prohibited under a medical rights enforcement mechanism. However, in the face of the continuing occurrence of these events, the objective of this study was to determine whether patients have fundamental rights and whether harm to patients through medical negligence, error and malpractice was in violation of their fundamental right to liberty. Pursuant to this, the doctrinal research method was employed to undertake the evaluation through reliance on available Library literature, Journal publications and Internet sources. It was found that the harmful consequences due to medical negligence, error and malpractice are in violation of the fundamental right to liberty in Nigeria. Furthermore, it was found that although there is the problem of the significant violation of the fundamental right to the right to liberty against patients in medical practice in Nigeria, fundamental rights law was not been enforced to prevent this from happening or provide remedy upon occurrence. The identification of this problem, offered the opportunity for the use of fundamental rights enforcement procedure as a basis for medical malpractice claim. Accordingly, it was recommended that the fundamental right to liberty of patients be enforced in medical practice in Nigeria through the instrumentality of the fundamental rights enforcement procedure.

**Keywords:** Right to Liberty, Medical Negligence, Error, Malpractice, Fundamental Rights, Fundamental Rights Enforcement Procedure

### 1. Introduction

Patients suffer harm when receiving treatment in Nigerian hospitals in diverse ways. One of such ways is through the deprivation of the liberty of patients which offends their fundamental rights in terms of the fundamental rights rules provided for in the Constitution of Nigeria, 1999 (as amended).<sup>1</sup> The fundamental rights of patients include the right to life,<sup>2</sup> the prohibition against torture, inhuman and degrading treatment and punishment,<sup>3</sup> the right to liberty,<sup>4</sup> the right to privacy and confidentiality<sup>5</sup> and the prohibition against discrimination.<sup>6</sup> This study will examine and discuss how medical malpractice claims can be made under the fundamental rights enforcement procedure as it pertains to the fundamental right to liberty.

### 2. Medical Negligence, Error and Malpractice

Medical negligence derives its origins from the tortious principle of negligence.<sup>7</sup> The essence of the tort of negligence was that a person should be subject to liability for carelessly causing harm to another.<sup>8</sup> In addition, it was also recognized that there was the necessity of a causal connection between the defendant's breach of duty

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<sup>1</sup> The 2009 Rules was made by the then Chief Justice of Nigeria, Hon. Justice, I. L. Kutigi, CJN (as he then was) pursuant to S. 46 (3) of the 1999 Constitution, which empowers the Chief Justice of Nigeria to make Rules with respect to practice and procedure of a High Court for the purpose of Enforcement of Fundamental Rights. Flowing from the above, breach of Fundamental Rights in Nigeria can now be redressed under the Fundamental Rights (Enforcement Procedure) Rules, 2009.

<sup>2</sup> Section 33 Constitution of Nigeria, 1999 (as amended).

<sup>3</sup> Section 34 Constitution of Nigeria, 1999 (as amended).

<sup>4</sup> Section 35 Constitution of Nigeria, 1999 (as amended).

<sup>5</sup> Section 37 Constitution of Nigeria, 1999 (as amended).

<sup>6</sup> Section 42 Constitution of Nigeria, 1999 (as amended).

<sup>7</sup> *Ojo v. Gharoro & UBTH Management Board* (2006)10 NWLR, 987

<sup>8</sup> JH, Deering, *The Law of Negligence*, (Book on Demand Ltd, 2020), p. 45.

and the plaintiff's damage that was natural, probable, proximate, and not too remote.<sup>9</sup> Relatedly, medical negligence constitutes an act or omission by a medical practitioner which breaches the duty of care the practitioner owes to the patient resulting to injury or death of the patient.<sup>10</sup> With specific reference to the practice of medicine, negligence assumes a peculiar character which has been aptly identified by Enemo as follows, 'Medical negligence is, therefore, a breach of a duty of care by a person in the medical profession, to a patient, which results in damage to the patient.'<sup>11</sup> Abegunde provides deeper clarity as follows, 'Medical negligence is a branch of negligence which has its root in medical law. Medical negligence law covers the consequences for medical practitioner's non-exercise of appropriate care and rights of patients when a medical practitioner makes an error or fails to provide an acceptable level of care in the execution of his duty. This is called 'fault liability'.<sup>12</sup> Hence, for a doctor to be liable in negligence, duty of care must exist.

Generally, errors are unintentional because an error occurs 'when someone is trying to do the right thing, but actually does the wrong thing'.<sup>13</sup> Thus, a medical error is a commission or an omission with potentially negative consequences to the patient that would have been judged wrong by skilled and knowledgeable peers at the time it occurred, independent of whether there were any negative consequences.<sup>14</sup> Essentially, Medical errors occur in the treatment of patients with deleterious consequences for those affected.<sup>15</sup> A hospital, doctor, or other health care professional is expected to provide a certain standard of care. Thus, medical malpractice is a legal cause of action that occurs when a medical or health care professional, through a negligent act or omission, deviates from standards in their profession, thereby causing injury to a patient.<sup>16</sup> The negligence might arise from errors in diagnosis, treatment, and aftercare or health management.<sup>17</sup> In this regard, medical malpractice happens when a doctor or another medical professional whose actions fall below the appropriate standard of care hurts a patient.<sup>18</sup>

### 3. Medical Malpractice Claims under the Right to Liberty

The right to personal liberty is central to the human rights rubric as it is concerned with the physical and psychological freedom of every citizen of a nation. This is why the right to liberty requires that the arrest or detention of an individual must be in accordance with the law so that citizens are protected against the excesses of the government and its agents. This is in keeping with the decision of the court in *Oba Gabriel Orogie v A.G. Ondo State*<sup>19</sup> where it was held that citizens are not to be the subject to imprisonment, arrest and any other physical coercion in any manner except in accordance with the law. Thus, the enjoyment of this right implies freedom from external coercion in the use of one's good or faculties as it is representative of the status of not being the property or chattel of another.<sup>20</sup> This reflects a deeper philosophical foundation which is that every citizen has the freedom to think what he will, to say what he will on his lawful occasions, without let or hindrance from any other person.<sup>21</sup> However, practical painful consequence for many patients who end up at the wrong end of the practice of medicine by medical practitioners evoke similitudes of the violations of liberty and security of the person perpetrated by other agents of the state such as the Police and the Directorate of State

<sup>9</sup> F, Wharton, *Law of Negligence*, (Gale, Making of Modern Law, 2010), p. 3; See also WB, Hale, *Handbook on the Law of Torts* (Gale, Making of Modern Law, 2010), p. 19.

<sup>10</sup> FN, Chukwunke, 'Medical Incidents in Developing Countries: A few case studies from Nigeria' [2015] (18(7) *Niger J Clin Prac*; 20

<sup>11</sup> PI, Enemo, 'Medical Negligence: Liability of Health Care Providers and Hospital' (2011-2012) (10) *Nig. J.R.*; 117.

<sup>12</sup> B, Abegunde, n. 167.

<sup>13</sup> B, Runciman, et al, *Safety and Ethics in Healthcare: A Guide to Getting it Right*, (Ashgate, 2007), p. 5.

<sup>14</sup> JO, Lokulo-Sodipe, 'An Examination of the Legal Rights of Surgical Patients under the Nigerian Laws' [2009] (4)(1) *J Law Conflict Resolut.*; 79.

<sup>15</sup> L, LA Pietra, et al, 'Medical Errors and Clinical Risk Management: State of the Art' [2005] (25) *Acta Otorhinolaryngol Ital*; 339.

<sup>16</sup> Physician Weekly, 'Proving a Medical Malpractice Case I – Proving Negligence (Part I)' <<https://www.physiciansweekly.com/proving-a-medical-malpractice-case-i-proving-negligence-part-i>> Accessed 29/09/2021.

<sup>17</sup> Ibid.

<sup>18</sup> Justia, 'Medical Malpractice' <<https://www.justia.com/injury/medical-malpractice/>> Accessed 29/09/2021.

<sup>19</sup> (1982) 3 NCLR, 349.

<sup>20</sup> Honourable Justice Chukwudifu Oputa, 'Human Rights in the Legal and Political Culture of Nigeria' being a paper delivered at the 2nd Idigbe Memorial Lecture at the University of Benin on 28th November, 1986.

<sup>21</sup> A, Denning, *Freedom under the Law* (Hamlyn Lecture Series) Hardcover, 1st ed, (Stevens & Sons Ltd, 1949), p.5.

Security Services (DSS).<sup>22</sup> For example, in Nigeria, reports of unfounded hospital detention of patients for inability to pay bills<sup>23</sup> or other unlawful restraints have been made. Most of these acts are in violation of the liberty and bodily integrity of many patients. Some of these misconducts go hand in hand with the violations of the privacy and confidentiality of patients, in addition to cases of discrimination and unequal treatment of patients by medical practitioners.

It is submitted that apart from the general, legal, judicial and institutional regime, all of these infractions are also suggestive of violations of human rights provisions namely that everyone has the right to liberty and security of person, no one shall be subjected to arbitrary arrest or detention, no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law, and no one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation.<sup>24</sup> In this regard, clinicians do not abide by the basic human rights and equity considering the values and dignity of patients before making decisions or taking actions that may affect them.<sup>25</sup> It is submitted that despite forward thinking thoughts such as this, medical practitioners still violate the liberty of patients when receiving treatment.

The legal basis for addressing the violation of the right to liberty and need to rely on the fundamental rights rules will now be discussed.

#### **4. Right to Liberty under the Nigerian Constitution**

The right to liberty is protected in international, regional and national instruments. Nigeria being a signatory to most international and regional human rights instruments has reflected the protection into its local legislations starting with its *grundnorm*, the constitution. In this regard, section 35 of the Constitution of Nigeria, 1999 (as amended) provides that:

- 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-
- (c) for the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence: Provided that a person who is charged with an offence and who has been detained in lawful custody awaiting trial shall not continue to be kept in such detention for a period longer than the maximum period of imprisonment prescribed for the offence.
  - (3) Any person who is arrested or detained shall be informed in writing within twenty-four hours (and in a language that he understands) of the facts and grounds for his arrest or detention.
  - (4) Any person who is arrested or detained in accordance with subsection (1) (c) of this section shall be brought before a court of law within a reasonable time, and if he is not tried within a period of –
    - (a) two months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or

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<sup>22</sup> Section 35(1), Chapter IV: Fundamental Rights, Constitution of Nigeria, 1999 (as amended); Article 9(1), International Covenant on Civil and Political Rights (ICCPR). Accessed 23/04/2018. Article 25, United Nations Convention on the Rights of the Child (CRC). Article 14, Convention on the Rights of People with Disabilities (CRPD). Article 6, African Charter on Human and Peoples' Rights, (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986).

<sup>23</sup> A, Aliyu, 'Detention of new mums over medical bills rampant – Report' *Daily Trust*, 12 January, 2018; G, Olawale, 'Government hospitals detain patients in Lagos' *Vanguard Newspapers*, 15 December, 2017; C, Obinna, 'Doctors react to alleged detention of patients in hospitals' *Vanguard Newspaper*, 21 May, 2013.

<sup>24</sup> UN Human Rights Committee (HRC). *A. v New Zealand*, Communication No. 754/1997. (CCPR/C/66/D/754/1997). Views adopted July 15, 1999; see also UN Human Rights Committee (HRC); *Fijalkowska v Poland*. Communication No. 1061/2002: Poland. (CCPR/C/84/1061/2002). Views adopted July 26, 2005. These cases individually and severally, challenge breaches of Article 7, Article 9, Article 11 and Article 17 International Covenant on Civil and Political Rights (ICCPR). Article 12, International Covenant on Economic, Social and Cultural Rights (ICESCR). Articles 12(1) and 39 Child Rights Convention (CRC). Article 17 Convention on the Rights of Persons with Disabilities (CRPD). Principle 3(a) World Medical Association (WMA) Declaration on the Rights of the Patient. *M.S. v Sweden* (27/08/1997) and *Z v Finland* (1998) 25 EHRR 371, interpreting Article 8(1) of the ECHR.

<sup>25</sup> FN, Chukwunke, 'Medical incidents in developing countries: A few Case Studies from Nigeria' [2015] *Niger J Clin Pract*; 22.

- (b) three months from the date of his arrest or detention in the case of a person who has been released on bail, he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.
- (5) In subsection (4) of this section, the expression ‘a reasonable time’ means –
  - (a) in the case of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of forty kilometers, a period of one day; and
  - (b) in any other case, a period of two days or such longer period as in the circumstances may be considered by the court to be reasonable.

The meaning of personal liberty was construed by the court in *Egenokwu v A.G. Federation & Anor*<sup>26</sup> where the applicant sought a declaration that his arrest and the detention of the applicant by the 2nd respondent’s officers for a total period of four days at Karimu Police Station, Police Command Area 11 and Police force CID Area 10 is unreasonable, unconstitutional and a grave violation of the applicant’s Fundamental Right of Right to Liberty as guaranteed under Sections 35 of the 1999 Constitution and Article 6 African Charter on Human & Peoples Right (Ratification & Enforcement) Act Cap 10 Laws of the Federation of Nigeria, 1990. The court held that:

the arrest and detention of the applicant by the 2nd respondent’s officers for a total period of four days at Karimu police station and later at police command area 11, Abuja is unreasonable, unconstitutional and a grave violation of the applicant’s fundamental right of right to liberty as guaranteed under Section 35 of The 1999 Constitution And Article 6 African Charter On Human & People’s Right (Ratification & Enforcement) Act Cap 10 Laws of the Federation Of Nigeria 1990.

In *Adewole v Jakande*,<sup>27</sup> the court held in this case that the closure of private schools by the Lagos State government is a violation of the personal liberty of parents to train their children where and how they deem fit. The court particularly stated that:

Personal liberty’ means privileges, immunities, or rights enjoyed by prescription or by grant. It denotes not merely freedom from bodily restraint, but rights to contact, to have an occupation, to acquire knowledge, to marry, have a home, children, to worship, enjoy and have privileges recognized at law for happiness of free men.

### 5. Exceptions to the Right to Liberty under the Nigerian Constitution

The right to liberty is not absolute as it can be deprived in circumstances prescribed by any law in accordance with the constitution.<sup>28</sup> In this regard, section 35(1) (c) permits the authorities to deprive an individual of his right to personal liberty upon reasonable suspicion of having committed a criminal offence, or to a reasonable extent for the purpose of preventing him from committing a criminal offence. A plethora of cases such as those of *Bobade Olutide & Ors v Adams Hamzat & Ors*,<sup>29</sup> *Dokubo-Asari v FRN*,<sup>30</sup> *Odogwu v Attorney General of the Federation*<sup>31</sup> and *A.G. Anambra State v Uba* reflect the law.<sup>32</sup> Exceptionally however, the court in *Olugbesi v COP*<sup>33</sup> held that the police however is not to arrest and detain an accused person until there are evidence which establishes a prima facie case against him. This is why the court held in *Ateze v Momoh*<sup>34</sup> that the mere invitation to the police station for interrogation does not constitute arrest if honoured by the affected person willingly.

### 6. The Right to Liberty under International and Regional Law

International protection for the right to liberty is provided in several instruments starting with the Universal Declaration of Human Rights. The relevant provisions include: Article 3: Everyone has the right to life, liberty and security of person; Article 9: No one shall be subjected to arbitrary arrest, detention or exile. Similarly, the International Covenant on Civil and Political Rights provides for the right to liberty under Articles 9 and 10, while the Convention on the Rights of the Child makes provision for the right to liberty in its Article 37, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

<sup>26</sup> Suit No. FCT/HCM/5094/11 (2/4/2013).

<sup>27</sup> (1981) 1 NCLR 262 at 278 HC Lagos.

<sup>28</sup> *Ogunwunmi v Federal A.G.* (1973) CCHC II 4/75 52 HC Lagos.

<sup>29</sup> (2016) LPELR-26047 (CA).

<sup>30</sup> (2007) 12 NWLR (PT 1048).

<sup>31</sup> (1996) 6 NWLR (pt. 456) 508.

<sup>32</sup> (2005) 15 NWLR (pt.947); See also *Olufule v FGN* (2005) 3 NWLR (pt.913) 574.

<sup>33</sup> (1970) 2 A.N.L.R. 1 at 6.

<sup>34</sup> (1958) NRNLR 127.

provides protection for the right to liberty in its Article 16 and the Convention on the Rights of Persons with Disabilities provides protection for the right to liberty in its Article 14. Regional Protection for the right to liberty in Africa is provided under Article 6 of the African Charter on Human and Peoples. The meaning of personal liberty was construed by the African Commission on Human and Peoples Rights in *Aminu v Nigeria*<sup>35</sup> where the Commission held that it found the situation where the complainant was constantly arrested and detained without charge and any recourse to the courts for redress, arbitrary and in contravention of article 6 of the Charter.

### **7. Medical Negligence, Error and Malpractice as conduct in violation of the Right to Liberty of Patients in Nigeria**

Evidence demonstrates that deprivation of liberty is conduct that is in violation of the fundamental right to liberty of patients. Examples include a hospital employs excessive restraints on patients, such as tying them to a bed or wheelchair for hours each day. Mentally ill patients are confined without a set procedure or standard. There are unjustified delays in reviewing whether mentally ill patients must continue to be institutionalized. Patients are detained in hospitals for their inability to pay bills. Patients are quarantined unnecessarily. These examples point to the fact that deprivation of the liberty of patients arising from medical negligence, error or malpractice are not items that fall within the exception of the right to liberty.

#### **International Practice**

As it concerns the fundamental rights of patients under International Human Rights standards, Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) provides: ‘Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law’. In interpreting this provision, the Human Rights Committee (HRC) at its Seventy-seventh session in Consideration of Reports submitted by States Parties under Article 40 of the Covenant made the following Concluding observations concerning ESTONIA:<sup>36</sup>

The Committee takes note of the delegation’s acknowledgement that legislation on detention of mental health patients is outdated and that steps have been taken to revise it, including the adoption of a draft Patient Rights Act. In this regard, the Committee is concerned at some aspects of the administrative procedure related to the detention of a person for mental health reasons, in particular the patient’s right to request termination of detention, and, in the light of the significant number of detention measures that had been terminated after 14 days, the legitimate character of some of these detentions. The Committee considers that a period of 14 days of detention for mental health reasons without any review by a court is incompatible with article 9 of the Covenant.

Therefore, the HRC directed that:

The State party should ensure that measures depriving an individual of his or her liberty, including for mental health reasons, comply with article 9 of the Covenant. The Committee recalls the obligation of the State party under article 9, paragraph 4, to enable a person detained for mental health reasons to initiate proceedings in order to review the lawfulness of his/her detention. The State party is invited to furnish additional information on this issue and on the steps taken to bring the relevant legislation into conformity with the Covenant.

On the violation of the right to liberty of patients, the UN Working Group on Arbitrary Detention has this to say:

The Working Group has also been informed by several sources that, in some countries, the disabled, drug addicts and people suffering from AIDS are detained in places that are incompatible with their state of health, sometimes without treatment and without it having been established that their detention is justified on medical or public health grounds. The Group is concerned because it is vulnerable persons that are involved, people who are often stigmatized by social stereotypes; but it is concerned above all because often such administrative detention is not subject to judicial supervision.<sup>37</sup>

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<sup>35</sup> Communication 205/97, *Kazeem Aminu v Nigeria*. Decided at the 27th ordinary session, May 2000, 13th Annual Activity Report.

<sup>36</sup> CCPR/CO/77/EST (HRC, 2003), 15 April 2003

<sup>37</sup> E/CN.4/2004/3 (December 15, 2003), 74. (See also, E/CN.4/2005/6 (December 1, 2004), 47-58 on psychiatric detention).

**Regional Practice**

Regional practice provides evidence of the violation of the human rights of patients through deprivation of liberty arising from medical malpractice.

***Practice under the European System for the Protection of Human Rights***

Under the European system for the protection of human rights, Article 5(1) of the European Convention on Human Rights (ECHR) provides that: 'Everyone has the right to liberty and security of person. No one shall be deprived of their liberty except in accordance with a procedure prescribed by law and except in those instances specifically enumerated by this Convention'. Article 5 ECHR is similar to section 35 of the Constitution of Nigeria 1999 (as amended). The case of *Storck v. Germany* demonstrates how the European Court of Human Rights has protected the right to liberty of patients. The case of *Storck v. Germany*<sup>38</sup> originated in an application against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention') by a German national, Ms Waltraud Storck ('the applicant'), on 15 May 2000. The applicant alleged, in particular, that her confinement in different psychiatric hospitals and the medical treatment she had received had violated Article 5 of the Convention. The case concerns the applicant's repeated placement in a psychiatric institution, her stay in a hospital, her medical treatment and her various compensation claims. The applicant is currently 100% disabled and receives an invalidity pension. She claims to be constantly suffering from significant pain, especially in her arms and legs and her vertebral column. She has spent almost twenty years of her life in different psychiatric institutions and other hospitals.

From 29 July 1977 (when she was 18 years old) to 5 April 1979, she was placed in a locked ward at a private psychiatric institution, the clinic of Dr Heines in Bremen, at her father's request. There had been serious conflicts between the applicant and her parents, following which her father believed her to be suffering from a psychosis. The applicant's mother had suffered from a paranoid-hallucinatory psychosis. The applicant – who by that time had attained the age of majority – had not been placed under guardianship, had never signed a declaration that she had consented to her placement in the institution, and there had been no judicial decision authorizing her detention in a psychiatric hospital. The private clinic of Dr Heines was not entitled to detain patients who were to be kept in accordance with the Act of the Land of Bremen on the detention of mentally insane persons, mentally deficient persons and drug addicts. On 4 March 1979 the police brought the applicant back to the clinic by force after she had attempted to escape. 16. During her forced stay at that clinic, the applicant was unable to maintain regular social contact with persons outside the clinic. When she was three years old, she had fallen ill with poliomyelitis, and following her medical treatment at the clinic she developed post-poliomyelitis syndrome.

On 12 February 1997 the applicant, on the basis of the expert report by Dr Lempp, lodged an application for legal aid and an action for damages against Dr Heines's clinic in the Bremen Regional Court. She claimed, firstly, that her detention from 29 July 1977 to 5 April 1979 and from 21 January 1981 to 20 April 1981 had been illegal under German law. Furthermore, the medical treatment she had received had been contraindicated because of her poliomyelitis. She argued that her forcible detention and the medical treatment she had received had ruined both her physical and mental health. It was only at that time, on 24 February 1997, that the applicant was given access to her medical file from Dr Heines's clinic, despite her previous and repeated requests. On 9 July 1998 the Bremen Regional Court, after a hearing, allowed the applicant's action for damages, as her detention had been illegal under German law. The Regional Court found that the applicant, who had attained the age of majority, had not been placed under guardianship, and her detention had not been ordered by a district court as provided by the Act of 16 October 1962 of the Land of Bremen on the detention of mentally insane persons, mentally deficient persons and drug addicts. According to the Regional Court, such a detention would only have been legal if the applicant had given her consent, which had not been the case. Firstly, she had not signed the admission form filled in on the day of her initial admission to the clinic. Secondly, she had not given her implicit consent to her placement and treatment at the clinic. The mere fact that on the day of her initial admission she had come to the clinic, accompanied by her father, did not suffice to establish valid consent. According to the private clinic's submissions, it could not be ruled out that, at that time, the applicant had not been in a position to realise the importance and the consequences of her detention. This was due, in particular, to the fact that the applicant had been given very strong medication from the time of her arrival. On that point, the Regional Court concluded as follows: 'Even assuming the claimant's initial consent, it would have lapsed as a result of her undisputed attempts to escape and the need to shackle her. From these times at the latest, which have not been specified any further by the defendant, it would have been necessary to obtain a court order.' The

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<sup>38</sup> Application No. 61603/00.

Regional Court found that, for the second period in which the applicant was placed in the psychiatric hospital (from 21 January to 20 April 1981), she had likewise not consented to her confinement, as she had shown signs of autism and had suffered from temporary loss of speech. Therefore, a court order would also have been necessary for this period. As the applicant was therefore entitled to damages in any event, the Regional Court did not examine the question whether her medical treatment had been adequate or not. The Regional Court also found that the applicant's compensation claim was not time-barred. Under Article 852 § 1 of the Civil Code, the limitation period of three years for tort claims started running only when the victim had knowledge of the damage and of the person responsible for it. The court observed that a victim could only be perceived to have that knowledge when he was in a position to bring an action for damages that had sufficient prospects of success. Only from then on could he reasonably be expected to bring that action, regard being had in addition to his state of health. The court referred to the case-law of the Federal Court of Justice on the subject. Even if the applicant might already have been conscious of the fact that she had been placed in the clinic against her will, it was established that during her long stays in the psychiatric hospital she had been forced to take very strong medication. When she had been released from the clinic, she had still received medical treatment, and she had always been regarded as mentally ill. The applicant had also suffered from serious physical disorders and had, in particular, subsequently lost the ability to speak for more than eleven years (from 1980 to 1991/92). It was not until the end of this medical treatment and after the submission of Dr Lempp's expert report on 18 April 1994 – in which it had been concluded for the first time that she had never suffered from schizophrenia – that she had become sufficiently aware of her situation, of her possible right to damages, and of the possibility of bringing an action in court. Her application for legal aid, lodged on 12 February 1997, had interrupted the three-year limitation period. Her claim was therefore not time-barred.

On 22 December 2000 the Bremen Court of Appeal, following an appeal by the clinic, quashed the judgment of the Bremen Regional Court and dismissed the applicant's action. The Court of Appeal disagreed with the Bremen Regional Court's finding that the applicant had illegally been deprived of her liberty during her stay and treatment at the clinic. It noted that the Regional Court had not taken evidence on the issue in dispute. It found that the applicant had conceded in the appeal proceedings that she had to a certain extent voluntarily consented to her stay in the clinic in 1981. The Court of Appeal left open the question whether the applicant had a compensation claim in tort on account of her unlawful deprivation of liberty or the damage caused to her body by her medical treatment. In any event, such a claim would be time-barred under Article 852 § 1 of the Civil Code, which provided for a three-year time-limit. The Court of Appeal considered that the applicant had always been conscious of the fact that she had purportedly been detained against her will, independently of the expert opinion submitted by Dr Lempp. She had also been aware that she had allegedly been forced to take antipsychotic medication. Therefore, she had also been in a position to bring an action in court, despite her physical problems. According to the case-law of the Federal Court of Justice, it sufficed to be aware of having suffered damage, without knowledge of the entirety of the damage being necessary. Furthermore, the Court of Appeal found that the applicant was likewise not entitled to bring a compensation claim on a contractual basis following her medical treatment. According to the Court of Appeal, the applicant had not sufficiently proved that she had expressly objected to her stay in the psychiatric hospital. Moreover, a contract between the applicant and the clinic concerning the applicant's medical treatment could also have been concluded implicitly. It could not be assumed that this contract had been terminated by each of the applicant's attempts to escape, which were attributable to her illness. In fact, when the clinic prevented the applicant from escaping, it had complied with its duty of care. According to the expert opinion of Dr Rudolf, a psychiatrist appointed by the Court of Appeal, the applicant had been seriously ill at that time and in need of medical treatment. 38. Irrespective of this, the Court of Appeal pointed out that the clinic had disputed the applicant's assertion that she had been detained against her will, so that it remained uncertain whether this assertion was true. Even if a contract concluded between the clinic and the applicant, who had at that time attained the age of majority, could not be presumed, there was in any event a contract between the clinic and the applicant's father, concluded implicitly for the applicant's benefit. This contract had run at least from 29 July 1977 to January 1978, when attempts had been made to place her in a different psychiatric institution. Furthermore, the Court of Appeal did not consider that the applicant's treatment had been erroneous, or that the dosage of her medication had been too high. It relied in this connection on the conclusive expert report by Dr Rudolf. In assessing the opinion expressed by the expert, who had submitted his report both in writing and orally during the hearing, the court thoroughly considered the partly different conclusions reached in the expert reports by Dr Lempp and Dr Köttgen, which had been prepared at the applicant's request.

The applicant lodged an appeal on points of law with the Federal Court of Justice against the Bremen Court of Appeal's judgment of 22 December 2000 and against the judgments delivered by the Mainz Regional Court on 5 May 2000 and the Koblenz Court of Appeal on 30 October 2001. On 15 January 2002 the Federal Court of Justice refused to admit the applicant's appeal against the judgment of the Bremen Court of Appeal. On 5

February 2002 the five judges of the Federal Court of Justice with jurisdiction to adjudicate on the applicant's case refused to grant her legal aid for her appeal on points of law against the judgments of the Mainz and Koblenz courts. They argued that her appeal did not have sufficient prospects of success. On 25 March 2002 the same five judges of the Federal Court of Justice dismissed the applicant's appeal against the judgments of the Mainz and Koblenz courts as inadmissible, the applicant not having submitted grounds for her appeal within the statutory time-limit.

On 2 February 2002 the applicant lodged a constitutional complaint against the judgments delivered by the Bremen Court of Appeal on 22 December 2000 and the Federal Court of Justice on 15 January 2002. Quoting the relevant provisions of the Basic Law, she claimed that her rights to liberty and human dignity and to a fair trial had been violated. She argued that her physical integrity had been infringed. She set out in detail the conditions of her stay in the various psychiatric institutions, the hearings in and the judgments delivered by the Bremen courts and explained why she considered that her rights had not been respected. On 6 March 2002 the Federal Constitutional Court refused to allow the applicant's constitutional complaints. The court argued that the complaints were not of fundamental importance, as the questions raised by them had already been resolved in its case-law. Furthermore, it was not the function of the Constitutional Court to deal with errors of law allegedly committed by the competent civil courts. The applicant's complaints did not disclose a violation of her constitutional rights. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION IN RESPECT OF THE APPLICANT'S CONFINEMENT IN A PRIVATE CLINIC FROM JULY 1977 TO APRIL 1979 The applicant claimed that through her forced stay at Dr Heines's clinic in Bremen, she had been deprived of her liberty contrary to Article 5 § 1 of the Convention, the relevant parts of which provide: 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ... (e) the lawful detention ... of persons of unsound mind ...'

#### ***Whether the applicant was deprived of her liberty***

The applicant maintained that she had been detained against her will in Dr Heines's clinic. Referring to the findings of the Bremen Regional Court, she stressed that she had objected to her confinement in that clinic, where she had been placed in a locked ward and had been unable to contact others. The Government contested this view. They submitted that the applicant had not been deprived of her liberty, as she had consented to her stay in Dr Heines's clinic. Otherwise, the applicant would certainly not have returned there voluntarily in 1981. The Court reiterates that, in order to determine whether there has been a deprivation of liberty, the starting-point must be the specific situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case, such as the type, duration, effects and manner of implementation of the measure in question (see, inter alia, *Guzzardi v. Italy*, judgment of 6 November 1980, Series A no. 39, p. 33, § 92; *Nielsen v. Denmark*, judgment of 28 November 1988, Series A no. 144, p. 24, § 67; and *H.M. v. Switzerland*, no. 39187/98, § 42, ECHR 2002-II). 72. The Court observes that, whereas the applicant's factual situation at the clinic was largely undisputed, the Bremen Regional Court found that the applicant had been deprived of her liberty because she had neither expressly nor implicitly consented to her stay there. However, the Bremen Court of Appeal took the view that either the applicant had implicitly concluded a contract concerning her medical treatment with the clinic, or, alternatively, there had been an implicit contractual agreement between her father and the clinic concluded for her benefit. The Court needs to have regard to the domestic courts' related findings of fact but is not constrained by their legal conclusions as to whether or not the applicant was deprived of her liberty within the meaning of Article 5 § 1 of the Convention (see *H.L. v. the United Kingdom*, no. 45508/99, § 90, ECHR 2004-IX). 73. Having regard to the factual situation of the applicant at the clinic in Bremen, the Court notes that it is undisputed that the applicant was placed in a locked ward there. She was under the continuous supervision and control of the clinic personnel and was not free to leave it during her entire stay there of approximately twenty months. When the applicant attempted to escape it had been necessary to shackle her in order to keep her in the clinic. On the one occasion she managed to escape, she had had to be brought back by the police. She was also unable to maintain regular social contact with the outside world. Objectively, she must therefore be considered to have been deprived of her liberty. However, the notion of deprivation of liberty within the meaning of Article 5 § 1 does not only comprise the objective element of a person's confinement in a particular restricted space for a not negligible length of time. A person can only be considered to have been deprived of his liberty if, as an additional subjective element, he has not validly consented to the confinement in question (see, mutatis mutandis, *H.M. v. Switzerland*, cited above, § 46). The Court notes that, in the present case, it is disputed between the parties whether the applicant had consented to her stay in the clinic. Having regard to the national courts' related findings of fact and to the factors that are undisputed between the parties, the Court observes that the applicant had attained the age of majority at the time of her admission to the clinic and had not been placed under guardianship. Therefore, she was considered to have the capacity to consent or object to her admission and treatment in hospital. It is undisputed that she did not sign the clinic's admission form prepared on the day of her arrival. It is true that she came to the clinic herself, accompanied by her father.



However, the right to liberty is too important in a democratic society for a person to lose the benefit of the Convention protection for the single reason that he may have given himself up to be taken into detention (see *De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, Series A no. 12, p. 36, § 65, and *H.L. v. the United Kingdom*, cited above, § 90). 76. Having regard to the continuation of the applicant's stay in the clinic, the Court considers the key factor in the present case to be that – as is uncontested – the applicant tried on several occasions to escape. She had to be shackled in order to prevent her from absconding and brought back to the clinic by the police when she managed to escape on one occasion. Under these circumstances, the Court is unable to discern any factual basis for the assumption that the applicant – presuming that she had the capacity to consent – agreed to her continued stay in the clinic. In the alternative, assuming that the applicant was no longer capable of consenting following her treatment with strong medication, she cannot in any event be considered to have validly agreed. Indeed, a comparison of the facts of this case with those in *H.L. v. the United Kingdom* (cited above) cannot but confirm this finding. That case concerned the confinement of an individual who was of the requisite age but lacked the capacity to consent in a psychiatric institution he had never attempted to leave; the Court found that there had been a deprivation of liberty. In the present case, *a fortiori*, it must be concluded that there was a deprivation of liberty. The applicant's lack of consent must also be regarded as the decisive feature distinguishing the present case from that of *H.M. v. Switzerland* (cited above, § 46), in which it was held that the placing of an elderly person in a foster home to ensure the necessary medical care had not amounted to a deprivation of liberty. However, the applicant in that case, who had been legally capable of expressing a view, had been undecided as to whether or not she wanted to stay in the nursing home. The clinic was then able to draw the conclusion that she did not object. The Court therefore concludes that the applicant was deprived of her liberty within the meaning of Article 5 § 1 of the Convention. That the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts: (i) EUR 75,000 (seventy-five thousand euros) in respect of nonpecuniary damage; (ii) EUR 18,315 (eighteen thousand three hundred and fifteen euros) in respect of costs and expenses; (iii) any tax that may be chargeable on the above amounts; (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

## **8. Conclusion**

This study involved a discourse on the enforcement of the fundamental right to liberty of patients under the Fundamental Rights Enforcement Procedure in the context of medical negligence, error and malpractice. In the course of the discourse, it was shown that patients have the right to liberty and that this right is protected under the Fundamental Right Enforcement Procedure Rules. It was demonstrated that medical negligence, error and malpractice are conduct that violates the right to liberty of patients in Nigerian hospitals. In the main, it is recommended that the Fundamental Rights Enforcement Procedure Rules be used by Legal Practitioners as a medical malpractice claims regime to enable the enforcement of the right to liberty of patients in Nigeria.