

THE RIGHTS OF NIGERIAN HEALTH CONSUMERS IN COSMETIC SURGERY*

Abstract

Medical negligence is a medical practitioner's failure to exercise a reasonable degree of skill and care in the treatment of a patient. Cosmetic surgery is the surgical enhancement of the appearance of human body parts for aesthetics. Such medical procedure is done, not for medical reasons, but for beauty sake. Cosmetic surgery is a phenomenon that has gained roots and acceptance in modern Nigerian society as the quest for a seemingly better physical appearance takes centre stage. This artificial enhancement of beauty comes with attendant risks and issues of medical negligence. This work carefully dissected the topical legal issues surrounding cosmetic surgery and medical negligence in Nigeria and emphasized the importance of a spirited regulation of cosmetic surgery practice and ensuring that only licensed practitioners are allowed, so as to depict credibility, responsible medical care, respect for cosmetic surgery patients and maximize the protection of cosmetic surgery health consumers in Nigeria. The doctrinal method of research was utilized in this work. The paper recommended that cosmetic surgery complaints be made in camera for patients' privacy concerns, more health awareness be made to enhance knowledge of dangers in the procedure and health rights in the area of cosmetic surgery, adequate punishment be meted out for the current widespread subtle social media advertisement of supposed cosmetic surgery prowess, a closer regulation of cosmetic surgery practice to disallow quackery and conduct below par and the need to factor in multi-door court house in the resolution of cosmetic surgery medical negligence claims.

Keywords: Cosmetic surgery, medical negligence, medical malpractice, vicarious liability, *res ipsa loquitur*, medical procedure

1. Introduction

The quest for public validation of physical appearance in modern times has taken a phenomenal dimension. Indeed, the inclination towards beauty and youthfulness has always been residing in human beings and on introducing this idea into medicine, cosmetic surgery, one of the most complex medical fields was formed.¹ By some measures, such as the rise in cosmetic surgery our preoccupation with attractiveness is becoming more common.² In financial terms, the annual global investment in grooming totals at least \$115 billion with \$38 billion for hair, \$24 billion for skin care, \$20 billion for cosmetic surgery, surgery, \$18 billion for cosmetics.³ Plastic surgery deals with reshaping and beautifying (aesthetic) as well as repair and reconstruction (reconstructive) aspects of surgery.⁴ That is to say that plastic surgery has two arms – reconstructive surgery and cosmetic surgery. While reconstructive plastic surgeries is undertaken on abnormal structures of the body caused by congenital defects, developmental abnormalities, infection, trauma, tumour or disease, cosmetic surgery is performed to reshape normal body structures to improve their form and appearance. Cosmetic surgery is surgery in a normally functional anatomic part of the body with the aim of improving the client's acceptability of that part, and some of such surgeries undertaken are tribal mark removal and breast reduction cosmetic surgeries.⁵

The sphere of this study is medical negligence in cosmetic (aesthetic) surgery as a modern phenomenon in Nigeria, and as such reconstructive surgery is not within the purview of consideration. This surgery is not practiced for the purpose of treating a defect; rather it is mainly because of the inclination toward beauty. Some of such rhinoplasty (nose reconstruction), facelift, liposuction (fat removal), breast enlargement, breast reduction and breast lift, breast silicone implant, blepharoplasty (eyelid surgery), tummy tuck, hair transplant,

* **By B. N. OKPALAOBI, PhD, BL**, Professor of Law and Sub-Dean (Law), College of Postgraduate Studies, Nnamdi Azikiwe University, Awka, Anambra State. Phone No: 08034700544; and

***Precious Nduburuoke EGBULE, LLB (Hons) (Madonna), BL, LLM (IMSU), PhD Candidate**, Faculty of Law, Nnamdi Azikiwe University, Awka. He is the Managing Solicitor of Apex Chambers, Port Harcourt, Nigeria. Email: managingsolicitor@apexchambersglobal.com. Phone No: 07030868694.

¹H. R. Salehi and A. M. Mangion, 'Legal Aspects of Cosmetic and Plastic Surgery' [2014] *International Journal of Advanced Studies in Humanities and Social Science*, (2)(2), p. 111 <http://www.ijashss.com> accessed 11 June 2021.

²D. L. Rhode, 'The Injustice of Appearance,' [2009] *Stanford Law Review*. (61)(5), p. 1034 <<https://www.jstor.org/stable/40379704>> accessed 9 July 2021.

³ A. Kuczynski, 'Beauty Junkies: Inside our \$15 Billion Obsession with Cosmetic Surgery,' 2006, p. 7.

⁴ T. O. G. Chukwuanukwu, 'Plastic Surgery in Nigeria: Scope and Challenges' [2011] *Nigerian Journal of Surgery* (17)(2), p. 68.

⁵ I. I. Onah, U. U. Nnadozie and I. S. Ogbonnaya, 'Aesthetic Surgery Indications at the National Orthopaedic Hospital, Enugu' [2011] *Nigerian Journal of Plastic Surgery* (6)(1), p. 1. Tribal marks removal were undertaken.

<https://www.researchgate.net/publication/272342487_Aesthetic_surgery_indications_at_the_National_Orthopaedic_Hospital_Enugu> accessed 13 July 2021

forehead lift, lip augmentation, penis enlargement, vaginoplasty (vagina tightening), face lift, facial implant, body contouring, buttocks augmentation, etc.

While there are various reasons why people have adopted this service, in a country that comprises mainly conservatives, cosmetic surgery is becoming a fast-rising favourite.⁶ In a world of high-definition, the pressure is on for everyone to always look their best. This has given rise to a relentless drive for perfection, and the trend is now trickling down to everyone who feels left behind and challenged by the images they see on *Instagram*, *Snapchat*, *Facebook*, etc no matter how fake they are, but this also comes at a price. These appearance enhancement procedures sometimes come with negative consequences. According to one of the subcommittees of the American Congress, approximately two million unnecessary surgeries are practiced in a year which results in the death of 12,000 people and loss of 10 billion dollars.⁷

2. What is Medical Negligence?

Law provides the framework upon which medical practices thrive be it in what its permit and in what its prohibit, while ethics provide a roadmap in deciphering what is standard conduct, it is the law that determines what ultimately blameworthy conduct is, thus where what is ethically a standard procedure falls short of a legal standard, such become a blameworthy conduct amenable to the judicial process wherein damages or penal sanctions may accrue.⁸ An act amounts to medical negligence if the medical professionals such as doctors, nurses do not exercise their duty of care under the required and accepted standard Medical negligence can result in death, physical or psychological injury, damage, disability or impairment, and it can have long or short term effect.⁹ Medical negligence is a medical practitioner's failure to exercise a reasonable degree of skill and care in the treatment of a patient. Where a cosmetic surgeon fails to exercise the standard level of medical skill and expertise in the treatment of a cosmetic surgery patient, he is said to be negligent. In instances where the degree of recklessness of the cosmetic surgeon is so profound that the death of a patient becomes a consequent of such, then it may amount to criminal negligence.

In this study, 'medical negligence' is mostly used interchangeably with 'medical malpractice'. Medical negligence is a breach of a duty care by a person in the medical profession to a patient which results in damage to the patient.¹⁰ Interestingly, medical science is an area where changes do occurs, and therefore, a health care provider must be tune with current skill. He must keep abreast of new developments and is expected to be familiar with his own specialist literature.¹¹ In the case of *Roc v. Minister of Health*¹² the anaesthetist, injected the two plaintiffs with contaminated anaesthetic, which caused them paralysis from waist downwards. The anaesthetist was held not to be negligent because the risk of such contamination was not generally appreciated by competent anaesthetists at that time. Negligence generally, in law, connotes an omission or failure to do something which a reasonable man, under same circumstance, would do or doing of something which a reasonable and prudent man would not do.¹³ So a healthcare provider may not only be liable in negligence due to lack of skill or care in the performance of the procedure, but may also be liable where the injury is caused by defective disclosure of information, because, had relevant information been given, the patient would have chosen not to have the procedure, and therefore may have been exposed to its risk. It is for the provider, in order to avoid negligence, to ensure that appropriate information is provided. Medical negligence law covers the consequences for medical practitioner's non-exercise of appropriate care as well as 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.¹⁴

⁶Njideka Agbo, 'The Rise of Cosmetic Surgery in Nigeria,' *The Guardian Newspaper*, 30 October 2018 <https://guardian.ng/life/the-rise-of-cosmetic-surgery-in-nigeria/> accessed 13 July 2021. See also Lanre Alfred, 'Everyone is Altered: Why Nigerian Ladies Risk Everything for Breast, Butt Surgeries,' *This Day Newspaper*, February, 28, 2021.

⁷ B. M. Charles, 'Dangers of Modern Medicine' [2003] *Siahate Gharb Review*, (6), p. 82.

⁸ H. C. Alisigwe, 'Medical Practice and the Law of Negligence; Implication for the Medical Practitioners in Nigeria [2016] *Port Harcourt Journal of Business Law* (2)(2), p. 304.

⁹ P. Cane, *The Anatomy of Tort Law* (Oxford: Hart Publishers 1997), p. 59

¹⁰ I. P. Enemo, 'Medical Negligence; Liability of Healthcare Providers and Hospital' [2011-2012] *The Nigerian Juridical Review*, (10) p. 112.

¹¹ C. O. Okonkwo, 'Medical Negligence and the Legal Implications' cited in B. C. Umerah, *Medical Practices and the law in Nigeria (Nigeria: Longman Nigeria Ltd., 1989)* p. 126; see also R. J. Cook, B M. Dickens, M.F. Fathalla, *Reproductive Health and Human Rights: Integrating Medicine, Ethic and Law.* (Oxford: Clarendon Press, 2003), p. 130.

¹² [1954] 2 QB 66

¹³ Per Ogbuinya, J.C.A. (as he then was) in the case of *University of Ilorin Teaching Hospital v Dr. Dele Abegunde* [2013] LPELR-21375 CA.

¹⁴ Abegunde Babalola, 'Legal Implications of Ethical Breaches in Medical Practice: Nigeria a Case Study,' [2013] *Asian Journal of Humanities and Social Sciences*, (1)(3), p. 9.

3. Legal and Regulatory Framework for Medical Practice in Nigeria

This work will limit its discussion on the legal framework for medical practice to that relating to surgeons under which cosmetic surgeons fall as opposed to the expansion of the intervention to include different healthcare professionals who are indeed part of the medical profession. A discussion of medical practice generally will, no doubt, amount to a digression. The National Health Act, 2014 established a national health system and provides a framework for Standards and the Regulations of health services, including the rights and obligations of health care providers, health care workers, health establishments and healthcare users, protecting and promoting the rights of Nigerians to have access to health care services.¹⁵

The Act regulates healthcare providers in Nigeria and provides a framework for the regulation, development and management of Nigeria's national healthcare system and sets a standard for rendering health services. It provides an avenue for complaints to be filed.¹⁶ However, the nature of complaints that can be filed or the sanctions that such complaints might incur is not stipulated in the Act.

The Medical and Dental Practitioners Act (MDPA)¹⁷ is the principal legislation that regulates the medical profession in Nigeria. This Act established the Medical and Dental Council of Nigeria (MDCN), which provides for the registration of medical and dental practitioners. The MDCN in furtherance of its statutory function as provided by the Act codified the rules of professional conduct for medical and dental practitioners in its Code of Medical Ethics in Nigeria, 2008. This code lays down the standard of acceptable medical and dental practice in Nigeria. The Act also established the Medical and Dental Practitioners Investigating Panel¹⁸ and the Medical and Dental Practitioners Disciplinary Tribunal.¹⁹ The Panel is charged with carrying out preliminary investigations of any allegation of infamous conduct in professional respect made against a medical practitioner, and where such allegations have merit, the Panel forwards the case to the Tribunal for trial.²⁰ Other than the meting out of punishment by the Medical Practitioners Disciplinary Committee (to medical and dental practitioners found culpable) such as admonishing the practitioner, suspension from practice for a period of not exceeding six months, striking the name off the relevant register, a medical practitioner may also be liable criminally and may be asked to pay damages by way of civil remedy where it is discovered that the act or omission of the medical practitioner falls below expectation. Indeed in the case of *Denloye v. Medical Practitioners Disciplinary Committee*²¹ the court pointed out the fact that where the nature of the act or omission of a medical practitioner amount to a crime, the regular law court must determine the criminal aspect of it before liability is determined under the Medical and Dental Practitioners Act with respect to misconduct or infamous conduct. Appeals from the Tribunal go to the Court of Appeal. The National Health Act provides a framework for the regulation and provision of national health services. It also defines the right of health workers and stipulates guidelines for the formulation of a National health policy. The Act allows users to hold Government to account for their rights to health including equitable access to care

The Federal Competition and Consumer Protection Act (FCCPA), 2019, which is modeled after the Competition and Consumer Protection Commission of Ireland) repeals the Consumer Protection Council Act (which had established the erstwhile consumer protection council) and has as one of its objectives the protection and promotion of the interest and welfare of consumers by providing consumers with wider variety of quality products at competitive prices.²² The Act brings to existence the Federal Competition and Consumer Protection Commission (FCCPC) whose mandate is the protection of consumers via varying means. the FCCPC is the foremost consumer protection agency in Nigeria as the provisions of this Act are superior to any other on consumer protection, except of course the Constitution.²³ The Commission is also involved in the regulation of set standards for the protection of healthcare users.

4. Makeup of Professional Medical Responsibility

As soon as a doctor consents to undertake the medical examination of a cosmetic surgery patient, his responsibility to that patient kick starts. Consent could be oral or by conduct. On the part of a cosmetic surgery patient, and indeed just as it is the case for other surgeries, a written consent of the patient or close family

¹⁵ S. 1(1) NHA.

¹⁶ S. 30(1) NHA 2014.

¹⁷ Cap M8 LFN 2004

¹⁸ S. 1(2)(c) MDPA

¹⁹ S. 15 MDPA.

²⁰ *Olaye v. Chairman, Medical and Dental Practitioners Investigation Panel (1997) 5 NWLR (Pt. 506) 55 CA; Okezie v. Chairman Medical & Dental Practitioners Disciplinary Tribunal (2010) 26 WRN*

²¹ (1968) ALL N.L.R 308

²² S. 1(1)(c), FCCPA 2019.

²³ S. 104(1) FCCPA.

member is standard procedure before the procedure is undertaken. Negligence as a separate and independent tort was defined in the case of *Ojo v. Gharoro*²⁴ as ‘the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.’ It therefore follows that medical practices goes with a legal responsibility to be in tune and align oneself with such conducts as are expected of a reasonable medical expert.

5. Dissecting the Tort of Medical Negligence

The tort of negligence is that every person owes a duty of care to any person who would be adversely and directly affected by his act or omission. This is the neighbour principle. It is trite that every doctor owes his or her patients a duty of care.²⁵ A medical practitioner owes a duty to exercise reasonable skill and care in the treatment of his patients. This duty is independent of any contract between the practitioner and his patients and therefore subsists regardless of whether the treatment subsists regardless of whether the treatment was performed gratuitously, voluntarily or for a fee. It has to be pointed out that a cosmetic surgeon is not negligent if the damage to the cosmetic surgery patient was not a reasonably foreseeable consequence of the cosmetic surgeon’s conduct. For him to be held liable, it must be shown that the particular act or omission was the cause of the loss or damage sustained. Although, the notion sounds simplistic, the causation between a breach of duty and the harm that results to another can be very complicated. The ideal test is to ruminate whether the injury would have occurred before, or without, the accused party’s breach of the duty owed to the injured party. However, even where a breach of duty is clearly established, a patient may not recover damages unless he can prove that said breach resulted in pecuniary loss or injury. In order words, it must be shown that some pecuniary damage or loss to the cosmetic surgery patient was the direct consequence of the cosmetic surgeon’s medical negligence. Such damage or loss could be in the form of trauma, pains, loss of consortium, additional medical expenditure incurred or the likes.

6. Nature of Medical Liability in Cosmetic Surgery

Medical negligence is an omission by the medical practitioner to do something which a reasonable doctor or practitioner in his position and capacity would have done and such omission resulting in harm being caused to the patient. In effect, it is the failure of a medical practitioner to exercise reasonable degree of skill and care in the treatment of a patient. If a cosmetic surgeon, or indeed any of his support healthcare workers, administers medical treatment to a cosmetic surgery patient in a negligent manner and causes him harm, damage or loss, the patient can bring an action for negligence against the cosmetic surgeon or hospital claiming damages for the harm, damage or loss suffered as a result.

The Black’s Law Dictionary²⁶ explains medical malpractice to mean a doctor’s failure to exercise the degree of care and skill that a physician or surgeon of the same medical specialty would use under similar circumstances. It therefore follows that the liability of a cosmetic surgeon is judged from the standard of skill or care he applied or brought to bear in the cosmetic surgery and same is juxtaposed with that which another cosmetic surgeon would apply in the circumstances. It is also the case that a definite warranty by a cosmetic surgeon to his cosmetic surgery patient binds the former to the latter. In the case of *La Fleur v. Cornelius*²⁷ the court held that a cosmetic surgeon was bound to an express contractual warranty that he made to the patient, and this warranty arose when he was unwise enough to say: ‘there will be no problem. You will be very happy.’ In the United States of America, medical negligence form the majority of the claims against cosmetic surgeons, which includes, ‘claims for improperly performed surgery, early postoperative complications (typically bleeding or infection) and long-term problems such as scarring or deformity, and, in addition, it includes direct claims against the surgeon arising from the administration of local and general anesthesia, for errors or delays in diagnosis, and misjudgments and omissions in the plan of treatment.’²⁸ The nature of medical liability in cosmetic surgery can be categorized into two viz: civil liability which is founded in the law of torts and criminal liability which is based on criminal law.

However, the point must be made that if a cosmetic surgeon gives an impression to a patient that he possesses skill and knowledge in cosmetic surgery, the cosmetic surgeon must exercise the same degree of care and skill as cosmetic surgeons. General damages are awarded for items such as loss of faculty, pain and suffering, loss of expectation of life among others while special damages are awarded for expenses such as medical and nursing

²⁴ (2005) 25 NSCQR 712 at 771 per E. O. Ogbuegbu JSC

²⁵ See the case of *Abatan v. Awudu* (2003) 10 NWLR (pt. 829) 451 C.A where it was held that the relationship between a doctor and his patient is one of trust and confidence.

²⁶ B. A. Garner, *Black’s Law Dictionary*, (8th Edition, West Publishing Co., 2004) p. 978

²⁷ (1979) 28 NBR 2D 569

²⁸ M. S. Lehv, ‘Liability of Plastic Surgeons’ in Shafeek Sandy Sanbar (ed.), *Legal Medicine*, (Mosby Elsevier Publishers, 2007) 481.

attention expenses. While computation of general damages depends on the assessment of all the factors obtained in the particular case by the court, special damages on the other hand are liquidated sums capable of being computed more exactly and with certainty. The burden of proving an entitlement to these damages is on the cosmetic surgery patient and he discharges it by proof on a balance of probabilities. Usually, expert medical testimony is called to prove this.

Unless the cosmetic surgeon admits medical negligence, it is only a medical practitioner that can establish that the treatment given by his colleague fell below the set standard. This poses a herculean task for the cosmetic surgery Claimant in prosecuting his medical malpractice claim because healthcare providers are usually reluctant to provide evidence against their colleagues in court.²⁹ Interestingly, in the case of *Ojo v. Dr. Gharoro & Anor*,³⁰ the Supreme Court of Nigeria held that a doctor is not liable in medical negligence if he left a swab, foreign object or broken surgical needle in the body of a patient during a surgical procedure provided he notified the patient of the fact. In this case, the Appellant had a surgical operation for the removal of a growth in her fallopian tube. The 1st Respondent performed the surgical procedure and in the course of the operation, broken surgical needles were left in the abdomen of the Appellant, which resulted in great pains to her. This necessitated a second operation but the broken needle was not found. Consequently, she was referred to another hospital where she was to undergo an exploratory laparotomy in order to locate and remove the broken surgical needle. At the trial, the Appellant testified for herself and relied on the principle of *res ipsa loquitur*. The Respondents called expert evidence to say in rebuttal of the Appellant's evidence that surgical needles of these days easily get broken as they are hardly strong enough, and that the Respondents were not negligent in carrying out the surgery on the Appellant. The court held that no case of negligence was established against the Respondents since it was only a broken part of the surgical needle and not the whole unbroken needle that was left in the Appellant's abdomen. The court went further to state that the Respondents' explanation as to why the broken needle came to be in the Appellant's abdomen had sufficiently dislodged the application of *res ipsa loquitur* and that the fact that the broken needle could not be found after a search in the Appellant's abdomen was not enough to establish negligence against the Respondents. Niki Tobi J.S.C held that the Appellant should have called expert evidence in proof of her case. He made reference to Lord Denning³¹ where he stated as follows:

A medical man for instance should not be found guilty of negligence unless he has done something of which his colleagues would say - He really did make a mistake there. He ought not to have done it... but in a hospital where a person who is ill goes for a treatment, there is always some risk no matter what care is used. Every surgical operation involves risks. It would be wrong, and indeed bad law to say that simply a misadventure or mishap occurred, the hospital and the doctors are thereby liable.

It is difficult to explain how the conduct of the surgeon would not amount to medical negligence. This writer opines that the fact that what was left in the abdomen of the patient was *merely* a piece of a broken surgical needle (which caused the patient serious pains over a length of time) as opposed to the whole needle is insufficient to excuse such conduct. A cosmetic surgeon was convicted of medical negligence in the death of Stella Obasanjo, then First Lady who died on October 23, 2005, two days after undergoing liposuction on her abdomen and other parts of her body at a clinic in the southern Spanish town of Marbella. A court in Malaga convicted the cosmetic surgeon, Antonio Mena Molina of criminal negligence. He was sentenced to one year imprisonment, barred from practicing medicine for three years and ordered to pay 120,000 Euro (\$175,000) in damages to the former First Lady's son. The judge described him as having shown 'carelessness and neglect.'³² Also, the family of a UK-based Nigerian woman, 38 year old social worker and mother of three, Abimbola Bamgbose, is suing Mono Cosmetic Surgery, a Turkish firm, over a buttocks lift error that allegedly caused her death. Moyosore Olowo (also a Nigerian) the husband of the deceased, is suing the firm alongside Hakan Aydogan, the cosmetic surgeon for 1 Million Pounds Sterling, alleging medical negligence, with the proceedings being issued in the Turkish courts. Abimbola opted for the Turkish surgery package which included airport transfers and accommodation for £5,000. It was said that Bamgbose began experiencing severe abdominal pain, prompting her to undergo a second surgery. A post-mortem examination conducted on the deceased by the North West Kent Coroner Service was said to have found that Bamgbose died from peritonitis and multi-organ failure due to a complication of the liposuction surgery.³³

²⁹ D. E. Seidelson, Medical Malpractice Cases and the Reluctant Expert, [1966] *Catholic University Law Review*, (16), p. 158.

³⁰ (2006) 10 NWLR (Pt. 987) 173

³¹ Master of the Rolls, in his book, 'The Discipline of Law,' (Butterworths, 1979) 156.

³² *Nigeria Health Watch Magazine*, October 9, 2009.

³³ *The Cable Newspaper*, January 3, 2021

In the case of *Maly Keo v Dr. Ban Vu & Ors*³⁴ the Appellant, having earlier undergone an injection of silicon to her nose bridge, lip and chin underwent nose reshaping surgery after the cosmetic surgeon Defendant had informed her that the prior silicon injection could cause additional problems with the new surgery (including a propensity to develop an infection) and also explained the other risks associated with the surgery, and she gave her informed consent. He then placed a cosmetic implant in her nose and she was given post-operative instructions including a follow up appointment in one week. She did not return for the follow up appointment. In the following year the prosthesis implanted in her nose moved. The court held that in a medical negligence case the negligent act must be the proximate cause of the injury and that, to establish causation, the Claimant must prove the Defendant's conduct caused an event and that the said event caused the Claimant to suffer compensable damages, and that the causal link between the event and the injury must be shown by competent evidence. The Court also held that an expert witness need not be a specialist in the particular branch of the medical profession for which the testimony is offered, as the court may qualify a medical witness of a different specialty to testify if the witness has practical knowledge of what is usually done by other practitioners under circumstances similar to those confronting with the malpractice claim.

In the case of *Klein v. South Shore Cosmetic Surgeons & Ors*³⁵ the Appellant, a 49 years old breast cancer survivor after undergoing lumpectomy and chemotherapy and radiation treatment wanted to improve the appearance of her breasts. The cosmetic surgeons suggested a breast augmentation and a breast lift, the latter of which she declined. The cosmetic surgeon also negligently told her that the risk was only 1% to 2%, although the statistic printed on the Respondents' medical form stated the risk of up to 20%. An expert cosmetic surgeon testified that due to the radiation treatment the risk attached to it was higher than 50%. After the breast augmentation and two more cosmetic surgeries she had a deep wound under her left breast, a grossly deformed left breast and her two breasts were uneven. Despite two subsequent corrective surgeries, she was left with permanent scars. The New York Supreme Court awarded \$1.5 million to the Appellant for medical negligence. Also in the case of *Hugh v. Dr. Ofodile*³⁶ the Appellant underwent gastric piping surgery and she was left with excessive skin on her leg. She then had thigh lift cosmetic surgery to remove the excess skin, after which she claimed that the cosmetic surgeon failed to inform her of the risk associated with the thigh lift cosmetic surgery, including the risk of injury and deformity to her vagina. She alleged that too much skin was removed during the procedure, causing a flattening and pulling open of her vagina, and the skin pulling also caused the wound to break and bleed. The New York Supreme Court found the Respondent liable for medical negligence and awarded \$600,000 as damages. Also, in the case of *Christy Aills v. Dr. Luciano Boemi*³⁷ the Appellant underwent a breast implant and a breast lift during the same procedure. She alleged that the cosmetic surgeon Respondent failed to inform her of the risks associated with performing both breast implantation and a breast lift during the same procedure, which led to her traumatic injury requiring thirteen additional corrective surgeries. The Florida Circuit Court awarded \$2 million for medical negligence. Similarly, in the case of *Maria Alaimo v. Dr. Keith Berman*³⁸ the Appellant was referred to the Respondent, a cosmetic surgeon, through an online referral service when she sought a breast lift at the age of 40 after giving birth twice and breastfeeding both of her children. During the first consultation session she stated that he showed her a book of pictures depicting women with successful breast augmentation surgeries and told her 'you are going to look beautiful.' She maintained that prior to the cosmetic surgery he never informed her of the risks involved and that she was given a twelve-page consent document to sign as she was being rushed into the operating theatre. The Respondent cosmetic surgeon testified that he initially planned to perform a level two breast lift procedure but shifted to a level one procedure while she was on the operating table, and he slipped the implant 'into the only place it could fit.' The surgery left her with scarred and disfigured breasts that, with two swelling bubbles (one on top of the other) gave the appearance of having four breasts. After two failed follow up corrective procedures (the first by the Respondent and the second by some other cosmetic surgeon) she said she went into a deep depression and her 17 year old marriage ended because she refused to undress in front of her husband. The New York State Supreme Court awarded \$3.5 million in her favour for and against the Respondent for medical negligence. In the case of *Temara Matatoff & Anor. v. Dr. Ricardo Samitier Jr. & Anor.*³⁹ the Appellant underwent tummy tuck and thigh trim cosmetic surgeries, and the surgeries made her unable to stand up for a year after the surgery. The cosmetic surgeon had promised her that her surgery would take one and half hour, and that she would be healed enough to attend her son's wedding which was a month after the surgery. The surgery took five hours and she was bleeding so heavily that he stitched her up on the operating table while she was on a sitting position. The US Court found him liable for medical negligence and awarded \$2.5 million in her favour, which included

³⁴ (2002) 62 NYR 461

³⁵ (2005) 22 NYJV 6

³⁶ (2011) 20475/05

³⁷ (2010) 04003135

³⁸ (2010) 51 NYR 512

³⁹ (1994) FJVR 11234

\$125,000 for loss of consortium. In the related case of *Samiter v State*⁴⁰ the Respondent in the last case was charged with manslaughter when his patient undergoing liposuction cosmetic surgery and a penis enlargement surgery bled to death during the operation. The Florida Court of Appeal found him guilty of manslaughter and sentenced him to five years imprisonment. In the case of *Brown v. Lafontaine-Rish Medical Associate*⁴¹ a 32 year old man died while undergoing liposuction surgery, and his estate administrators asserted that the surgeon negligently administered anesthesia causing his death. The medical examiner found the cause of his death to be complications of local and general anesthesia. During the surgery, when his heart rate and blood pressure slowed down the Defendants – cosmetic surgeon and anesthesiologist - were said to be negligent in their resuscitation efforts because the batteries in a medical equipment were dead. Although the resident surgeon was only to assist in the procedure, the Defendant anesthesiologist asked him to begin the surgery until the scheduled cosmetic surgeon arrived. The scheduled surgeon never arrived. In addition, the anesthesiologist also listed and forged the signature of another surgeon on the record for the procedure, although that surgeon was not present on the day of the surgery. The New York Supreme Court found the Defendant liable for medical negligence and awarded \$5 million as damages. There are cases where an action for medical negligence may be founded on criminal law. That is criminal liability. Criminal liability for criminal negligence is effectively limited to prosecutions for manslaughter. The level of negligence that the doctor must have indulged in is considerably higher than that for which civil liability may be incurred. The essential concern is that it surpasses the civil tests or threshold.

7. Vicarious Liability in Medical Negligence

Vicarious liability refers to a situation where someone is held responsible for the actions or omissions of another person. A cosmetic surgery hospital employer can be liable for the acts or omissions of its employees (healthcare professional or not), provided it can be shown that they took place in the course of their employment and the employee was not on a frolic of his own. The doctrine of vicarious liability is based on the fact that if an employee, while acting in the course of his employment, negligently injures another person, rather than the employee been held liable the employer will be held liable for that injury.⁴²

8. Doctrine of *Res Ipsa Loquitur*

There are instances where the plaintiff may lack evidence of what actually happened, but might attempt to make up for the deficiency by means of inferences from what is known. These inferences are often called instances of the application of the maxim *res ipsa loquitur* (the thing speaks for itself). Where an accident occurs in circumstances in which it would not ordinarily happen if proper care is being used, and the defendant or servant of the defendant is in control of the state of affairs which cause the harm, the court may infer negligence against the defendant without calling on the plaintiff to show the respect in which the defendant had been negligent. *Res ipsa Loquitur* applies only in the absence of explanation. If the plaintiff can show how the damage occurred, there is no room for inference and the maxim does not apply the practical effect is that unless the defendant is able to offer a reasonable explanation of how the accident could have happened, the judge would draw the inference that the defendant had been negligent.⁴³

9. Criminal Liability for Medical Negligence

Other than civil liability for medical negligence, it is important to note that a cosmetic surgeon may also be criminally liable for negligence. Civil and criminal liability may occur or arise not only from the doing of an act, for example making the wrong incision, but also from an omission to do an act. Lack of care from a cosmetic surgeon to the patient under his care could amount to medical negligence and attract civil and/or criminal law consequences. In any case, a cosmetic surgeon is not criminally responsible for a patient's death unless his negligence or incompetence went beyond a mere matter of compensation between subjects and showed such disregard for life and safety of others as to amount to a crime against State, thus amounting to gross negligence.⁴⁴ Section 303 of the Criminal Code Act⁴⁵ provides thus:

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

⁴⁰ (1994) RV 2568

⁴¹ (2004) 20 NYJVRA 7

⁴² See the case of *Ibekwe v. UCH Board of Management (1961) WNLR 173* where it was held that a hospital authority is responsible for the acts or omission of the whole of its staff, whether they were physicians, doctors, nurses or other employees.

⁴³ See the case of *Management Enterprise Ltd v. Otusanya* (1987) 2 NWLR (pt53) at pg 179

⁴⁴ See the case of *Kim v. State* (1992) 4 NWLR (Pt 233) 175.

⁴⁵ Cap C12 LFN 2004

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.

Section 343(1) on the Criminal Code Act provides that:

Any person who in a manner so rash or negligent as to endanger human life or to be likely to cause harm to any other person gives medical or surgical treatment to any person whom he has undertaken to treat, is guilty of a misdemeanour, and is liable to imprisonment for one year.

A popular Lagos cosmetic surgeon, Anuoluwapo Adepoju, was on Friday arraigned before a Federal High Court in Lagos for alleged evasion from an investigation into a failed cosmetic surgery. She was charged for alleged failure to comply with FCCPC's requirements to appear and provide information relevant to an ongoing investigation. She, alongside her hospital, Med Contour Services Limited, was arraigned for allegedly obstructing the investigation by FCCPC into the case. The FCCPC had in April, 2020 sealed the second defendant (Med Contour), a plastic surgery hospital, over suspicion of illegal activities. In a five-count charge brought against the defendants, the prosecution alleged that, without sufficient cause, the first defendant failed to appear before the FCCPC in compliance with the commissions' summons and for allegedly preventing and obstructing the commission from carrying out its investigation into the botched cosmetic surgery. The offences were said to have contravened the provisions of sections 11(1)(a), 33(1)(a), 110, 113(1)(a) and 159(4) of the FCCPC Act. In a six-paragraph affidavit of completion of investigation attached to the charge sheet, the commission said it received complaints against the 1st Defendant from three patients that the cosmetic surgeon's services 'are unsafe for consumers,' and that she made 'false, misleading and deceptive representation in relation to the marketing of their services,' allegedly resulting in the death of a female patient after a failed cosmetic surgery. The incidents were said to have happened between April 15 and May 4, 2020, at Lekki Phase 1, Lagos.⁴⁶ This is in addition the suspension of the 1st Defendant by the MDCN.⁴⁷

10. Legal Defences for Medical Negligence

A defence is a Defendant's answer to a Claimant's claim in civil proceedings or a denial of culpability in a criminal prosecution. It is that which is alleged by a party proceeded against in an action or suit as a reason why the Claimant should not recover or establish that which he seeks by his complaint.

Contributory Negligence

Contributory negligence has been said to mean that the party charged is primarily liable but that the party charging him has contributed by his own negligence to what has eventually happened.⁴⁸ An example of contributory negligence is where a patient fails to follow instruction to return for further treatment. See *Gerber v. Day*.⁴⁹ Where the damage suffered by the Claimant is partly as a result of the Claimant's own fault and partly as a result of the Defendant's fault, then the Claimant is liable for contributory negligence and will not recover damages in full.

Assumption of Risk - Volenti Non Fit Injuria

Volenti non fit injuria is a Latin maxim which means 'injury cannot be done to a willing person.' It is a common law doctrine which is to the effect that if someone willingly puts himself in a position where he knows harm might result to him, he is not legally permitted to bring a claim against the other party. In professional medical liability, it is a cardinal legal principle that one who knowingly enters upon a course of conduct involving certain risks cannot recover damages for injuries resulting from the conduct. No doubt, cosmetic surgery is a risky venture as it is an artificial enhancement of bodily appearance. For the rule to apply, however, it must be found that the cosmetic surgery patient actually knows or that the risks were so obvious that the patient should have known of the risks involved. In medical professional liability suits, the defence of consent applies to the risk of injury from medical treatment performed with proper care and not when such harm or loss result from medical negligence.

Defence of Accident

An accident can stand as a valid legal defence where the Defendant has no criminal intent and was not negligent. But the Defendants must show the occurrence of an event over which they had no control and the consequence of the event could not have been obviated by adherence to set standards and in the absence of

⁴⁶ *Premium Times Newspaper*, Thursday, June 17, 2021.

⁴⁷ The Cable Newspaper, 23 November 2020 <https://lifestyle.thecable.ng/mdcn-suspends-lagos-doctor-after-failed-cosmetic-surgery-led-to-clients-death/> accessed 10 July 2021.

⁴⁸ Per Coker JSC in *Evans v. Baker* (1973) S.C.P. 80.

⁴⁹ (1931) 119 Cal. 535

medical negligence. Where an unexpected event beyond the control of the cosmetic surgeon occurs, the fact itself is a lawful defence in a matter for medical negligence. Cosmetic surgery, just like a good number of medical procedures, comes with some form of accident risks even when skillfully and carefully undertaken.

Defence of Emergency

By this defence, a Defendant who shows that he rendered emergency care at the scene of an accident will not be held liable in Negligence even where it is shown that the normal, requisite care and skill has not been demonstrated in the circumstance. He will, however be held to be Negligent if he gives more treatment than is reasonably necessary in the circumstance.⁵⁰

Defence of Acceptable Practice

Another defence that medical practitioners usually rely on is the defence of acceptable practice. The choice of accepted medical practice as to the criterion governing the disclosure of risks which supports the view that a doctor owes no duty to warn of normal risks, such as infection, and those created by anesthesia which are inherent in any surgical procedure and the view that a doctor's clinical assessment of the patient's condition may justify the withholding of information in the patient's interest. The law balances the conflicting interests in this area by a departure from accepted practice as not itself constituting negligence, but requiring the practitioner who chooses to experiment to justify his actions by recourse to the reasoning which underlined them.⁵¹

11. Conclusion and Recommendations

It is obvious that a cosmetic surgeon owes his patients a duty of care as he is in a fiduciary relationship. This legal duty is breached where the level of medical care or skill exercised falls below par and injury, damage or loss results. Given the rampant rate of medical injury and wrongful deaths in Nigeria, our legal system ought to be sensitive to the plight of victims especially with regard to the peculiar difficulties that they face in proving the particulars of negligence in a medical malpractice suit. The field of medical negligence, particularly as it relates to cosmetic surgery is relatively new. Although there are a handful of materials in the area of medical negligence in Nigeria, there is a dearth of scholarly works and judicial pronouncements on medical negligence in the practice of cosmetic surgery. This is also exacerbated by the fact that the FCCP Act is a fairly new legislation having been enacted in 2019. Nigerian jurisprudence on the subject of medical negligence in cosmetic surgery advertising consumer rights is relatively sparse, and academic exposition in journal articles and books on the subject are scanty. Much of the literature on this subject is those dwelling on general medical negligence law. It is recommended that in view of the very private nature of cosmetic surgery, such complaints relating to cosmetic surgery be attended to and given necessary attention *in camera* for patients' privacy concerns and to protect the identities of such complainants, except they elect to waive the need for such privacy. This is because it is thought that one of the factors militating against the airing of grievances in cosmetic surgery matters is the attendant publicity and shaming of such patients in our traditional African setting. It is also recommended that more health awareness be undertaken to enhance knowledge of risk factors and dangers in the procedure and health rights (including the right to adequate information) in the area of cosmetic surgery. It is further suggested that adequate punishment be meted out for the current widespread subtle social media advertisement of supposed cosmetic surgery prowess and that there is a pressing need for a closer regulation of cosmetic surgery practice to disallow quackery and medical conduct below par. There is also a growing need to factor in the opportunities that multi-door court house present in the resolution of cosmetic surgery medical negligence claims.

⁵⁰ J. A. Dada, *Legal Aspects of Medical Practice in Nigeria* (University of Calabar Press, 2002), p. 103.

⁵¹ Eric Okojie, *Professional Medical Negligence in Nigeria* (University of Benin Press, 2011), p. 4.