

AN EXAMINATION OF MEDICAL NEGLIGENCE ERROR AND MALPRACTICE AS CONDUCT IN VIOLATION OF THE RIGHT TO LIFE OF PATIENTS 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 death. 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 life. 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 life of patients Nigeria. Furthermore, it was found that although there is the problem of the significant violation of the fundamental right to life of 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 life of patients be enforced in medical practice in Nigeria through the instrumentality of the fundamental rights enforcement procedure that protects the fundamental rights of patients so as to reduce or curb the problem of harm to patients.

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

1. Introduction

The harm patients suffer when receiving treatment in Nigerian hospitals offends their fundamental rights in terms of the fundamental rights rules provided for in the Constitution of Nigeria, 1999 (as amended).¹ The fundamental rights of patients include the right to life,² the prohibition against torture, inhuman and degrading treatment and punishment,³ the right to liberty,⁴ the right to privacy and confidentiality⁵ and the prohibition against discrimination.⁶ 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 life.

2. Medical Negligence, Error and Malpractice

Medical negligence derives its origins from the tortious principle of negligence.⁷ The essence of the tort of negligence was that a person should be subject to liability for carelessly causing harm to another.⁸ In addition, it was also recognised that there was the necessity of a causal connection between the defendant's breach of duty and the plaintiff's damage that was natural, probable, proximate, and not too remote.⁹ Relatedly, medical negligence constitutes an act or omission by a medical practitioner which breaches the duty of care the

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¹ 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.

² Section 33 Constitution of Nigeria, 1999 (as amended).

³ Section 34 Constitution of Nigeria, 1999 (as amended).

⁴ Section 35 Constitution of Nigeria, 1999 (as amended).

⁵ Section 37 Constitution of Nigeria, 1999 (as amended).

⁶ Section 42 Constitution of Nigeria, 1999 (as amended).

⁷ *Ojo v. Gharoro & Ubth Management Board* (2006)10 NWLR, 987

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

⁹ 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.

practitioner owes to the patient resulting to injury or death of the patient.¹⁰ Generally, errors are unintentional because an error occurs ‘when someone is trying to do the right thing, but actually does the wrong thing’.¹¹ 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.¹² Essentially, Medical errors occur in the treatment of patients with deleterious consequences for those affected.¹³ 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.¹⁴

3. Medical Malpractice Claims under the Right to Life

The fundamental rights provisions of the Nigerian Constitution have implications for the treatment of patients in medical practice in Nigeria. One of such implications is that the right to life is protected. In this regard, it is submitted that whereas, it is natural that people will die, however, the question as to the arbitrary taking or unlawful deprivation of life through the death and injury of patients due to the individual or institutional negligence, error and malpractice of medical practitioners or government arises in terms of violations of the right to life.¹⁵ This flow naturally from the fact there is no moral belief that is more universal, stable, and unquestioned, both across different societies and throughout history, than the belief that killing people is normally wrong.¹⁶ Essentially, if we should not kill, it is because in killing we are harming someone. That is the reason killing is wrong. Thus, the rule against killing a human being has as its point the protection of the victims.¹⁷ Importantly too, what primarily makes killing wrong is its effect on the victim because the loss of one’s life is one of the greatest losses one can suffer. Practically, the loss of one’s life deprives the human being of all the experiences, activities, projects, and enjoyments that would otherwise have constituted one’s future. Therefore, killing someone is wrong, primarily because the killing inflicts one of the greatest possible losses on the victim.¹⁸ What is being said is that acts of unlawful killing are normally wrong principally because of the harm they inflict on the victims and that the degree to which an act of killing is wrong varies with the degree of harm it causes to the victim.¹⁹ This important moral or philosophical statements lies at the very heart of the Fundamental Rights regime and this is why it expressly prohibits the arbitrary taking or unlawful deprivation of life. This is why it is universally accepted that the individual has a right not to be arbitrary or unlawfully killed by the state or through its agents.²⁰

4. Right to Life under the Nigerian Constitution

The right to life is provided under section 33 of the Constitution of Nigeria, 1999 (as amended). Section 33 (1) provides: ‘Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria’. The right to life is provided for under Article 4 of the African Charter on Human and Peoples’ Rights. Article 4 provides: ‘Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right’. To further guarantee the protection of human rights, the Constitution in its section 36 (8) prohibits the use of retroactive laws to limit right to life. In

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

¹¹ B, Runciman, et al, *Safety and Ethics in Healthcare: A Guide to Getting it Right*, (Ashgate, 2007), p. 5.

¹² JO, Lokulo-Sodipe, ‘An Examination of the Legal Rights of Surgical Patients under the Nigerian Laws’ [2009] (4)(1) *J Law Conflict Resolut.*; 79.

¹³ L, LA Pietra, et al, ‘Medical Errors and Clinical Risk Management: State of the Art’ [2005] (25) *Acta Otorhinolaryngol Ital*; 339.

¹⁴Physician 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.

¹⁵ Section 33(1), Chapter IV: Fundamental Rights, Constitution of Nigeria, 1999 (as amended); Article 6(1), International Covenant on Civil and Political Rights (ICCPR) UN General Assembly Resolution 2200A [XXI]. December 16, 1966. Article 6, United Nations Convention on the Rights of the Child (CRC). Article 10, Convention on the Rights of Persons with Disabilities (CRPD). Article 4, 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).

¹⁶ J, McMahan, *The Ethics of Killing: Problems at the Margins of Life*, (Oxford University Press, 2002), p. 189.

¹⁷ J, Rachels, *The End of Life: Euthanasia and Morality*, (Oxford University Press, 1986), p. 6.

¹⁸ D, Marquis, ‘Why Abortion is Immoral’ [1989] (86), *Journal of Philosophy*; 189.

¹⁹ J, McMahan, n. 8, p. 191.

²⁰ K, Thompson, C, Giffard, *Reporting Killings as Human Rights Violations: How to document and respond to potential violations of the right to life within the international system for the protection of human rights*, (The Human Rights Centre, 2002), p. 20.

this regard, section 36 (8) states: ‘No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such offence, and no penalty shall be imposed for any of criminal offences heavier than the penalty in force at the time the offence was committed’. In addition, section 36 (12) stipulates that: ‘A person shall not be convicted of criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law’. The term, ‘written law’ includes any other Act or law of the National or State Legislature. This means that derogation from fundamental rights cannot be lawfully justified on grounds of retroactive laws or commission of an offence unknown to law. Inherently, section 33 has two core elements namely that ‘every person has a right to life’ and ‘no one shall be deprived intentionally of his life’. Traditionally, the two elements suggest that the right to life is interpreted as imposing only a negative duty on the State not to arbitrarily deprive a citizen of his or her life as exemplified by the decision of the Supreme Court in *Nasiru Bello v AG Oyo State*.²¹ The facts of the case were that a convicted felon was executed by the respondent while his appeal to a higher court was pending. At the suit of the deceased family, the Supreme Court of Nigeria held that the respondent violated the deceased right to life and ordered compensation to his family.

It is submitted that there has been a move away from the traditional approach to the right to life to a more liberal and expansive approach that does not consider the breach of the right in terms of only the occurrence of death. This is because the Constitution of the Federal Republic of Nigeria provides for any person to take action or initiate proceedings where any of the rights are in issue before the conclusion of an act which may violate their rights. Pursuant to this, the Fundamental Rights Enforcement Procedure Rules (FREPR) makes provisions which are intended to give effect to this new approach. In this regard, Order II FREPR provides, ‘Any person who alleges that any of the Fundamental Rights provided for in the Constitution or African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act and to which he is entitled, has been, or is likely to be infringed, may apply to the Court in the State where the infringement occurs or is likely to occur, for redress.’ In giving effect to this constitutional provision, in particular, as it relates to the right to life, the Court of Appeal in *Dilly v Inspector General of Police*,²² had this to say, ‘Right to life is in a class of its own because its violations range from attempt which is a process before full violation occurs which is when violation is completed. Before completion the person can act for himself. When, however, such violation has gone to the irreversible stage such as death, then, such can only be litigated by a next of kin.’²³ Thus, if a person’s right to life is likely to be infringed a person can act for himself before the act is completed by applying to the Court in the State where the infringement occurs or is likely to occur for redress. In terms of the right to healthcare this is relevant and acceptable because the right is in itself quite encompassing as it covers everything that would adversely affect health when deprived, and thus, ultimately threatens life. Clearly, the liberal posture of the FREPR is useful in securing the right to life in the context of preventing such harm from befalling patients arising from medical negligence, error and malpractice.

5. Right to Life under the African Charter on Human and Peoples’ Rights

Article 2 of the African Charter guarantees the right to life to all human beings without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. Going forward, the African Charter in Article 4 provides that: ‘Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person No one may be arbitrarily deprived of this right’. In *Organisation Mondiale Contre La Torture and Association Internationale des juristes Democratiques) Commission Internationale des Juristes (C.I.J) Union Interafricaine des Droits de l’Homme/ Rwanda*²⁴ the African Commission on Human and Peoples Rights interpreted the right to life as follows:

The Commission found that the massacre of a large number of Rwandan villagers by the Rwandan Armed Forces and the many reported extra judicial executions for reasons of their membership of a particular ethnic group were series of violations of the right to life in article 4 of the African Charter on Human and Peoples’ Rights

Clearly, the right to life under the ACHPR can be used to protect the human rights of patients.

²¹ [1986] 5 NWLR (pt. 45) 828.

²² (2016) LPLER-41452 (CA).

²³ Supra.

²⁴ Communication 27/89, 46/91, 49/91,99/93.

6. Exceptions to the Right to life under the Nigerian Constitution

Whereas, section 33 (1) of the Constitution of Nigeria, 1999 (as amended) guarantees the right to life to every person, the court in *Musa v. The State*²⁵ held that the sentence of death passed by a court of competent jurisdiction will be a ground for derogations from same right. To this end, only sentence of death upon proof of capital offences²⁶ are contemplated; and this must be proved beyond reasonable doubt as spelt out in *Udosen v. The State*²⁷ where the Supreme Court held that the commission of crime by a party must be proved beyond reasonable doubt. In addition, section 33 (2) provides three further permissible grounds upon which the deprivation of right to life may be justified by use of reasonable force resulting in death but this does not include negligence, error or malpractice of any kind. In this regard, section 33 (2) states:

A person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use, to such extent and in such circumstance as are permitted by law, of such force as is reasonably necessary: -

- (a) for the defense of any person from unlawful violence or for the defense of property;²⁸
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or
- (c) for the purpose of suppressing a riot; insurrection or mutiny.²⁹

Further derogation from the right life is laid down in section 45 (2) of the Constitution of Nigeria which provides: 'A period of emergency means any period during which there is in force a proclamation of a state of emergency declared by the president in exercise of the power conferred on him under section 305 of constitution'. Pursuant to section 45 (2) reasonable measures justifiably taken for the purpose of dealing with situations of emergency or situation of lawful act of war resulting in death can lawfully limit right to life. Thus, whereas the fundamental right to life and indeed all fundamental rights are sacrosanct they are only so to the limit permissible by law.

7. Medical Negligence, Error and Malpractice as conduct in violation of the Right to Life

Evidence demonstrates that medical negligence, error and malpractice are conducts that violate the right to life of patients and as such deserves enforcement under the Fundamental Rights Enforcement Procedure Rules. Such evidence demonstrates that medical negligence, error and malpractice whether arising individually from the actions or inactions of medical practitioners or institutionally from the actions or inactions and failures of government are items that do not fall within the exception of the right to life. Note should be taken however, that the evidence discussed here is dominantly persuasive as there is no similar mandatory evidence available in Nigeria.

International Practice

The starting point is Article 12(1) International Covenant on Economic, Social and Cultural Rights (ICESCR) which provides that: 'The States' Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. In interpreting this human rights standard, the Committee on Economic, Social and Cultural Rights (CESCR)³⁰ in its General Comment No. 14(1) had this to say: 'Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.'³¹ Interconnected is Article 6(1) International Covenant on Civil and Political Rights which provides that: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'. In interpreting this human rights standard as it relates to the right to life of patients pursuant to medical negligence under its case law jurisprudence, the Human Rights Committee (HRC)³² in *Novaković v Serbia*³³ considered whether the State party had failed in its

²⁵ SC. 323/2006.

²⁶ The capital offences include murder under s. 319 of the Criminal Code Act, 2004; armed robbery under the Robbery and Firearms (Special Provision) Act, 2004; treason under the Treason and other Offences (Special Military Tribunal) Act, 2004 and sabotage under the Petroleum Production and Distribution (Anti-Sabotage) Act, 2004.

²⁷ S.C. 199/2005; (2007) 4 NWLR (Pt. 1023) 125.

²⁸ In *Musa v State* [1993] 5 NWLR (Pt.295) 513, the Court held that: the provision of S. 30 (now s. 33 of 1999 Constitution) of the 1979 constitution of Federal Republic Nigeria allows a person to use such force as is reasonably necessary for the defense of any person from unlawful violence or for the defense of property. A person is even entitled to kill in the defense of property provided the force used is reasonably necessary in the circumstance.

²⁹ See Section 24 of the Police Act, 2004; Section 271 of the Criminal Code Act, 2004.

³⁰ Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4)

³¹ *Supra*.

³² The Human Rights Committee is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State parties. All States parties are obliged to submit regular reports to the Committee on how the rights are being implemented. <<https://www.ohchr.org>> Accessed 30/09/2021.

³³ Communication No. 1556/2007, CCPR/C/100/D/1556/2007.

obligations regarding Articles 6³⁴ and 2³⁵ of the Covenant in connection with the death of the author's son as a result of inadequate medical treatment. The authors of the communication are Marija and Dragana Novaković, Serbian nationals. They submitted the communication on behalf of their son and brother, respectively, Zoran Novaković, also Serbian national, who passed away in a state-owned hospital in Belgrade, Serbia, on 30 March 2003, at the age of 25. The authors claim Mr. Novaković to be a victim of violations of article 6 and article 2, paragraph 3 in conjunction with article 6 of the International Covenant on Civil and Political Rights.

The facts of the case were that the victim was admitted to the Clinic for Maxillofacial Surgery, in Belgrade on 24 March 2003 with a swelling jaw, resulting from a tooth infection. On 29 March 2003, he was transferred to the Clinic for Infectious Diseases. Both hospitals are state-owned and state-run. On 30 March 2003, Mr. Novaković died as a result of suppurating inflammation of his mouth, neck, chest and subsequent complications. The tooth at the origin of the initial infection was never extracted, basic medical tests, such as microbiological analysis, were never conducted and the surgical treatment applied was totally inappropriate. On the basis of several documents, such as the post-mortem examination carried out on the victim and findings and opinions of forensic experts, they consider that the doctors who treated Mr. Novaković in the two hospitals were responsible for serious omissions and mistakes in the medical treatment, which caused serious health deterioration and resulted in his death. The authors claim that the State party violated Mr. Novaković's right under article 6 of the Covenant because it failed to protect his right to life. They state that in the case of *Lantsova v the Russian Federation*, the Committee concluded that in the case of persons in vulnerable situations, such as detainees, the authorities had a special duty to protect the right to life if they knew about or ought to have known about the danger. The authors claim that the same standard should apply to persons who entrusted themselves to the care of medical professionals of a state-run hospital. They submit that the doctors, employed by the State, should have known of the danger to Mr. Novaković, since it is clear from the submitted reports that the doctors committed gross negligence. The authors consider that gross negligence committed by government employees, including hospital personnel, triggers the State's responsibility for failure to protect life in a particular case. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, was of the view that the facts before it disclosed a violation of article 2 paragraph 3 in conjunction with article 6 of the Covenant. In accordance with article 2, paragraph 3 (a) of the Covenant, the State party was under an obligation to provide the authors with an effective remedy. The State party was under an obligation to take appropriate steps to first, ensure that the criminal proceedings against the persons responsible for the death of Mr. Novaković are speedily concluded and that, if convicted, they are punished, and second, provide the authors with appropriate compensation. The State party is also under an obligation to prevent similar violations in the future.

Regional Practice

Regional human rights standards and case law jurisprudence also provides evidence pursuant to the theme under discussion.

Practice under the European System for the Protection of human Rights

Under the European System for the Protection of Human Rights, Article 2 European Convention on Human Rights (ECHR) provides that:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 2 of ECHR is *in pari materia* with Section 33 of the Constitution of Nigeria. In relation to Article 2, the European Court of Human Rights (ECtHR) in *Tavares v France*³⁶ ruled that 'this provision for the right to life requires states not only to prevent intentional killing but also to take steps against unintentional loss.' Thus,

³⁴ Article 6. 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

³⁵ Article 2. 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

³⁶ /90 (September 12, 1991) (unreported), cited in RJ, Cook, BM, Dickens, 'Human Rights Dynamics of Abortion Law Reform' [2003] (25) *Hum. Rts. Q.*; 28.

according to Janis, et al, the Court has inferred that where there has been a loss of life due to unintentional or intentional factors, the actions that brought about that loss of life may be subject to scrutiny under Article 2.³⁷ Specifically, as it relates to the human rights of patients in view of medical negligence, error and malpractice, the Court ruled in *Cyprus v Turkey*³⁸ that a violation of the right to life of a patient occurs ‘where it is shown that the authorities put an individual’s life at risk through the denial of health care which they have undertaken to make available to the population generally.’ Also, the court stated the same principle of law in *Nitecki v Poland*.³⁹ The European Court of Human Rights (ECtHR) has in a plethora of cases which will be discussed here interpreted Article 2 as having both substantive and procedural elements which applies equally to addressing the violation of the right to life arising from medical negligence, error and malpractice. The Court’s substantive and procedural approach in finding states’ violations of the right to life in medical negligence cases is poignant.

According to Starmer,⁴⁰ the ECtHR approach to findings of substantive or procedural violations of Article 2 in terms of medical negligence, error and malpractice cases is grounded in the Convention requirements that States parties have the positive obligation to fulfill the Convention rights to its citizens. Similarly, it is submitted that there is the constitutional requirement that the Nigerian Government has the positive obligation to fulfill the constitutional rights of Nigerians whether they be patients or otherwise.⁴¹ In this regard, the general legal grounds for the existence of positive obligations can be found in the Convention under three inter-related principles. These are the requirement under Article 1 of the Convention that states should secure conventional rights to all persons within their jurisdiction, the general principle of the effectiveness of rights guaranteed by the Convention and the supplementing obligation under Article 13 to provide an effective remedy. Thus, according to Kamber, arising from the requirement of positive obligations, there are two distinct aspects to States’ human rights responsibility in cases of medical negligence, error and malpractice.⁴² The first aspect, which is the substantive aspect of positive obligations, is when the state fails to regulate the health profession and health care. Thus, under the substantive limb the Court only assesses whether the requirement to have in place the regulatory framework aimed at protecting patients’ medical rights was fulfilled by a State. The second aspect, which is the procedural aspect of positive obligations, is when the state fails to provide effective procedural measures by which those responsible may be identified and held accountable.⁴³

The Court’s approach is reflected in a plethora of cases. For example, in *Giuliani and Gaggio v Italy*⁴⁴ the Court said that the procedural obligation under Article 2 is a distinct obligation where the question of procedural obligations has consistently been examined separately from the question of compliance by the state with the substantive obligation. In *Slimani v France*,⁴⁵ compliance with the procedural obligation under Article 2 has even been subjected to a separate voting on the admissibility of the case. Another approach by which the Court has made a distinction between substantive and procedural obligations under Article 2 refers to the aim that such obligations are made to achieve. Hence, substantive obligations aim to contribute to a particular state of affairs, while the procedural obligations aim only at a certain kind of formal fairness.⁴⁶

In some areas of medical negligence, the Court examined separately procedural and substantive breaches under Article 2. For example, in *Lopes de Sousa Fernandes v Portugal*,⁴⁷ the positive obligation to set up a regulatory structure requiring hospitals to take appropriate steps to ensure the protection of patients’ lives was subjected to scrutiny under the substantive limb of Article 2. Thus, the positive obligation to put in place a legal and administrative framework is required by the Court in a number of cases, including cases in the area of medical negligence.⁴⁸ Also, in the same case, the Court held that the obligation to set up an effective judicial system

³⁷ M. Janis, R. Kay, A. Bradley, *European Human Rights Law Texts and Materials*, (Oxford University Press, 2008), p. 130.

³⁸ 25781/94 (May 10, 2001), para. 219.

³⁹ Application No. 65653/01

⁴⁰ K. Starmer, *European Human Rights Law* (Legal Action Group, 1999), p. 753.

⁴¹ See the Preamble and Overriding Objectives of the Fundamental Rights Enforcement Procedure Rules, 2009.

⁴² K. Kamber, ‘Medical Negligence and International Human Rights Adjudication: Procedural Obligation in Medical Negligence Cases Under the American Convention on Human Rights and the European Convention on Human Rights’, in *The Inter-American Court of Human Rights: Theory and Practice, Present and Future*, Yves Haeck, Oswaldo-Rafael Ruiz-Chiriboga, Clara Burbano Herrera, (eds.), (Intersentia, 2015), p. 175.

⁴³ *ibid.*

⁴⁴ Application No. 23458/02 ECtHR (GC), 24 March 2011

⁴⁵ Application No. 57671/00 27 July 2004; See also *Kanlıbaş v Turkey*, Application No. 32444/96, (inadmiss), 28 April 2005.

⁴⁶ L. May, *Global Justice and Due Process*, (Cambridge University Press, 2011), p. 48.

⁴⁷ Application No. 56080/13

⁴⁸ L. Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship Between Positive and Negative Obligations under the European Convention on Human Rights*, (Intersentia, 2016), p. 110.

related to the procedural aspect.⁴⁹ According to Lavrysen, substantive and procedural obligations in principle serve different rationales.⁵⁰ Thus, whereas the former are regarded as the part of the law that creates, defines, and regulates the rights, duties, and powers of parties, the latter are seen as the rules that prescribe the steps for having a right or duty judicially enforced.⁵¹ In general terms, it is considered that substantive obligations have a preventive function, whereas procedural obligations have a remedial one.⁵²

A plethora of cases under case law jurisprudence show the evolution of the way it deals with questions on medical negligence, error and malpractice cases affecting the right to life through increasing recourse to the substantive and procedural approaches. For example, in *Powell v the United Kingdom*⁵³ the issue arose as to whether the State was responsible for the death occurred due to the malpractice of the doctor. In *M.A.K. and R.K. v The United Kingdom*⁵⁴ the question arose as to whether a state can be held liable for the violation of Article 2 arising from medical intervention without parental consent. In *Codarcea v Romania*⁵⁵ the issue arose as to whether the State was responsible for violation of Article 2 when medical personnel fails to inform a patient regarding risks to health. Other questions the ECtHR has had to deal with include whether an error of judgment of a doctor or negligent health professionals in the treatment of a particular patient amount to a breach of the state's positive obligations under the Convention as it relates to Article 2. Will the issue of whether the doctor, who is allegedly guilty in medical negligence, error or malpractice works for public or private hospital influence the existence of the state's positive obligations under the Convention?

Questions have also arisen in related areas. For example, in *Centre for Legal Resource on behalf of Valentin Campeanu v Romania*⁵⁶ the question arose as to whether the vulnerable status of an applicant will influence the Court's finding of the violation of Article 2 by a state in case the patient dies in a psychiatric hospital. In *Budanov v Russia*⁵⁷ the question arose as to whether the vulnerable status of an applicant will influence the Court's finding of the violation of Article 2 by a state in case where a detainee suffers from inappropriate medical treatment. In *Akkoyunlu v Turkey*⁵⁸ the question arose as to whether the vulnerable status of an applicant will influence the Court's finding of the violation of Article 2 by a state in case of the failure by state authorities to provide necessary medical assistance to military servicemen. Pursuant to the resolution of many of these questions, findings of substantive and procedural violations of Article 2 due to medical negligence, error and malpractice have been made by the ECtHR in a number of cases.

Practice under the Inter-American System for the Protection of Human Rights

Under the Inter-American system for the protection of human rights Article 4 American Convention on Human Rights (ACHR)⁵⁹ provides that:

Article 4. RIGHT TO LIFE. 1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life. 2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply. 3. The death penalty shall not be reestablished in states that have abolished it. 4. In no case shall capital punishment be inflicted for political offenses or related common crimes. 5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women. 6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Application No. 45305/99 ECtHR (inadm.), 4 May 2000; See also *Calvelli and Ciglio v Italy* Application No. 32967/96 ECtHR (Grand Chamber), 17 January, 2002; *Silih v Slovenia* Application No. 71463/01 ECtHR (Grand Chamber), 9 April 2009

⁵⁴ Application No. 45901/05 and 40146/06 ECtHR, 23 March 2010

⁵⁵ Application No. 31675/04 ECtHR, 2 June 2009; see also *Csoma v Romania*, Application No. 8759/05 ECtHR, 15 January 2013

⁵⁶ Application No. 47848/08 ECtHR (GC), 17 July 2014

⁵⁷ Application No. 66583/11 ECtHR, 9 January 2014

⁵⁸ Application No. 7505/06 ECtHR, 13 October 2015,

⁵⁹ Pact of San José, Costa Rica'. Signed at San José, Costa Rica, on 22 November 1969. Came into force on 18 July 1978, United Nations, Treaty Series, vol. 119, p. 3.

cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority

Article 4 of the ACHR shares similarities with section 33 of the Constitution of Nigeria 1999 (as amended). The violation of Article 4 ACHR in terms of medical negligence, error and malpractice has been the subject matter of inquiry by the Inter American Commission on Human Rights.

Case of Damião Ximenes Lopes v Brazil

The case of *Damião Ximenes-Lopes v Brazil*⁶⁰ originated out of a petition brought against the Federative Republic of Brazil by Mrs. Irene Ximenes Lopes Miranda and submitted to the Inter American Commission on Human Rights on November 22, 1999. That petition alleged violations of Articles 4, 5, 11, and 25 of the American Convention on Human Rights, on the right to life, the right to humane treatment, the right to privacy, and the right to judicial protection. The petitioner alleged that this was all in connection with the generic duty of the State to respect and ensure the rights enshrined in the American Convention, as provided for in Article 1(1), to the detriment of Mr. Damião Ximenes Lopes, her brother, who died while at the Guararapes Rest Home, in Sobral, Ceará, after he was admitted there to receive psychiatric treatment. The petitioner alleged that the Brazilian State is responsible for the death of her brother, Damião Ximenes Lopes, at the Casa de Repouso Guararapes, on October 4, 1999. The facts of the case are that Damião Ximenes Lopes the brother of the petitioner was admitted to the Casa de Repouso Hospital to receive psychiatric treatment as he suffered from a mental illness. Two days after being admitted, his mother went to visit him and found him with visible signs of torture, his hands tied, nose bleeding, face and abdomen swollen; he asked her to call the police. Hours later, after receiving medication, he died. The petitioner alleged that the result of the autopsy performed on her brother's corpse only mentioned the apparent lesions, and was silent as to the cause of his death, reporting in its conclusion, 'in view of what is set forth above, we infer that it is an actual death of undetermined cause.' According to the petitioner, the above-noted Casa de Repouso is known for the inhumane treatment meted out to its patients. To this end, the petitioner cited statements made by former patients and newspaper clippings. The petitioner alleged before the Commission that her brother, Mr. Damião Ximenes Lopes, 30 years old, who had a mental illness, was killed on October 4, 1999, at the Casa de Repouso Guararapes, while there for medical treatment. According to the report attached by the petitioner, by the Group for Monitoring and Evaluation of Hospital Psychiatric Care (GAPH) the Casa de Repouso Guararapes was, at the time, licensed under the Single Health System, a system maintained by the Federal Government. It appears from the record that Mr. Damião Ximenes Lopes could have been admitted to the said Casa de Repouso through the Single Health System. According to the complaint, Mr. Damião Ximenes suffered abuse and torture, and was cared for in an inexperienced and negligent manner by the physicians and nurses of said Casa de Repouso, which caused his premature death. According to the statement made by Damião Ximenes's mother, Mrs. Albertina Ximenes, to the Federal Public Ministry, at her hearing as part of the administrative proceeding opened to investigate the allegations made before the Inter American Court of Human Rights, she reported that she had her son hospitalized on Friday, October 1, 1999, and when she went to visit him the following Monday, the guard at the said Casa de Repouso informed her that her son was not in a condition to receive visitors. Not satisfied, Mrs. Albertina entered the institution calling her son by his name, and then 'he came to her, collapsing, and with his hand tied behind his back, with a bloody nose, he had bruises all over his body, his head was so swollen it appeared not to be his and his eyes were practically shut, and that he reeked of feces and urine. That when he fell at her feet she cried out 'police, police, police,' and that she did not know what to do, imploring that he be untied. Mr. Damião's mother recounted that after asking that they bathe her son, she went to find a physician, and, finding one on a mezzanine, she asked him to provide assistance to her son, for otherwise he would die. The physician, according to the petitioner, was Mr. Francisco Ivo de Vasconcelos, Director of the Casa de Repouso, and medical examiner at the Instituto Médico Legal of Sobral, who allegedly answered, 'Let him die, for whoever is born, it is to die,' and said that she should stop crying because he hated to see people cry. That right where he was, and without examining the patient, the medical practitioner prescribed drugs for him.

After the aforementioned events transpired, Mrs. Albertina went to look for her son. On the way, she encountered a 'cleaning woman' who told her that 'the son of the deponent had struggled a great deal with the nurses and had lost a lot of blood.' Immediately thereafter, she found her son lying on the floor in one of the rooms, completely naked, his hands still tied behind him. That a nurse told her that he had calmed down, that one shouldn't try to deal with him, since he was now calming down. According to the petitioner, after she left her son alive at the Casa de Repouso, and shortly after arriving home, there was already a message waiting for her from the same Casa de Repouso informing her that he had died. On that same day, the medical practitioner Francisco Ivo de Vasconcelos left a signed medical certificate at the Casa de Repouso indicating that the cause

⁶⁰ 2006 Inter-Am. Ct. H.R. (ser. C) No. 149 (July 4, 2006) Report No. 38/02, Admissibility Petition 12.237 October 9, 2002

of death had been cardiorespiratory failure. The physicians of the Casa de Repouso were silent as to the torture and abuse suffered by Mr. Damião, and also as to the drugs taken. She adduced that Damião's family members, not trusting in the medical examiner's report that could be produced at the IML of Sobral, since Mr. Ivo de Vasconcelos, the Director of that Institute was also the director of the Casa de Repouso, took his corpse to the capital city for an autopsy. To the surprise and desperation of everyone, and in the face of all the physical evidence of torture, the autopsy report did not indicate the cause of death of petitioner's brother, concluding only that 'in the face of what is set forth above, we infer that it is an actual death of indeterminate cause.' The practitioner alleged that in the petition that reported the case to the competent authorities, she requested that the Civilian Police initiate an inquiry, and that the Federal Public Ministry initiate an administrative proceeding. She referred to several statements made by victims of the said Casa de Repouso. She also attached the Report prepared by the Group for Monitoring and Evaluation of Hospital Psychiatric Care (GAPH) when it visited the Casa de Repouso Guararapes at the request of the Commission on Human and Citizen Rights of the Legislative Assembly of Ceará. This was in view of the complaint lodged by the petitioner with that Commission, and, notwithstanding that initiative, according to the petitioner, the case was not duly investigated, no action was filed, the Casa de Repouso continued operating, and the guilty persons continued to go unpunished. The GAPH, when visiting the Casa de Repouso in November 1999, just after the incident alleged here, collected information on the reports of the death of Damião Ximenes. In that respect, they concluded as follows:

The 'Damião Case' evidences the precarious medical care, abusive treatment, various shortcomings listed in this report, which should be denounced to the various councils related to psychiatric care, and to the Public Ministry, for it to take the appropriate measures.

The report by the group of specialists in psychiatry and signed by Dr. Raimundo Alonso Batista de Aquino, Coordinator of Mental Health Care for the state of Ceará, supported the petition by the petitioner that the said Casa de Repouso was inadequate for the purposes to which it was established as follows:

The clinic does not have the conditions for operating, based on all the comments referred to above. Based on its strategic location, we suggest it be intervened, or that a similar measure be adopted, changing its management or having its license stripped by the Single Health System. Measures to be adopted by the municipal government of Sobral or in conjunction with the SESA.

Even though the petitioner had demonstrated the existence of a police inquiry and an administrative proceeding, there is nothing in the record about what happened in these procedures. Furthermore, the State has not provided the Commission any information as to the development and results of those procedures. Accordingly, the petitioner alleged that the State did not fulfill its obligation to carry out the judicial investigation in order to determine the responsibility for her brother's death. Specifically, she alleged State responsibility, as the State allowed and it continues to allow the operation of the said Casa de Repouso, which, through its staff of physicians, nurses, and monitors, dispenses cruel and inhuman treatment to its patients, treatment that caused the death of her brother Damião Ximenes Lopes. In its ruling, the Inter American Commission on Human Rights held that Brazil violated Article 4 of the Inter-American Convention on Human Rights as it relates to the right to life. This is in addition to Article 5 as it relates to the right to humane treatment. This implicates the State's generic obligation to respect and ensure the rights as established in Article 1(1) of the American Convention, to the detriment of Mr. Damião Ximenes Lopes.

8. Conclusion

This study involved an examination and discussion of the enforcement of the fundamental right to life of patients under the Fundamental Rights Enforcement Procedure. It was shown that patients have the right to life 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 life 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 life of patients in Nigeria.