CRITICAL APPRAISAL OF MEDICAL NEGLIGENCE IN NIGERIA

Ochem Charles Emeka*

Abstracts

I solemnly pledge to concentrate my life to the service of humanity, I will give to my teachers the respect and gratitude which are their due; I will practice my profession with conscience and dignity; the health of my patient will be my first conditions. I will respect the secrets which are confided in me, even after the patient has died; I will maintain by all means in my powers the honour and the noble traditions of the medical profession. My colleagues will be my brothers and sisters; I will not permit considerations of religion, nationality, race, party, politics, or social standing to intervene between my duty and my patient; I will maintain the utmost respect for human life from time of conceptions even under threat, I will not use my medical knowledge contrary to any laws of humanity[1].

* LLB, LLM, Ph.D, Senior Lecturer, Igbinedion University, Okada, Edo State, Nigeria. Email ochemistry2006@gmail.com

[1] **Hipocratic oath**, being an aoth taken by all medical practitional on their admission to the medical profession, It must be noted that the Hippocratic Oath did not become an integral part of ethical teaching until well into the Christian era. It lapsed with the decline of Greek civilization and was restored with the evolution of University Medical School .Hippocrates remains the most famous figure in Greek philosophical medicine. Its oath which was said to predate the school of Hippocrates himself brought about the fundamental governance of the medical profession which is summed as the medical ethics. The oath known as the **Hippocratic Oath** lays down guidelines ranging from coordinated instruction and registration of doctors to doctors being beneficial to the patient. It went further to say that the doctor must in the best of his ability do the patient good and does nothing that will cause him harm

> *Typically, whilst law is practised in the open court with members of the public and sometimes, the press, in close watch, medicine or the medical profession is practiced behind the fortress of Jericho-walls. Consequently whilst it is easy to identify a lazy, reckless and negligent member of the legal profession, it is not easy to do the same relative to a medical practitioner. The reason is, of course, obvious. The legal practitioner performs his legal functions before a sea of critical public eyes, carefully watching from the grand-stand, but the medical practitioner is locked up with his or her patient behind the iron-curtain of the theatre and the examination table*
> *- A.I .UMEZULIKE*[2]

Introduction

Medical Law is primarily concerned with the relationship between health care professionals (particularly Doctors and to some lesser extent hospitals or health care institutions) and patients. Also, respect for a person's body, respect for dignity, negligence, abortion, surrogacy, product liability, donation and transplant of human tissues and fluids, right to life and right to die, care of dying patients, death and dead bodies are common issues which do arise in medical law[3] .

Both in Nigeria and overseas, the health profession is being regulated by statutorily. In Nigeria, medical practice is governed by the provisions of the Medical and Dental Practitioners Act[4]. In the

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[2] Umezulike A I 'Liability of hospital in Medical Negligence: Are The Walls of Jericho Crumbling?' in Umezulike et al (ed) *Law Democracy and Its Dividends (Being an essay in honour of Chimaroke Nnamani*)Enugu, Snaap Press Ltd 2004 pp589-600 at pp589-590.

[3] Kenedy, I and Grubb,A; MEDICAL LAW (3rd ed) London, Buterworths (2000) P3

[4] Cap M21 LFN 2004.

United Kingdom, the health profession is regulated by a considerable number of legislation namely; the General Medical (Doctors) Medical Act[5], the United Kingdom Central Council of Nursing, Midwifery and Health (Nurses, Midwives and Health Visitors) Act[6]; and the General Dental Council (Dentistry) Act[7] , other health profession which are similarly regulated include Pharmacist[8]and Opticians[9]

Very early medicine was a matter of mystery. This was so because there was no apparent natural reason why disease struck one person rather than another, the answer had to be found in the natural and supernatural powers being sparingly distributed, healing became a prerogative of a few whose powers depended largely on the ignorance of others. At its inception, therefore, the medical profession was deficit and it was easy to imagine the transference of healing powers from the isolated tribal witch doctors to the priests of organized religion[10]

Priestly medicine extended the principle of supernatural power. Since the gods were the arbiters of life and death, those in association with them could reasonably be expected to inference successfully on behalf of the outsider; it was believed then that evil spirits at war with the gods who were themselves the protectors of the people caused disease. Religion and medicine therefore had the same objectives, a defence against evil which expressed itself in spiritual (disease of mind) or material (disease of the body) form. God used priests then. They were said to have powers. Apart from that, they were a relatively closed community who could learn from

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5 1983

6 1997.

7 1984.

8 Phamacy Act1954, now Cap P17 LFN 2004.

9 Opticians Act 1989 Now cap O9 LFN 2004 See also AKINTUNDE V CMDPDT (2005) 9NWLR Pt 9o4 P338

10 Mason and Mc Call Smith: ***Law And Medical Ethics***, London, Butterworth. (1983) P.3

each other and who cold appreciate the advantages of organization and codification. They could also teach and by virtue of their privileged position they could attract students from the higher reaches of society. Medicine thus developed both priestly and secular practitioners while still preserving the image of superiority[11].

Contemporary Medical Practice

The medical practice has from time immemorial, and universally still remains one of the most learned of the three original learned professions. These three primary learned professionals were the physician, the scribe (lawyer) and the priest.[12] It is the primary duty of every doctor to maintain this prima position in the society. Rules are therefore made to enable medical and dental practitioners in Nigeria maintain universally acceptable professional standards of practice and conduct as well as to meet the prescription of the Medical and Dental Council of Nigeria[13] with regards to ethics and the quality of professional practice.

Before a medical professional can be qualified to practice his profession he must register with the Medical and Dental Council of Nigeria who must first approve the institution, the course contents and the certificate to be awarded. The registrar of MDCN is saddled with the responsibility of preparing and maintaining in accordance with the rules of the council, register of names, addresses, approved qualifications and such other particulars as may be specified of all persons who are entitled in accordance with the positions of the Act to be registered as Medical and Dental

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[11] It can be said early medicine was derived from both Egypt and Babylon by 500 BC.

[12] Medical and Dental Council of Nigeria: Code of Medical Ethics in Nigeria; Revised Edn. January (2004) p.9.

[13] Hereinafter referred to as MDCN: Empowered to enforce the provision of the Medical and Dental Practitioners Act Cap M8 221 Laws of the Federal Republic of Nigeria 2004 Hereinafter referred to as LFN 2004.

practitioners and who have applied in the specified manner to be so registered.

Medical Negligence

The law of negligence is pervasive in that it is applicable to the conduct of every person whether layman or professional. Strict ethical standard are therefore required against negligence since a negligent act can cost a man or woman his/her limb, leg or hand and in extreme cases even life. The question what is negligence will now be answered. Thus if doctor holds himself out as possessing special skill and knowledge and he is consulted as possessing such skill and knowledge by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his discretion and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary, nor is it necessary that the service be rendered for reward[14].

Negligence has been defined as the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs would do or the doing of something which a reasonable and prudent man would not do.[15]

Negligence is the breach of a legal duty to take care which result in damage undesired by the defendant to the plaintiff[16]. That such a care is owed by a medical practitioner to the patient has long been recognized in common law[17]. This duty attaches to all those who

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[14] See **R V Bateman** (1925)94 LJKB 791

[15] Garner B.A. (Ed), ***Black's Law Dictionary*** (8th ed), US Thomson West, 2004 P1061.

[16] W.V. Rogers, M.A: ***Winfield and Jolowinz on Tort. (***15th Ed) London: Sweet & Maxwell, 1989 P. 72.

[17] See *Pippin V Sheppard* (1822) Ex. Ch. 11 Price 400.see also *Pimm v Roper* (1822) 2 F & F 783

hold themselves out as skilled in medical nursing and paramedical matters and arises independently of any contractual relationship[18]. The duty of care is imposed even when a practitioner acts gratuitously or in a voluntary capacity. The internal structure of the tort of negligence is simple and has proved to be a pragmatic cause of action which has had flexibility in adapting to changing social circumstances. To establish the existence of a duty of care the counts have held that there must be three interconnected, characteristic. First, there must be the foreseeability of harm, secondly a relationship of proximity between the plaintiff and the defendant and thirdly that it is fair, just and reasonable that a duty of care is imposed as matter of policy.[19]

According to Margaret Brazier[20]

> The patient… may feel that he had not been fully consulted or properly consulted about the nature and risks of the treatment. He may have agreed to treatment and ended up worse not better. Consequently a patient may seek compensation from the courts or he may simply want an investigation of what went wrong and to ensure that his experience is not suffered by others…[21]

To then maintain an action in negligence, the plaintiff must establish the following:

i. That the doctor owed him a duty of care
ii. That the duty was breached
iii. That he suffered damages caused by that breach.[22]

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18 Nelson-Jones R & Burton F ***Medical Negligent Cases*** *(*2nd Ed)London ,Butterworth, 1995 P. 18.

19 Ibid.

20 Margaret Brazier . ***Patient and The Law***, 2nd Ed (1992) Pp 21-22 cited in Kennedy and Brubb: ***Medical Law: Text with Materials***.(3rd ed) London, Butterworths (2000) P. 399.

21 Ibid.

The duty of care

A doctor will be in breach of the duty owed to his patient if the doctor fails to exercise the degree of care which the law requires. Unless a special contract has been made by a physician with the patient to affect a cure, the law does not impose any absolute obligation on the physician to cure or even to improve the patient's condition. The law however creates a broad standard of conduct and imposes the duty of conforming t that standard on any doctor or medical practitioner who undertakes to diagnose and treat a patient's illness[23]. In most countries the general nature of such a duty is well established and few have bee earlier on mentioned in chapter 2 of this essay. The rule is that, it is the obligation of the Physician to use "*reasonable care"* in all that he does or omits to do with respect to the patient. In the famous of Donohue V. Stevenson a manufacturer of ginger bear had sold to a retailer ginger beer in an opaque bottle. The retailer resold it to a man who treated a young lady, his acquaintance to its contents which included the decomposed remains of a snail which had found its way into the bottle of the factory. The young woman had consumed a substantial part of this drink before becoming aware of its impurity. She alleged to have become seriously ill in consequence and sued the manufacturer liable, the House of Lords held that the manufacturer owed the woman a duty to take care that the bottle did not contain noxious matter and that the manufacturer would be

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[22] A doctor will be liable in Negligence to a patient in the following instances. Failure to sterilize surgical equipment, cross-match blood for transfusion, give proper instructions and to communicate his findings to others responsible for continuing the treatment of a patient. He will also be liable when he administers medical treatment without proper diagnosis, prescribes expired drugs or sutures, uses out dated technique or procedures?. He will also be liable where he also uses a patient to experiment without his consent, falls to warn a patient of the likely side effects of a drug or even medical treatment, and gives cocaine injection instead of procaine?. Also where he forgets to remove scalpel, scissors, cotton wool etc in the bowel of a patient before stitching it up and gives a drug having the knowledge that a patient is intolerant to it?.

[23] Burke & Marcus: The law of Medical practice op cit. p. 116.

liable in negligence if that duty was broken. *In Kuechler V. Volgman*[24], this duty was described thus

> … the rule is that a physician is required to exercise only degree of care, diligence, judgement, and skill which other physicians of good standing of the same school or system or practice usually exercise in he same or similar localities under like or similar circumstance, having due regard to the advanced state of the medical profession at the time in question…

This is generally accepted legal standard of reasonable care for the medical practitioner and at such he must exercise this reasonable care and skill not withstanding whether he's treating a patient or such a service is being rendered purely out of charity[25] In *R.V. Bateman*[26] Lord Heward C.J. put the case thus

> If a person holds himself out a possessing special skill and knowledge, and he is consulted, as possessing such skill and knowledge by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his discretion and treatment accordingly, he owes a duty to the patient to sue diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary nor is it necessary that the service be rendered for reward.

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24 (1923) 180 Wis 238.

25 Umerah B.C*: Medical Practice and the Law in Nigeria*, Op cit p. 124. See also Ademola Yakubu, *Medical Law in Nigeria*, Ibadan, Demlax Press Ltd, (2002)P77see finally Olopade 'Consent And Informed Consent To Medical Treatment,' vol 3 *Igbinedion University Law Journal(* 2003) pp55 - 67.

26 (1925) 94 LJKB 791.

The duty of cared owed by a doctor raises by virtue of the legal concept of "holding out". If the medical practitioner allows or encourages the patient to believe that he is a doctor then a duty of care is applied which measures that doctor against the standard of the reasonable doctor in that situation[27].

It should be noted that this legal standard of case is related or should be related to current medical practices and the existing state of knowledge of the medical profession and this standard changes from time to time as conduct methods and procedures which constituted reasonable care in the past, even recent past as the case may be may not meet the legal standard at the resent time. It therefore seems that legal responsibility is placed on the physician to be enlightened on up to date technique and experiences in the art.

The law then requires the physician to keep abreast of modern knowledge and development in the medical field and related areas of leaning.

A doctor owes duty to patients in the ward in which he's employed as a doctor. A private physician who has contracted to provide medical services in the employment of a company owes a duty to such employers on the clinic list. In medical centres, a doctor employed to work owes a duty to take care of staff and student who come for treatment. It must be stated that it is not only doctors that owe a duty of care but other workers in the hospital like nursing staff, paramedics etc they all owe legal duties of care to their patients[28].
Where a doctor offers free services in an emergency, for example at the scene of a rod accident to the accident he's under a duty to use the same standard of care on the victims. In some American states

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[27] Andrew, Phillips: ***Medical Negligence Law Seeking A Balance***: Lagos, Dart Mouth publishing company, (1997). PP. 14 – 15.

[28] Burke & Marcus op cit. p. 124

the Good Samaritan Laws have been enacted which grants a doctor relieve from liability for ordinary negligence in cases such as this. This according to O. O Okonkwo[29] is to encourage doctors who pass by the scene of accidents to stop and render medical aid to the victims of an accident without fear of a civil action against them though if they decide not to help out no liability can be exercised against them.

On the test of medical Negligence, two leading case readily come to mind and they are *Bolam V. Friern Hospital Management Committee*[30] and *Hunter V Hanley*[31]. Although, they have been developed periodically to apply to new circumstances, the test is same in England and Scotland and their substances have stood the test of time[32]

In *Bolam's case*, Mc Nair J said:

> It is sufficient if he (the doctor) exercises the ordinary skill of an ordinary competent man exercising that particular art.

And in Hunter's case, Lord President Clyde said:

> The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty and such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care.

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29 B.C. Umerah, (Ed): *Medical practice and the Law in Nigeria_Ikeja, Longman,(2003) P 72 see also Ogwuche, S.* O **A** *Compendium Of Medical Law Under The Commonwealth & United States Legal System,* Lagos Maiyati Chambers (2006)

30 (1957) 1 WLR 582,

31 (1955) SC 200

32 Andrew. F. Philips: *Medical Negligence Law, Seeking A Balance* op cit p. 124.see also Ademola Yakubu *Medical Law In Nigeria* opcit *72 see also Ogwuche, S.* O *A Compendium Of Medical Law Under he Commonwealth & United States Legal System, op cit*

This approach applies to all aspects of clinical activity that is diagnosis, advice, treatment etc. it must be noted here that its not all errors of judgment that are automatically indicative to negligence as occurrence of a mistake of even an adverse treatment or outcome may occur in the absence of negligence. The point simply recognises that medical treatments is not an exact science, nor are favourable outcomes always to be anticipated[33]. In Bolam's case again, Mc Nair J went further to explain on this issue.

> A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical man skilled in that particular art… a doctor is not negligent, I his action is in accordance with such a practice, merely because there is a body of opinion that takes a contrary view.

Where there are different bodies that take dissenting opinion as to an issue in which a case of supposed negligence has occurred by reason of which the doctor followed a particular opinion, as seen in Bolam's case, where two schools of professional thoughts were involved. One on which the defendant adhered which held that relaxant drugs should not be given with electro-conclusive therapy (ECT) and the other thought that such drugs should be given. McNair J. stated that in cases of this nature, established adherence to a responsible body of opinion was sufficient to avoid a finding of negligence, this approach which was approved by the House of Lords in *Maynard V. West Midlands's Regional health authority*[34] and also *Sideway V Board of Governors of the Bethlem Royal Hospital*[35]**.** However, in *Maynard's case***,** *Lord Scarman* explained thus:

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[33] Ibid.

[34] (1984) 1 WLR 634

[35] Supra.

> Differences of opinion and practice exist, and will also was exist in the medical as in other profession…A court may prefer one body of opinion to the other, but that is no basis for a conclusion of negligence[36]

On duty of a specialist, we'll start by defining who a specialist is. A specialist is a physician who devotes special attention to a particular organ or bodily region and to the diagnosis and treatment of its injuries, diseases and ailment. The duty imposed by law on one who is a specialist is measured to be of a higher standard than that applicable to a general medical practitioner. A specialist is required to possess a higher degree of knowledge and ability and to exercise the amount of care and skill which are ordinarily possessed and exercised by specialist of a similar class, having regard to the current state of knowledge in medicine and surgery in his field[37]

Where a medical practitioner discovers, or in the exercise of reasonable care should have discovered that his patient's ailment or disease as the case may be in one beyond his knowledge, skill, capacity or competence to treat with a reasonable likelihood of success, it is his duty to disclose the situation to his patient and advise him of the necessity of other or different treatment. Where he fails to do so and continues with such treatment, he will be held liable for negligence if harm come to his patient.

Breach of duty of care

If a doctor does not possess the required degree of knowledge or fails to exercise the require degree of skill and care necessary to diagnose and treat the illness of his patient, he breaches the legal duty owed to his patient, such failure or breach of duty is said to constitute "negligence" and thus make the physician liable. In law,

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[36] Supra p. 18.

[37] Burke & Shartel: Op cit Pp. 117 – 118.

the term negligence is not necessarily synonymous with "Carelessness". Carelessness may constitute negligence in a given case but not all negligence involves carelessness. A physician who lacks the required degree of knowledge or skill may be as careful as he can be, but minimum legal standard because of his deficiencies. Thus if an obstetrician undertakes a complicated cardiac surgery when the patient could have been referred to a cardiac surgeon that obstetrician must conform to the standard of the cardiac surgeon. If he doesn't then it will constitute negligence on his part to undertake the treatment at all knowing that as an obstetrician he does not posses the special skill and facilities required for cardiac surgery[38].

Where there is an emergency on the other hand or any circumstance which compels a doctor to render medical service outside his area of speciality the law will not require the doctor to confirm to the standard of specialist in that area of medicine but the average standard of an average doctor of similar experience working in similar circumstances[39].

Doctor also should be free to take initiative and confidence which is necessary of the proper exercise of their noble profession instead of trying to watch their back against cases of litigation on them for various reasons. In Hatcher V Black[40] the plaintiff a singer suffered from a diseased thyroid gland. She underwent a thyriodectomy after being assured that there was no risk to her voice. A nerve was badly injured in the operation that the plaintiff's voice was damaged. The doctor knowing these was a slight risk to the plaintiff's voice chose to tell her there was none, to prevent her from worrying. In an action against the doctor for negligence.
Lord Denning directed the jury thus.

> It will be wrong, and indeed, bad law, to say simply because a misadventure or mishap occurred, the

[38] Umerah B.C. Op cit p. 125

[39] Ibid.

[40] (Unreported***) see*** *Times* 2nd of July 1954.

> hospital and the doctors are thereby liable… It will mean that a doctor examining a patient or a surgeon… would be forever looking over his shoulders to see if someone was coming up with a dagger for an action for negligence against a doctor is for him like unto a dagger… You must not, therefore, find him negligent simply because something happens to go wrong, if, for instance, one of the risks inherent in an operation actually takes place or some complications ensures which lessens or takes away the benefits that were hoped for, or if in a matter of opinion he makes an error of judgement, you should only find him guilty of negligence when he falls short of the standard of reasonably skilful medical man. In short, when he is deserving of censure for negligence in a medical man is deserving of censure

The jury found the doctor not negligent.[41]
Conducts which then constitute breach of duty may take different forms and it will briefly be discussed below.

Damages as a Result of the Breach

Where a plaintiff has suffered some harm in the cause of treatment given to him by a doctor, he has a cause of action in court against that doctor which might find the doctor liable. It will not be sufficient that the doctor was negligent in giving medical treatment to the plaintiff and the plaintiff suffered some harm, it must be shown that the harm was caused by the doctor's negligee. Though damages will still be broadly discussed later in this chapter, it will however be mentioned here. The burden of proofing the negligence

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[41] Burke & Shartel op. cit p. 125. Conducts which may constitute breach of duty may take different forms and may include the following; Superficial diagnosis. Failure to follow standard procedures, Failure to consult patient's Prior consent, Failure to give proper Instruction, Failure to refer to a specialist or to another method of treatment' the list is inexhaustive.

is on the one asserting which is the plaintiff. And it will be done by showing that on a balance of probabilities, the harm was so caused.[42]

The process of deciding whether plaintiff has met his burden of proving that the physician was negligent require the court to appraise and weigh the evidence produced by each side. This is however no fixed mechanical rule to be used by the court in this process. It is a matter of the number of witnesses or documents on one side as against the number on the other. However, the courts often, adopt a broad commonsense approach in resolving an issue of this nature. That is if the damage would have occurred despite the doctor's negligence, then the negligence did not cause the act.

In *Barnett V. Chelsea and Kensington Hospital Management Committee*[43] three fellow night watchmen presented themselves at the casualty department of a hospital complaining to the nurse on duty that they had been vomiting for three hors after drinking tea. The nurse called the casualty doctor on phone relaying the message. The doctor without seeing them told the nurse to tell them to go home to bed and call in their own doctors. The doctor himself not being well. The men left and five hours later one of them died from arsenic poisoning. His widow brought an action claiming that the death resulted from the casualty doctor's negligence in not diagnosing her husband's condition and treating him. It was held that the doctor was negligent in not seeing and examining the deceased and admitting him for treatment. But further, dismissed the case because, evidence that the deceased would have died in any even if he was admitted into the words five hours earlier and treated with care. The widow therefore failed to prove that the death was caused by the doctor's negligence.

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[42] Umerah B.C. Op cit p. 126.

[43] (1969) 1 Q.B. 428.

In the case where damage was cause as a result of drugs administered, most times it's difficult for the plaintiff to prove or establish negligence unless there is a prima-facie case of an overdose as was seem in *R.V. Akerele*[44]**.** Where a doctor, who administered drugs to children, who later died from overdose of those drugs. The doctor nevertheless escaped liability. If a patient must establish negligence, then he must be able to connect the negligent act of the doctor to the damage done to him and that damage must not be too remote to be a consequence of the doctor's negligent.

Criminal Liability of Doctors

Liability may occur or arise not only from the doing of a positive act, for example administering the wrong treatment but also from negligent omission to do an act. It may be from a lack of care from a doctor to the patient under his care to various other means. In Nigeria, there is no specific criminal law relating to the doctor and his patient though there are provisions in the **Criminal Code**[45] of Nigeria as regards doctor/patient relationship.

Section 300 of the Criminal Code provides;

> It is the duty of every person having charge of another who is unable by reason of age, sickness, unsoundness of mind, detention or any other cause to withdraw himself with the necessaries of life, whether the charge is untaken a contract, or is with the necessaries of life, whether the charge is untaken under a contract, or is imposed by law or arises by reason of any ct, whether lawful or unlawful, of the person who ha such charge, to provide for that other person the necessaries of life, and he is held to the life of health of the other person by the reason of any omission to perform that duty.

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[44] (1914) 7 WACA. 56.

[45] Cap. C38: Laws of the Federation of Nigeria 2004

Under this provision, a doctor's patient is under his care and is under an obligation to provide that which will help to sustain his health as any consequence as to the health of that patient will be on him and if negligent, the patient having a cause of action. Also Section 303[46]

> It is the duty of every person who, except in a case of necessity who 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 case in doing such act, and he is held to have caused any consequence which result to the life or health of any person by reason of any omission to observe or perform that duty.

An example of a consequence, which might result as to the health of any person (a doctor's patient) can be said to be murder or culpable homicide.

Where such Murder or culpable homicide is punishable with death, the plaintiff must be able to establish that the doctor intentionally caused the death or the grievous harm, which causes the death that, occurred to the plaintiff. Or in the alternative that the doctor knew or had reason to belief that death would be a probable consequence of his act[47]. The problem the plaintiff will encounter is how to prove the negligence of the doctor and his non-observance of the rule of foresee ability as to the likely consequence of his action to the patient or that the negligent act or omission exercised by the doctor was he actual cause of the damage which occurred to him.
In a claim against a doctor, the prosecutor has a higher standard to prove which must be "beyond reasonable doubt". In cases of criminal liability where there must be a criminal act *(actus reus)* it

[46] Ibid.

[47] Umerah B.C. cit p. 119 – 120.

must have been accompanied with the appropriate state of mind which is the *(Mens rea)* where these two are not present, there can b e no conviction. In serious cases of liability, other mental element that can be proved is deliberate intention (that is a knowing intention to harm) by the physician and recklessness (meaning the physician did not consider the risks involved)[48].

The dividing lie between criminal and civil law is drawn between recklessness and negligence and less serious of the two is negligence, which is more of a civil matter. Negligence is analogous to carelessness, and is less serious than recklessness although both may involve failure to consider risk. Be that as it may it can be seen that the test for the standard of care which is the focus of negligence, is an objective and[49] that is depending on the case at hand.

Death in medical cases could arise in different way. It could be as a result of euthanasia or it could be s a result of substandard treatment being administered to the patient by the doctor. This simply means death may have been intended as in the case of the former or unintended as in the case of the latter. In R v. Cox[50]. Dr. Cox a rheumatologist had allegedly given a patient suffering from a terminal and excruciating painful condition an injection of potassium chloride. He was convicted for attempted murder. In this case, the court tried to differentiate situations in which something was done primarily to assist patient's in the words of the court.

> If a doctor genuinely believes that a certain course is beneficial to his patient, either therapeutically or analgestically then even though he recognizes that the course carries with it a risk to life, he is fully entitled, nonetheless to pursue it. If in these circumstances the patient dies: nobody could

[48] Andrew F. Phillips: *Medical Negligence case* Op cit 98.

[49] Ibid.

[50] (1992) 12 BMLR 38

> possibly suggest that in that situation the doctor was guilty of murder or attempted murder[51].

In England and Scotland, where substandard treatment is the resultant cause of death, involuntary manslaughter and involuntary culpable homicide is the relevant crime. Most times, manslaughter is the crime for medical mistakes. According to *C.O. Okonkwo in a book Medical Practice & the Law in Nigeria,* he said in a case of criminal liability.

> …the degree of negligence required is more than what is necessary for a mere matter of compensation that is for civil liability. To ground a conviction for manslaughter or culpable homicide not punishable with death, there must be gross negligence or recklessness…[52]

In Scotland, the degree of negligence is that of recklessness that is negligence of a particularly high degree, which is also called criminal negligence. An author said the negligence ,must be above the ordinary tortuous negligence[53]. In ***R.V. Akerele*[54]**, Dr. Akerele a qualified medical practitioner in Nigeria, on 6th and 7th of May 1941 treated 57 children in Asaba suffering from Yaws. He injected nearly all of them with sobita a short word for Sodium bismuth Tart rate. Ten of the children died. He was charged with Manslaughter of one of them, Kalu Ibe. The trial judge found that he negligently prepared too strong a mixture of sobita which resulted to poisoning of the boy. The accused was convicted and sentenced to imprisonment. The court of Appeal upheld the conviction but on appeal to the Privy Council, it was held that the single dose of mixing too strong a solution in making up the preparation of drug

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51 Ibid p.38.

52 Op cit p. 120.

53 Okonkwo & Nash, *Criminal law in Nigeria*: (2nd Ed). Ibadan, spectrum , (1980) p. 253.

54 (1941) 7 WACA. 56.

didn't amount to criminal negligence. The negligence to be imputed depends on the probable, not the actual result. The fatal consequence to the ten children did not convert carelessness into criminal negligence[55]. It can be said that where there is gross negligence, what is paramount is the nature of the act alleged to be negligent e.g. (mixing the drug in this case) and this is to be judged in the light of its probable consequences and not in the light of the actual result that did occur.

In **Section 343(1)** of the **Criminal Code** 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.

a. gives medical or surgical treatment to any person whom he has undertaken to treat or
b. Dispenses, supplies, sell, administer, or give away, any medicine, or poisonous or dangerous matter is guilty of a misdemeanour and is labile to imprisonment for one year.

The offence here is a misdemeanour and the degree of negligence which will ring about a conviction is not as high a in a prosecution for manslaughter which is of a stiffer punishment. Criminal liability cases are rare and this is because criminal law seeks to punish and stigmatise people and society generally find any criminal act reprehensible and damaging. It kills generally the confidence of other doctors and if used very often will not be of benefit to the society as doctors and even specialist might object to undertaken risks for the sake of their patient.

Where a registered medical practitioner or dental surgeon is convicted by any court in Nigeria or elsewhere which has the power ot award imprisonment for an offence within the opinion of the medical and dental council is incompatible with the status of a medical and dental practitioner whether or not such an offence is

[55] Rodney Nelson – Jones op cit. p. 223.

punishable with imprisonment, particular conviction (s) such may afford a ground for the striking off the practitioners name from the register of the medical and dental council of Nigeria[56]

Civil Liability

A doctor that is not charged for criminal negligence might be liable in tort against the patient to whom he owes a duty of care. Negligence must be established by the plaintiff on a balance of probabilities and the ingredients of the tortuous act of negligence must have been present: that is, the doctor owes a duty of care to the patient, breached that duty owed the patient and thirdly damage occurred to him as a result of the breach of duty to the patient. In a test for medical negligence, Mc Nair J said in Blam's case,[57] that
It is sufficient if he (doctor) exercise the ordinary skill of an ordinary competent man exercising that particular art.

Where a medical practitioner is found liable in a case of medical negligence, the burden being on the plaintiff to establish that the medical practitioner was negligent and being so established to the satisfaction of the court, the court may find the practitioner liable and in most cases he is made to pay for damages.

Role of Court in Medical Negligence

Medical negligence is the failure by healthcare professionals either doctors, nurses or other allied professionals to take reasonable care of a patient constituting a breach of duty. When a patient sues his doctor, he should be able to convince the court that the doctor was bound to take care of him and demonstrate that the doctor neglected his duty. He should prove that he suffered damage, caused by the doctor's conduct. In other words, the patient has to establish the guilt of the doctor.

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[56] Code of Medical Ethics in Nigeria op cit p. 68.

[57] supra

The doctor on his part has to prove his innocence before the court. The doctor would be able to prove his innocence if the negligence is self-evident. This would occur in three circumstances: when the damage could not have occurred without negligence, when the patient has not contributed to his own injury, or when the doctor is in complete control of the situation as in an operation theatre.

Courts on their parts try to be careful or wary of Cranks and Pranksters[58]. If a case for instance doesn't appear genuine, the complaint may be dismissed. The court may penalize patients who file frivolous complaints. A case of medical negligence is stronger where the patient has followed doctor's instruction diligently, also where patient has paid for his treatment promptly, and done all demanded by the hospital. This is important to the patient's case as this little piece of paper demanded matter in court. Also all medical records and bills must be carefully preserved and files updated after the patient must have left the hospital.

Since the court is most times not well vast in the field of medicine. The court most time welcome expert opinions where medical negligence is involved. The service of a forensic medical doctor comes in handy. Here the appearance of such a doctor is to give oral evidence on work done and medical reports prepared by the doctor.

It must be noted that a medical witness whose opinion is to assist the court solve a problem must not be biased even though he's called to testify by one side of in the case. He must be honest and must not be involved in suppression of facts.
In conclusion, the court which can be said to be the last hope of the common man is always called to force when the rights of a patient is breached by a medical practitioner. The court exercising its power as enshrined in *Section 6* of the Constitution of the Federal republic of Nigeria 1999 which provides that the judicial power of

[58] Agbebaju U J loc cit.

the Federation shall be vested in the courts and they are quick to adjudicate on such matter so that justice is done to deserving cases and remedies in the likes of damages to compensate victims who have suffered one form of injury or the other[59].

Conclusion

In this work, efforts have been made to discuss the critical appraisal of medical negligence; this became necessary because of the importance of medicine to mankind, it has been highlighted that before a medical practitioner will be found wanting, there must be a duty of care which the medical personnel owed the patient, and there must be a breach of this duty and the patient of course must have suffered damages.

In Nigeria, illiteracy, poverty and ignorance of one's legal rights and legal protection makes people unable to pursue any course of action open to them, when they suffer ill-treatments and sometimes, irreversible bodily and mental damage (or even, death) in the hands of medical practitioners. Also an average doctor in Nigeria is idolized and much revered by the society making his short-coming easily excused. So we have situations that most times, the Doctor gets away with his fault without remedy to the injured party. , it was discussed that medical law is concerned mainly with the relationship between healthcare professionals and patients, the relationship thereto is governed by law both nationally and internationally, in Nigeria, medical practice is governed by the provisions the Medical and Dental Practitioners Act [60], in the United Kingdom, medical practice is regulated by the General Medical Act, the United Kingdom Central Council of Nursing , Midwifery and Health Act as well as the General Dental Council Act[61]

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[59] See the published wonderful work of Agebaku U J, title *Doctor And Patient;The Legal Implication Of Medical Negligence*, Obafemi Awolowo University , Ile-Iife ,

[60] Cap M21 LFN 2004

[61] 1983, 1997 and 1984, respectively.

A Medical Practitioners owes his patient a duty of care and a breach of this duty of care is tantamount to negligence, and when this negligence occur the patient is entitle to damages , this is the fulcrum of this paper, it is submitted that laws have been enacted to curb or cure the incidence of medical negligence, but the problem is now that of enforcement, it is suggested that the citizenry be educated about their rights and the medical practitioners on the other hand be educated on the extent of their rights, privileges and duties their patients.