

## APPLICABILITY OF THE DOCTRINE OF *RES IPSA LOQUITUR* IN MEDICAL NEGLIGENCE IN NIGERIA

### **Abstract**

*Medical negligence or malpractice is a recurrent challenge in the field of medical practice. This occurs as a result of failure to exercise due diligence in the acts or omissions of medical practitioners while discharging their duties in the treatment and care of their patients. Before a patient can obtain damages from the medical practitioner/doctor or hospital (defendant) for injury suffered, he has to prove that the defendant's negligence is the cause of the injury. However, majority of medical negligence/malpractice cases are difficult to prove by the plaintiff, hence, the latter relies on the doctrine of Res Ipsa Loquitur which shifts the onus of proof to the defendant. Thus, this paper examines the elements of negligence in tort; and medical negligence; the concepts of vicarious liability, occupier's liability, contributory negligence; and the principle of Res Ipsa Loquitur and its elements. It further discusses the synergy between Res Ipsa Loquitur and medical negligence; and finally concludes by making few recommendations.*

**Keywords:** *Medical Negligence/Malpractice, Duty of Care, Breach of Duty, Damages, Res Ipsa Loquitur, Nigeria.*

### **1. Introduction**

Lanre Onidundu was rushed to the Gbagada General Hospital with a gunshot wound to the leg after being shot by bank robbers. He says that upon arriving at the hospital, he was left unattended to for hours and when a medical officer finally attended to him, his wounded leg was wrapped up with brown carton papers following an injection treatment for his pain. Onidundu alleges that due to the hospital's medical negligence – a lack of facilities, inexperienced medical staff, delayed treatment and poor management of his wound – his leg deteriorated and eventually required amputation. Today he lives in Germany with a prosthetic limb, his price for medical negligence. Despite the life-altering consequences, Onidundu never reported his case. The experience itself was too draining for him to think of anything, let alone filing a court case. 'The psychological impact on me was there [at that time].' In addition, he had already lost his leg and felt 'the deed has already been done.' Still, as he looks back on the incident today, he wishes that he had taken some form of action. He says, 'I would not want the effect of the same negligence by the medical personnel to be suffered by other Nigerians.'<sup>1</sup>

This pathetic story is one out of the numerous medical negligent/malpractice cases encountered by patients in Nigerian hospitals. Several victims take no legal action against negligent practitioners, but, those that do fail to prove breach of duty by the doctor. However, the proof of majority of these cases may be shifted to the defendant doctor/hospital by establishing the doctrine of *res ipsa loquitur*. Thus, this paper shall study the elements of general negligence and medical negligence. It will also discuss in brief the doctrines of vicarious liability, occupier's liability, and contributory negligence. The principle

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<sup>1</sup> Temitayo Olofinlua, 'Medical Negligence in Nigeria [Part 2]: The Slow Road to Justice.' <<http://www.radianthealthmag.com/health-wellness/medical-negligence-in-nigeria-the-long-road-to-justice/>> accessed 18 November 2017.

of Res Ipsa Loquitur, its elements, and the synergy between *Res Ipsa Loquitur* and medical negligence will also be analysed. In conclusion, recommendations will be made on how negligence can be reduced in medical practice in Nigeria.

## **2. Negligence**

Generally, negligence is the breach of a legal duty to take care which results in damage undesired by the defendant, to the plaintiff.<sup>2</sup> Similarly, Lord Wright in the case of *Lochgelly Iron and Coal Co. Ltd. v. McMullcan*<sup>3</sup> defined negligence thus: ‘In strict legal analysis negligence means more than heedless or careless conduct, whether in omission or commission. It properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owed’. Therefore, negligence can be defined as the commission or omission of a careless or reckless act by the plaintiff who owes a duty of care to the defendant, and who fails in his duty to be careful, which in turn results in damages. There are three essential elements of negligence which a plaintiff must establish in order to succeed in an action for negligence.<sup>4</sup> The elements are: 1) A duty of care owed by the defendant to the plaintiff; 2) Breach of that duty by the defendant; and 3) Damage to the plaintiff resulting from the breach.

### **2.1. Duty of Care**

A duty of care arises wherever in the circumstances it is foreseeable that if the defendant does not exercise due care, the plaintiff will be harmed.<sup>5</sup> This foreseeability test came up in the case of *Donoghue v. Stevenson*<sup>6</sup> where the plaintiff sued the defendant in negligence alleging that she fell ill as a result of drinking ginger beer manufactured by the defendant which contained a decomposed snail. The ginger beer was bought from a retailer by a friend. The beer was sold in an opaque bottle so that the poisonous substance could not be seen and was not discovered until the lady was refilling her glass. The lady had no cause of action in the law of contract against either the retailer or the manufacturer because there was no privity of contract between the plaintiff and the defendant. However, she sued under the tort of negligence and the court held that a manufacturer of an article owes a duty of care to the ultimate consumer to see that the article is free from any defect likely to cause harm. Consequently, Lord Atkin laid down the principle:

The rule that you are to love your neighbor becomes, in law, you must not injure your neighbor and the lawyer’s question, ‘Who is my neighbour?’ receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would likely to injure your neighbor. ‘Who, then in law is my neighbor?’ The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplations as being so affected when I am directly my mind to the acts or omissions which are called in question.

‘The neighbour principle’ above is based on reasonable foreseeability or proximity. Proximity does not necessarily mean physical nearness but reasonable foreseeability, which is generally known as the neighbour test. Who then is my neighbour? My neighbour is anyone in the world who will be injured by my negligent act/conduct. Where injury is not reasonably foreseeable or damage is remote, there is no liability. Thus, a vehicle driver owes a duty of care to his neighbours that is, other road users, pedestrians and occupiers of premises on the highway to drive carefully. An employer of a factory also

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<sup>2</sup> W. V. H., Rogers, *Winfield and Jolowiz on Torts* (1<sup>st</sup> Ed, London: Sweet and Maxwell, 1998) p. 132.

<sup>3</sup> (1934) A. C. 1 at p. 25.

<sup>4</sup> *Royal Ade Ltd. v. National Oil and Chemical Marketing Company Plc* (2004) 117 LRCN 3899 at 3904 (SC).

<sup>5</sup> Kodilinye and Aluko, *The Nigerian Law of Torts*, (1<sup>st</sup> Ed, Ibadan: Spectrum Books Ltd, 1996) p. 39.

<sup>6</sup> (1932) AC 562.

owes his neighbours (employees) a duty of care to provide safe working environment and adequate equipment to them.

## 2.2. Breach of Duty of Care

In deciding this question, the court considers the standard of care expected of the defendant. This standard of care is that of a reasonable man, that is, whether or not a reasonable man, placed in the defendant's position, would have acted as the defendant did. To this end, Alderson B., in *Blyth v. Birmingham Water Works Company Co.*,<sup>7</sup> states:

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would do, or doing something which a prudent and reasonable man would not do.

Hence, a reasonable man is a person of normal/ordinary intelligence,<sup>8</sup> or a normal adult possessing the degree of common-sense or knowledge of everyday things.<sup>9</sup> Accordingly, in order to decide what a reasonable man would do in a similar circumstance or to assess the standard of care expected of a defendant, the court will consider the 'risk factor' which comprises of four elements vis-à-vis: the likelihood of harm; the seriousness of the injury that is risked; the utility or importance of the defendant's activity; and the cost and practicability of measures of avoiding the harm.

## 2.3. Damages

Having established that the defendant owes the plaintiff a duty of care and the former is in breach, the next step is for the plaintiff to prove that he has suffered hurt or damage for which he should be compensated as the overall purpose of damages is to put the claimant back into the position he or she would have been in had the accident not occurred. Thus, the test to be employed in resolving whether the defendant's breach of duty caused the damage is called the 'but-for' test, that is, would the damage have happened but for the defendant's negligent act? If yes, then, the act will have caused the damage. However, in *Ajaegbu v. Etuk*,<sup>10</sup> the plaintiff was unable to establish that the damage suffered was as a result of the breach of duty by the medical practitioner.

## 3. Medical Negligence

Medical negligence, also known as, medical malpractice is an act or omission (failure to act) by a medical professional that deviates from the accepted medical standard of care.<sup>11</sup> Furthermore, medical malpractice occurs when a health care professional or provider neglects to provide appropriate treatment, omits to take an appropriate action, or gives substandard treatment that causes harm, injury, or death to a patient.<sup>12</sup> For instance, where a medical practitioner had the consent of his patient to treat him, but such treatment did not conform to the standards imposed on the medical practitioner by law.<sup>13</sup> Therefore, medical negligence or malpractice can be defined as an act or omission by a doctor in

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<sup>7</sup> (1856) 11 Ex Ch 781, 156 ER 1047.

<sup>8</sup> *Vaughan v. Menlove* (1837) 132 ER 490.

<sup>9</sup> *Caminer v. Northern & London Investment Trust* (1951) AC 88.

<sup>10</sup> (1962) 6 ENLR. 196.

<sup>11</sup> David Goguen, in AllLaw, 'Medical Negligence', <<http://www.alllaw.com/articles/nolo/medical-malpractice/negligence.html>> accessed 19 November 2017.

<sup>12</sup> Christian Nordqvist, in MedicalNewsToday, 'Medical malpractice: What does it involve?' (2017) <<https://www.medicalnewstoday.com/articles/248175.php>> accessed 19 November 2017.

<sup>13</sup> Ishak Bello, 'Tortious Liability of Medical Practitioners in Nigeria: An Appraisal', A Thesis Submitted in Partial Fulfilment of the Requirements for the Award of the Degree of Master of Laws (LL.M.) of the Faculty of Law Ahmadu Bello University, Zaria, Nigeria, 2000, p.9.

providing treatment which falls below the accepted standard of practice in the medical community, causing injury or death to the patient.

### **3.1. Duty of Care**

The duty of care and standard of care in medical negligence are quite different from those of negligence in tort. This is because a medical practitioner does not owe all patients worldwide a medical duty to treat them, except those that have entered into contractual relationship with him. Before a medical practitioner can be said to owe a patient a duty of care, there must have existed a doctor-patient relationship between them, that is, a patient must have gone to the medical practitioner for treatment, the latter must have offered to treat him, and the former must have accepted that the doctor should treat him. Thus, the law implies a contract in any circumstance where a patient submits himself to a doctor for treatment, and there is an implied term of contract that a doctor will exercise reasonable care and skill in the treatment of his patient.

According to Halsbury's Law of England,<sup>14</sup>

A person who holds himself out as ready to give medical advice or treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person, whether he is a registered practitioner or not who does a patient, consult, owes him certain duties, namely, a duty of care in deciding what treatment to give and a duty of care in the administration of that treatment. The practitioner must bring to his task a reasonable degree of care. Neither the very highest, nor very low degree of care and competence judged, in the light of the particular circumstances of each case is what the law requires; a person is not, liable in negligence because someone else of greater skill and knowledge would have prescribed different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a reasonable body of medical men skilled in that particular art, although a body of adverse opinion also existed among medical men.

Therefore, where a medical practitioner holds out himself as a good surgeon, he must measure up to the standard generally acceptable in the field of surgery. For instance, in *Mahon v Osborne*,<sup>15</sup> the majority of the judges of the Court of Appeal held that the surgeon should explain how a swab came to be left in the patient's abdomen. Towards the end of the operation, a nurse has assured the surgeon before the abdomen was closed that all the swabs used for the operation had been removed. In spite of that evidence the court felt it was the responsibility of the surgeon to have ascertained this fact. It is prima facie negligence to omit to remove such materials from the body of the patient at the end of surgery.

Where a patient relies on the skill and knowledge of a provider with respect to his/her health, a duty of care arises. Furthermore, a medical practitioner is expected to upgrade his skill as best as possible in the light of advancing knowledge in the profession.<sup>16</sup> To achieve this aim, it is necessary for a doctor to regularly participate in programmes of continuing medical education in order to remain relevant in practice and to achieve renewal of his practising licence.

Also, in *R v Bateman*<sup>17</sup> the court explained that:

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<sup>14</sup> See G. Kodilinye, (n. 5) p.83.

<sup>15</sup> (1939) 2 KB 14.

<sup>16</sup> In *Roe v. Minister of Health* (1954) 2 QB 66, the anaesthetist injected the two plaintiffs with contaminated anaesthetic, which caused them paralysis from the waist downwards. The anaesthetist was held not to be negligent because the risk of such contamination was not generally appreciated by competent anaesthetists at that time.

<sup>17</sup> [1935] 94 K.B. 791

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

Similarly, section 230 of the Criminal Code Act<sup>18</sup> requires a person who undertakes to administer surgical or medical treatment to possess reasonable skill and use reasonable care in acting. Consequently, a medical practitioner owes his patient a duty to use due diligence, care, knowledge, reasonable care, skill and caution in deciding what treatment to give, omitting to take an appropriate action, giving of substandard treatment and a duty of care in the administration of that treatment that causes harm, injury, or death to a patient.

### 3.2. Breach of Duty of Care

A practitioner will be in breach of the duty of care he owes a patient if he fails to exercise the standard of skill and care which the law expects of him. The standard expected of a doctor is the skill and care expected by the most experienced doctor, taking into account the practice location of the practitioner,<sup>19</sup> the time and the availability of medical materials. The reason is that some practitioners may be more educated than the others, so, a doctor need not possess the highest expert skill but it is enough if he exercises the ordinary skill and care of an ordinary competent doctor exercising that particular act, placed in the same circumstances. However, the standard required of a specialist is higher than that required of a pupil doctor because he is an expert in his particular speciality.<sup>20</sup> Hence, the standard is an objective one.

*Bolam v. Friern Hospital Management Committee*,<sup>21</sup> also known as ‘Bolam Test’ lays down the rule for assessing the appropriate standard of reasonable care in medical negligent cases. In that case, Mr Bolam was a voluntary patient at Friern Hospital, a mental health institution run by the Friern Hospital Management Committee. He agreed to undergo electro-convulsive therapy. He was not given any muscle relaxant, and his body was not restrained during the procedure. He flailed about violently before the procedure was stopped, and he suffered some serious injuries, including fractures of the acetabula. He sued the Committee for compensation. He argued they were negligent for not issuing relaxants, not restraining him and not warning him about the risks involved. The court held that:

...But where you get a situation, which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill; neither that of a specialist of perfection; nor that of one with Olympian reputation, but an average yardstick of reasonableness and objectivity. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art... I myself would prefer to put it this way, that he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.

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<sup>18</sup> Criminal Code Act, Cap. C38, Laws of the Federation of Nigeria 2004.

<sup>19</sup> In *Warnock v Kraft* (1938) 85 p. 2nd 505, it was explained that a doctor in a small community or village not having the same opportunity and resources or keeping abreast of the advances in his profession, should not be held to the same standard of care and skill as that employed by physicians and surgeons in large cities.

<sup>20</sup> *R v. Akerele* (1942) 8 WAKA 56.

<sup>21</sup> [1957] 1 WLR 582 at 586.

Thus, where the defendant has represented himself as having more than average skills, this test expects standards which must be in accordance with a responsible body of opinion, even if others differ in opinion, that is, according to Bolam test, 'If a doctor reaches the standard of a responsible body of medical opinion, he is not negligent'.

In Nigeria, the body of medical opinion that prescribes standards of practice for medical professionals is the Medical and Dental Council of Nigeria. The Council was established by the Medical and Dental Practitioners Act<sup>22</sup> which regulates the Medical and Dental professions. The Council in turn prepares and reviews from time to time a statement as to the code of Conduct considered desirable for the practice of the professions in Nigeria. For instance, Rule 28 of the Rules of Professional Conduct for Medical and Dental Practitioners in Nigeria, also known as Code of Medical Ethics in Nigeria<sup>23</sup> provides for acts that constitute professional negligence to include:

- (A) Failure to attend promptly to a patient requiring urgent attention when the practitioner was in a position to do so.<sup>24</sup>
- (B) Manifestation of incompetence in the assessment of a patient.<sup>25</sup>
- (C) Making an incorrect diagnosis particularly when the clinical features were so glaring that no reasonable skillful practitioner could have failed to notice them.<sup>26</sup>
- (D) Failure to advise, or proffering wrong advice to, a patient on the risk involved in a particular operation or course of treatment, especially if such an operation or course of treatment is likely to result-in serious side effects like deformity or loss of organ.<sup>27</sup>
- (E) Failure to obtain the consent of the patient (informed or otherwise) before proceeding on any surgical procedure or course of treatment, when such a consent was necessary.<sup>28</sup>

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<sup>22</sup> Section 1 of the Medical and Dental Practitioners Act, Cap M8, Laws of the Federation of Nigeria 2004.

<sup>23</sup> Rules of Professional Conduct for Medical and Dental Practitioners in Nigeria (1995) <<http://www.mdcnigeria.org/Downloads/CODE%20OF%20CONDUCTS.pdf>> accessed 20 November 2017.

<sup>24</sup> *Akintade v. CMDPDT (2005) 9 NWLR (pt. 930) 338*. In that case, Akintade, the medical practitioner was found negligent in failure to attend to the deceased patient promptly, incompetence in the assessment of the patient, deficient treatment arising from inadequate pre-operative investigation, deficient operative procedure and poor and faulty post-operative management.

<sup>25</sup> *Ibid*.

<sup>26</sup> In *Whiteford v. Hunter and Gleed* (1950) 94 SJ 758, a 70 years old plaintiff successfully sued a surgeon and general practitioner for negligence in that he wrongly diagnosed his condition. However, in another situation, a doctor might not be negligent if he misdiagnoses the patient because he used methods which were common at the time. But where a doctor is in doubt about a diagnosis, good practice suggests that he makes a referral to a specialist: *Medical & Dental Practitioners Disciplinary Tribunal (MDPDT) v. Okonkwo* (2002) 7 NWRL (pt 711) 206.

<sup>27</sup> In *Sidaway v. Board of Governors of the Bethlem Royal Hospital* [1985] AC 871: The claimant suffered from pain in her neck, right shoulder, and arms. Her neurosurgeon took her consent for cervical cord decompression, but did not include in his explanation the fact that in less than 1% of the cases, the said decompression caused paraplegia. She developed paraplegia after the spinal operation. It was held that a doctor should have a duty to tell the patient of the inherent and material risk of the treatment proposed.

<sup>28</sup> In *MDPDT v. Okonkwo* (n. 26), the medical practitioner is guilty of infamous conduct when, in deference to the patient's religious objection to blood transfusion, he failed either to adopt such course of treatment; terminate his medical contract; or refer the patient to another health institution or another medical doctor. See also *Malette v Shulman* (1990) 47 NLR.

- (F) Making a mistake in treatment e.g. amputation of the wrong limb, inadvertent termination of a pregnancy, prescribing the wrong drug in error for a correctly diagnosed ailment, etc.<sup>29</sup>
- (G) Failure to refer or transfer a patient in good time when such a referral or transfer was necessary.<sup>30</sup>
- (H) Failure to do anything that ought reasonably to have been done under any circumstance for the good of the patient.<sup>31</sup>
- (I) Failure to see a patient as often as his medical condition warrants or to make proper notes of the practitioner's observations and prescribed treatment during such visits or to communicate with the patient or his relation as may be necessary with regards to any developments, progress or prognosis in the patient's condition.<sup>32</sup>

Furthermore, a practitioner may be found guilty of negligence in failure to secure the services of other professionals. In *Okezie V Chairman Medical & Dental Practitioners Disciplinary Tribunal (MDPDT)*,<sup>33</sup> Dr Okeize a registered Specialist Obstetrician and gynecologist and a lecturer at University of Nigeria Teaching Hospital, Enugu was found guilty of infamous conduct and gross professional negligence in 2001. He was suspended from practices for six months for losing his patient (Mrs. Obiekwu) after a caesarian operation. The charges against him include negligent failure to secure the professional services of an anesthetist and also of qualified registered nurses to provide necessary professional care as required before, during and after the caesarian operation; failure to provide crossmatched bloods and oxygen which would have been used to resuscitate the patient at the time of impending respiratory failure which eventually set in post operatively; operating at an unregistered institution known as Christian Miracle Hospital etc. These and many more acts/cases of negligence or malpractice can lead to a lawsuit.

### 3.3. Damages

As mentioned earlier, damages involve the plaintiff showing a causal link between the damage he suffered and the medical practitioner's act, that is, he must show that the defendant's breach of duty caused the damage. Where he fails to show this, his action will not succeed. In *Barnett v Chelsea & Kensington Hospital Management Committee*,<sup>34</sup> three men attended at the emergency department but the casualty officer, who was himself unwell, did not see them, advising that they should go home and call their own doctors. One of the men died some hours later. The post mortem showed arsenical

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<sup>29</sup> abc News, 'Michael Jackson's Doctor Guilty', (2011) < <http://abcnews.go.com/US/michael-jacksons-doctor-guilty/story?id=14880567> > accessed 20 November, 2017. Michael Jackson's doctor Conrad Murray was found guilty of involuntary manslaughter in the death of Michael Jackson, the singer who had been proclaimed the king of pop. The prosecution triumphed after six weeks of impassioned arguments and witness testimonies, arguing that Murray was responsible for a lethal overdose of the anesthetic propofol.

<sup>30</sup> *Akintade v. CMDPDT* (n. 24).

<sup>31</sup> In *Igbokwe v. University College Hospital Board of Management* (1961) W.N.L.R. 173, a nurse was instructed to keep watch over the deceased patient who after child birth had suspected psychosis but the former failed to do so. The patient jumped-down from the fourth floor of the hospital and died. The court held that the defendant (hospital) was guilty of negligence.

<sup>32</sup> In *Olaye v Chairman, Medical & Dental Practitioners Disciplinary Tribunal(MDPDT)* (1977) NMLR pt 506 P. 550, the appellants and three other medical practitioners were charged before the Disciplinary Tribunal for negligence by their non-attendance to a patient contrary to the ethics of the medical profession. Though the appellant denied liability, the tribunal found him liable and directed that his name be struck off the Register of Medical and Dental Practitioners in Nigeria.

<sup>33</sup> (2010) 26 WRN.

<sup>34</sup> [1968] 1 All ER 1068.

poisoning which was a rare cause of death. Even if the deceased had been examined and admitted for treatment, there was little or no chance that the only effective antidote would have been administered to him in time. Although the hospital had been negligent in failing to examine the men, there was no proof that the deceased's death was caused by that negligence.

Furthermore, in medical law, a plaintiff may be awarded general damages which include: fair and reasonable compensation for the injury suffered<sup>35</sup> (for example, compensation for the loss of a finger); damages for pain and suffering;<sup>36</sup> loss of amenity;<sup>37</sup> loss of expectations and enjoyment of life;<sup>38</sup> medical and nursing expenses;<sup>39</sup> loss of earnings suffered as a result of the harm up to the date of the hearing;<sup>40</sup> future losses (which involves guesswork of the estimate as to how long the claimant will live); and damages for secondary victim.<sup>41</sup> Special damages for payment of prescribed drugs; and future ongoing medical expenses may also be ordered by the court.<sup>42</sup>

Asides civil damages, a practitioner may also face some disciplinary measures by the Medical and Dental Practitioners Disciplinary Tribunal. Thus, where a practitioner is charged for professional negligence for the second time, and is found guilty by the Medical and Dental Practitioners Disciplinary Tribunal, he shall not be admonished but suspended from practice for a period not less than six months. A practitioner who is habitually negligent in a professional respect could have his name struck off the relevant register.<sup>43</sup> Rule 30<sup>44</sup> makes a practitioner guilty of gross negligence where the extent of the negligence had resulted in permanent disability or death of the patient, consequently, the practitioner will either be suspended for a period of six months or have his name struck off the medical or dental register.

### **3.4. Remoteness of Damage**

Generally, damages will be awarded by the court where the plaintiff proves beyond reasonable doubt that the defendant was guilty in negligence. However, the law sets limits to the extent of a defendant's liability, particularly, where the consequences of a defendant's acts are too remote in law to have caused the damage complained of. Foreseeability is also a yardstick in determining whether damage is remote or not. Therefore, in the leading case of *Hadley v. Baxendale*<sup>45</sup> where the plaintiffs operated a mill and a component of their steam engine broke causing them to shut down the mill. Plaintiffs then contracted with Defendants, common carriers, to take the component to W. Joyce & Co. to have a new part created. When delivery was delayed due to Defendants' neglect, causing Plaintiffs' mill to remain closed longer than expected, Plaintiffs sued to recover damages. It was held that the damages available for breach of contract include those which may fairly and reasonably be considered arising naturally from the breach of contract, or such damages as may reasonably be supposed to have been in the contemplation of both

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<sup>35</sup> See *Heil v Rankin* [2000] 2 W.L.R. 1173.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> See *Julius Berger Nigeria PLC & anor v. Mrs. Philomena Ugo* (2015) L P E L R – 24408 (CA).

<sup>39</sup> See *H v Thomson Holidays Ltd* [2007] EWHC 850 (QBD).

<sup>40</sup> In *XYZ v. Portsmouth Hospital NHS Trust* [2011] EWHC 243 (QB), the claimant was awarded damages for the loss of income consequent upon the chance the claimant had of establishing a business; the award for future medical expenses; and the provisional damages order.

<sup>41</sup> *Ward v The Leeds Teaching Hospital NHS Trust* [2004] EWHC 2106 (QB).

<sup>42</sup> See *Julius Berger Nigeria PLC & anor v. Mrs. Philomena Ugo* (2015) L P E L R – 24408 (CA).

<sup>43</sup> Rule 29 of the Code of Medical Ethics in Nigeria.

<sup>44</sup> Rule 30 of the Code of Medical Ethics in Nigeria.

<sup>45</sup> [1843] All ER Rep 461. See also *Overseas Tankship (UK) Ltd v. Morts Dock and Engineering Co Ltd (The Wagon Mound No 1)* [1961] AC 388.



the parties at the time the contract was made. Consequently, where a doctor's act causes an injury to his patient, he would be held liable for his negligence, but, such liability will be limited to the direct consequences of his act which a reasonable man would foresee as the natural and probable consequences of his act. But those consequences, which a reasonable man would not foresee, are regarded by the law as being too remote. In such case, the defendant escapes liability.

### 3.5. Vicarious Liability

Vicarious liability is the liability a master incurs to a third party for the wrong of his servant committed in the course of employment. It does not matter that the master was not at fault himself. This means that for the liability of a master to arise, a relationship of master and servant as distinct from employer and independent contractor has to exist.<sup>46</sup> Thus, a hospital or health care centre is an employer while her doctors, nurses, radiographers, surgeons, anaesthetists, etc, are her employees/agents, and any damage for negligence exercised by them will fall back on the hospital.

Consequently, a plaintiff can sue both the doctor and the hospital jointly, or either of them. The usual thing is to join the hospital as a defendant. So, to hold a hospital vicariously liable, the plaintiff must prove that the person who commits the negligent act is the hospital's employee, and secondly, that the act is performed in the course of his employment. In *Cassidy v Ministry of Health*,<sup>47</sup> the court held that the hospital authority will be vicariously liable, unless it can show that there was no negligent treatment by any of its servants.

### 3.6. Occupier's Liability

Apart from vicarious liability of a hospital, it can also be liable for breach of duty to care for visitors who are lawfully on its premises, irrespective of whether they are in the hospital for medical care or not. In *Slade v. Battersea and Putney Group Hospital Management Committee*,<sup>48</sup> a 67 year old lady visiting her husband in a hospital slipped and fell on a part of the floor of the ward where polish had just been spread, while she was leaving. Due to the fact that polish had just been spread, the floor was slippery and dangerous, and there was no sign to warn users. The woman succeeded in an action for damages against the hospital authority. Therefore, the hospital authority owes a common duty of care to all persons lawfully on its premises to ensure that its premises are reasonably safe. If it does not fulfil this duty to the visitor, it will be liable in damages for any injury caused to a person lawfully on its premises. Such visitors include patients and relatives visiting patients, the hospital workers or employees.<sup>49</sup> However, the hospital can escape liability by giving sufficient warning notice to visitors of danger in the premises. It should be noted that 'sufficient warning notice' to visitors will depend on surrounding circumstances of a case.

## 4. The Doctrine of *Res Ipsa Loquitur*

The Latin term means 'the thing itself speaks' or 'the thing speaks for itself.' This occurs when the plaintiff shifts the burden of proof to the defendant because the former is a layman and medical science is a specialized and complicated area to him, because the particular practitioner that is responsible for the negligent act is unknown to him, or because the plaintiff is not in a position to locate the exact act or omission that caused the injury. However, the presumption of *res ipsa loquitur* will be rebutted where the defendant can explain the occurrence of the injury/accident, or where the facts are sufficiently

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<sup>46</sup> I. P. Enemo, *The Law of Tort* (Enugu: Chenglo Ltd, 2007) p. 306.

<sup>47</sup> [1951] 2 K.B. 343.

<sup>48</sup> [1955] 1 All E. R. 429.

<sup>49</sup> I. P. Enemo, 'Medical Negligence: Liability of Health Care Providers and Hospitals' (2011-2012) 10 Nig. J. R., 130.

known. Consequently, the doctrine was stated by Erle, C. J. in *Scott v London and St. Kathrine Docks Co*<sup>50</sup> thus:

...Where the thing is shown to be under the management of the defendant or his servant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of care...

From the above quotation, three elements must be proved by the plaintiff before the doctrine can be invoked by the court. They are:

#### **4.1. The Thing Is Under the Management of the Defendant or His Servant**

This is a question of fact to determine whether or not the thing causing the accident was under the defendant's control. For example, in the case of negligent driving, the driver of the motor vehicle will be presumed to have sufficient control over his vehicle and the surrounding circumstances to attract the doctrine.<sup>51</sup> In *Gee v Metropolitan Railway*,<sup>52</sup> the plaintiff was injured when he fell out of a door on the defendant's underground train, immediately after leaving the station. The doors were controlled by the driver. The defendant was liable as he was in control of closing the door and therefore, the facts spoke for themselves and the injury was likely caused by negligence. Thus, where the activity causing the damage is under the control of one of the several servants of the defendant, and the plaintiff is unable to identify which particular servant had control, he may still invoke the doctrine so as to make the defendant vicariously liable.<sup>53</sup> In other words, the injury must be caused by an agency or instrumentality within the exclusive control of the defendant for the doctrine to apply.

#### **4.2. Presence of Negligence (Want of Care)**

This means that the injury is of the kind that does not ordinarily occur without negligence, which the plaintiff cannot explain, thus, the reasonable explanation is that what has happened was the result of some negligent act of the defendant. For instance, in *Bennett v. Chemical Construction (GB) Ltd*,<sup>54</sup> the plaintiff was injured when a panel, which was standing behind a panel which was being moved by the defendant's workmen, fell. There were some suggestions that the two panels had been tied together, but the judge held that it was not possible to determine precisely how the accident had happened, but that it could not have occurred without negligence on the defendant's workmen's part. Subsequently, on appeal, it was held that the case was a classic example of *Res Ipsa Loquitur*.

#### **4.3. It must not have Been Due to any Voluntary Action or Contribution on the Part of the Plaintiff**

There must be no inference of contributory negligence on the part of the plaintiff. The injury must be caused by the defendant alone. Thus, contributory negligence is negligence of the patient himself which combines with the doctor's negligence in bringing about the injury to the patient. The doctor alone is not under the duty to take reasonable care in the treatment of his patient, the patient also must be reasonable, if not, he will be held to have contributed to his damage, and compensation will be reduced. Hence, in the case of *Hôpital Notre-Dame de l'Espérance and Théoret v. Laurent*,<sup>55</sup> it was held that although the surgeon and hospital were negligent in their failure to diagnose, the plaintiffs also

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<sup>50</sup> (1865) 3 H & C 596. See also *Byrne v Boadle* (159 Eng. Rep. 299 (Exch. 1863).

<sup>51</sup> *Halliwell v. Venables* (1930) 99 L.J.K.B. 353. See also *Ejisun v. Ajao* [1975] N.L.M.R. 4.

<sup>52</sup> (1873) LR 8 QB 161. Compare with *Easson v London & North Eastern Railway* [1944] 2 KB 421

<sup>53</sup> G. Kodilinye, (n. 5) p. 49.

<sup>54</sup> [1971] 3 All ER 822. See also *Houghland v. R.R. LOW (luxury of coaches) Ltd* [1962] 2 All ER 159.

<sup>55</sup> [1978] 1 SCR 605.

contributed to the damage suffered by delaying to obtain medical care, and subsequently obtained two-quarter of the total damages.

### 5. Synergizing *Res Ipsa Loquitur* and Medical Negligence

It should be noted that *res ipsa loquitur* collaborates with and is applicable in a variety of situations, for instance, in cases of commercial airplane accidents, road and traffic accidents. Then, the question to be answered is whether there is any synergy between it and medical negligence. The answer is yes, and the elements applicable in proving *res ipsa loquitur* under the general negligence must also be proved in medical negligence. Hence, *res ipsa loquitur* is applied in cases of medical negligence where it cannot be ascertained as to which specific act of the hospital or that of his employees had caused the injury and where the situation is never outside the control of the hospitals. Thus, as held in *Cassidy v. Ministry of Health*,<sup>56</sup> a hospital authority was liable to a patient in respect of negligent treatment; even though the patient could not show which member of the hospital staff was responsible. Furthermore, in *Ybarra v. Spangard*,<sup>57</sup> a patient undergoing surgery experienced back complications as a result of the surgery, but it could not be determined the specific member of the surgical team who had breached the duty so it was held that they had all breached, as it was certain that at least one of them was the only person who was in exclusive control of the instrumentality of harm.

*Res ipsa loquitur* can also arise in the ‘scalpel left behind’ variety of cases, for instance, in *Mahon v. Osborne*<sup>58</sup> where swabs were left in the body of the patient after abdominal operation, the doctrine of *res ipsa loquitur* was applied when Goddard L.J. stated that:

The surgeon is in command of the operation, it is for him to decide what instruments, swabs and the like are to be used, and it is he who uses them. The patient, or if he dies, his representatives, can know nothing about this matter... If therefore, a swab is left in the patient’s body, it seems to me clear that the surgeon is called on for an explanation...

Thus, a surgeon in a theatre room is the Commander-in-Chief of all medical/operational activities there, and final check-up should not be shifted to the nurses or other officers in the room. Where he shifts his duty to others, he is negligent. Also, in *Anderson v. Chasney*,<sup>59</sup> a sponge was left behind by the defendant during a tonsil and adenoid operation. The Court of Appeal contended that one of two existing security methods, that is, sponge counting or using sponges with tapes, should have been adopted. The defendant was found negligent based on the doctrine of *res ipsa loquitur*.

In other cases, the doctrine is applicable simply where the doctor is negligent but the patient is unable to explain or does not understand how the damage happened. In the case of *Igbokwe & Ors v. University College Board of Management*,<sup>60</sup> a woman who just delivered her baby fell from the 4th floor of the hospital building. A doctor had specifically asked a nurse to keep an eye on her, but she was found fatally wounded after her fall. The court found the hospital negligent on the application of *res ipsa loquitur*. The similar decision was pronounced in *Fish v Kapur*,<sup>61</sup> where a dental extraction resulted in a jaw fracture.

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<sup>56</sup> [n. 47]. In that case, a plaintiff who entered a hospital to be cured of two stiff fingers ended up after the treatment with four stiff fingers, and as a result, lost the use of his left hand.

<sup>57</sup> 154 P.2d 687.

<sup>58</sup> [n. 15].

<sup>59</sup> [1949] 4 D.L.R. 71 (Man. C.A.), affirmed [1950] 4 D.L.R. 223 (S.C.C.).

<sup>60</sup> (n. 31).

<sup>61</sup> [1948] 2 All E. R. 176.

Thus, the purpose of this doctrine in medical negligent cases is to preclude the defendant from defending on the submission of 'no case to answer'. In *Ibekendu v. Ike*,<sup>62</sup> the plaintiff/respondent sued the appellant claiming damages for injuries sustained in an accident caused by the negligence of the appellants. The said accident occurred when the haice-bus driven by the appellant swerved from its own side of the road to the other side and collided with the respondent who was walking by the side of the highway. The bus eventually ended up in a ditch along the road. The court held that these facts clearly raised a prima facie presumption of negligence which automatically brings into play the doctrine of *Res Ipsa Loquitur*.

Unfortunately, in spite of the synergy between *res ipsa loquitur* and medical negligence, a lot of injured patients and their families in Nigeria are suffering silently by leaving the matter to God, attributing every medical adverse event in the course of treatment as 'God's Will' or believing 'It's God's Time' for a person to die while the negligent doctor(s) and/or hospitals are becoming more careless in discharging their duties, consequently causing more harm and death to their patients. This silent attitude of affected victims is caused by several reasons. The primary reason is the socioeconomic, cultural, and religious beliefs of Nigerians towards litigation (that litigation is evil and should be discouraged). Another factor is that majority of Nigerians do not know their rights. Those who know their rights and proceed to litigation have been discouraged because mostly, medical practitioners that are called to give expert opinion/evidence are usually reluctant to testify against fellow practitioners or cover-up for them which hinder prosecution of cases against them. Furthermore, the applicable laws, especially, the Code of Medical Ethics in Nigeria, and their enforcements are not very effective. Thus, there is a call on the Nigerian government to fill up the loop-holes in deciding synergizing the doctrine of *res ipsa loquitur* with medical negligent cases.

## **6. Conclusion**

This paper has examined the elements of negligence and the onus on the plaintiff to link the injury he suffers with the defendant's negligence. However, due to the peculiarity of medical law, the onus of proving negligence may shift to the defendant where the plaintiff cannot explain how the damage occurred or where the thing causing the damage was under the management or control of the defendant or his servants. Nevertheless, negligence has eaten deep into the Nigerian health care system, and at the same time litigation of guilty practitioners are not embraced by the citizens. In view of this, this paper suggests the sensitization of people by the government about their medical rights including the right to seek redress by instituting suits against negligent practitioners and health care institutions. Furthermore, medical practitioners should be men of integrity and uphold truth and justice, especially when called upon by the court to give expert opinion/evidence. This attitude will protect the sanctity of the profession and increase people's trust in the system. Also, some provisions of the Code of Medical Ethics in Nigeria, for instance, aspects relating to discipline of erring members should be copied to the Medical and Dental Practitioners Act. On the other hand, Rule 29 of the Code should be amended. The Medical and Dental Practitioners Disciplinary Tribunal should not wait till when a practitioner becomes habitually negligent before striking off his name from the relevant register. This is because more patients are likely to be injured by merely admonishing a negligent doctor or suspending him from practice for a period not less than six months. Therefore, this paper suggests that once negligence is gross or results in death, the guilty practitioner's name should be struck off the register.

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<sup>62</sup> (1993) 5 NWLR (Pt. 299) 287.