AN EVALUATION OF THE LEGAL FRAMEWORK FOR THE PROTECTION OF USERS OF MEDICAL SERVICES IN NIGERIA*

Abstract
The medical services sector is one of the most critical for Nigeria's economic and social development. Medical service is significant and delicate because it directly affects human lives. Providers of medical services are required under the relevant laws to undergo professional training for a requisite period because of the uniqueness of this service. Every citizen of Nigeria is a potential user of medical service at one point or the other. Medical accidents account for one of the globally acknowledged causes of death. Many of the victims do not live to tell the story. The need to protect the end users of medical services is unarguable. This paper attempts an appraisal of the legal framework for the protection of users of medical services in Nigeria. The paper found that Nigerian patients are vulnerable to various medical hazards including loss of life. The paper also found that victims do not get adequate legal redress because of leakages in the legal framework for the protection of end users of medical services in Nigeria. The paper further found that there is a need to rework the legal framework to ensure adequate protection of the end users of medical services in Nigeria.

Keywords: *Negligence, Malpractice, Medical Services, End Users Autopsy*

1. Introduction

The deplorable condition of the healthcare services has resulted in the phenomenon of patients who can afford the costs going overseas for medical attention or further treatment on account of wrong diagnosis. [1] Medical service providers include those who are qualified and appropriately registered (where necessary), to practice any of the health related professions within the medical field. This includes doctors, nurses, ophthalmologists, physiologists, physiotherapists, dentists, pharmacists, laboratory scientist, radiologists and a host of others. The relationship between the providers and their patients creates a duty of care, the breach of which makes the provider liable in negligence. Doctors, nurses and other healthcare workers treat millions of Nigerians on daily basis in both private and public hospitals. Medical malpractice includes the act or omission by a physician or other medical personnel during treatment of a patient that deviates from accepted norms and practice in the medical community, and which causes injury to the patient. Medical negligence on the other hand is the failure of a medical practitioner to do what a reasonably prudent person in his position as such medical doctor would do.[2] Medical negligence is a breach by a health care practitioner of a medico legal duty of care that causes harm to the patient. However, the plaintiff who brings an action for medical negligence must establish the following: the existence of a duty of care owed by the defendant, the occurrence of the breach of that duty, that the plaintiff suffered damage, and the damage was caused by the defendant's breach. [3]Both malpractice and negligence result in harm to the patient. The medical practitioner in both situations has failed to meet the standards of his profession in the treatment of his patient. The relationship between a doctor and his patients undoubtedly is a special one involving the 'neighbour' principle.[4] Applying the "neighborhood test" there is no gainsaying the fact that the doctor or any other health professional in a health facility is a very close neigbhour of the patient to whom the doctor and other health personnel owes a duty of care. This is quite apart from the contractual obligation between the patient and the owner of the health facility. The end users of medical services otherwise called patients do suffer untold injury in the hand of medical personnel.

2. The Standard of Care Expected of a Medical Service Provider

A professional relationship must exist between the patient and the medical personnel. Once a doctor undertakes to treat a patient, whether or not there is an agreement between them, a duty of care arises. The doctor must exercise reasonable care and skill in treating the patient; it is immaterial that the doctor is rendering such service out of charity. [5] In *Mrs Deborah Agere & Anor v S Ojobo,*[6] the plaintiff brought an

* **Uzoamaka Gladys EZE,** Reader, Faculty of Law, Nnamdi Azikiwe University, Awka, Anambra-State, Nigeria. 234-37429390 ; tedama7@yahoo.com

[1] Temitayo Olofinulua 'Medical Negligence in Nigeria: When Hospitals Kill' *Radiant Health Magazine* 8th June 2015.

[2] C.O Okonkwo, *Medical Negligence and the Legal Implication* (Longman, 1989) p.119; H.A Olaninyian, 'Liability for Medical Negligence' (2003) 4 *NJHBS* 167.

[3] C.O Okonkwo *op. cit* at p 123.

[4] See Lord Atkin LJ in *Donoghue v. Stevenson* (1932) A.C

[5] O. Akintola, 'Medical Negligence in Nigeria: An Appraisal' (2002) *University of Ado Ekiti Journal*, vol, 1 p.37.

[6]Doing business under the name and style of Ponder End Clinic (Unreported suit No. B/595/94.

action in negligence for the loss of the first male child, pains, emotional and psychological depression due to the gross negligent manner in which defendant carried out the delivery of the plaintiff's pregnancy. The Court held that where a patient relies on the skill and knowledge of a medical provider in relation to his health, a duty of care exists on the part of the medical service provider towards the patient. The occurrence or not of a breach of duty will be determined by measuring the practitioner's action with a standard of care expected of a reasonably skilled practitioner of his standing. It must also be that the patient suffered harm as a direct result of the breach. Most cases of Medical malpractise and negligence must meet similar criteria to have any chance of rendering a verdict in favour of the injured patient. The elements are; existence of duty, breach of duty, causation and damages. The standard of care required of a medical practitioner is that of the ordinary reasonable medical practitioner in the shoes of the defendant. It is the standard of the ordinary skilled man, exercising or professing to have that special skill. This standard of comparable professional practice (standard of care for doctors) was laid down in the case of *Bolam v Friern Hospital Management Committee*.[7] In that case, a patient who sustained fractures during an Electroconvulsive Therapy (ECT) treatment alleged that the medical service provider had been negligent in part hence no muscle relaxation was administered on him for the procedure. He also complained that he was not informed of the risks associated with the fracture treatment. The court held that there was still a responsible body of doctors who administered the procedure without muscle relaxation and considered this an acceptable practice. It held that negligence was not established. This case established the principle that a medical practitioner has a defence where he can show that he has acted in accordance with practice accepted as proper by a responsible body of medical opinion.

If a doctor holds out to a patient as possessing special skills and knowledge in a particular field of medicine or surgery, the doctor must exercise the same degree of care and skill as a doctor who generally practices in that field.[8] The House of Lords in *Bolitho v City and Hackney Health Authority,*[9] four decades after *Bolam* departed from the conventional understanding of the *Bolam* test. Their Lordships emphasized that the words" responsible" body of medical men connoted a practice that withstands the scrutiny of 'logical analysis' from a judicial point of view. Accordingly, customary practice even if favoured by a substantial body of opinion, can still be negligent if such opinion fails to withstand logical analysis in matters of medical judgment, involving diagnosis and treatment.[10] In *Miss Felicia Osagiede Ojo v Dr. Gharoro & University of Benin Teaching Hospital (UBTH) Management Board*, [11]the plaintiff's claim arose from a medical or surgical operation performed on her by the defendants. The said operation was designed to correct a certain medical condition, but at the end of it, one of the surgical needles used in the operation got broken and the broken part could not be located or retrieved and it was consequently left inside the plaintiff. The plaintiff said that after the operation, she had serious pain in her abdominal and vaginal parts and she complained to the plaintiff who is ascribed it to the stitches on the site of the operation wound. When the pains would not subside, the plaintiff ordered for an x-rays, which confirmed that there was a broken needle in her stomach, which was not there before the operation. The plaintiff said the Ist and 3rd defendants informed her that due to the fresh wounds from the surgical operation they could not immediately conduct another surgical operation to recover the needle. In addition, that the Ist and 3rd defendants did not tell her that they left anything behind in her stomach, The plaintiff gave evidence that she saw another gynecologist who informed her that judging from the way she was operated upon, she would be unable to have a child. The defendants admitted the broken needle in her stomach but said the plaintiff was informed after the first operation. He also admitted also that nowadays sub-standard needles are being used and that such needles break easily during operations. He denied that the plaintiff could not have any child because of the broken needle in her stomach, that where the needle was located is in the anterior abdominal wall and there was no relationship with pregnancy. Certain legal questions arose for determination, including negligence, which was even pleaded by the plaintiff. The court in considering whether the plaintiff could rely on the doctrine of *res ipsa loquitur*, reviewed the case of

[7] [1957] 1WLR 582
[8] Lord Edmund Davies in *Whitehouse v Jordan* (1981) 1 WLR 246 at 258 HL
[9] 1998] 1 AC 232, at 243
[10] *Bolitho v City and Hackney Health Authority op. cit* at p. 243
[11] Unreported suit No. B/21/94

Management Enterprises Ltd v Otusanya and Strabag Construction Nig. Ltd v Oguaraekpe [12]*which* illustrates the fact that a mishap occurs does not establish negligence on the part of the provider as long as he followed the approved procedure for the alleged treatment. The standard of care is therefore relative and will in each case be judged by factors like time, place and availability of resources. [13]The test is the standard of the ordinary skilled man exercising and professing to have that special skill which is not part of the ordinary equipment of the reasonable man. The law requires that the conduct of the health care provider shall be of the required standard. Where he fails to act as a competent and skilful provider would, he shall incur liability.

3. The Regulation of the Standard of Care required of Medical Service Providers in Nigeria

Apart from the standard of care required of medical service providers under common law in Nigeria, there is extant legislation on the matter. This paper shall now examine the provisions for standard of care expected of medical service providers contained in these enactments.

National Health Act [14]

This Act provides the legal framework for the regulation, development, management and advancement of Nigeria's health system.[15] It established the national health system applicable to both public and private providers of health care services. [16]The Act provide for the rights of patients /users of healthcare services.[17]This includes the right to be given relevant information pertaining to his state of health and necessary treatment relating thereto. The user has a right to have full knowledge,[18]right to health records,[19] and the protection of such records, [20]right to confidentiality of information relating to his health status.[21]The Act provides that every healthcare provider be required to have a mechanism through which users may channel complaints on the services received.[22] The Minister or the Commissioner of health or relevant local health authorities are required to provide procedures for laying complaints.[23] This provision is not helpful to the users of medical services in Nigeria, The minister or commissioner or health authority is a health service provider and may likely devise procedures that will be more favourable to the provider other than serve the end of justice. The Act needs to be amended to the extent that an independent body or person, not being a member of the medical profession, should make the procedure for complaint. It is hoped that with the enactment of this Act in 2014, the rights of patients will be better ventilated. The medical profession will no doubt be open to legal scrutiny. Regrettably, patients who are able to access medical services in most cases do not receive substantial care due to negligence on the part of medical practitioners or health care providers. Those who cannot afford the services of professionals go to quacks that may provide cheaper services, while causing greater harm or damage to the patients or their families. Furthermore, not much has been done to implement the Act. This is due to challenges such as poor knowledge of the Act by health professionals and members of the public. The non-implementation of this Act is a clog in the wheel of the progress of health care delivery in Nigeria. Nigeria has the highest infant and maternal mortality rate in Africa some of which are due to medical negligence and malpractice.

Health professionals form a significant component of health-care systems and are important in the delivery of smooth, efficient, effective and quality health care services. Since the goal of the NHA is the regulation, development, management, and advancement of Nigeria's National Health System, the role of health professionals in the actualization of this goal cannot be over-emphasized. Their awareness, knowledge, and perception of the NHA will therefore likely influence the degree of success in the implementation of the Act and the realization of its ultimate benefits of improved health coverage, quality, and health outcomes.

The operational details of the Act and its implementation have been left to secondary legislation, policy and administrative arrangements. For example, Part II of the Act provides a framework for regulating health establishments and technologies. The details of the framework are, however, left to secondary legislation, which

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[12] [1987] ANLR 250, 16. (1991) 1 NWLR Pt 170) p.747
[13] B A Susu, *Law of Torts,* Lagos: CJC Press Nigeria Ltd, 1996), p. 155.
[14] 2014.
[15] Section 1.
[16] *op. cit*
[17] Part III to the Act.
[18] section 23
[19] s. 27
[20] s.29
[21] S 26
[22] S.30
[23] *op.cit.*

will prescribe details about the classifications of health establishments and technologies under the Act, based on: their role and function within the national health system; the size and location of the communities they serve; the nature and level of health services they are able to provide; their geographical location and demographic reach; the need to structure the delivery of health services in accordance with national norms and standards within an integrated and coordinated national framework; and in the case of private health establishments, whether the establishment is for-profit or not. One settled provision of the Act is that which provides for autopsy for the purpose of determining the cause of death. This is so because it is only autopsy that can determine whether or not a death was caused by medical negligence or malpractice. The Act provides as follows:

> Subject to subsection (2), a post mortem examination of the body of a deceased person may be conducted if-
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> (a) the person, while alive, gave consent thereto;
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> (b) the spouse, child, parent, guardian, brother or sister of the deceased not below the age of eighteen (18) years in the specific order mentioned, gave consent thereto; or
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> (c) such an examination is necessary for determining the cause of death.
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> (2) A post mortem examination may not take place unless-
>
> (a) the medical practitioner in charge of clinical services in the hospital or authorized institution or of the mortuary in question, or any other medical practitioner authorized by such practitioner, has authorized the post mortem examination in writing and in the prescribed manner; or
>
> (b) In the case where there is no medical practitioner in charge of clinical services, a medical practitioner authorized by the person in charge of such hospital or authorized institution, has authorized the post mortem examination in writing and in the prescribed manner.[24]

The inclusion of the medical doctor in the hospital where an act of medical negligence occasioning death is suspected to have happened is not helpful. This is because the likely of bias in order to protect the reputation of his health institution. It is suggested that in future amendments, medical personnel serving in the institution where the accident occurred should not be part of the team to authorize or conduct autopsy.

Medical and Dental Practitioners Act

This Act[25] was enacted to regulate the practice of medical and dental professions, and for purposes connected therewith. [26] It was designed to regulate and govern medical ethics in Nigeria and rules of professional conduct for medical and dental practitioners. The Act provides for the establishment of a Nigerian Medical Council whose function includes determining the standards of knowledge and skill to be attained by persons seeking to become members of the medical and dental profession and raising these standards from time to time as circumstances may permit. [27] The Act established the Nigerian Medical and Dental Council with responsibility of reviewing and preparing from time to time a statement as to the conduct that the council considers desirable for the practice of the profession in Nigeria.[28] The Council is a body corporate capable of suing and being sued in its corporate name.[29] Medical service providers who fail to comply with these standards may be held to be in breach of their duty. The Council listed acts constituting professional negligence. [30]The investigating Panel of the Council investigates and report cases of professional misconduct.[31]Where a disciplinary panel finds a practitioner guilty of in-famous conduct in any professional respect, in line with the provision of the Act, the Disciplinary Tribunal may order the registrar to strike the person's name off the register, or suspend the person from practice by ordering him not to engage as medical practitioner or dental surgeon for a period not exceeding six months ; or admonish the practitioner. [32] Some offences may deserve more than six months suspension. Penalties for professional misconduct may include admonition, suspension, striking out the name of the erring person from the register of doctors. [33] Such

[24] National Health Act 2014 Section 58

[25] Medical and Dental Practitioners Act Cap M8 Laws of Federation of Nigeria 2004 as amended.

26 See the long title to the Act

[27] Section 1.

[28] Section 3

[29] Muhammad J.C.A delivering the lead judgment Abaalaka v Minister of Health(2006) 2NWLR (Pt..963) 105.

[30] Section 17(these include: making mistake in treatment, failure to advise or proffering wrong advise to a patient, making incorrect diagnosis, failure to attend to a patient and so on.

[31] Section 15

[32] section 16(2) of the MDPA.

[33] Section 16

a practitioner however has a right of appeal pursuant to the Act.[34] The striking out of the name of the practitioner will no doubt deter other practitioners. However, what constitutes infamous conduct in the professional disregard may require a biased interpretation by medical officers who naturally would be better disposed to help their colleagues. This Act failed to proffer any intervention for the already injured medical users. This pitfall apart from ignorance explains why victims do not lodge complaints. In *Dr (Mrs) FCL Olaye v Chairman Medical and Dental Practitioner Investigating Panel & Others* ,[35] the Council reiterated its standard for fitness to practice and exercised discipline over the medical practitioner whose professional negligence is an embarrassment to the Council. The Act should however also empower the Council to as much as possible prevent the rendering of medical services by inexperienced medical personnel. Most cases of medical negligence may be attributed to the practice of inexperienced doctors. This body should devise an established strategy to ensure that not all doctors who have graduated from the university be allowed to manage certain types of ailments or allowed to open a clinic immediately after leaving the university. The body may also improve medical service delivery by not only raising standards of medical practice from time to time as circumstances may permit but also ensuring that medical personnel who fail short of the standard are brought to book. It is should gazette the list of such erring officers and publish same to the unsuspecting end users. It is further regrettable that this Act did not make any provision for award of compensation to the victims. It is unfortunate that a medical service user who suffers damage in the hand of a provider may still need to institute a civil action even after the Council has found the practitioner liable. Not everybody can afford litigation costs. The Act should provide for award of compensation directly to the medical user or victim who suffered whatever in the hand of an erring medical practitioner. This will also curtail multiplicity of suits at the instance of such victims.

Code of Medical Ethics

The Medical and Dental Council of Nigeria in furtherance of its statutory functions as provided for by the Act,[36] codified the rules of professional conduct for medical and Dental Professionals in its Code of Medical Ethics in Nigeria 2008. This is a code of practice containing the basic ethics that underline the moral values that govern professional practice and is aimed at upholding its dignity. The Code lays down in a broad form the standard of acceptable medical and dental practice in Nigeria. The Code prescribes that a medical practitioner owes a duty of care to their patient. Breach of this duty shall give rise to an action in negligence. [37]An overriding principle in the code is that medical or dental practitioners will be guilty of 'infamous conduct in a professional respect' where an act is disgraceful or dishonourable. The emphasis of the Code is more on the discipline of an erring medical personnel. It is of the interest of medical users that the names of such erring medical personnel be struck off the roll of medical practitioners The Code in order to assure quality medical service delivery, should internalize quality assured health standards in the discharge of their routine professional duties. This is a crucial step in ensuring reforms in doctor-patient relationship and to benefit the patient and society in general.

National Agency for Food Drug Administration and Control Act

NAFDAC came into being to stop the spread of adulterated and counterfeit drugs, foods and medical devices that militates against the well-being of the people. The agency by virtue of its mandate is charged to amongst other things regulate and control the manufacture, importation, exportation, advertisement, distribution and sale of foods drugs cosmetics, medical devices, bottled water and chemicals in Nigeria. [38]Regrettably, NAFDAC oversees all aspects of drug medical devices in addition to other regulated products.[39] The agency is very unlikely to be efficient in carrying out these onerous tasks. The Agency should in possible amendment incorporate and apply strict liability where a defective medical product causes injury to a patient because of a defect. Such application should not only be limited to the manufacturers but should also extend to retailers of medical products and the hospital authority or healthcare institution that requires the patient concerned to purchase the product . In the case of *Ojo v Gharoro*[40] a surgical needle supplied by the plaintiff broke in the cause of an operation. Evidence disclosed that the plaintiff bought the surgical needle and all the drugs administered on her throughout her stay in the hospital from the open drug market.[41] The supreme court per Ntiki Tobi did said "… the medical profession must invent surgical needles

[34] S 15(6).
[35] (1997) 5 NWLR (Pt 506) 55 C.A
[36] Medical and Dental Practitioners Act Cap M8 LFN 2004 s15.
[37] Medical and Dental Practitioners Act Cap M8 LFN 2004 s 28.
[38] Section 5 of the NAFDAC Act
[39] Section 30 of the NAFDAC Act defined 'regulated products to include (food drugs cosmetics medical devices and bottled water).
[40] (2006) 10 NWLR 173 681 at 205
[41] *op. cit* at 683.

that will stand the test of time to ensure that they do not break or snap easily."[42]Doctors have no distinctive expertise in inventing medical products. They however have a significant role to play in monitoring the use of such products and choosing to use one product based on safety. Since Nigerian patients do supply and purchase these medical products by themselves, NAFDAC as a sole regulator considering the delicate nature of such products should make provision obligating medical institutions and authorities to take reasonable steps to ensure that patients make purchases that will not occasion harm or injury to them. Medical officers should as much as possible discharge this obligation by monitoring the use of medical products. This may include advising the patients in advance as to where to make the purchase and on the precise product brand they must buy.

Consumer Protection Council Act[43]

This provides the general legal mechanism for the protection of consumer rights in Nigeria.[44] This includes the rights of patient to quality services and treatment in line with existing laws and practices. The Council has power to apply to court to prevent the circulation of any product which constitutes an imminent health hazard; compel a manufacturer to clarify that all safety standards are met in their products; cause as it deems necessary, quality tests to be conducted on a consumer product, demand production of labels showing date and place of manufacture of a commodity as well as certification of compliance; compel manufacturers, dealers and service companies, where appropriate, to give public notice of any health hazards inherent in their products; ban the sale, distribution, advertisement of products which do not comply with safety or health regulations.[45] The functions of CPC as stipulated under the Act includes to organize and undertake campaigns and other forms of activities as will lead to increased public consumer awareness, encourage trade, industry and professional associations to develop and enforce in their various fields, quality standards designed to safeguard the interest of consumers. [46]It is in the furtherance of this mandate to improve the health care services that the CPC in conjunction with the Federal Ministry of Health launched the Patient's Bill of Rights.

Patients' Bill of Rights (PBR)[47]

This Bill exhaustively covered the rights of patients in Nigeria. The rights provided under the PBR are: Right of Access to Information: A patient has a right to all relevant information in a language that the patient understands, including complete and accurate information about diagnosis, treatment, prognosis, other procedures and possible outcomes.. End users illiteracy is a serious impairment. A patient should be made aware of his right to seek information from the caregiver about their services. Such information should be made available to the patient whether or not he request for same.. Information is also necessary in relation to the range and scope of services available, record of the identity, skills and credentials of treating professionals and care providers. Other rights include: Right to be informed about impending interruption or disengagement of services of primary or attending professionals responsible for patient's care. Medical service provider is obliged to reschedule patients' appointment in the event of inevitable service interruption and render sufficient intervention to in-patients and emergency cases in the event of inevitable service interruption. Patients have right to complaints express dissatisfaction regarding service. The provider should however encourage patients to ask questions about the services maintain records of complaints and redress procedure of the facility and address complaints in accordance with procedure; also inform patient at onset of the redress mechanism provided by the facility and regulatory bodies. Patients have right to fee related information. Such information includes full disclosure of cost or estimation of recommended treatment plan services, transparent and itemized billing. Patients also have right to privacy and confidentiality of all information and medical records unless disclosure is vital and in the interest of public health in accordance with prevailing law. This right is limited to the extent that patients should as much as possible proffer complete, truthful and accurate disclosure of medical history, medication and complaints to the authorized and attending caregiver. Patients also have rights of access to quality clean, safe and secure healthcare environment, right to be treated with respect and dignity without prejudice to gender, religion, race, and ethnicity, allegation of crimes, geographical location, disability or socio-economic circumstances. There is also right of access to emergency care which must be urgent, immediate and sufficient intervention. Equally, there is right to visitors and right to refuse or decline care upon full disclosure of the consequences of such decisions. It is not a statutory instrument and can only be enforced within the existing legal framework. Thus, it can only be enforced pursuant to the provisions of the extant laws that created similar rights and circumstances.

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[42] *op. cit* at 687.
[43] Cap C25 Laws of the Federation of Nigeria 2004 as amended.
[44] Consumer Protection Council Act section 4, 5 and 8.
[45] Section 20 *op.cit*
[46] *ibid.*
[47] 2018

Constitution of the Federal Republic of Nigeria 1999

The Constitution is the supreme law of the land and the source of citizens' rights.[48] The Right to health is inferred from the right to life under Chapter IV of the 1999 Constitution. The right to health exists as a socio-economic right under the Directive Principles for the government as opposed to constitutional right.[49]The enjoyment of this right will depend on the availability of resources as they are not justiceable.[50] In relation to the users of medical services, the relevant rights are: the right to life,[51] the right to human dignity, [52]the right to freedom from discrimination, [53]the right to personal liberty,[54] the right to freedom of thought, conscience and religion.[55] The purport of these constitutional provisions is that everyone including a user of medical service or patient has a right to life. A corresponding duty is accordingly imposed on everyone, including medical practitioners to take reasonable care when treating the patient and must ensure that death does not result because of such treatment. The right to human dignity is also guaranteed by the Constitutions.[56] This right imposes a duty on the medical practitioner to respect the worth and person of his patient. The patient must be respected and must not be treated in a cruel, inhuman or degrading manner. This is notwithstanding the state of his health. The right to personal liberty is also guaranteed in the Constitution.[57]The constitution vests in an individual the right to his personal liberty. He must not be deprived of this right whether within or outside the confines of a hospital except where there is justification for the deprivation. Therefore, a patient shall not be arbitrarily detained in hospital to enforce the hospital payment bill. The hospital management in this provision under obligation to discharge a patient who is certified medically fit. It is immaterial that such a patient still owes his hospital bill. However, a person suffering from infectious or contagious disease, persons of unsound mind or persons addicted to drugs may for the purposes of their care be temporarily deprived of their personal liberty. The Constitution protects and guarantees the right to privacy of citizens, their homes, correspondences, telephone conversations and telegraphic communication. [58]However, this right is not very exclusive, as patients will need to disclose their family history and possibly their HIV status in some situations as a necessary requirement in their treatment. The Constitution unfortunately excludes the application of international treaties and conventions that are relevant to the protection of medical service users,[59] Such treaties and conventions have no force of law in Nigeria unless they are enacted as laws of National Assembly.[60]

4. Deviation from the Standard of Care by Medical Service Providers in Nigeria

Some of the travails that affect doctor/patient relationships include poor patient care, lack of proper diagnosis, unsafe drug options, and limited treatment options. In *University of Nigeria Teaching Hospital (UNTH) v Nnoli,*[61] number of children aged 1 to 4 years died as a result of improper compounding of a chloroquine syrup. Surprisingly, the major issue that was canvassed at the Supreme Court was not in relation to the act of medical negligence / malpractice. Thr court and the counsels to the parties rather dwelt lavishly on whether or not the appointment of the respondent was properly determined by the appellant and completely abandoned the fact of medical negligence. The Supreme Court anchored its approach on the fact that the issue of medical negligence was an ancillary matter and rested its conclusion on their statement that the absence of adequate machinery for the compounding of drugs could actually be the cause of the death of the infants. It is submitted that an opportunity was missed in this case to have heard authoritatively from the Supreme Court on key issues relating to medical negligence. The onus of proof is on the patient who is alleging breach to establish it. [62]This will necessarily be after the cause of action has arisen. This is because the fact of causation cannot be determined without medical

[48] Constitution of the Federal Republic of Nigeria 1999 as amended s 1.
[49] N. Nwabueze," The Legal Protection and Enforcement of Health Rights in Nigeria" Chapter 14 of C Flood & A Gross eds. , *The Right to Health the Public/Private Divide: A Global Comparative Study*(Cambridge University Press 2014) 371, at 372-3
[50] The Constitution of the Federal Republic of Nigeria s. 17(3) (c) and (d) of the 1999 constitution *;*
Okogie &7 Ors v Attorney General of Lagos State(1981)1NCLR 218.
[51] Constitution of the Federal Republic of Nigeria 1999 as amended s 33
[52] Constitution of the Federal Republic of 1999 as amended s 34,
[53] Constitution of the Federal Republic of as amended s 42.
[54] s. 35
[55] s 38,
[56] 34.
[57] S 35
[58] S 37.
[59] The Constitution of the Federal Republic of Nigeria 1999, section 12.
[60] *ibid.* An example of such treaties is the Convention on Human Right and Biomedicine, 1997
[61] (1994)LPELP, SC. 221/1992.
[62] Section 136 of the Evidence Act.

testimony. Unfortunately, cause of action cannot arise without an autopsy to ascertain the cause of death. The said autopsy can only be carried out by an expert who must be medical personnel. In most cases, they tend to favour their colleagues or frustrate the action. This is possible because none of the statutory framework stipulated time within which the autopsy shall be carried out.

Consent constitutes a significant aspect of deviation from the expected standard of care. Most cases of breach of the standard care are excused on the ground that the patient consented to the treatment. In such circumstances, the court may either imply consent or afford the medical personnel the benefit of the defence of necessity under consent. Valid legal consent can only exist where all the relevant details are communicated to the patient within reasonable time.[63] Most Nigerian medical practitioners do not comply with this demand. They do not afford patients sufficient information about the ailment, the treatment proposed as well as possible risks. The practice situation where patients consent signature are obtained in advance and the forms to be filled later are required to sign blank consent form only for the practitioner to fill same latter is unacceptable. The purported consent is tainted with vitiating elements like misrepresentation, fraud**,** threat, and duress and lacks voluntariness. Accordingly, it cannot be said to constitute a valid legal consent. Consent that is obtained by fraud is no consent. Also consent given by a patient who is under the influence of drugs or anesthesia is not valid consent. Conversely, the principle of consent though a complete defence in medical negligence is a deviation of the standard of care on its own. Medical service providers can only administer treatment on a patient who has consented to treatment. A service provider that urgently need do a blood transfusion on a *Jehovah Witness* faith adherent whose beliefs do not support blood transfusion is helpless. [64]Such a practitioner cannot administer treatment on the said patient. The issue of consent is in this instance conflicting with the need to save life. Medical personnel who urgently needed to operate on a pregnant woman to deliver her of her baby cannot proceed without the consent of her husband.

Medical practitioners do also rely on the defence of acceptable practice. This principle is considered the criterion governing the disclosure of risks. It is to the effect that a doctor owes no duty to warn of normal risks, such as infection and those created by anesthesias that are inherent in any surgical procedure. This is based on the rationale that a doctor's clinical assessment of the patient's condition may justify the withholding of information in the patient's interest. Such information may cause psychological damage to the patient.

5. Conclusion and Recommendations

The present Nigerian situation where patients buy medical products by themselves constitutes a breach to human right to life and is not fair. The NAFDAC Act needs to be amended to hold such medical institutions responsible for any harm or danger caused on a human life because of the use of defective products. It should be noted that there are no decided cases yet that are anchored on the application of the National Health Act. Most of the decided cases were based on the common law tort of negligence. Furthermore, the trial of medical service providers for infamous conducts under the Medical and Dental Practitioners Act did not make any provision for compensating victims of medical negligence/malpractice. These victims are still required to approach the civil courts for redress. It is further remarkable that a medical doctor from an offending institution is one of those named in the Act for approving or conducting autopsy to determine the cause of death.

It is recommended that the practice of asking patients to go and purchase drugs and medical equipments by themselves should be discontinued. It is further recommended that the implementing institutions of the National Health Act should embark on sensitization and awareness campaign to sensitize the end users of medical services about their rights contained in the Act. In view of the fact that the disciplinary tribunal constituted under the Dental and Medical Practitioners' Council Act is on the same level as a high court in the judicial hierarchy, it should be empowered to award compensation to victims of medical negligence. This means that the decisions of this quasi-judicial body should go beyond merely striking out the name of the medical personnel from the roll. Finally, it does not serve the end of justice for medical personnel from an offending institution to be named among those that could authorize or conduct autopsy to determine the cause of death. It is therefore recommended that the Act be amended to exclude such medical personnel from authorizing or conducting autopsy to determine the cause of death when his institution is involved . This is in line with the principle of *nemo judex in causa sua* which disallows a person to be a judge in his own case. It is a furtherance of the principle of fair hearing.

[63] *Okekearu v Tanko* (2002)15NWLR Pt791 p791.

[64] *Deborah Agere & Anor v Dr S. Oyibo* (doing business under the name and style of Ponder End Clinic).