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THE RELEVANCE OF THE DOCTRINE OF *RES IPSA LOQUITOR* IN PROOF OF MEDICAL NEGLIGENCE UNDER THE NIGERIAN LAW

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Abstract

It is a cardinal principle of the Nigerian jurisprudence that a person who alleges the existence of any facts must bring evidence to prove that those facts actually exist. Thus, in order to prove medical negligence, a plaintiff must present evidence to demonstrate that the defendant's negligence resulted in the plaintiff's injury. This is by pleading and proving the particulars (circumstances) which gave rise to the negligence. However, where direct evidence of the medical negligence is not forthcoming, the plaintiffs can still use circumstantial evidence in order to establish negligence. Res ipsa loquitor is one type of circumstantial evidence that allows a reasonable determination of the defendant's negligence. Thus, the aim of this paper is to determine the relevance and application of the doctrine of res ipsa loquitor in proof of medical negligence before the Nigerian courts. The paper found, among others, that there is inconsistency in the requirements for the application of the doctrine as to whether there should be proof of the particulars of negligence or only proof of injury while the court makes inference as to the existence of medical negligence. Thus, it is recommended that there should be consistency in the requirement for application of the doctrine in proof of medical negligence. The requirements that the plaintiff only needs to establish the injury suffered whereupon the court infers negligence or not should be the only requirement for the application of the doctrine.

Keywords: Negligence, Res Ipsa Loquitor, Proof, Court

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Introduction

Negligence is one of the common torts which impose an obligation not to breach the duty of care owed to those who may be injured by a particular conduct. In fact, negligence has a place of pride in the law of tort in that majority of tort claims are based on negligence.[1] The tort of negligence gives rise to civil liability where the plaintiff could be awarded damages/compensation against the defendant due to the injury/harm he (Plaintiff) suffered.[2] Medical negligence is one of the issues of concern to both medical and legal professions. It is a recurring decimal among health care providers as a result of which many patients had been subjected to physical and psychological trauma; permanent incapacity or even death. The general previous position was that the jurisprudence of medical negligence was underdeveloped as there was an acute paucity of recorded judicial decisions on the matter due to unwillingness of Nigerians to litigate medical negligence claims which stem from certain social, cultural, religious and even economic biases.[3] However, this is no longer the case as our society is now more knowledgeable and better enlightened which brings medical negligence to the forefront of the public glare and consequently received both domestic and global attention. In fact, in the past few years, there have been published reports of cases of physical harm and deaths occurring as a result of the negligence of doctors, nurses, pharmacists, dentists, laboratory technologists and technicians, anaesthetists, ward attendants, and hospitals.[4] The result is that lawsuits in our courts and petitions to disciplinary tribunals and hospital managements against health providers are increasing.

It is a cardinal principle of the Nigerian jurisprudence that a person who alleges the existence of any facts must bring evidence to prove that those facts actually exist.[5] Thus, in order to prove negligence, a plaintiff must present evidence to demonstrate that the defendant's negligence resulted in the plaintiff's injury. This is by pleading and proving the particulars (circumstances) which gave rise to the negligence. However, claims founded on medical negligence have been known to be difficult to establish because the evidence to be adduced by the plaintiff is usually

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[1] Griselda Muhametaj, (2017) 5 'Introduction of the Tort of Negligence in the UK Legislation and Jurisprudence', *Global Journal of Politics and Law Research* 29

[2] Vladislava Stoyanova, (2020) 24 'Common Law Tort of Negligence as a Tool for Deconstructing Positive Obligations under the European Convention on Human Rights', *The International Journal of Human Rights* 632

[3] D. O. Okanyi, and G. O. Gureje, (2019) 1 'Socio-Cultural, Economic, Religious and Legal Impediments to the Implementation of the Law Relating to Medical Negligence in Nigeria'*International Review of Law and Jurisprudence* 149

[4] Imuekemhe Emike Jessica,(2018) 2 'An Examination of The Disposition of the Law to Cases of Medical Negligence in Nigeria'*Edo University Law Journal* 17

[5] Section 131 of the Evidence Act, 2011

in the domain of the hospital and doctors.[6] Thus, proof of medical negligence most times requires calling of expert witness to give expert evidence.[7] This is necessary because the medical field is considered to be complicated to be understood by an average patient and mostly the patients are unconscious when the act performed causes damage.[8] So, often medical practitioners are unwilling to testify as expert witnesses against their fellow practitioners due largely to familiarity and peer pressure.[9]

However, where direct evidence from the medical practitioner is not forthcoming, plaintiffs can still use circumstantial evidence in order to establish negligence. *Res ipsa loquitor* is one type of circumstantial evidence that allows a reasonable determination of the defendant's negligence.[10] Thus, the objective of the paper is to determine the relevance and application of the doctrine of *res ipsa loquitor* in proof of medical negligence before Nigerian courts.

Meaning, Nature and Application of *Res Ipsa Loquitor*

Meaning and Nature of *Res Ipsa Loquitor*

The term "*res ipsa loquitor*" is a Latin maxim which simply and literally means "the thing (fact) speaks for itself". Or "things speak for themselves."[11] It is usually employed in cases of proof of alleged unexplained happenings, the occurrence of which could not have happened in the ordinary course of events or things without negligence on the part of somebody other than the claimant.[12] The Nigerian Supreme Court had provided an exposition of the meaning, nature and extent of the doctrine as follows:

> The meaning as I understand that phrase, is this, that there is in the circumstances of the particular case, some evidence which viewed not as a conjuncture but of reasonable argument, makes it more probable that there was some negligence, upon the facts as shown and undisputed,

[6] *George Abi v Central Bank of Nigeria* (2012) 3 NWLR (pt. 1286) 1

[7] Dennis Uba Donald, (2014) 2 'The Curious Case of Medical Negligence in Nigeria'*The International Journal of Indian Psychology* 139

[8] Harshita Agarwal 'Res Ipsa Loquitur and its Application in Medical Negligence', *Legal Services India e-Journal*, <file:///C:/Users/USER/Downloads/Res%20Ipsa%20Loquitur%20And%20Its%20Application%20In%20Medical%20Negligence.html> accessed 23 March 2022

[9] Beatrice Nkechi Okpalaobi and Chino Nnenne Nzewi, (2021) 3 "Medical Malpractice and Negligence in Nigeria: Human Rights Enforcement as a Remedy" IJOCLLEP 194

[10] 'Res Ipsa Loquitur and Evidence Law'<file:///C:/Users/USER/Downloads/Res%20Ipsa%20Loquitur%20and%20Evidence%20Law%20-%20FindLaw.html≥ accessed 23 March 2022

[11] *Odebunmi & Ors.v Abdullahi* (1997) 2 NWLR (Pt 4890) 526 at 535

[12] *United Cement Company of Nigeria Limited & Ors v Mrs. Charity Mbeh Isidor & Ors* (2016) LCN/8441(CA). See also *Osigwe v Unipetrol* (2005) All FWLR (pt 267) 1225 @ 1543; *Royal De (Nig) Ltd v N. O. C. M. Coy Plc*(2004) 8 NWLR (pt. 874) 206 at 223; *Nig. Port Plc v B. P. Ltd* (2012) 8 NWLR (pt 1333) 454 at 483

> than that occurrence took place without negligence… *Res ipsa loquitur* does not mean as I understand it, that merely because at the end of a journey, a horse is found hurt, or somebody is hurt in the streets, the mere fact that he is hurt implied negligence. That is absurd. It means that the circumstances are, so to speak, eloquent of the negligence of somebody who brought about the state of things complained of.[13]

Thus, *res ipsa loquitur* has the effect of shifting the burden of proof from the plaintiff to the defendant[14] to explain that the accident occurred without any fault on his part.[15] The burden then shifts back to the plaintiff to explain how the negligence of the defendant caused the accident or injury.[16] In effect, the doctrine of *res ipsa loquitor* raises a rebuttable presumption of negligence by the defendant and presents a question of fact for the defendant to meet with an explanation. It is, therefore, for the defendant to establish by credible evidence that he was not negligent, therefore, not responsible for the event that caused damage to the plaintiff.[17]

Application of *Res Ipsa Loquitor*

As far as the application of the doctrine is concerned, the most important issues worthy of consideration are plea of the doctrine and the conditions for its application. Thus, the questions which need to be answered are: should *res ipsa loquitor* be specifically pleaded before it becomes applicable? Are there conditions which must be satisfied before the application of the doctrine? In this light, plea of *resipsa loquitor* and conditions for its application are considered below.

Essentially, the doctrine is pleaded or raised in one of two ways. First, it may be pleaded or raised by expressly reciting the doctrine itself. Secondly, it may alternatively be pleaded or raised to the effect that the plaintiff intends to rely upon the occurrence of the wrong or injury itself as evidence of negligence.[18] In other words, the doctrine could be specifically pleaded whereby the plaintiff states that he is relying on it. It could also be pleaded not specifically but by mere reliance on the negligent act of the defendant as sufficient to invoke its application.

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[13]*Odebunmi* (n 9)

[14]*Nigeria Bottling Plc v. Mr. Jokotade A. Ibrahim* (2016)LCN/9092(CA)

[15]*Mrs. Comfort Oyeladun Adetoun v Lafarge Africa Plc & Anor* (2018) LCN/11689(CA). See also See *SPDC (Nig.) Ltd v Edamkue Ors* (2009) 4 FWLR (pt.496) 9077; *Ibekendu v Ike* (1993) LPELR 1390 (SC) and *Strabag Construction (Nig) Ltd v Ogarekpe* (1991) 1 NWLR (pt.170) 733

[16]*Mr. Bayo Ayadi & Ors v Mobil Producing Nigeria Unlimited* (2016) LPELR-CA/K/162/2013

[17]*Plateau State Health Services Management Board & Anor. v Inspector Philip Fitoka Goshwe* (2021) LCN/SC.229/2003

[18] See also See *Strabag Const. (Nig) Ltd* (n 13); *Onwuka v Omogu* (1991) 3 NWLR (PT 230) 393 at 415;*SDPC (Nig) Ltd v Amaro* (2000) 10 NWLR (PT 675) 248

Thus, the doctrine may not be considered for application in any way other than these ways. For instance, in *Emirate Airline v Tochukwu Aforka & Anor*[19] the doctrine was rejected because it was not sufficiently pleaded. Similarly, in *United Cement Company of Nigeria Limited & Ors v Mrs. Charity Mbeh Isidor & Ors*[20]the trial court applied and relied on the doctrine even though it was not pleaded nor alluded to by the respondent in his pleadings but reply address. Rejecting its application, the Court of Appeal held that there was no credible evidence on record before the trial court in proof of the finding for its application.

Another issue related to plea of the doctrine is whether the doctrine can be pleaded in the alternative to particulars of negligence so that when the latter fails the former could be applied. The position of the law on this issue seems unsettled as the courts gave conflicting decisions. For instance, in *Chudi Verdical Company Limited v Ifesinachi Industries Nigeria Limited & Anor*[21] the plaintiff pleaded the doctrine in the alternative which was accepted by the trial court but rejected by the Court of Appeal and the Supreme Court. In its rejection, the Supreme Court said that the Plaintiff/Appellant could not invoke the principle of *res ipsa loquitur* against the Defendants/Respondents on the basis of available evidence of how the petrol service station got burnt. This is in agreement with the decision of the Court of Appeal that the doctrine is meant to apply "where there is no other proof of negligence than the accident itself. It should be reiterated that the ratio of the Supreme Court's decision is that the doctrine is not applicable where the plaintiff has given evidence of the occurrence of the negligence. Thus, pleading and proving the particulars of negligence and the doctrine at the same time is misconceived.

However, the same Supreme Court had earlier given a contrary decision on the issue. In *Ibekendu v Ike*[22] the respondent pleaded the particulars of negligence and also that in the alternative he would rely on the doctrine of *res ipsa loquitor* in proof of the negligence. The appellant contended that since the respondent had pleaded particulars of negligence on which he intended to rely, he was bound to succeed or fail by proof of those particulars and that he could not supplement an inconclusive evidence/proof of such particulars by falling back on the doctrine of *res ipsa loquitor*. He further submitted that the respondent had in his pleadings sufficiently given the facts known to him as the cause of the accident and, therefore, the plea of *res ipsa loquitor* was "a non-issue". The Supreme Court held that the trial judge should have

[19] (2014) LPELR-CA/L/285/2011
[20]*United Cement Company of Nigeria Limited & Ors* (n 10)
[21] (2018) LPELR-SC.246/2009
[22]*Ibekendu*(n 13)

considered the doctrine of *res ipsa loquitur* which was before him and drawn the only conclusion available to him that the appellant had failed to give a credible explanation as to why the accident occurred and that the presumption of negligence which arose had not been rebutted. It further stated that the doctrine was applicable in the circumstance because the respondent even though pleaded the particulars of negligence, but, also pleaded that he would alternatively rely on *res ipsa loquitor.*

The next important issues are the circumstances and conditions which must be satisfied before the doctrine becomes applicable. The doctrine is applicable to actions for injury caused by negligence where no proof of such negligence is required beyond the accident itself. The purport of the doctrine is that an event which in the ordinary course of things was more likely than not to be caused by negligence was by itself evidence of negligence depending on the absence of any explanation.[23] The doctrine applies only where the cause of the accident is not known but from its nature negligence on the part of the defendant can be inferred. Thus, it does not apply if facts as to the cause of the injury are sufficiently known or where the defendant gave an explanation in relation to the cause of the injury.[24]Afortiori, where there is credible evidence on the record explaining the occurrence of an event, it would be highly injudicious for the court to place reliance on the doctrine of *res ipsa loquitur*.[25] Thus, reliance on the doctrine is a confession on the part of the plaintiff that he has no direct and affirmative evidence of the negligence and that reliance is placed only on the surrounding circumstances which simply establish the negligence.[26]

Furthermore, for the doctrine to succeed, the plaintiff must establish these conditions namely- that the thing causing the damage was under the management or control of the defendant or his servants; and that the accident was of such a kind as would not, in the ordinary course of things, have happened without negligence on the defendant's part[27] and that there must be no evidence as to why or how the occurrence took place. Where there is such evidence, then the plea is inappropriate.[28] In other words, "where the thing which causes the accident is under the management of the defendant or his servants and the accident is such which does not ordinarily

[23]*George* (n 4) 32. See also *NEPA v Alli* (1999) 8 NWLR (PT 259) 279 @ 302; *Fan Milk Ltd v Edemeroh* (2000) 9 NWLR (pt. 672) 402 @ 418
[24]*United Cement Company of Nigeria Limited & Ors* (n 10)
[25]*Ibid*
[26]*Chudi Verdical Company Limited* (n 19). See also *Management Enterpries Ltd v Otusanya* (1987) 2 NWLR (Pt 55) 179; *Strabag Construction (Nig) Ltd (*n 13) 750 and *Ibekendu* (n 13) and *Royal Ade (Nig) Ltd v N.O.O.M. Co Plc* (n 10) 2006
[27] See also *Ifeagwu v Tabansi Motors Ltd* (1972) 2 ECSLR pg. 790; *Tijani v Balogun* (1974) 9 CCHCJ 1471.
[28]*George Abi* (n 4)

occur if the defendant exercises proper care or diligence, there is presumption that such accident was caused by lack of care."[29] Thus, where the plaintiff fails to lead evidence of the nature of the accident from which the inference of negligence can be drawn, the plea of *res ipsa loquitor* is considered "dead on arrival" as such cannot be applied.[30] In other words, the doctrine is not meant to supplement inconclusive evidence of negligence on the part of the plaintiff. Rather, it is meant to apply where there is no other proof of negligence than the accident itself.

Meaning and Nature of Medical Negligence

Negligence has been defined as the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do.[31] It simply entails the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm.[32] It means carelessness in a matter in which the law mandates carefulness.[33] It also connotes lack of proper care and attention and careless lack of proper conduct.[34] Medical negligence is, therefore, the breach of duty of care by a person in the medical profession to a patient which results in damage to the patient.[35] It is also defined as failure to act in accordance with the standards of reasonably competent medical men at the time.[36] Thus, it signifies the failure of a medical practitioner to exercise reasonable degree of skills and care in the treatment of a patient and which has resulted in harm to the patient.[37] Medical negligence can simply be referred to as the improper, unskilled, or negligent treatment of a patient by physician, dentist, nurse, pharmacist or other health care professional.[38]

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[29]*Odebunmi & Ors.*(n 9)

[30]*Mrs. Comfort Oyeladun Adetoun* (n 13)

[31]*Blyth v Birmingham Waterworks Co.* (1856) 11 EXCH. 781 at 784; *Stemco Ltd v Gabriel Okon Essien* (2019) LPELR-CA/C/259/2017; *Nigeria Breweries Plc v David Audu* (2009)LCN/3121(CA); *Okwejiminor v Gbakeji & Anor* (2008) LPELR-2537 (CA)

[32]*Viva Menthol & Ors v Garba & Anor* (2019) LPELR-CA/L/1095/2016

[33] Sriramak Murthy, (2007) 'Medical Negligence and the Law' *Indian Journal of Medical Ethics* 115

[34]*Adesina v People of Lagos State* (2019) LPELR-Sc.622/2014

[35] Enemo Ifeoma, (2012) 10 'Medical Negligence: Liability of Health Care Providers and Hospitals' *Nigerian Juridical Review* 112-31

[36] Shobha Pandit (2009) 25 'Medical Negligence: Coverage of the Profession, Duties, Ethics, Case law, and enlightened Defense - A Legal Perspective', *Indian Journal of Urology* 374.

[37] Micheal Aondona Chiangi, (2019) 4 'Principles of Medical Negligence: An Overview of the Legal Standard of Care for Medical Practitioners in Civil Cases' *Miyetti Quarterly Law Review* 53

[38] <https//legal-dictionary.thefreedictionary.com> accessed on 22 July 2022.

Consequently, when a driver knocks down a pedestrian while driving dangerously in a crowded street as a result of which the pedestrian broke his leg, the driver is liable for negligence. However, where a doctor performs surgery using substandard medical equipment, as a result of which the patient died, the doctor is liable for medical negligence.

Proof of Medical Negligence

The law is quite trite that he who asserts must prove. In civil cases, the burden of proof is on the party who asserts a fact to prove it. Thus, the burden of proof of negligence falls upon the complainant[39] or plaintiff who alleged negligence. In fact, the law is that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.[40] In case of medical negligence, the patient who alleges that the doctor is negligent has the burden of proof which could be discharged by credible opinion evidence of another competent doctor.[41] Therefore, failure to prove the particulars of medical negligence pleaded is fatal to the plaintiff's case.[42] Thus, in an action for medical negligence, the law is that the plaintiff (patient) must prove the elements of negligence *viz*: the existence of duty of care owed to the plaintiff (patient) by the defendant; breach of the duty of care by the defendant; and damage suffered by the plaintiff (patient) as a result of the breach.[43]

Existence of Duty of Care

Health care providers such as doctors, nurses, ophthalmologists, physiologists, physiotherapists, dentists, pharmacists, laboratory scientists, radiologists, have held themselves out to serve members of the public and their patients rely on their skills and knowledge.[44] Thus, the law is that:

> …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

[39] Murthy(n 31) 117
[40] Evidence Act (n 3)
[41] The Indian Supreme Court in the case of *Jacob Mathew vs State of Punjab* Criminal Appeal Nos 144-145 of (2004).
[42] *Nigeria Breweries Plc* (n 30). See also the cases of *Alh Otaru & Sons Ltd v Idris* (999) 6 NWLR (pt.606) p.330; *Onagoruwa v JAMB* (2001) 10 NWLR (pt.722) p.742; *Makwe v Nwukor* (2001) 14 NWLR (pt. 733) p. 356 and *Ololo v Nig. Agip Oil Co. Ltd* (2001) 13 NWLR (pt.729) p.88
[43] *ABC (Transport) Co. Ltd. v Miss Bunmi Omotoye* (2019) LPELR-SC.177/2011
[44] Ifeoma(2011) 113

> client to use due caution, diligence, care, knowledge and skill in administering treatment…[45]

The same duty of care is codified in the Nigerian Criminal Code as follows:

> It is the duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any other person, or to do any other lawful act which is or may be dangerous to human life or health, to have reasonable skill and to use reasonable care in doing such act; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to observe or perform that duty.[46]

Similarly, the Code of Medical Ethics also imposes a duty of care on medical practitioners as follows:

> Medical practitioners and dental surgeons owe a duty of care to their patients in every professional relationship. The particular skill which training and eventual recognition and registration bestow on a practitioner is to be exercised in a manner expected of any practitioner or any member of the profession of his experience and status...[47]

Duty of care also arises from the obligation imposed by the common law in all cases where one's action could cause harm to another which is recognised in Nigeria. This is called foreseeability test as propounded by the eminent jurist, Lord Atkins, in the celebrated case of *Donoghue v Stevenson*.[48]According to the common law, there is a duty of care in any situation where it is foreseeable that the defendant's action or inaction could cause harm to the plaintiff. Simply, put, a person must take reasonable care to avoid acts or omission which is reasonably foreseen as likely to injure another who is closely and directly affected by such acts or omission. Thus, since the action of a medical practitioner directly affects the life and health of a patient, he owes the patient a duty of care to ensure that he does not cause any injury to him. This is what is referred to as "Principle of Neighbour" which is explained to mean that a person owes a duty of care to his neighbour who would be directly affected by his act or omission.[49] In medical negligent cases, persons who offer medical advice and treatment implicitly state that they have the skill and knowledge to do so, which is known as an "implied undertaking"

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[45]*R v Bateman* [(1935] 94 KB 791
[46] Section 303 of the Criminal Code, cap. C38 Laws of the Federation of Nigeria, 2004
[47] Rule 28 of the Code of Medical Ethics in Nigeria, 2004
[48][1932] AC 562 (HL)
[49]*First Bank & Ors vEromosele*(2019) LPELR-CA/B/55/2017

on the part of a medical professional "that he possesses skill and knowledge for the purpose" and "to act with a reasonable degree of care and skill".[50]

Breach of Duty of Care

The duty of care is said to be breached in two different circumstances, namely, where the medical practitioner failed or refused to attend to the patient and where the care and skill exhibited by the medical practitioner is below the standard of a reasonable medical practitioner in the same circumstance. Thus, standard of care is one of the determinants of the breach of duty of care. In law, standard of care is the degree of prudence expected of an ordinary reasonable individual who is under a duty of care. It is the degree of prudence required for the conduct of persons whose activities unavoidably impose risks of injury on other.[51] In medical negligence, the test that determines whether an act of a medical practitioner is below standard or not is the perception of a reasonable doctor in similar circumstance. Thus, it was stated:

> A medical man, for instance, should not be found guilty of negligence unless he has done something of which his colleagues would say: "He really did make a mistake there. He ought not to have done it"...But in a hospital, when a person who is ill goes in for treatment, there is always some risk, no matter what care is used. Every surgical operation involves risks… You must not, therefore, find him negligent simply because something happens to go wrong.... you should only find him guilty of negligence when he falls short of the standard of a reasonably skilful medical man, in short, when he is deserving of censure.[52]

In the light of the foregoing, a "reasonable doctor", whose perception forms the basis of judgement, is a doctor who has reasonable skills in the relevant field. As much as reasonable duty of care is expected from a physician, punishment will not be imposed if such care had been exercised and yet error occurred. But where there is deviation from the applicable standard of care and the patient is injured, the physician will be held liable for medical negligence.[53]

Generally, the test of reasonable man in the determination of standard of care depends also on the circumstances of each case. The test is the standard of the ordinary skilled man exercising and professing to have that special skill.[54] Thus, where a person holds himself out as possessing

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[50] *State ofHaryana v Smt Santra* (2000) 5 SCC 18: AIR 2000 SC 3335
[51] *Ibid*
[52] See also *Unilorin Teaching Hospital v Abegunde* (2013) LPELR-CA/IL/63/2011
[53] *Rees v Roderiques* 101 Nev. 302, 304 (Nev, 1985)
[54] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, 586

the skill of an ordinary medical doctor, then all that will be expected of him is what an average doctor under similar circumstances will do. But where he professes to have any special skill, for example a cardiac surgeon, then he must display the special skill and facilities required during a cardiac surgery. In effect, the standard of care varies according to the proficiency required of the individual.[55] Similarly, the circumstance in which the medical practitioner finds himself also determines the standard of duty of care. Thus, the standard of care where there are no sufficient and state-of-the-art medical facilities[56] may not be the same as where they are available.[57] Similarly, the standard of duty of care is equally affected by the timing of administering medical care, as the standard of care in recent negligent cases will be highly than early cases due to improvement in medicine and technology.

Damage/Injury

Damage/Injury is the harm that a defendant suffered from as a result of the alleged breach of duty of care. A claimant must prove that he has suffered an injury which must flow directly from the action of the defendant.[58] Simply put, the damage suffered must be the natural consequence of the wrongful act of the defendant.[59] Thus, the damage done must be the direct effect of the defendant's breach of duty of care owed to the plaintiff. Action for negligence will fail where the damage is so remote that a reasonable man would not have foreseen it as the possible consequence of the defendant's action.[60] In medical negligence, the damage must have resulted directly from the treatment administered by the medical practitioner and it is not so remote to be foreseen as possible consequence of the treatment by a reasonable medical practitioner. The damage could include bodily harm; mental illness; nervous shock; property damage; financial or economic loss.[61]

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[55] Dauda Momodu, (2019) 9 'Medical Duty of Care: A Medico-Legal Analysis of Medical Negligence in Nigeria'*American International Journal of Contemporary Research* 61

[56] In a case where the medical practitioner is confronted with having to work under substandard conditions, the hospital management should bear individual responsibility for the negligence. See Gureje, (n 1)149

[57] J. A. Dada, *Legal Aspects of Medical Practice in Nigeria*, (2nd edn, University of Calabar Press 2013)133-34

[58]*NEPA v Role* (1987) 2 NWLR (Pt. 5) 179 16

[59]*Donoghue* (n 44)

[60] D.A Akhabue, (2012) 6'Negligence in Nigeria-Not at Claimant's Beck and Call'*International Journal of Law and Jurisprudence Studies*61

[61]Bayero-Jimoh, (2016) 5 'Physicians and Wrong Diagnosis of Patients: An Assessment of Legal Duties and Liabilities in Nigeria'*Nnamdi Azikwe University Journal of International Law and Jurisprudence* 48

Relevance and Application of *Res Ipsa Loquitor* in Proof of Medical Negligence

The circumstances and conditions necessary for the application of *res ipsa loquitor* generally have been discussed earlier. Suffice it here to point out the relevance and actual application of the doctrine in proof of medical negligence. It may be safe to state that there is dearth of judicial decisions on the application of the doctrine of *res ipsa loquitor* in proof of medical negligence in Nigeria. However, the few available judicial decisions which shows the relevance of the doctrine are analysed below.

For the doctrine to apply in proof of medical negligence, the plaintiff must establish the injury which resulted from the negligent act of the defendant. Thus, in *Alex Otti v Excel-c Medical Centre Limited & Anor*[62] a patient presented himself to the doctor just to receive a prescription and supply of pain-relieving tablets for his haemorrhoids. He expressly informed the doctor that he did not want to be detained overnight and he did not want any surgical procedure performed on him. Contrary to these instructions, he alleged that the procedure performed on him by the doctor only served to worsen his condition. Consequently, the plaintiff instituted an action claiming for damages for false imprisonment, bodily trespass by unauthorized surgical operation and clinical negligence which the trial court dismissed. One of the issues for determination at the Court of Appeal was whether the appellant had proved negligence against the respondent doctor. The appellant argued that negligence could be proved by recourse to the common law presumption of *res ipsa loquitur*. The court held that for the doctrine to avail, the appellant he should have proved the resultant injury from which the negligent actions of the respondents could then be inferred. The court concluded that there was nothing on record establishing any injury suffered by the appellant, arising from the surgery performed by the respondents on the basis of which negligence could be inferred. Thus, the decision of the trial court that the appellant could not prove negligence was upheld. As could be understood in the above case, the doctrine was held inapplicable in proof of medical negligence due to inability of the appellant to prove that he suffered some injury arising from the surgery performed by the respondents on the basis of which medical negligence could have been inferred. In some cases, the courts do require that the patients should, apart from proof of injury, establish how the negligent act of the medical practitioner caused the injury. This is unlike the case of *Alex Otti v Excel-c Medical Centre Limited & Anor*[63] discussed above. Does this mean there is inconsistency in the conditions for application of the doctrine? Thus, in *George Abi v Central*

[62]*Alex Otti v Excel-c Medical Centre Limited & Anor* (2019) LPELR-CA/L/755/2012
[63]*Ibid*

Bank of Nigeria[64]the court required the patient to prove how the treatment by the doctors caused his deafness. The court stated:

> The evidence of administration of gentamycin by the 3rd Respondent on the Appellant is not enough. The Appellant must proceed to prove that wrong dosage of the drug was administered, and that it was the result of the wrong dosage that caused the deafness.

Contrary to the position stated above, the law is that where there is on record credible evidence explaining the occurrence of an event, it would be highly injudicious for the Court to place reliance on the doctrine of *res ipsa loquitur*.[65] This means the doctrine will only be considered for application where there is no evidence on the part of the patient of how the injury was caused by the doctor. When you ask a patient to show how the treatment from the doctors resulted in the injury he suffered, you are invariably asking him to produce expert medical evidence. In fact, the trend being taken by the courts is that the doctrine will not be applicable in the absence of expert medical witnesses.

This trend appears to have been established in the earlier case of *Ojo v Gharoro*.[66] In the instant case, the Supreme Court said:

> The only witness who gave evidence for the appellant is the appellant herself. She did not call any expert witness to give evidence and so her evidence had to struggle for the first place with the expert evidence of the three witnesses for the respondents – two medical doctors and a radiologist. There was real cause and need for the appellant to call expert evidence. In her evidence in-chief, appellant said that following pains and swollen tummy after the second surgical operation, she was rushed to Egharevba Hospital, Benin City, where another surgical operation was performed. Appellant said that she was informed in the hospital that the operation became necessary because of the needle left in her tummy by the defendants. That is not all. Appellant said that the medical doctor, Dr. Egharevba, recommended that she should go to the University College Hospital Ibadan, to undergo exploratory laparotomy under fluoroscopy in order to remove the surgical needle. I expected the appellant to call Dr. Egharevba or any other competent witness to give evidence in her favour.

In furtherance of the trend, for instance, the Supreme Court continued:

> One other aspect that should have determined the level of negligence on the part of the respondents was evidence on the size of the piece of the needle left in the abdomen. No evidence was led on that and the party

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[64] (n 4)
[65] (2012) 3 NWLR (pt. 1286) 1 at 32
[66]*Ojo v Gharoro* (2006) LPELR-SC.251/2001

> who ought to have led evidence on that was the appellant, if she felt that such evidence would be in her favour. The above apart, I expected the appellant to tender a complete surgical needle and call an expert witness to demonstrate to the court the piece or pieces that remained in the abdomen of the appellant, again if she thought that such evidence would be in her favour. Again, she did not deem it proper to call such evidence…[67]

While the need for medical expert witness/evidence may be justified where the defendant brings evidence to rebut the application of the doctrine, it is not so where it is required as a condition for the application of the doctrine. In other words, it is not the requirement of the law that the plaintiff/patient should bring any medical evidence before the application of the doctrine. However, where the defendant/doctor had produced medical evidence in rebuttal of the application of the doctrine, it behoves on the plaintiff/patient to equally produce medical evidence to counter that of the defendant/doctor. This is the reason it may be not be right to fault the following dictum in support of the decision of the court:

> In a complicated and highly professional case such as this, where she relies on the doctrine of *res ipsa loquitur*, arising from an abdominal operation, I expected her to call expert evidence and here I have in mind surgeon or surgeons… As it is, the lay evidence of the appellant, if I may say so, for lack of a better expression, in an essentially professional matter, and in the professional areas, cannot match side by side with the evidence of 1st respondent, DW1 and DW2. In the circumstances, I have no difficulty in coming to the conclusion that the presumption of negligence on the part of the respondents was clearly rebutted by the evidence of the three witnesses, and I so hold.[68]

Perhaps it is safe to conclude that the doctrine is only applicable in the absence of medical evidence or medical expert witness testified in rebuttal of the doctrine. Thus, in *Igbokwe v University College Hospital*[69] a pregnant woman was admitted at the defendant's hospital. She was delivered of a baby and thereafter diagnosed of psychosis and given sedatives. A nurse on duty was assigned to look after her. Subsequently, she fell from the fourth floor and died. The husband of the deceased brought an action contending that the circumstances of the death of his wife pointed negligence on the part of the defendant. In effect, he relied on the doctrine of *res ipsa loquitor*. The court held that the defendants were negligent in that" no medical expert had been called by the defendant to say that given the case's history all reasonable precaution

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[67]*Ibid*
[68]*Ibid*
[69] (1961) WRNLR 173

had, in his option, been taken to prevent the occurrence." This shows that the decision was based on the absence of medical expert evidence in rebuttal of the application of the doctrine.

Similarly, in the case of *Plateau State Health Services Management Board & Anor. v Inspector Philip Fitoka Goshwe,*[70] the doctrine was rightly and properly applied in proof of medical negligence. In the instant case, the Respondent, a policeman had gone to the hospital of the 2nd Appellant for treatment of pneumonia and after the said treatment the Respondent became 100% deaf. A panel of inquiry set up by the Appellants arrived at a conclusion that the Respondent's deafness was due to some injections he received for treatment of pneumonia at the Appellant's hospital. Having been retired on health grounds and his request for the payment of compensation fallen on deaf ears, the Respondent brought an action against the Appellants claiming two Million Naira as damages for negligence. The Respondent relied on the doctrine of "*Res ipsa loquitur*". The trial court and the Court of Appeal held the appellant liable and awarded damages in the sum of 300,000.00. On further appeal to the Supreme Court, the decisions of the two courts were upheld. Justifying the application of the doctrine of *res ipsa loquitor* in the case, the court stated:

> What conclusion can one reasonably draw from a case in which a man who is hale and hearty but for a complaint that he has pneumonia and so proceeds to a hospital to have that ailment treated but comes out of the said hospital with a completely different and worse ailment after taking some drugs administered by the hospital's personnel? The scenario is worse when no attempt is made by the hospital authorities to explain its own side of the story after promising to do so. The Respondent had stated in his affidavit evidence that the Appellants were negligent. The Appellants led no evidence whatsoever of their own to controvert those facts as stated by the Respondent.

Hence, the facts of the above case are in *pari materia* with that of *George Abi v Central Bank of Nigeria*[71] but different decisions were given. While in the former the doctrine was applied in proof of medical negligence, it was rejected in the latter on the ground that the defendant in the former case did not adduce evidence to rebut the application of the doctrine while the defendant in the latter case did.

It appears, from the cases examined on the application of the doctrine, that it will be difficult to apply it in proof of medical negligence due to the unwillingness of the courts to accept it whenever evidence is adduced by medical experts in rebuttal. This is because defendant

[70] (n 15)
[71] (n 4)

medical practitioners will always try to bring evidence to justify their actions and courts will not be in positions to determine whether the justification provided is appropriate or not in the absence of medical evidence on the part of the plaintiff. Thus, in *George Abi v Central Bank of Nigeria*[72]the patient became deaf after treatment of pneumonia with gentamycin as a result of which he instituted the action in damages for negligence relying on *res ipsa loquitor*. The trial court rejected it as inapplicable in proof of negligence because it was not supported by expert medical evidence. This decision was justified on appeal as follows:

> …What the appellant need was to call an expert skilled medical witness to testify on whether the prescription of gentamycin in the circumstance of the health condition of the appellant was right and whether it did cause appellant to become deaf. Whether a reasonable medical mind will say there was a mistake. Failure of the appellant to call an expert witness affected the claim. Therefore I have no reason to interfere with the decision of the court below. There must be evidence to show that the appellant became deaf due to lack of diligence in prescription, administration and consumption of the drugs in particular gentamycin. In most cases drugs manufactures will clearly state its side effects in the packets bought from the pharmacy but when administered in hospital the patient hardly has the opportunity to know of the side effects unless told. It is only a reasonable/responsible medical expert in that field of medicine that can explain medically in evidence the benefit and risk of the drug for the judge to assess and weigh between two doctors evidence. The presumption is that a judge is not a medical doctor he can only assess evidence presented before her.

The justification above also enjoys support from some scholars because the human system and the nature of medical practice make it easier to succeed in cases where things are purely 'physical' and obvious.[73] Some others argue that the patient will be able to know what happened during the treatment by going through the records[74] and that medical evidence, by an expert, is reliable when uncontroverted by another expert.[75] However, this should not have been the appropriate and correct approach as it defeats the whole essence of the doctrine. The doctrine is mostly resorted to because the plaintiff who felt that he was injured by the negligent conduct of the defendant is a lay man, that is not a medical expert and lacks evidence to prove it. Rather, having the belief that the circumstances in which the injury was caused smacks of negligence, the court should infer same. When the court so infers negligence, the defendant

[72]*Ibid*32
[73] Oludamilola Adebola Adejumo and Oluseyi Ademola Adejumo, (2020) 35 'Legal Perspectives on Liability for Medical Negligence and Malpractices in Nigeria'*The Pan African Medical Journal* 44
[74] Kennedy and Grubb,*Medical Law: Text with Materials* (2nd edn, Butterworth 1994) 466
[75] O.J. Odia and A. R. George, *Law and Ethics of Medical Practice in Nigeria* (2nd edn, University of Port Harcourt Press Ltd 2015) 193

should then be given the opportunity to dispel the inference by showing that he was not negligent. Where he produces medical evidence, the burden of proof shifts to the plaintiff to also produce most compellingly medical evidence for the court to determine which way the scale of justice tilts.

A classic example of a case wherein the doctrine of *res ipsa loquitor* would have applied is *Dr. Daru & Ors v Barrister Ibrahim Aminu* Umar.[76] In the instant case, the wife of the respondent visited the Jos University Teaching Hospital for treatment. She was asked to undergo surgery which allegedly led to her death. The Respondent consequently sued the Appellants for, among other things, a declaration that the illness his wife presented for treatment was common cold and not a case of ectopic pregnancy; that the act of the appellants in carrying out a surgery on his wife for an alleged ectopic pregnancy (which did not exist) and which surgery led to her death constituted acts of gross medical negligence and claimed Ten Million Naira in damages. However, the case ended on a ruling on preliminary issue of jurisdiction raised without considering the substantive issues. Had the case been determined on its merit, the doctrine of *res ipsa loquitor* would have been most relevant and appropriate in proof of medical negligence. What more evidence does one need to adduce apart from the facts that the deceased presented a case of common cold and she was subjected to an operation for non-existent ectopic pregnancy which operation led to her death?

Conclusion

From the foregoing discussions, it is found that it is difficult to prove medical negligence by plea of doctrine of *res ipsa loquitor*. This is because the courts are mostly reluctant to apply the doctrine where the defendant tenders expert medical evidence in rebuttal. It is recommended that in such cases the courts should not insist on expert evidence from the plaintiff especially where that of the defendant is contrary to common sense which is in line with the established general principle for use of expert evidence. For instance, where a needle got broken and left in the abdomen of a patient during surgery, the court does not need medical evidence to infer negligence on the part of the doctor.[77] So also where the patient was cut open for surgery only to find out that the ailment did not exist as a result of which the patient died.[78]

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[76] (2013) LCN/6750(CA)
[77] Contrary to what happened in the case of *Ojo* (n 62)
[78] As it happened in the case of *Dr. Daru & Ors* (n 73)

When this idea is embraced by the Nigerian courts, the doctrine becomes more relevant and its application appropriate in proof of medical negligence under the Nigerian law.

The article also found that there is inconsistency in the interpretation of the requirements for the application of the doctrine in proof of medical negligence. For instance, in some cases, the courts insist that the plaintiff only needs to establish the injury suffered as a result of the act of the defendant whereupon the court infers negligence or not on the part of the defendant until contrary is proved.[79] However, in other cases, the courts require the plaintiff to also prove the particulars (circumstances) which gave rise to negligence.[80] By so doing, the courts are unwittingly requiring that the plaintiff should prove negligence not *res ipsa loquitor.* In fact, it is judicially established that the doctrine is applicable only where there is no evidence of the injury complained of and once such evidence exists, the doctrine becomes inapplicable. In view of the above examination of the requirements for the application of the doctrine of *res ipsa loquitor* in proof of medical negligence, this article recommends that there should be consistency in the requirement for application of the doctrine. The requirement should be that the plaintiff only needs to establish the injury suffered whereupon the court infers negligence or not.

[79] See for instance, the case of *Alex* (n 58); *Management Ents Ltd* (n 24) and *Ojo* (n 62)
[80] See for instance, the case of *George* (n 4) where the patient was required to prove how the negligent treatment of the doctors caused the deafness of the patient.