

# Escalating Medical Negligence in Commonwealth West Africa: Evaluating the Efficacy of Deterrence Mechanism

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## Abstract

Medical malpractice remains a persistent issue across Commonwealth West-African countries, with limited legal interventions to ensure accountability or deter future occurrences. Despite increasing incidents of medical negligence, both Nigeria and Ghana continue to grapple with the challenge of establishing criminal liability in clear-cut cases. This paper examines the emergent jurisprudential shift signaled by *Lagos v Orji*, which demonstrates the feasibility of invoking criminal law in medical negligence cases—an area traditionally confined to civil and administrative remedies. Employing a doctrinal methodology and drawing on primary and secondary legal sources, the study explores the shared common law heritage and regional leadership roles of Nigeria and Ghana to assess broader trends in West African legal responses to medical negligence. A key finding of the study is the critical role of social media in raising rights-consciousness and exposing malpractice cases that often escape official documentation. The research highlights a troubling dearth of judicial precedents and underdeveloped jurisprudence on the subject, arguing that the severity and frequency of such cases necessitate a shift toward penal deterrence. The paper underscores the urgency of rethinking legal frameworks to ensure medical accountability, proposing the adoption and refinement of Indonesia's criminal liability model as a potential roadmap. In advocating for the integration of criminal jurisprudence into the discourse on medical negligence, this study offers a novel contribution to legal scholarship and calls for urgent reform in regulatory and prosecutorial approaches within the region.



## 1. Introduction

The propensity of death from medical negligence is 33,000 times higher than dying in an aircraft mishap.<sup>1</sup> Panagioti *et al* suggest that at least 12% of recorded deaths in medical facilities result from medical error.<sup>2</sup> Medical negligence has assumed the status of a global phenomenon with about 7.4% of medical personnel in the United States of America (USA)<sup>3</sup> alleged with malpractices every year whereas South Africa made some 2, 403 entries of cases of medical negligence between 2011 and 2012.<sup>4</sup> Cases of medical negligence also doubled in the United Kingdom (UK) between 2007 and 2012.<sup>5</sup> In Nigeria, the trend has sustained a percentage rate of 42.8% to 89.8%<sup>6</sup> to the effect that about 250,000 deaths every year result from medical negligence,<sup>7</sup> whereas in Ghana 58% surge in cases of medical negligence was recorded in 2023.<sup>8</sup>

Every citizen has the fundamental right to healthcare delivery.<sup>9</sup> This is important as good health attaches the right to life.<sup>10</sup> It is therefore most worrisome when the act of a healthcare provider, meant to save life, results in death or injury to the patient.<sup>11</sup> In daily interactions between medical facilities and individual citizens, the expectation of the citizen is that his fundamental rights would be respected and that he would be safe from avoidable harm.<sup>12</sup> The guarantee of

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<sup>1</sup> A. Alghrami et al., "Balancing the Scales of Safety: The Criminal Law's Impact on Patient Safety and Error Reduction," *British Journal of Oral and Maxillofacial Surgery* 62, no. 3 (2024): 229–32, <https://doi.org/10.1016/j.bjoms.2023.11.018>.

<sup>2</sup> M. Panagioti et al., "Preventive, Severity and Nature of Preventable Patient Harm Across Medical Care Settings: Systemic Review and Meta-Analysis," *BMJ* 366, no. 14185 (2019): 390, <https://doi.org/10.1136/bmj.l4185>.

<sup>3</sup> B. Hanganu et al., "Reasons for and Facilitating Factors of Medical Malpractice Complaints: What Can Be Done to Prevent Them?," *Medicina* 56, no. 259 (2020), <https://doi.org/10.3390/medicina56060259>.

<sup>4</sup> J. Bayuo and A. O. Koduah, "Patterns and Outcomes of Medical Malpractice Cases in Ghana: A Systemic Content Analysis," *Ghana Medical Journal* 56, no. 4 (2022): 322–30, <https://doi.org/10.4314/gmj.v56i4.11>.

<sup>5</sup> T. Bourne et al., "Doctors' Experiences and Their Perception of the Most Stressful Aspects of Complaints Processes in the UK: An Analysis of Qualitative Survey Data," *BMJ Open* 6, no. e011711 (2016), <https://doi.org/10.1136/bmjopen-2016-011711>.

<sup>6</sup> A. O. Gabriel, "Documentation of Medical Errors in Nigeria: A Review," *Research Square* (2024), <https://doi.org/10.21203/rs-4002952/v1>.

<sup>7</sup> A. Onwuzoo, "Costly Error: Tales of Patients Killed, Disabled by Health Workers' Negligence," *Punch* (Lagos, October 1, 2023), <https://punching.com>.

<sup>8</sup> C. O. A. Botchewey et al., "Patient Safety Culture and Satisfaction in Ghana: A Facility-Based Cross-Sectional Study," *BMJ Open* 14, no. 1 (2024), <https://doi.org/10.1136/bmjopen-2023-073190>.

<sup>9</sup> A. Maulana, C. B. E. Praja, and M. L. Hakim, "Compensation as Hospital Liability for Negligence in Medical Services Harming Patients: Empirical Study of Several Peace Agreements," *Varia Justicia* 19 (2023): 153.

<sup>10</sup> Indonesia, *Undang-Undang Dasar Republik Indonesia Tahun 1945*, art. 28H.

<sup>11</sup> B. Maini, R. Kumar, and A. K. Dwivedi, "Medical Negligence: A Conceptual Analysis," *Journal of Advanced Zoology* 45, no. S2 (2024): 425–32, <https://doi.org/10.5355/jaz.v45Is2.5032>.

<sup>12</sup> J. G. Ruggie, "The Social Construction of the UN Guiding Principles on Business and Human Rights," in *Research Handbook on Human Rights and Business*, ed. Surya Deva and David Birchall (Cheltenham: Edward Elgar Publishing, 2020), 63–86.



patients' safety underscores professionalism, justifying the application of emerging technologies in healthcare delivery.<sup>13</sup> Consequently, the disappointment which follows victims' regrets when they suffer from avoidable medical negligence may be horrific.

Medical negligence refers to an act or omission by a medical practitioner which falls below the tolerable standard of care occasioning harm and sometimes the death of a patient.<sup>14</sup> It may occur in circumstances in which a medical doctor's act contravenes the ethics, morals and discipline; the law; the standards of the medical profession and especially, lacking in knowledge or lagging behind in knowledge which is common within medical circles and so on.<sup>15</sup> The literal construction of medical negligence implicates *bad practice*<sup>16</sup> or *malpractice*<sup>17</sup> in relation to the practice of medical profession.

Generally, negligence is a breach of a legal duty to take care which results in damage to the claimant. The modern principle of negligence which is coterminous with failure of the duty of care is rooted in the case of *Donoghue v Stevenson*.<sup>18</sup> In the case, Lord Atkin laid down the foreseeability test to establish negligence where reasonable care was not employed to avoid foreseeable harm to another. Where an injury is suffered owing to failure to comply with the duty of care, a liability arises against the person who has occasioned the failure. Medical doctors, like other professionals, are expected to show higher and informed quality of service delivery in the practice of their profession. It is a settled principle of law that 'a person exercising a profession or calling is liable for failing to exercise due care and skill, despite the absence of a contractual relationship, if the person ... is relying on him to take the care required in the circumstances, such reliance being reasonable and he knows or ought to know that he is being relied on'.<sup>19</sup>

In *Abatan v Awudu*,<sup>20</sup> the Nigerian Appellate Court held that 'the relationship between a doctor and his patient is one of trust and confidence. A relationship where one has the power and the duty to treat and restore the other to mental physical well-being. It is only natural, therefore for a doctor to know that a patient relies on

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<sup>13</sup> D. A. Akinpelu and S. O. Akintola, "Navigating the Legal and Ethical Terrain of Artificial Intelligence in Enhancing Patient Safety in Nigeria," *Journal of Intellectual Property and Information Technology Law (JIPIT)* 3, no. 1 (2023): 176, <https://doi.org/10.52907/jipit.v3i1.261>; J. Bajwa, S. Nori et al., "Artificial Intelligence in Healthcare: Transforming the Practice of Medicine," *Future Healthcare Journal* 8, no. 2 (2021): e188–e194, <https://doi.org/10.7861/fhj.2021-0095>.

<sup>14</sup> F. N. Chukwuneke, "Medical Incidents in Developing Countries: A Few Case Studies from Nigeria," *Nigerian Journal of Clinical Practice* 18 (2015): 20–24.

<sup>15</sup> J. Yadav, M. Yadav, and S. Chand, "Medical Negligence and Its Determinants," *International Journal of Recent Scientific Research* 11 (2020): 40080–82.

<sup>16</sup> R. Sidi, "Legal Responsibility for Medical Risks and Medical Negligence in the View of Health Law," *Journal of General Education Science* 2 (2023): 106.

<sup>17</sup> H. Khalid, "Legal Protection for Victims of Medical Malpractice during the COVID-19 Pandemic: A Study on Legislation," *SJH* 5 (2023): 263–75.

<sup>18</sup> *Donoghue v. Stevenson* [1932] AC 562.

<sup>19</sup> *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465.

<sup>20</sup> See *Abatan v. Awudu* [2014] 17 NWLR (Pt 430) 3 (per Aderemi, JCA).



his skill and care in the delivery of medical services. Since medical malpractice may be expanded to involve the wrongful use or abuse of medical science and technology applicable to healthcare delivery, the legal obligation of care in the circumstances attaches algorithms and sundry medical infrastructure.<sup>21</sup> To that extent, cause of action in cases of medical negligence may extend to the performance of a variety of acts by diverse healthcare service personnel, even in vicarious capacity.<sup>22</sup>

The principles of vicarious liability of a healthcare provider or facility was expounded in the recent South African Case of *Mohun v Philips*,<sup>23</sup> wherein the act of a *locum tenens* doctor which resulted to brain damage and hypoxia was vicariously imputed to the defendant. In Nigeria and Ghana, appropriate standard of care expected of medical practitioners are codified and may safely be referred to as code of professional ethics for medical practitioners as enacted by the Medical and Dental Council of Nigeria and Ghana respectively.<sup>24</sup>

Available literature on the subject matter has concentrated on the civil remedies available in cases of medical negligence at the expense of a penal deterrence regime. This is because since *R v Akerele* was upturned in 1963 by the House of Lords, no successful criminal prosecution has been recorded against a negligent medical doctor within the Commonwealth West Africa despite the meteoric rise in complaints of medical malpractice until the decision in *Lagos v Orji* in 2023, a period of six decades.

The development contrasts with the UK and USA jurisprudence which have developed the penal deterrence aspect of the medical malpractice to stem the tide of professional rascality. As recent as 2015, in *R v Bawa-Garba*,<sup>25</sup> the defendant was convicted for gross negligence manslaughter (GNM) for the death of Jack Adcock.<sup>26</sup> Earlier, in *People v Murray*,<sup>27</sup> the California High Court in USA convicted the defendant who administered *popofol* for treatment of insomnia on pop superstar, Michael Jackson. The conviction of involuntary manslaughter cost him his practice licence and earned him imprisonment for four years.

Application of penal deterrence has been in the increase since 1990. Italy has the highest record of prosecution of medical errors whereas Taiwan routinely

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<sup>21</sup> F. Griffin, "Artificial Intelligence and Liability in Health Care," *Health Matrix: Journal of Law-Medicine* 31 (2021): 65–106.

<sup>22</sup> B. Odunsi, "Medical Negligence and Its Litigation in Nigeria," *Beijing Law Review* 14 (2023): 1090–1122; F. H. Hasibuan et al., "The Relationship between Ethics and Institutions in the Health Sector in the Enforcement of Professional Ethics from a Utilitarian Perspective," *AJOMRA* 2 (2024): 130–39.

<sup>23</sup> *Mohun v. Philips* [2022] ZASCA 186.

<sup>24</sup> *The Medical and Dental Practitioners Act* (MDPA), Cap M8, Laws of the Federation of Nigeria (LFN) 2004. See also *Code of Medical Ethics in Nigeria*, made pursuant to Section 1(2) of the MDPA.

<sup>25</sup> *Health Professions Regulatory Bodies Act* No. 857 of 2013 (Ghana); *National Revolutionary Council Decree* (NRCD) No. 91 of 1972.

<sup>26</sup> *R v. Bawa-Garba* [2016] EWCA Crim 1841.

<sup>27</sup> P. Case and G. Sharma, "Promoting Public Confidence in the Medical Profession: Learning from the Case of Dr Bawa-Garba," *Medical Law International* 20 (2020): 58–72, <https://doi.org/10.1177/0968533220933788>.



convicts at least a medical doctor for negligence in every 3 months.<sup>28</sup> Prior to *Lagos v Orji*, the relevance of criminal law principles to medical malpractice in West Africa has remained academic for decades. This paper focuses on criminal prosecution of erring medical practitioners as deterrence for negligence in the medical field.

## 2. Method

This paper is conceptual in nature and primarily based on doctrinal, library-based research without the inclusion of empirical data. It undertakes a rigorous desk-based evaluation of both primary and secondary sources, including relevant statutes, case law, scholarly articles, books, law reports, policy documents, and other pertinent legal materials. In addition to peer-reviewed publications, gray literature was also consulted to provide a comprehensive understanding of the subject. Media reports on incidents of medical negligence were tracked and analyzed to assess societal responses and verify the authenticity of reported cases. Given the legal significance and contemporary relevance of *Lagos v Orji*, this case serves as the focal point of the paper's case study analysis.

The selection of Nigeria and Ghana as comparative jurisdictions is grounded in their shared common law heritage, having both been formerly subject to the jurisdiction of the West African Court of Appeal and, ultimately, the House of Lords in England. These countries continue to maintain parallel judicial precedents and institutional structures, allowing for mutual influence across the sub-region. Drawing on a comparative analysis of the literature and an informed understanding of the legal philosophy surrounding medical negligence in West Africa, the paper offers critical and pragmatic recommendations aimed at enhancing patient protection and fostering accountability within medical practice.

## 3. Analysis or Discussion

### 3.1. What Constitutes Medical Negligence?

Medical negligence or malpractice occurs in circumstances where a doctor who owes a duty of care to the patient acts in breach of that duty, which breach results in injury to the patient. The *desideratum* of medical negligence is that the doctor exhibited crass and harmful behaviour in such a manner in which another doctor in the defaulting doctor's professional standing, acting reasonably in the same circumstances, would have acted differently. The difference between medical negligence and medical errors or malpractices is rather blurred. Medical errors occur when a medical practitioner chooses an inappropriate method of care or properly executes an inappropriate method of care or improperly executes an appropriate method of care.

Medical error is a grave failure on the part of the medical practitioner which may be by commission or omission with potential negative consequences on the patient that would have been adjudged improper or wrong by the knowledgeable

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<sup>28</sup> *People of the State of California v. Conrad Robert Murray*, No. B237677 [2011] Cal.



and skilled colleagues at the time irrespective of whether negative consequences actually occurred.<sup>29</sup> Maimela rightly posits that a medical practitioner may be absolved from consequences if the error of judgement is shown to be reasonable and could have been made by any other competent professional of like standing.<sup>30</sup> All medical malfeasance, malpractices or errors tantamount to medical negligence so long as damage or injury results therefrom.<sup>31</sup> The terms may, in this paper be used interchangeably. Such offending medical error, being in breach of medical rules and ethics may earn the doctor a disciplinary action.<sup>32</sup> To this extent, a doctor is under obligation to properly diagnose a case before treatment. In *University of Ilorin Teaching Hospital v Mrs. Theresa Akilo*,<sup>33</sup> the Nigerian Court of Appeal rightly stated the law when it held that, 'A medical doctor is liable in negligence if without due care and skill he wrongly diagnosed a patient's ailment resulting in error of treatment'.

In *Gyan v Ashanti Goldfields Corporation*,<sup>34</sup> a senior nurse at the company's hospital, without laboratory tests or reference to the doctor gave the plaintiff's child a chloroquine injection, thinking that the child was suffering from malaria. The injection resulted in the paralysis of the child's right leg as it turned out to be that the child had polio instead of malaria. It was contended for the plaintiff-patient that if the medical personnel had carried out a proper diagnosis, a different treatment would have been administered and the injury would have been averted. The Ghana Court of Appeal found that the nurse was negligent in attempting to play the role of an experienced doctor with the resultant effect of incapacitating the plaintiff for life.

Consequently, a breach of obligation is established where a medical practitioner's practice falls short of appropriate professional standard.<sup>35</sup> Certain variables may be called in aid in the determination of what constitutes appropriate standard. It suffices if the practice was considered acceptable in the circumstances by such medical practitioner's professional brethren.<sup>36</sup> Lord Denning conceives that a medical man should not be considered liable in medical negligence unless 'he has done something of which his colleagues would say "He really did make a mistake

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<sup>29</sup> E. J. Imuekemhe, "An Examination of the Disposition of the Law to Cases of Medical Negligence in Nigeria," *Edo University Law Journal* 1 (2018): 13.

<sup>30</sup> C. A. Maimela, "Medical Negligence and the *Res Ipsa Loquitur* Doctrine in the Administration of Cancer Treatment in South Africa," *Obiter* 43, no. 1 (2022), <https://doi.org/10.17159/obiter.v43i1.13499>.

<sup>31</sup> D. Violato, "Doctor-Patient Relationships, Laws, Clinical Guidelines, Best Practices, Evidence-Based Medicine, Medical Errors and Patient Safety," *Canadian Medical Education Journal* 4 (2013), <https://www.researchgate.net>.

<sup>32</sup> See *Medical and Dental Practitioners Act*, Cap M8, Laws of the Federation of Nigeria (LFN) 2004, Section 17.

<sup>33</sup> *University of Ilorin Teaching Hospital v. Mrs. Theresa Akilo* [2000] 22 WRN 117.

<sup>34</sup> *Gyan v. Ashanti Goldfields Corporation* [1991] 1 GLR 466.

<sup>35</sup> S. Wulandari and University of 17 Agustus 1945 Semarang, "Legal Formulation Patient Protection in Medical Malpractice," *International Journal of Social Science and Human Research* 6 (2023), <https://doi.org/10.47191/ijssshr/v6-i5-88>.

<sup>36</sup> *Okonkwo v. Medical and Dental Practitioners Disciplinary Tribunal (MDPRT)* [2001] 7 NWLR (Pt 711) 206.



there. He ought not to have done it.”<sup>37</sup> Denning’s reasoning represents the legal jurisprudence within the Commonwealth of Nations. The Indian Supreme Court has improved on Denning’s reasoning to set a higher threshold for medical negligence.<sup>38</sup> In *Mittal v State of U.P.*,<sup>39</sup> the court laid down the rule for the construction of the duties owed by a medical doctor to a patient upon consultation to include:

- a. duty of care in deciding whether to undertake the case;
- b. duty of care in deciding what treatment to give; and
- c. duty of care in administration of the treatment.

The standard may vary with alternative medical practitioners who have not held themselves out as professing the art of medicine in the orthodox sense. In *Shakoor v Situ*,<sup>40</sup> the court stated that an alternative medicine practitioner could not be held to the same standard with an orthodox medical practitioner. The defendant in this case was a practitioner of Chinese herbal medicine. He gave several doses of herbal therapy to cure multiple benign lipomas. The remedy produced severe reaction resulting in acute liver failure. The case of *Situ* implicates that a patient bears a heavier risk if he/she elects to patronize an alternative medicine practitioner who is not bound to observe any established standard of care.

It is doubtful if the case would be decided on the same *ratio* outside England where legal liability of informal workers is statutorily defined.<sup>41</sup> However, a London Court in a recent development, Hongchi Xiao was convicted for manslaughter and sentenced to 10 years in prison for engaging a diabetic with an alternative healing procedure which instigated the deceased to quit using insulin and consequently died of body poisoning.<sup>42</sup>

Medical negligence, therefore, refers to the failure to exercise skill or act with degree of care expected of the status and experience of a registered medical practitioner (healthcare provider) in attending to a patient. Registered practitioners may in the circumstances include doctors, ophthalmologists, pharmacists, physiologists, nurses, dentists, physiotherapists, laboratory scientists and radiologists. These practitioners belong to bodies such as the Nigerian Medical Association, the Medical and Dental Consultants Association of Nigeria have also established ethical rules for their members as well as disciplinary mechanism

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<sup>37</sup> A. T. Denning, *The Discipline of Law* (Oxford: Oxford University Press, 2013), 237, 242–43.

<sup>38</sup> *M. A. Biviji v. Sunita and Others*, Civil Appeal No. 3975/2018, judgment delivered 19 October 2023 (India).

<sup>39</sup> *Mittal v. State of U.P.*, [1989] AIR SC 1570 (India).

<sup>40</sup> *Shakoor v. Situ* [2001] 1 WLR 410.

<sup>41</sup> P. Wicaksono et al., “Quo Vadis: Legal Certainty of Informal Worker through Manpower Act,” *Jurnal Cendekia Hukum* 8 (2023): 301.

<sup>42</sup> *R v. Hongchi Xiao* [2024]; B. Melley, “Alternative Healer Gets 10 Years in UK Prison for Death of Woman at Slap Therapy Workshop,” *AP News*, December 6, 2024, <https://apnews.com/article/britain-slap-therapy-death-insulin-diabetic-california-australia-17b485f9b96d38219613c65c6e48ad0a>.



compel compliance.<sup>43</sup> Hence medical practice in Nigeria has not been without abundance of regulations in terms of quality and standard of healthcare service delivery.<sup>44</sup> In the light of the foregoing, medical negligence portends three major eventualities for a health care provider, namely:

- a. he may be sued in the tort of negligence for reparation;
- b. he may be cited for breach of professional code amounting to misconduct in a professional capacity;
- c. he may be prosecuted by the state in criminal proceedings with all consequences in any event of conviction.<sup>45</sup>

The rules of Professional Conduct for Medical and Dental Practitioners prescribe instances that would amount to professional negligence in the field of medical practice. These instances include:<sup>46</sup>

- a. refusal to give timeous attention to a patient in need of urgent attention when the practitioner was in a position to do so.<sup>47</sup> Where the deceased wife of the plaintiff was diagnosed with post-natal psychosis after delivery. On the same day she was delivered of her baby, she jumped from the heights and died. It was held that the hospital staff were negligent for failure to give a close-watch attention to the deceased after the diagnosis.
- b. neglect to advise, or providing wrong advice to a patient in respect of the risk involved in a particular procedure or line of treatment, particularly where such procedure is likely to give rise to serious side effects like deformity or loss of organ;<sup>48</sup>
- c. failure to secure the informed consent of the patient or otherwise prior to commencement of any surgical procedure or course of treatment, when such a consent was necessary.<sup>49</sup> In *Okekearu v Tanko*,<sup>50</sup> the

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<sup>43</sup> O. A. Adejumo and O. A. Adejumo, "Legal Perspectives on Liability for Medical Negligence and Malpractices in Nigeria," *Pan African Medical Journal* 35 (2020): 1-2.

<sup>44</sup> O. Ayenakin, T. Akindejoye, and I. Kolade-Faseyi, "Examination of the Legal Institutional Framework of Medical Law in Nigeria," *Global Journal of Politics and Law Research* 9 (2021): 13.

<sup>45</sup> D. Ferorelli et al., "Medical Legal Aspect of Telemedicine in Italy: Application Fields, Professional Liability and Focus on Care Services during COVID-19 Health Emergency," *Journal of Primary Care & Community Health* 11 (2020), <https://doi.org/10.1177/2150132720985055>.

<sup>46</sup> M. Abdulsalam, "Nigeria: A Review of Medical Negligence in the Nigerian Healthcare Sector: Utilising the Law as a Panacea," *Mondaq* (2023), <https://www.mondaq.com/Nigeria/healthcare/1266406/a-review-of-medical-negligence-in-the-nigerian-healthcare-sector-utilising-the-law-as-a-panacea>.

<sup>47</sup> *Compulsory Treatment and Care for Victims of Gunshots Act* 2017 (Nigeria).

<sup>48</sup> *National Health Act* 2014, Section 23 (Nigeria).

<sup>49</sup> *Code of Medical Ethics in Nigeria*, Rule 19; H. Saripan et al., "Artificial Intelligence and Medical Negligence in Malaysia: Confronting the Informed Consent Dilemma," *International Journal of Academic Research in Business & Social Sciences* 11 (2021): 293-302.

<sup>50</sup> *Okekearu v. Tanko* [2002] 15 NWLR (Pt 791) 657 [SC].



Nigerian apex Court upheld a case of battery against a doctor who amputated an injured fourteen-year-old boy without the consent, first had and obtained. The consent required by law must be direct and unequivocal except in dire cases of emergency.<sup>51</sup> In the Nigerian case of *Medical and Dental Practitioners Disciplinary Tribunal v Dr. John Okonkwo*,<sup>52</sup> the Supreme Court of Nigeria declared the freedom of an individual to decide what to do with his life, subject to paramount and prevailing state interest. An adherent to Jehovah's Witnesses Faith who had refused to admit blood transfusion for being contrary to her religious belief died eventually, consequent upon her decision. The Court discountenanced the argument that respondent doctor was negligent in the circumstances.

- d. making an error in diagnosis or a mistake in treatment such as amputation of the wrong limb, mistakenly inducing abortion of pregnancy, giving wrong drug prescription for a correctly diagnosed ailment in very glaring circumstances and so on. In *Darko v Karle-bu Teaching Hospital*,<sup>53</sup> a team of doctors from the defendant's Teaching Hospital in Ghana carried out surgery operation on the patient's left knee instead of the right knee which was diagnosed with torn ligament. The plaintiff initiated and succeeded in a court action against defendant in tort of negligence;<sup>54</sup>
- e. refusal to transfer or refer a patient timeously in justifiable circumstances;
- f. manifestation of incompetence in the assessment of a patient;
- g. omitting to do anything that should reasonably be done under any circumstances for the good health of the patient;
- h. neglect to cross-check blood before transfusing into the patient's system;
- i. conducting a 'trial' or 'gamble' procedure on a patient without his/her informed consent;
- j. use of unsterilized tools;
- k. failure to see or inspect a patient regularly as his condition warrants and to communicate with the patient or his kins on developments or discoveries regarding the patient's health status;

<sup>51</sup> M. Dauda and T. I. A. Oseni, "Medical Duty of Care: A Medico-Legal Analysis of Medical Negligence in Nigeria," *American International Journal of Contemporary Research* 9 (2019): 60.

<sup>52</sup> *Medical and Dental Practitioners Disciplinary Tribunal v. Dr. John Okonkwo* [2001] 2 MJSC 61.

<sup>53</sup> *Darko v. Karle-bu Teaching Hospital*, Suit No. 44/06, Judgment by Accra Fast Track High Court delivered 24 June 2008.

<sup>54</sup> *University of Nigeria Teaching Hospital Management Board v. Hope Nnoli* [1994] 8 NWLR (Pt 365) 367, 395-396.



- l. abandoning a swab or surgical tool inside the patient after surgical procedure. In *Ojo v Gharoro & Ors*,<sup>55</sup> the appellant was diagnosed of urine fibroid and secondary infertility requiring surgery. After the operation, Appellant felt pains in her uterus. An x-ray showed abandoned surgical tools inside her. Another surgery was done by another team of doctors to successfully remove the needle. The Nigerian apex court agreed that the surgeons exercised due surgical skills common to such operations and so incurred no liabilities.<sup>56</sup> Conversely, in the Indian case of *Dr Ravishankar v Jerry K. Thomas II*,<sup>57</sup> a patient diagnosed with nasal complications underwent septoplasty. The pains kept increasing after the surgery. Scan revealed some unnatural deposits in the nasal cavity which required immediate endoscopy. The doctor was found liable to negligence for abandoning cotton gauze in complainant's body.

Delafontaine *et al* suggest three comprehensive criteria for determination of what should constitute medical errors, drawn from Bernard Knight's opinion.<sup>58</sup> A breach of any of these identified duties resulting in injury or harm to the patient is referred to as a medical malfeasance which may result to a claim for reparation.<sup>59</sup>

### 3.2. Medical Negligence in Ghana

Ghana has had its own fair share of medical negligence or malpractices.<sup>60</sup> In *State v Kwaku Nkyi*,<sup>61</sup> a nursing intern who practiced without requisite certification or supervision injected a baby with *arsenic* instead of *mepacrine*. The child died within hours. Post-mortem examination established that the child died of poisoning from arsenic substances.

The defendant was charged and convicted of manslaughter. In *Asan-Tekramo (Kumah) v Attorney-General*,<sup>62</sup> a woman was diagnosed of ruptured ectopic pregnancy. While undergoing surgery at Kamfo Anokye Government Hospital, she developed swollen arm following the blood infusion through her vein. The arm became gangrenous and was amputated to save her life. Her action against the hospital in negligence succeeded. Also, in *Somi v Tema General Hospital*,<sup>63</sup> a pregnant woman was diagnosed with an *ante partum* hemorrhage. The doctors on night duty closed at 4:00 am instead of 8:00am while those on morning duty reported at 10.00am. Efforts by the nurses to keep the patient alive was futile as only an

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<sup>55</sup> *Ojo v. Gharoro & Others* [2006] 10 NWLR (Pt 987) 173 [SC].

<sup>56</sup> *Abi v. Central Bank of Nigeria* [2012] 3 NWLR (Pt 1286) 1.

<sup>57</sup> *Dr. Ravishankar v. Jerry K. Thomas II*, [2006] CPJ 138 (NC) (India).

<sup>58</sup> A. Delafontaine et al., "Impact of Confrontation to Patient Suffering and Death on Wellbeing and Burnout in Professionals: A Cross-Sectional Study," *BMC Palliative Care* 23 (2024), <https://doi.org/10.1186/s12904-024-01393-8>.

<sup>59</sup> J. S. Avoseh, "The Duties and Responsibilities of Medical Practitioner and Liability for the Breach under Nigerian Law," *E-Justice, India* (2020), <https://www.ejusticeindia.com/the-duties-and-liability-for-breach-under-nigerian-law/>.

<sup>60</sup> See generally, J. Bayuo and A. O. Koduah, "Pattern and Outcomes of Medical Malpractice Cases of Ghana: A Systemic Content Analysis," *Ghana Medical Journal* 56 (2022): 324.

<sup>61</sup> *State v. Kwaku Nkyi* [1962] GLR 197.

<sup>62</sup> *Asan - Tekramo (Kumah) v. Attorney-General* [1975] 1 GLR 319.

<sup>63</sup> *Somi v. Tema General Hospital* [1994–2000] CHRAJ 196.

emergency Caesarean session could have saved mother and baby. The hospital was held liable in negligence.<sup>64</sup> Similarly, in *Darko v Korle - bu Teaching Hospital*,<sup>65</sup> a young man was diagnosed of torn patella ligament having had a history of pain in his right knee. He signed a consent form to allow a surgery on the right knee. However, instead of the right knee, the surgeons operated on the left knee. The plaintiff's action in medical negligence succeeded. The pattern of medical malpractice has been sustained over the years.<sup>66</sup>

### 3.3. Prevailing cases of Negligence in Medical Practice in Nigeria

Medical negligence is not peculiar to Nigeria and Ghana. Study reveals a staggering five million deaths in India attributed to medical negligence yearly.<sup>67</sup> What is worrisome is the poor data management in hospitals in both countries.<sup>68</sup> It is argued that an alarming percentage of the acts of malpractices is interred with the victims and so, go unrecorded. Most cases are only revealed by media reportage. The awareness of the 'epidemic' of medical negligence has no doubts, grown with corresponding awareness of rights and options available to patient-victims in Nigeria.

The Nigerian community woke up to the breaking news of the death of Peju Ogbona, a Lagos-based socialite, pastry chef allegedly on grounds of crass negligence by the hospital personnel.<sup>69</sup> Independent credible autopsy reveals accumulation of about two litres of blood in her abdomen and pelvic part. She drove herself to nearby Specialist Hospital to remove fibroid by surgery. Complications set in and the gynecologist that performed the surgery practically abandoned her, refused to see her for a whole day. Peju's husband contacted a specialist gynecologist in United Kingdom (UK) who evaluated the signs to mean that she had internal bleeding but the hospital ignored the specialist's advice. She died eventually. Coroner's inquest by the Lagos State Government in March 2023 indicted the facility and its operators for Peju's death.<sup>70</sup> Professional misconduct was established against the three doctors involved but no deterrence was served.

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<sup>64</sup> See also *Kwaku Agyire Tetley & Anor v. The University of Ghana & 2 Ors* [2018], in R. N. Obu, "The Worrying State of Medical Negligence in Ghana: Do We Need a Special Healthcare Court to Handle Such Issues?" (2020), *Modern Ghana* (Accra: 14 July, 2020), <https://www.modernghana.com/news/1016025/the-worrying-state-of-medical-negligence-in-ghana.html>.

<sup>65</sup> Darko, *op. cit.*

<sup>66</sup> R. N. Obu, "Resolving the Medical Negligence Quagmire in Ghana: Some Suggested Solutions," *News Ghana* (2022), <https://newsghana.com.gh/resolving-the-medical-negligence-quagmire-in-ghana-some-suggested-solutins/>; O. Tawiah, "Cases of Medical Negligence in Ghana on the Rise," (2022), <https://www.myjoyonline.com/cases-of-medical-negligence-in-ghana-on-the-rise/>.

<sup>67</sup> S. Malhotra, "Supreme Court Solidifies the Law on Medical Negligence: Is it the Balanced Position?" *The Leaflet* (27 November, 2023), <https://theleaflet.india>.

<sup>68</sup> F. Oluwadamilola, "The Cultured Hell of Medical Negligence in Nigeria," *Foundation for Investigative Journalism* (Lagos, 5 August, 2023), <https://fij.ng>. The author postulates that 42.8% of 145 medical practitioners in Nigeria engage in medical negligence. See also J. Onyekwere, "Menace and Consequences of Medical Negligence in Nigeria," *The Guardian* (Lagos: 21 February, 2023), <https://guardian.ng>.

<sup>69</sup> C. Ezeobi, "A Tale of Medical Negligence," *This Day Live* (2022), <https://www.thisdaylive.com>.

<sup>70</sup> O. D. Michael, "Understanding the Theoretical and Legal Foundations of Medical Negligence Law in Nigeria," *SSRN Electronic Journal* (2024), <https://doi.org/10.2139/ssrn.4777626>.



On 3 October 2023, the legal community was again jolted to the realities of negligence in the practice of medicine in Nigeria.<sup>71</sup> The solicitors to Abigail Bankole had filed a petition with the Lagos State Health Authorities seeking redress for negligence of medical doctors in the case pertaining to a set of twins roasted under the blue light. The twins were delivered on 3 October 2023 and diagnosed with jaundice. The mother, Abigail Bankole had returned to the medical facility for treatment where the babies were taken into the blue light. The nurse in-charge increased the density of the light so much so that the room became too hot for Mrs. Bankole. Mrs. Bankole's several protests were ignored by the authorities of the medical facility until she raised an alarm and was prepared to create a scene. The babies were brought out of the facility, charred.

### 3.4. Legal Mechanisms for Addressing Medical Negligence in Nigeria

Medical doctors are responsible for the health and medical well-being of their patients and this responsibility comes with high expectations that the doctors would deliver quality care. Where these expectations are dashed, a wrong or grievance arises.<sup>72</sup> Through law and practice, mechanisms have been put in place to address grievances arising from poor quality of service delivery by medical doctors in Nigeria to ensure reparation for the victims and deterrence for future occurrences. The mechanism may be dealt with in this paper as internal mechanism, private arranging method (ADR), civil liability and criminal prosecution.

#### 1) Internal Mechanism

The Medical and Dental Practitioners Act is primary statute governing medical practice in Nigeria.<sup>73</sup> The Act has provided avenues for the profession to self-regulate. The Act creates the Medical and Dental Council of Nigeria (MDCN)<sup>74</sup> with the primary duty to regulate standards in the profession. The Medical and Dental Practitioners Disciplinary Committee (Investigation Panel) has the responsibility to investigate cases of infraction of the medical code and duties.<sup>75</sup> Where a complaint is found to be meritorious, it is transmitted to the Medical and Dental Practitioners Disciplinary Tribunal (MDPDT).<sup>76</sup> Where a team of doctors neglected to give timely treatment to a woman diagnosed of ruptured ectopic pregnancy, abandoning her for a whole day and several hours into the next day. The MDPDT found the alleged team of doctors liable in medical negligence.<sup>77</sup> Similarly, in *Okezie*

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<sup>71</sup> C. E. Ukiri, "Medical Negligence Caused the Tragic Death of Twin Infants Born on 3 October 2023 at Ikorodu General Hospital," (2023), <https://www.thebarandbenchnews.com>.

<sup>72</sup> B. Ogundare, "Medical Negligence in Nigeria: A Quick Guide on Liabilities and Remedies," *Social Sciences Research Network (SSRN)* (2019), <https://dx.doi.org/10.2139/ssrn.3476524>.

<sup>73</sup> Medical and Dental Practitioners Act, Cap M8, Laws of the Federation of Nigeria (LFN) 2004, s. 5.

<sup>74</sup> *Ibid.*, s. 1.

<sup>75</sup> *Ibid.*, s. 15(3).

<sup>76</sup> O. Irehobhue and N. Remigius, *Comparative Health Law and Policy – Critical Perspectives on Nigeria and Global Health Law*, 1st ed. (Ashgate Publishing Limited, 2015), 95.

<sup>77</sup> T. R. Ibitoye, "The Applicability of the Doctrine of *Res Ipsa Loquitur* in Medical Negligence in Nigeria," *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 1 (2018): 173.



*v Chairman, Medical and Dental Practitioners Disciplinary Tribunal*,<sup>78</sup> Dr. Okezie was suspended from medical practices for six months. He was guilty of infamous conduct and gross professional negligence upon the death of Mrs. Obiekwu, a patient upon whom he had performed a caesarian operation.

The tribunal tries all questions of misconduct and professional ethical infractions by medical doctors and may issue directions in accordance with the Act.<sup>79</sup> The tribunal has no power to award compensation but may make findings which are criminal in nature. All appeals from the MDPDT go to the Appellate Court.<sup>80</sup>

Where a patient has received sub-standard service delivery in the hands of medical doctors in Nigeria which has resulted in injuries, such a patient may activate the internal machinery by filing a complaint with the tribunal. The tribunal has no monopoly of discipline over a medical practitioner. In *Olowo v Nigeria Navy*,<sup>81</sup> the Nigerian Supreme Court stated that it would lead to an absurdity to clothe the Medical and Dental Practitioners Disciplinary Tribunal with jurisdiction, to the exclusion of any other court or tribunal, to prosecute a medical practitioner for ethical breaches which caused injuries to his patient.

## 2) Private Arranging Resolution Technique

This arrangement is otherwise known as alternative dispute resolution (ADR). It has been deployed to advantage in cases of death caused by medical negligence and, particularly in situations where potential claimants cannot countenance the long, rigorous processes associated with other mechanisms. Litigation of a case of negligence in medical profession requires expert witnesses which may not readily be available to the poor and less privileged in the society. In *Otti v Excel-C Medical Centre Ltd & Anor*,<sup>82</sup> the Nigerian Court of Appeal stating the law on medical negligence held that it must be established that what the Doctor did is what professional colleagues (experts) would say that he really made an obvious, avoidable mistake.

The National Health Insurance Authority Act 2022 (NHIA)<sup>83</sup> of Nigeria has made ample provisions for non-adversarial alternatives to the resolution of issues of medical malfeasance. The scheme has an advantage of bringing doctors and patients together to negotiate settlement in a less combatant atmosphere. The NHIA is

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<sup>78</sup> *Okezie v Chairman, Medical and Dental Practitioners Disciplinary Tribunal* [2010] JELR 49389 (CA).

<sup>79</sup> See Medical and Dental Practitioners Act, Cap M8, Laws of the Federation of Nigeria (LFN) 2004, ss. 16–17.

<sup>80</sup> *Denloye v Medical Council Disciplinary Tribunal* [1968] All NLR 306.

<sup>81</sup> *Olowo v Nigerian Navy* [2011] 18 NWLR (Pt 1279) 659 (SC).

<sup>82</sup> *Otti v Excel – C Medical Centre Ltd & Anor* [2019] LPELR – 47699 (CA).

<sup>83</sup> National Health Insurance Authority Act (Nigeria), which replaced the National Health Insurance Scheme Act 1999. See also s. 30(1) of the National Health Act 2014; National Health Service Act 1946 (UK), which established the National Health Service in Great Britain.





fashioned after the UK's model of the National Health Service (NHS).<sup>84</sup> The NHS expended an estimated £2.4b (Two Billion Four Hundred Thousand Pounds) between 2018 and 2019 in settlement on matters of medical negligence.<sup>85</sup> The humongous figure demonstrates how serious issues of medical negligence could be as well as how this ADR technique may be advantageous to a victim of medical negligence. Indonesia has evolved peace agreements as mechanism for amicable resolutions of medical services negligence.<sup>86</sup>

The restitutive arrangement finds strength in Articles 1239, 1243 and 1365 of the Civil Code which mandates any person whose negligent act caused injuries to another to retribute in terms of costs, losses and interests. By this method, parties have avoided litigation, and doctors escape the professional ethics board's directions. The near-certainty of the law in UK and Indonesia on medical negligence accounts for the success of this mechanism. However, it is yet to be seen how this technique would produce effective results in Nigeria given Nigeria's poor record keeping, zero data security and near erosion of assurance of hope and integrity of the judiciary. Under the scheme, patients sign forms with arbitration clause prior to the commencement of treatment, which entails settlement by an arbitrator in any event of medical malpractice claim.

### 3) Civil liability

This mechanism, like other remedies in tort, is recognized by law primarily to cushion the effect of the injury suffered by the plaintiff. A successful proof of negligence would earn the plaintiff an award of compensation in monetary terms.<sup>87</sup> Negligence as a head of action is the most potent and common basis of civil liability for medical malpractices. A plaintiff in a case of medical negligence must prove: that the medical doctor owed a duty of care to him/her; that the duty of care was breached by the doctor; and that the plaintiff suffered injuries because of the failure of duty of care. The claimant is required to establish a causal link between the injury being complained of and the defendant's act.<sup>88</sup> In *Ajaegbu v Etuk*,<sup>89</sup> plaintiff failed to show that the damage he suffered resulted from the medical practitioner's breach

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<sup>84</sup> National Health Service Act 1946 (UK), which established the National Health Service in Great Britain.

<sup>85</sup> O. M. Atoyebi, "Addressing the Need for a More Robust Compensatory Regime in Tackling Cases of Medical Negligence in Nigeria," (2023), <https://www.omaplex.com.ng>.

<sup>86</sup> B. T. Bawono, "Restitution Rights as a Construction of Justice Referring to the Law on Protection of Witnesses and Victims," *International Journal of Law Construction* 5 (2021): 25.

<sup>87</sup> Nurarafah Nurarafah, "Doctor's Civil Responsibility in Medical Malpractice in Indonesia," *Journal Research of Social Science Economics and Management* 1, no. 10 (2022), <https://doi.org/10.59141/jrssem.v1i10.175>.

<sup>88</sup> H. K. Obaro, "Legal Imperatives of Medical Negligence and Medical Malpractice," *Nigerian Journal of Medicine* 31 (2022): 603.

<sup>89</sup> *Ajaegbu v Etuk* [1962] 6 E. N. L. R 196.



of duty of care.<sup>90</sup> In obvious cases where it is difficult to establish a nexus between the injury and the act of the doctor where the doctor denies liability, the claimant may need an expert to testify in support of the claim. This is because it is only a health care-giver who can demonstrate that another health care-giver in the same field acted below the required standard.<sup>91</sup>

Most cases of medical negligence are difficult for a claimant to explain sufficiently enough to establish elements of negligence, notably such actions that have resulted in death of surgeries carried out while claimant was put under sedation. For such times, the law has developed the doctrine of *Res Ipsa Loquitur* which compels the defendant to show that he has not been negligent in the circumstances. In the recent South African case of *Meyers v MEC, Department of Health, Eastern Cape*,<sup>92</sup> the Supreme Court held that under the doctrine, evidential burden does not shift from the defendant who is under obligation to offer some explanation for the injury caused.

The legal principle has acquired constitutional status in South Africa vide section 21 of the Republic of South Africa Constitution 1996.<sup>93</sup> The principle benefits the claimant as he faces a herculean task in securing the attendance of a medical doctor to testify in his favour. Doctors are too protective of their colleagues and most unwilling to reveal their colleague's lack of professionalism to persons outside the medical field.<sup>94</sup> They would rather chide their peers behind closed doors. In Ghana, health professionals never testify against one another thereby making litigation of medical malpractice cases very cumbersome.<sup>95</sup>

This attitude of medical doctors can at best be described as 'conspiracy silence'. Thus, the plaintiff is faced with the task of ensuring that he gets an expert, qualified by the same ranking with the defendant. The skill of an ordinary doctor may not suffice to dislodge the contention of a consultant. In *Unilorin Teaching Hospital v Adegunde*,<sup>96</sup> the Nigerian Court of Appeal admitted the expert testimony of the defendant's consultant-witness against the resident doctor who testified for the claimant. Ogbuinya, JCA remarked that 'the evidence of the consultant surgeon made mincemeat of those of the plaintiff's witness in all aspect.'

The Indian Supreme Court has constructed healthcare delivery within the tenets of consumer protection jurisprudence in which case the patient-consumer of the services of the facility is entitled to maximum satisfaction in accordance with the

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<sup>90</sup> *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 Q. B. 428., The Court held that the doctor in want of duty of care but found that there was no causal link between the negligent act of the doctor and the eventual injury suffered by the plaintiff. The case of medical negligence failed.

<sup>91</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, 586.

<sup>92</sup> *Meyers v MEC, Department of Health, Eastern Cape* [2023] ZASCA 130.; *MEC for Health, Gauteng v de Lange* [2024] ZASCA 38.

<sup>93</sup> *Lungile Ntsele v MEC for Health, Gauteng Provisional Government* [2013] 2 All SA 356 (GSJ).

<sup>94</sup> C. V. Odoeme, D. Ugwuja and C. S. Onah, "Medical Error Litigation in Nigeria: A Proposal for Change", *Journal of Legal Medicine*, (2023), <https://doi.org/10.1080/01947648.2023.2238564>.

<sup>95</sup> R. N. Obu, "The Worrying State of Medical Negligence in Ghana: Do We Need A Special Healthcare Court to Handle Such Issues?" *Modern Ghana* (Accra: 14 June, 2020). <https://www.modernghana.com/news/1016025/the-worrying-state-of-medical-negligence-in-ghana.html>.

<sup>96</sup> *Unilorin v Abegunde* [2015] 3 NWLR 421.



Consumer Protection Act 1986.<sup>97</sup> Medical negligence therefore derogates from the lofty intendment of the law.<sup>98</sup> The foregoing development implicates that while the remedy of negligence *per se* is available to a victim at common law, the victim could also take liberties with the civil statute.

#### 4) Criminal Liability

Criminal law may apply to address cases of alleged medical malpractices. A medical practitioner enjoys maximum legal protection as long as he/she discharges his/her duties in accordance with the code for standard operations.<sup>99</sup> The point of divergence between civil and criminal responsibility in the circumstances depends on magnitude of the negligence. Criminal negligence would demand an elevated threshold of indiscretion or recklessness. Where a health care service provider exhibits gross negligence resulting in grievous bodily harm or death, criminal liability may arise.<sup>100</sup> In *R v Adamako*,<sup>101</sup> the House of Lords in England set the template to determine when medical negligence may attract prosecution as an offence, particularly involuntary manslaughter by laying down the following requirements:

- a. there must exist a duty of care;
- b. the duty has been breached;
- c. the breach has occasioned death (iv) a jury considers the breach as gross negligence.<sup>102</sup>

The English courts appear to have endorsed criminal prosecution of erring medical doctors only in circumstances that have occasioned death. It is posited that circumscribing the jurisprudence to 'death' missed the point as criminal law punishes the act, the intent and not just the result. There is no justification for exempting acts resulting in grievous harm from the penal jurisprudence as in Germany, Italy and Taiwan.

Germany and Poland categorize criminal punishment for medical negligence in terms of severity, however making no distinction between negligence occasioning grievous harm or death within medical profession and other causes. Section 229 of the German Criminal Code provides for terms not in excess of 3 years and 5 years with options of fines as may be necessary to define the degree of negligence.<sup>103</sup>

In Taiwan, Hong Kong, Japan and Italy victims of medical negligence deploy both procedures of civil and criminal legal regimes with equal alacrity. Tsai *et al* argue

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<sup>97</sup> *Indian Medical Association v V. P. Shanta III*, [1995] CPJ 1 (SC)

<sup>98</sup> See Article 19 and 52 of Law No. 8 of 1999 (Indonesia).

<sup>99</sup> Article 50a of Law No. 29 of 2004 on Medical Practice (Indonesia).

<sup>100</sup> C. Phillips et al., "Medical Negligence: A Neurosurgeon's Guide," *Interdisciplinary Neurosurgery* 23 (2021): 100970, <https://doi.org/10.1016/j.inat.2020.100970>; see also *R v Rudling* [2016] EWCCA Crim 741

<sup>101</sup> *R v Adamako* [1994] UKHL 6.

<sup>102</sup> See *Rose v R* [2017] EWCA Crim 1168..

<sup>103</sup> See Criminal Code of Germany, [https://www.gesetze-im-internet.de/englisch\\_stgb/index.html](https://www.gesetze-im-internet.de/englisch_stgb/index.html).



that in the foregoing jurisdictions criminal litigation is one of the bases for successful civil remedy.<sup>104</sup> Taiwan has evolved specialized laws that cater for medical negligence. Article 82 of the Medical Care Act 2017, however, introduces the concept of 'allowed risk' which exonerates medical personnel when injury or death results notwithstanding the fact that adequate care was taken.

The impact of the specialized criminal statutes in Taiwan and Italy such as the *Gelli-Bianco*<sup>105</sup> is a significant reduction in litigation against medical personnel as doctors become more circumspect. India has followed the evolving trend of specific penal legal regimes for medical negligence cases to stem the alarming rate of the trend. The Bharatiya Nyaya Sanhita (BNS) 2023 has provided simultaneous platform for holding medical personnel accountable. Section 106 (1) of the BNS, act of medical negligence resulting in death is mandatorily penalized with imprisonment of at least 2 years. Gutorova *et al* rightly posit that the inevitability of penal sanction rather than its severity is a core technique for medical negligence prevention.<sup>106</sup>

Under the Indian jurisprudence, an erring medical doctor may not be arrested and charged to court like a common criminal. In *Jacob v State of Punjab*,<sup>107</sup> the court provided the basic procedure to be:

- a. a private complaint of criminal negligence may not be entertained except it is accompanied by *prima facie* evidence made under oath by another doctor;
- b. the investigating officer shall avail himself of a competent, independent medical opinion from a doctor in public service;
- c. the doctor may not be arrested but for the necessity of obtaining evidence and furthering investigation. In Nigeria, the Criminal Code and Penal Code apply to the Southern States and Northern States respectively.<sup>108</sup>

The criminal legal regime is invoked in aggravated cases to force a deterrence of such negligent acts. The state owes a duty to protect lives and limbs of its citizens

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<sup>104</sup> H. S. Tsai et al., "Impact of the Medical Care Act Amendment on Medical Malpractice Litigation in Taiwan," *Medicine* 101, no. 46 (2022): e31564, <https://doi.org/10.1097/MD.00000000000031564>.

<sup>105</sup> R. Rinaldi, "The Italian Supreme Court Joint Sections Set Forth the Interpretative Underpinnings of the 'Gelli-Bianco' Law: Varying Degrees of Guilt Aimed at Limiting Medical Liability, Article 2236 C.C. Makes a Comeback," *La Clinica Terapeutica* 171, no. 2 (2020): e101-106, <https://doi.org/10.7417/CT.2020.2197>.

<sup>106</sup> N. Gutorova, O. Zhytnyi, and T. Kaganovska, "Medical Negligence Subject to Criminal Law," *Wiadomosci Lekarskie* 72, no. 11 cz 1 (2019): 2161-2166, <https://doi.org/10.36740/WLek201911118>.

<sup>107</sup> *Jacob Mathew v State of Punjab* [2005] 6 SCC 1 (India).

<sup>108</sup> See *Criminal Code Act* Cap C38 LFN 2004; and *Penal Code (Northern States) Federal Provisions Act* Cap P3 LFN 2004. In Ghana, the operative criminal code is the *Criminal and Other Offences Act No. 29 of 1960*.



and to contain deviance even in professional capacities. This development is a global phenomenon.<sup>109</sup>

In Indonesia, Article 359 which resonates with Article 55 (1) of the Criminal Code generally apply to cases where medical practice results in fatality or some grievous harm in situations pointing to obvious negligence. Like other Commonwealth jurisdictions, medical negligence is not defined with particularity in Indian statute books. However, Section 304A of the Indian Penal Code 1945 (IPC) provides for two years in prison, or fine, or both for such acts which may be construed as medical negligence.<sup>110</sup> Crosby argues that there is no underlying reason why culpable gross negligence causing serious harm should not also be subject to criminal sanction.<sup>111</sup>

The purpose of criminal prosecution at all material times, including in cases of medical negligence is to punish offenders. To this end, doctors have developed defensive medicine by prescribing tests and procedures that are not ordinarily clinically necessary to shield themselves from liabilities. However, scholars are not united on the view that medical doctors should be subjected to criminal trials in the event that their services become tainted with criminal negligence.<sup>112</sup> This reasoning sets to obviate situations where doctors may be unwilling to engage certain risky medical procedures as a result of fear of injuries that could lead to criminal indictment.

Wolvaardt suggests that most results have external contributors that are systemic and external to the doctor.<sup>113</sup> It has been argued that the criminal justice model in its strictest application does not countenance systemic challenges in an informed manner, notably the fallible human nature in complex decision-making processes associated with healthcare delivery. The gap created by this understanding diminishes the credits in punishing doctors for errors that have endangered patients' lives.<sup>114</sup>

Otherwise, as Pranka posits, the use of the penal mechanism is the strongest medium by which the state can hold an individual accountable for actions that

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<sup>109</sup> See, P. Voultsos, G. Ricci, V. Tambone, et al., "A Proposal for Limited Criminal Liability in High-Accuracy Endoscopic Sinus Surgery," *Acta Otorhinolaryngologica Italica* 37 (2017), <https://doi.org/10.14639/0392-100x-1292>.

<sup>110</sup> See also sections 92 and 93 of the *Indian Penal Code*, which refer to acts done in good faith and for the benefit of the victim, even though the victim did not consent to the harm resulting from the acts.

<sup>111</sup> C. Crosby, "Gross Negligence Manslaughter Revisited: The Time for a Change of Direction?" *The Journal of Criminal Law* 84 (2020): 84, <https://doi.org/10.1177/0022018320926468>; M. Robson, J. Maskill, and W. Brookbanks, "Doctors Are Aggrieved – Should They Be? Gross, Negligence, Manslaughter and Culpable Doctor," *The Journal of Criminal Law* 84 (2020), <https://doi.org/10.1177/0022018320946498>.

<sup>112</sup> See W. Glauser, "Should Medical Errors Ever Be Considered Criminal Offences?" *CMAJ* 190 (2018).

<sup>113</sup> E. Wolvaardt, "Blame Does Not Keep Patients Safe," *Community Eye Health* 32 (2019): 36.

<sup>114</sup> V. Sameera, A. Bindra, and G. Rath, "Human Errors and Their Prevention in Healthcare," *Journal of Anaesthesiology Clinical Pharmacology* 37 (2021): 328–335, [https://doi.org/10.4103/joacp.JOACP\\_364\\_19](https://doi.org/10.4103/joacp.JOACP_364_19).





contravene public interest.<sup>115</sup> It is a drastic way to curtail a negative trend. A case in point is the case of Ian Peterson who was sentenced to 20 years in prison in 2017.<sup>116</sup> He performed unnecessary surgeries on 1000 patients out of which 750 had at the time of his conviction received compensation under the non-penal techniques. Sentencing him therefore was a valid way of stemming the tide of his crass medical malpractices. This is necessary as no persons, irrespective of profession or status, should be immune from the operations of the penal statute.

Consequently, a doctor may not be cited for criminal negligence except he displayed such a brazen disregard for life and limb of the patient. The Indonesian Law No. 17 of 2023 has reiterated the mandates of hospitals in healthcare delivery, not just for treatment of patients but for the protection of human rights of both workers and end users of the hospital services.<sup>117</sup>

Although no convictions have been recorded, the Indonesian Law No. 36/2014 on Health Workers specifically provides for 5 years imprisonment for personnel found guilty of gross negligence. The foregoing is without prejudice to the provisions of the sections 359, 360 and 361 of the Criminal Code which also stipulates sanctions for severe injuries occasioned by medical negligence.<sup>118</sup> The combined effect of both legislations, if properly applied, would serve to deter habitual negligence within the medical profession in Indonesia.

The level of negligent disposition required for a doctor to be accounted criminally liable in professional capacity must be above such as is ordinarily required in tortious liability or such outrightly prohibited by law. Medical negligence which constitutes the offence of misdemeanor must be of a high degree as that which is necessary to constitute the offence of manslaughter. In *R v Akerele*,<sup>119</sup> the Privy Council held that the degree of negligence required to hold a medical doctor criminally liable is such that must be shown to be gross; and that neither jury nor a court can transform negligence of a less degree into gross negligence by giving it that appellation.

In *Akerele's* case, the accused, a medical practitioner injected drugs known as *Sobita* into children as cure for yaws. Most of the children died and he was indicted

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<sup>115</sup> D. Pranka, "The Price of Medical Negligence – Should It Be Judged by the Criminal Court in the Context of the Jurisprudence of the European Court of Human Rights?" *Baltic Journal of Law and Politics* 14 (2021): 126.

<sup>116</sup> G. Adshead, "Offending in Theatre: The Case of Ian Peterson," *BMJ* 357 (2017): j2583; D. Lee and P. Lai, "Case of Ian Peterson: Reflection and Perspective on Clinical Governance Surgery Practice," *BMJ* 22 (2018): 5–9.

<sup>117</sup> H. H. Luqmansyah et al., "A Doctor's Responsibility for Alleged Negligence in Medical Actions," *Asian Journal of Medical Research and Analysis* 1 (2024): 97.

<sup>118</sup> Y. Prayuti et al., "Judicial Analysis of Legal Protection for Malpractice Victims by Hospitals in Patients with Brain Stem Death," *UNES Law Review* 6, no. 2 (2023), <https://doi.org/10.31933/unesrev.v6i2>.

<sup>119</sup> *R v Akerele* [1942] 8 WACA 5. Akerele's case, which was decided prior to 1963, is the last known case whereby a doctor was 'successfully' prosecuted, though the court eventually acquitted him. The case became authority in both Nigeria and Ghana.



for manslaughter of one of the children. It was established at the trial that the defendant administered an overdose of concoction on the children in a manner amounting to crass negligence. The trial court convicted the defendant and the decision was validated by the West African Court of Appeal. On final appeal, the House of Lords upturned the conviction.<sup>120</sup>

The principle established in *Akerele*'s case is in tandem with the rule of evidence requiring 'proof beyond reasonable doubt' for criminal cases. This implicates that for a patient-victim to explore the criminal prosecution option, he/she should be prepared to navigate the tortuous route of regular criminal prosecution by first having a complaint of criminal negligence made to the police who would then charge the medical practitioner to court after investigations. This is so because the police is the gateway to the criminal justice delivery infrastructure.<sup>121</sup> Where a report of criminal negligence is made, it must be determined before any liabilities may be established either in tort or by internal mechanism.

The point has been made that liability for criminal negligence is limited to manslaughter or culpable homicide without death punishment.<sup>122</sup> Under the Indonesian Law No. 17 of 2023 concerning health, a negligent medical practitioner gets a maximum of three years in prison. The foregoing derives from the difficulty in establishing the requisite *mens rea* to ground the offence of culpable homicide.<sup>123</sup> *Mens rea* which implicates 'guilty mind' as an essential ingredient of criminal liability cannot be excluded in the evaluation of every criminal charge before court, even in cases of crass medical negligence.<sup>124</sup>

*Mens rea* requirement has become a cardinal principle of law. Section 80 and 88 of the Penal Code of India, 1860 has codified the *mens rea* requirement in criminal proceeding. Consequently, the criminal code exonerates a person from criminal liability where the alleged crime resulted from an accident.<sup>125</sup> Nevertheless, where such complaint alleges willful acts by a medical practitioner against a patient, such a practitioner could be made to face the charge of murder or culpable homicide.<sup>126</sup>

Studies have not revealed any specific criminal law relating to the doctor and his patient, though there are provisions in the criminal code guiding the relationship between a doctor and his patient. Section 82 of the Ghanaian Criminal and Other

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<sup>120</sup> The principle established by the House of Lords in *Akerele v R* was applied by the Nigerian Supreme Court in *Kim v State* [1992] 4 NWLR (Pt 233) 7 to discharge the defendant-appellant doctor.

<sup>121</sup> U. G. Ehirim et al., "Strengthening Human Rights Protection in Nigeria: Safeguards Under the Police Act 2020," *Khazanah Hukum* 6, no. 3 (2024): 269-293, <https://doi.org/10.15575/KH.V6I3.39569>.

<sup>122</sup> A. M. Farrell and E. S. Dove, *Mason and McCall Smith's Law and Medical Ethics*, 12th ed. (Oxford University Press, 2023), 406-412.

<sup>123</sup> *Mens rea* is the requisite intent to bring about the result being complained of by the act of omission. It is a critical requirement in criminal trials. See *Okoro v State* [1988] 5 NWLR (Pt 94) 225.

<sup>124</sup> A. Sethi and R. Bilgaiyan, "Doctors in Conflict with the Criminal Law: A Records View of Gross Medical Negligence Cases under the Indian Penal Code," *Sri Ramachandra Journal of Health Sciences* 4, no. 1 (2024): 6-11, <https://doi.org/10.25259/srihs.50.2023>.

<sup>125</sup> See Section 24 of the Criminal Code, Section 317 of the Criminal Code.

<sup>126</sup> Section 319 and 326 of the Criminal Code; 221 Penal Code.



Offences Act<sup>127</sup> captures what constitutes criminal negligence under the statute. Mensah and Addy<sup>128</sup> illustrate the foregoing provision to implicate that where a surgeon by gross negligence, amputates a limb without necessity, the surgeon may be exculpated of having willfully and unlawfully caused harm. However, he may be convicted of having negligently and unlawfully caused harm.<sup>129</sup>

By Section 343 of the Criminal code,

- 1) any person who is a manner so rash or negligent as to endanger human life or to be likely to cause harm to any person;
- 2) gives medical or surgical treatment to any person whom he undertakes to treat; or
- 3) dispenses, supplies, sells, administers or gives away any medicine, or poisonous or dangerous matter ... is guilty of a misdemeanor, and is liable to imprisonment for one year.<sup>130</sup>

The express provision of the law in the foregoing Section 303 establishes the crime of manslaughter for crass negligent activities resulting in loss of live. The provision accommodates individuals other than medical doctors and extends to quacks who indulge in medical and surgical treatments of any kind. Consequently, the test for the determination of liability in the event of failure of duty of care is not a person's qualification or skill but the individual's conduct which is considered negligent.

Thus, in *R v Lawanta*,<sup>131</sup> the defendant, though unqualified to give medical care dispensed proper skill by sterilizing the equipment used for surgery before use. Defendant was discharged and cleared of a charge of manslaughter. The decision departed from an earlier case of *Conversely R v Ozegbe*,<sup>132</sup> in which the defendant who had no proper knowledge of surgery which he administered was convicted of manslaughter. The authorities of *Lawanta* and *Ozegbe* need reconciliation. It is suggested that *Ozegbe* is a better way to go. It is argued that a proof of absence of informal training is sufficient to establish that defendant has not deployed proper skill and reasonable care. The sanctity of human life should weigh higher than legal rhetoric as no person can give any care higher than what the person has been trained to give.

The activities of quacks in the medical sector have reached a breaking point with loss of several lives. It becomes necessary for the courts to serve a deterrence. In

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<sup>127</sup> See Ghanaian Criminal and Other Offences Act No. 29 of 1960 (Ghana Code).

<sup>128</sup> G. B. Mensah and A. Addy, "Medical Negligence in the Context of the Ghanaian Criminal Jurisprudence," *International Journal for Multiple Disciplinary Research (IJFMR)* 5 (2023): 2.

<sup>129</sup> See also, Section 51 of the Ghana Code.

<sup>130</sup> Section 343 of *Criminal Code* [Nigeria]. A similar provision is contained in the Ghana Code. See Section 84 of the *Ghana Code*.

<sup>131</sup> *R v Lawanta* [1961] Western Nigerian Law Reports 133.

<sup>132</sup> *R v Ozegbe* [1957] 1 Western Nigerian Law Reports 152.

*State v Okechukwu*,<sup>133</sup> a quack was handed a sentence of nine-years imprisonment for manslaughter. The court remarked that ignorant persons should not be allowed to experiment with human lives.<sup>134</sup> The case of *State v Kwaku Nkyi*<sup>135</sup> which originates from Ghana buttresses the legal reasoning in the Nigerian case of *State v Okechukwu*. In *Kwaku Nkyi case*, the law was rightly stated, proscribing medical practice without requisite licence.

This implicates that any health worker who practises medicine without a licence will commits a crime. Furthermore, the foregoing Section 343 establishes the offence of misdemeanour for acts capable of causing death or having the propensity to cause injury to another person. The prosecution is required to prove all cases of misdemeanour and manslaughter beyond reasonable doubt.

In recent times, the resort to criminal prosecution to deter rising cases of medical negligence in Nigeria and Ghana has taken the back seat. This is evident in the time space separating the twin cases of *Kwaku Nkyi and Okechukwu* and the present milieu of *Lagos v Orji*, in contrast to the up-to-date decisions in civil tort of medical negligence. Besides, none of the reported cases of successful criminal prosecutions involves medical doctors thereby consigning criminal prosecution of medical doctors for negligence committed in professional capacities to the academics, until Lagos blazed the trail. This development has accounted for the dearth of judicial authorities in criminal liability of negligent medical practitioners in West Africa, thereby increasing the need for legal certainty of protection of patients-victims of medical malpractice.<sup>136</sup>

##### **5) *The State of Lagos v Dr. Ejike Ferdinand Orji (Lagos v Orji)***<sup>137</sup>

The case of *Lagos v Orji* presents a re-think of the use of criminal prosecution to deter gross medical negligence in common law West Africa. The case reveals the following facts: Somi is a rising 16-year-old basketball star. He sustained injury on his left limb while playing basketball on 26 July 2018. He was taken to Excel Children Medical Centre, Lagos for medical attention. The defendant took Somi into the theatre, pulled his leg with the aid of non-medical staff in attempts to reset it. However, without an x-ray report ascertaining the state of the leg, defendant put Somi under sedation and wrapped his leg in a fibre glass cast.

The pain on Somi's leg continued with increased alacrity, resulting in Somi being taken to another hospital where he was diagnosed of having contracted *compartment syndrome* resulting from the tight cast. Between 2 – 9 August 2018,

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<sup>133</sup> *State v Okechukwu* [1965] E.N.L.R. 91.

<sup>134</sup> *Ibid.*, 94.

<sup>135</sup> *State v Kwaku Nkyi* [1962] GLR 197.

<sup>136</sup> Muhammad Ghazali, Cut Afra, Deddi Agusriadi and Sudirman Suti, "Legal Consequences of Medical Accidents and Malpractice in Indonesia", *International Journal of Law, Social Science, and Humanities (IJLSH)* 1, no. 2 (2024). <https://doi.org/10.70193/ijlsh.v1i2.159>.

<sup>137</sup> *State of Lagos v Dr. Ejike Ferdinand Orji* (Unreported Suit No: LD/8963C/2019: Judgment Delivered 20 January 2023 by Hon. Justice A. A. Akintoye of Lagos High Court, Lagos).

Somi had six (6) surgeries on his left leg to correct the damage caused by the tight cast without success and additional 6 in USA to rectify the havoc wrecked by the tight cast. When Somi was discharged on 5 September 2018, he left the hospital on a wheelchair! A petition to the MDPC was frustrated by fundamental rights proceedings filed against the council by Dr Orji. The Attorney-General of Lagos State brought charges against the defendant under Sections 230, 245, 251 and 252 of the Criminal Law of Lagos State, 2015. The court found defendant guilty of:

- a. endangering human life through reckless and dangerous act;
- b. breach of duty by a person doing dangerous act and endangering human life through reckless and dangerous acts. Trial court found that the decision of the surgeon, not being an orthopaedic surgeon to handle the case and to engage a police officer and a basketballer both of whom are not medical personnel to manipulate Somi's leg was negligent.; and
- c. breach of duty by the defendant in refusing to remove the tight cast which resulted in compartment syndrome.

*Dr. Orji's* case has strengthened the machinery of criminal prosecution against obvious misconduct and negligence committed by medical professionals in course of their duties.<sup>138</sup> It shows that a doctor shall be held accountable for his professional decisions. Wachukwu states that *Orji's* case is the first conviction of a medical doctor in Nigeria for medical negligence and the judgment paves the way for more successful prosecutions of negligent doctors who previously operated with impunity.<sup>139</sup>

## 6) Lessons from *Orji's* Case

The following lessons are deductible from the decision in *Orji's* case.

1. A medical practitioner could be successfully prosecuted for professional misconducts and negligent actions that have caused harm to his patient.
2. Disciplinary actions by the MDPCN or the GMDC as the case may be; and action in the tort of negligence may afford some remedies to victims of medical negligence but only criminal prosecution may deter the trend in Nigeria and Ghana as doctors are more concerned about criminal prosecution, because of the impact on their reputation, than monetary compensation of claimants in the tort of negligence.

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<sup>138</sup> A. Adedoyin and S. Omoregie, "Nigeria: Case Review: The State of Lagos v Dr. Ejike Ferdinand Orji (2023)", (2023). <https://www.mondaq.com/Nigeria/professional-negligence/1330996/case-review-the-state-of-lagos-v-dr-ejike-ferdinand-orji-unreported-decision-in-suit-ld8963c2019#>.

<sup>139</sup> R. Abujah, "LASG Commended for Convicting Doctor in Landmark Medical Negligence Case", (2023). <https://scienicenigeria.com/lasg-commended-for-convicting-doctor-in-landmark-medical-negligenc-case>.



3. The state should be actively involved in containing the various forms of medical deviance for the safety and security of lives. It is not sufficient to leave victims to the fateful outcome of the 'traditional approaches' of tort and disciplinary directions, which processes give medical practitioners undue advantage against victims of their negligence, particularly the less informed. Nigeria and Ghana should borrow a leaf from India, Italy and Taiwan where the rate of medical negligence has been reduced for the reality of the potency of the penal regime.

Criminal prosecution obviates the abuses to which administrative mechanism may be subjected, particularly the engagement of fundamental rights applications in the regular courts.

#### 4. Conclusion

This paper has examined the persistent rise in medical negligence in West Africa, focusing on Nigeria and Ghana, and assessed the viability of criminal liability as a deterrent mechanism. It has been established that, since the reversal of *Akerele v R* by the House of Lords prior to 1963, no medical practitioner in these jurisdictions has been successfully prosecuted for malpractice, effectively rendering criminal liability a dormant tool in the quest for accountability. This historical neglect has significantly impeded the development of criminal jurisprudence in medical negligence cases. However, the recent decision in *Lagos v Orji* marks a pivotal moment, reaffirming the state's role in protecting patients, even in the context of consensual medical procedures. The case also revitalizes the conversation around legal certainty and victim protection in healthcare settings. In response to the central research question, how criminal liability can be leveraged to deter medical negligence in Nigeria and Ghana, this paper concludes that a tripartite approach is essential:

- 1) robust disciplinary enforcement by medical regulatory bodies;
- 2) civil remedies through tort law; and
- 3) targeted criminal prosecution in egregious cases. Only through this integrated framework can deterrence be meaningfully achieved and accountability reinstated in medical practice. The urgency to reform legal and regulatory responses is critical if trust in the healthcare system is to be restored and preventable harm curtailed.

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