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The extent of the applicability of doctrine of *Res ipsa loquitur* in proving medical negligence/medical malpractice in Nigeria: An appraisal and a comparative analysis

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Abstract
Under the Common Law and the Nigerian Evidence Act, a patient who alleges that he/she has suffered any form of bodily damage or harm due to the negligence or error of a medical practitioner or someone under the directive of the medical practitioner is expected to prove and show amongst other things, the particulars of the alleged negligence or error on the part of the medical practitioner. In most cases, the patient who has no knowledge of the nitty-gritty of medical practice and one who also possess shallow account of the complained act (s) of the medical practitioner that resulted to the alleged harm may find it difficult to discharge this evidential burden placed on him by Common Law and the Evidence Act. In other cases, perhaps, surgery, the patient may be unconscious throughout the surgical period when the act that resulted to the harm occurred and thus the patient will be apparently bereft of any fact as to the cause of the harm. It is against this backdrop that this work appraises the onerous evidential burden placed on these naïve and credulous patients which said burden may even be difficult to be discharged in cases where the services of an expert is secured by the aggrieved patient. As a panacea to this onerous evidential burden placed on the Nigerian patient, this paper advocates for a reliance on the doctrine of res ipsa loquitur most especially when it is manifestly clear that the alleged harm occurred as a result of the medical practitioner's act and that there is no possible explanation as to how the alleged harm occurred. This work also carried out a comparative analysis of the extent of the applicability of the doctrine.

Keywords: medical negligence, medical practitioner, *Res ipsa loquitur*, medical malpractice, surgery, patient

Introduction

The practice of medicine, and its embodiment in the clinical encounter between a patient and a medical practitioner, is fundamentally an activity that flows from the need to show care to patients and to alleviate suffering [1]. The relationship between a patient and a medical practitioner is fiduciary in nature and this gives rise to the practitioner's ethical responsibility to place patients' welfare above his own self-interest, to use unassailable medical judgment on his patients' behalf and to clamour for their welfare [2]. Thus, a healthy medical practitioner-patient relationship is a key driver of clinical outcomes-both in promoting desired results and in preventing adverse outcomes [3]. The patient-medical practitioner relationship is a complex concept which set in motion when a patient consults a medical practitioner and subsequently follows the practitioner's guidance [4]. For the average Nigerian patient, a medical practitioner is deemed to be one so highly skilled to the extent that majority of his views, opinions, directives and actions is reckoned by the patient as one that is precise and accurate. Due to these special skills supposed to be possessed by the medical practitioner, the patient naively and trustingly follows the instructions and the directives of such medical doctor with little or no vacillation. These directives or actions by the medical practitioner may in some cases yield undesired results that may cause bodily damage to the unsuspecting patient and in other adverse cases, the action may result in the death of the patient. Thus, the expectations of a patient are two-fold: the medical practitioners and the hospitals are expected to provide medical treatment with all the knowledge and skill at their command and secondly they will not do anything to harm the patient in any manner either because of their negligence, carelessness, or reckless attitude of their staff [5].

Under the code of ethics applicable in Nigeria, [6] a medial practitioner must see and attend to all patients on admission under his care as frequently as their conditions demand. Also in cases of emergency, for instance, at the scene of a road traffic accident, a medical practitioner passing by is under no inherent duty to stop and render first aid to the victims but if he decides to stop and render care he has to do everything that a competent and reasonable registered practitioner would do in the circumstance [7]. Thus, the medical practitioner who is perceived as a specially skilled person by the patient is expected to employ his skill in the discharge of his obligations towards the patients.

It then follows that a registered medical practitioner who fails to exercise the skill or act with the degree of care expected of his experience and status in the process of attending to a patient is in breach of the duty of care owed to the patient and as a result of that he may be found liable for professional negligence [8].

Although the medical doctor is not supposed to be placed in a precarious situation while discharging his duty with the fear of looming litigation over every death of a patient or any unsuccessful surgery, however when he falls short of the standard of a reasonable skilful medical man, he should be found liable for being negligent. This was clearly expounded by *Lord Denning* in his direction to the jury in *Hatcher v. Black*, [9] which said case involved a singer who suffered from a diseased thyroid. She underwent a thyroidectomy after being assured that there was no risk to her voice. A nerve was so badly injured in the operation that the singer's voice was damaged. The doctor knew there was a slight risk to the singer's voice but had told her there was none in order to prevent her from deciding against treatment. In an action against the doctor for negligence, the eminent Jurist directed the jury thus:

> 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. It would be wrong, and, indeed, bad law, to say that simply a misadventure or mishap occurred, the hospital and the doctors are thereby liable. It would be disastrous to the community, if it were so. It would mean that a doctor examining a patient, or a surgeon operating at a table, instead of getting on with his work, would be forever looking over his shoulder to see if someone was coming up with a dagger for an action for negligence against a doctor is for him like unto a dagger. His professional reputation is as dear to him as his body, perhaps more so, and an action for negligence can wound his reputation as severely as a dagger can his body. 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.

Thus, where a patient perceives that a certain practitioner or anyone under his directive has acted below the expected standard and the said act has resulted to a damage, such patient is at liberty to approach the court for redress. However, the problems that may arise in the patient's bid to prove negligence which also informed most of the arguments contained in this paper and which will also be addressed in the succeeding paragraphs are; can a patient who accepts the directives of the medical practitioner with little or no hesitation be able to muddle through the millstone of establishing that one or more of the directives or actions of the medical practitioner led to the alleged harm and to what extent can a patient who lacks the fundamental knowledge of medical practice be able to pinpoint and isolate how and which of the act(s) of the medical-practitioner resulted in the alleged harm.

Medical Negligence/Medical Malpractice

Negligence simpliciter is failure to give enough care and attention. Negligence connotes lack of proper care and attention. Negligence is a careless lack of proper conduct. Negligence is a foremost aspect of tort and it forms a sizeable aspect of tort. Negligence is an omission or failure to do something which a reasonable and prudent man under similar circumstances would do [10]. Negligence is any conduct that falls below the legal standard established to protect others against reasonable risk of harm [11]. In *Chukwuma & Ors. v. Awoh*, [12] negligence was defined by the Nigerian Court of Appeal as an omission or failure to do something which a reasonable man under similar circumstances can do or the doing of something which a reasonable or prudent man would not do. In the words of the Court of Appeal in *MTN v. Chinedu*, [13] negligence has three meanings:

a. It is a state of mind which is opposed to intention.
b. Careless conduct
c. Breach of duty of care imposed by Common Law and statute resulting in damage to complainant [14].

What amounts to negligence depends on the facts of each particular case as the categories are not closed [15]. Negligence is a fluid principle that has to be applied to the most diverse conditions and problems of human life [16]. The tort of negligence is an upshot of the common law barrier which prevents a party from seeking redress for a wrongful act of another on the basis that the doctrine of privity of contract applies to deny the suffering party the right to seek redress. In Nigeria, a lot of injured patients and their families have attributed any medical adverse event in the course of treatment as the will of God and in cases where it results in death at the hospital, it is deemed as a death that occurred at God's appointed time [17]. This stereotypical attitude is also the reason why the idea of employing autopsy to ascertain actual cause of death is unpopular among Nigerians and for some it is tagged a waste of financial resources. Before now, medical negligence was not a topic of popular discourse in Nigeria, however in recent times the subject matter appears to have taken the centre stage and this can be attributed to the awareness and the sudden realization amongst Nigerian patients that a medical practitioner can be found liable in situations where he acts negligently, contrary to the ethics of the profession or acts below the acceptable medical standards. Medical negligence may arise where a medical practitioner who consents to treat a patient and obligates himself to use his best judgement and to use reasonable care in the exercise of his skill and the application of his learning fails to do so [18].

Medical negligence connotes the failure on the part of a medical practitioner to exercise a reasonable degree of skill and care in the treatment of a patient, such that if a doctor treats a patient in a negligent manner causing harm or worsening the existing health condition, the patient can bring an action in negligence against the doctor claiming damages for the harm suffered [19]. Medical malpractice occurs when a doctor or a person who is under their command intentionally or because of negligence commits an act (active or passive) against any of their patients in their medical practice that violates professional standards, procedural standards or medical principles which as a result causes harm to the body, the physical or mental health, and or the lives of patients [20]. Medical malpractice is a mistake that occurs in the process of carrying out the duties associated with the medical profession in accordance with the standards of the medical profession and/or of not performing medical measures according to a certain quality level based on medical science [21]. Although medical malpractice is a form of medical negligence, the key difference between

medical negligence and medical malpractice is intent. While medical negligence connotes a mistake that resulted in causing a patient unintended harm, medical malpractice is when a medical professional knowingly did not follow through with the proper standard of care. Thus, the difference is that medical negligence is unintentional.

Intricacies and Bottlenecks encountered in the Proof of Medical Negligence/Malpractice in Nigeria

Generally, proving medical negligence is a herculean task and this may be attributed to some prevailing factors which include the insubstantial medical knowledge possessed by the plaintiff and the obvious fact that the defendants are often the ones who made the findings and wrote the observations that make up the bulk of the patient's medical record. And since the defendant is often the only person who was present and knew what really occurred when the alleged medical negligence happened, even the most well trained and well informed expert medical witness will have his or her hands full in examining all the evidence, figuring out what really happened in terms of the provision of care to the patient [22]. The principles of Common Law [23] and provisions of the Evidence Act [24] have also made the proof of medical negligence in Nigeria tedious and wearisome by placing an onerous task on the illiterate and uninformed victim by expecting him to show via cogent evidence that the negligent act(s) complained of gave birth to the alleged injury. Even in cases where an expert witness is procured by the victim, there is a high likelihood that such witness will be hesitant in giving evidence that may be detrimental to the career of a fellow colleague.

Doctrine of *Res Ipsa Loquitur* and its Applicability in Proving Medical Negligence/Malpractice.

The Latin maxim *res ipsa loquitur* means the thing speaks for itself. The maxim connotes that in some circumstances, the mere fact of an accident occurrence raises an inference of negligence so as to establish a prima facie case. In other words, an accident may by its nature be more consistent with its being caused by negligence for which the defendant is responsible than other causes in such case, the mere fact of the accident is prima facie evidence of such negligence. This Latin maxim is applicable to actions for injury by negligence where no proof of such negligence is required beyond the accident itself which is such as necessary to involve negligence [25]. For instance, where a ship in motion collides with another ship at anchor, it can be inferred that ordinarily such collision could not and would not have occurred without the negligence of the ship in motion.

Res ipsa loquitur is no more than a rule of evidence affecting the onus of proof. The doctrine is designed to lighten the burden of proof that lies on a plaintiff. It is a rule of common sense, that there is no need to ask a plaintiff to prove what he did not see nor understand [26]. It raises a rebuttable presumption of negligence of the defendant, presenting a question of fact for the defendant to meet with an explanation. Generally, the doctrine of *res ipsa loquitur* is applicable to cases of medical negligence to enable the court draw inference of negligence. The application of the doctrine is necessary because in the course of medical care or surgery, a person may be unconscious, under anaesthesia or such patient may have insufficient knowledge as to what transpired during the surgery [27]. Historically, it has been the rule that *res ipsa loquitur* will be applied in medical practice cases only where the negligence of the physician may be inferred from the facts which laymen can understand from their common experience. Thus, the error complained of would not occur if the physician had exercised care and that these errors are of such a nature as can be fully understood by laymen [28]. The application of the doctrine of *res ipsa loquitur* in medical practice is a rule of evidence wherein the onus to rebut medical negligence is shifted to the physician who is expected to prove that he was not guilty of malpractice [29]. Although, the true purpose of *res ipsa loquitur* is not to reverse the onus/burden of proof and neither is it intended to change the responsibility criteria, rather it is geared towards assisting the victim in terms of proving who is guilty by doing so via circumstantial evidence [30]. Under English law there are basic requirements that must be fulfilled before the doctrine of *res ipsa loquitur* can be applied to infer negligence:

a. Events must be natural, so they do not always happen without negligence.
b. Equipment must be under the control of doctors and hospitals or medical personnel under the responsibility of doctors and hospitals.
c. The real cause of the accident must be unknown [31].

Generally, the courts are reluctant to apply *res ipsa loquitur* to cases of medical negligence as its strict applicability may cause a health care provider some degree of anxiety in the discharge of his duty. This empathy is also because of the nature of human system and medical practices [32]. In Texas, before 1977, the plea of *res ipsa loquitur* was not applicable in medical malpractice [33] cases except where the said case involved a physician who left surgical instruments or supplies inside a patient's body [34] or where the said physician operated on the wrong part of the body [35]. In 1990, the Texas Supreme Court addressed the applicability of *res ipsa loquitur* in medical malpractice and to that extent the court held that *for res ipsa loquitur* to apply, unaided laymen must be able to determine that negligence must have occurred from their common knowledge and not solely through the aid of an expert [36]. Thus the alleged negligent act must be obvious and glaring. In *O'Malley Williams v. Board of Governors of National Hospital for Nervous Disease* [37], the plea of *res ipsa loquitur* failed because the injury being complained of was a well-recognised consequence of the procedure that was carried out.

Extent of Applicability of *Res Ipsa Loquitur* in Proving Medical Negligence/Malpractice in Nigeria.

A foray through judicial decisions in cases pertaining to medical negligence/malpractice by Nigeria reveal that for a successful application of the doctrine of *res ipsa loquitur*, the only conditions to be fulfilled by the patient are those customary conditions laid down by *Erle Cj* in *Scott v. London and St. Katherine's Docks Co.*, [38] which are as follows:

1. The thing that inflicted the damage was under the sole management and control of the defendant or of someone for whom he is responsible or whom he has a right to control.
2. The occurrence is such that it would not have happened without negligence.
3. There must be no evidence as to why or how the occurrence took place [39].

Thus, there is no additional requirement of showing that before the doctrine can be applied, the negligent act complained of must be such that laymen must be able to determine that negligence must have occurred from their common knowledge and not solely through the aid of an expert. In the Nigerian case of *Ojo v. Ghahoro & Ors.*, [40] the apellant needed a child and that took her to the University of Benin Teaching Hospital (the 2nd respondent). The 1st respondent, a lecturer at the University of Benin, an Honorary Consultant in the Obstetrics and Gynaecology department of the 2nd respondent examined her. The appellant was diagnosed and told that she has a growth in her fallopian tube and that she needed a surgical operation to remove the growth to enable her become pregnant. Since the appellant needed to be pregnant, she consented to the surgery. After the surgery, the Appellant complained of pains which she reported to the 1st respondent who asked her to do an X-ray. The X-ray confirmed that there was a broken needle in her abdomen. This resulted in a second operation which could not totally or completely remove the broken needle. In an action filed, the plaintiff pleaded direct negligence and in addition relied on the maxim *res ipsa loquitur*. The action filed by the appellant was dismissed by the trial court and the Court of Appeal. On a further appeal to the Supreme Court, dismissing the appeal, the apex court made reference to the uncontroverted evidence of DW1 wherein he averred thus:

> It is not true that the needles used in the first operation with Plaintiff got broken negligently. Needles get broken from time to time in operations. With the quality of materials now available, needles get broken more often. No doctor breaks a needle negligently or intentionally, when needles get broken, the pieces are searched for and retrieved. In this case, one piece was found. The needle in this case got broken accidentally.

The court accepted this piece of evidence and also the fact that the appellant failed to call an expert witness to contradict the averment of DW1 also influenced the decision of the apex Court. The court *Per Oguntade, JSC* and *Ogbuagu, JSC* in their concurring judgment specifically pointed it out that failure of the appellant to call an independent Surgeon or Gynaecologist to controvert in any material aspect, the evidence of the respondents was fatal to her case. This paper aligns with the view of the apex court on the basis that if the Appellant had secured the services of an independent expert witness, the court may have arrived at a different conclusion for reason that the uncontroverted evidence of DW1 could have been punctured by the testimony of the expert witness. This paper also aligns with the view of the court that the doctrine of *res ipsa loquitur* was inapplicable because from the plaintiff's evidence, it was only shown that a broken needle was left inside her following the operation she had and there was nothing to show that it was the result of negligence on the part of the defendants. Furthermore, part of the uncontested evidence of DW1 which absolved the defendants of any inferred negligence was that according to the DW1, when the skin layer was being closed, the surgical needle got broken at the layer of the skin and this was noted by the gynaecological surgeon who documented it and took the necessary step to remove the broken pieces. Although one piece of the needle was found, the other could not be located and the normal procedure for reporting such incidents was duly followed [41]. According to the evidence, the plaintiff (appellant) was also informed that the missing broken piece of needle was still in the skin and that the broken piece will not constitute any danger to her because it was sterilized. The stance taken by this paper finds strength in the passage of *Lord Denning* [42] to the effect that a medical practitioner is not liable simply because something went wrong and coupled with fact that in the instance case, the broken needle was adequately communicated to the plaintiff (appellant) and that the said broken needle did not pose any serious threat to her [43].

However, in *Abi v. CBN &Ors.*, [44] the appellant fell ill and at about 12 midnight, he was taken to the 2nd respondent (Abuja Clinics) by his wife and neighbour. At the Abuja Clinic which was one of the retainer hospital of the 1st respondent (Central Bank of Nigeria). The appellant was examined, interviewed and attended to by Dr. Udom (3rd respondent). According to the appellant, the 3rd respondent negligently diagnosed, prescribed and administered to him drugs that made him deaf. He maintained that he was admitted in the hospital and after the diagnosis, that he was suffering from meningitis, the 2nd and 3rd respondent administered him with a variety of drugs including *Gentamycin* which made him permanently deaf. The Court of Appeal agreed with the appellant that the respondent owed him a duty of care but disagreed that there was a breach of that duty of care. Although, there was no evidence that the 3rd respondent who prescribed and administered the *Gentamycin* to the appellant gave his professional advice as to the possible side effects of the drug, the court held thus:

> From the totality of evidence adduced, I hold that the Appellant failed to discharge the onus on him on a balance of probability by establishing that the 2nd& 3rd Respondent breached their duty of care to him by the nature of treatment administered on him in particular the drug gentamycin. The Appellant failed to prove that the 2nd& 3rd Respondent failed to do what a reasonable medical man skilled in that particular art will do, there is no reasonable evidence adduced to show that the 2nd& 3rd Respondent did not act in accordance with practice accepted for the treatment of meningitis diagnosed. The sole testimony of the Appellant certainly could not per se amount to proof of the particulars of negligence pleaded against the Respondent [45].

Although this paper is in agreement with the position of the Nigerian Court of Appeal that the failure of the appellant to secure the services of an expert was fatal to the case, this work however differs on the position taken by the court that the doctrine of *res ipsa loquitur* was inapplicable in the case. The pertinent question then is if *res ipsa loquitur* is precluded from being applied to a case where a person who visited a medical practitioner for the treatment of a particular ailment leaves the clinic with a worse ailment, which other case can the doctrine be applied. It is submitted by this paper that facts of the case represent a clear instance of where the doctrine ought to have been applied. This assertion is anchored on the uncontested fact that at the point the patient visited the hospital, he was not deaf as was captured in the statement of the court when it stated thus: "*the appellant before the 26/02/01 was not deaf but at the time of his discharge he cannot hear*". The position of this paper is also strengthened by the absence of a clear-cut explanation by the

defendants as to the cause of the deafness and this was also captured in the statement of the court when it stated thus "*The DW1and DW2 maintained that gentamycin can cause deafness but because the appellant has other illness which can equally lead to loss of hearing they cannot tell what exactly caused the Appellant to be deaf*". It is further submitted that the absence and failure of the 3rd respondent to give evidence to what informed his decision to treat the patient with Gentamycin knowing fully well the possible side effects of the drug was enough for the honourable court to infer negligence on the part of the defendants.

A similar scenario played out in the case of *Plateau State Health Services Management Board & Anor. v. Goshwe* [46] however a different conclusion was reached by the Nigerian Supreme Court. In that 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 totally deaf. A panel of inquiry set up by the appellants had arrived at a conclusion that the respondent's deafness was due to some injections he received for treatment pneumonia at the appellant's hospital. That panel had also recommended that the respondent's employers, the Nigeria police, purchase two rare drugs which could cure the respondent's deafness. The panel further recommended that respondent be assigned to other duties which would not require communication but surprisingly the appellants went on to recommend to the respondent's employers that the respondent be retired on health grounds, instead of purchasing the drugs which might have cured the respondent's deafness. In consequence of the respondent's loss of job, his eight children had to leave school. His request for the payment of compensation having fallen on deaf ears, the respondent brought an action against the appellants claiming N2,000,000.00 (two million naira) as damages for negligence. The respondent relied on the doctrine of *res ipsa loquitur* and after the addresses of counsel, the learned trial Judge in a reserved judgment found in favour of the plaintiff (respondent) and awarded the sum of N300,000.00 damages in favour of the plaintiff for negligence. Aggrieved, the defendants appealed to the Court of Appeal. The Court of Appeal held *inter alia* that *res ipsa loquitur* was applicable and awarded the sum of N300,000.00 damages for negligence in favour of the respondent. Aggrieved, the appellant further appealed to the Supreme Court. Applying the doctrine in favour of the respondent the Court held thus:

> 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.

Conclusion

This work appraised medical negligence/malpractice and the difficulties experienced in proving same. The paper while advocating for the adoption for *res ipsa loquitur* as a remedy for the difficulties associated with the proof of medical negligence also reviewed the extent of the applicability of the doctrine. The work had also in its comparative analysis revealed that in some jurisdictions a plaintiff who intends to rely on the doctrine of *res ipsa loquitur* is expected to show first that the negligent act complained of must be such that laymen must be able to determine that negligence must have occurred from their common knowledge and not solely through the aid of an expert.

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11. See Adesina v. People of Lagos State LPELR-46403 (SC), 2019.
12. LPELR-44830 (CA), 2018.
13. LPELR-44621 (CA), 2018.
14. Ibid. at p. 14, paras. A-D, Per Pemu JCA. The first meaning ascribed to negligence implies that while the law of intentional tort allows a plaintiff to sue for harm the defendant caused on purpose, the law of negligence allows a plaintiff to sue for harm the defendant caused either by accident or through reckless behavior.
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33. Harle v Krchnak. 422 S.W.2d 810, 815 as cited in RG, Thornton, 'Limited Use of Inferred Negligence in Medical Cases': (2002) vol. 15 (2) Baylor University Medical Centre Proceedings, 228-230.
34. See Sullivan v. Methodist Hospital of Dallas, 699 S.W.2d 265, 267 as cited in (n.31). See also the case of Schorlemer v. Reyes, 974 S.W.2d 141, 14 which involved a sponge that was left in the patient's abdomen during a surgery to remove an ovary, fallopian tube, and appendix. Despite the testimony of two assisting nurses that the sole responsibility for removal of surgical sponges rested with them, the court held that res ipsa loquitur applied against the surgeon. This decision was based on three factors. First, the surgeon testified that the sponges were under his management and control during the surgery. Second, the plaintiffs' expert testified that the surgeon had control of the sponges during the procedure; that, even though nurses perform the ancillary function of sponge counting, ultimate responsibility for sponge removal lies with the surgeon; and that the surgeons generally follow a personal routine of insertion and removal to ensure that no sponge is left behind. Third, the defense expert testified that it was the responsibility of the surgeon to make sure that everything was removed from the patient.
35. See Steinkamp v. Caremark (3 S.W.3d 191, 197 Cited in n.33) where the court held that res ipsa loquitur applied to a situation in which a nurse inserted into the patient's arm a catheter that began to disintegrate into the vein. The patient then had to undergo surgery to remove the catheter fragments. The defense in the Steinkamp case argued that the doctrine of res ipsa loquitur was inapplicable and in support of his position he cited Arguello v. Gutzman (838 S.W.2d 583, 585 Cited in n.31). In that matter, while the patient's knee was being operated on, one of the surgical instruments broke and dropped into the patient. The surgeon was unable to locate that broken piece through arthroscopic visualization or x-rays and, therefore, had to perform an arthrotomy to find and retrieve the broken instrument. The Court of Appeal in Steinkamp held that the claim in Arguello pertained only to the physician's use of a mechanical instrument and not to the additional assertion that the physician's act of leaving a foreign object in the patient was the basis of a request for res ipsa loquitur instruction. Thus, in Steinkamp, since the catheter was undisputedly under the nurse's management and control when it broke off, and since expert testimony was not needed to establish that a surgical instrument should not remain inside the body, res ipsa loquitur could be utilized to establish that claim.
36. Farr v. Wright, 833 S.W.2d 597, 600Cited in (n.33).
37. 1 BMU 635, 1975.
38. 12 APP, CASE 41 (HL); 3 H & C 596 EXCH; (1865) 159 ER 665, 1865.
39. Some case laws from other jurisdictions included a 4th requirement; that the negligence must be such that the plaintiff did not contribute in any way to its occurrence.
40. (2006) LPELR-2383 (SC); (2006) 10 NWLR (Pt. 987); (2006) 2-3 SC 105.
41. The foregoing evidence of the DW1 forms one of the challenges faced by a patient in his bid to establish negligence on the part of the medical practitioner or the hospital for reason that in most cases it is the defendant that documents how and what actually transpired.
42. See (n.9).
43. The veracity of the foregoing account of DW1 could have been put side by side with the evidence of an expert witness if one was secured by the plaintiff (appellant).
44. (2011) LPELR-4192 (CA); (2012) 3 NWLR (Pt. 1286) 1.
45. Ibid at p. 42, paras. D-G, Per Nwodo, JCA (of blessed memory). The decision of the court was chiefly influenced by the failure of the appellant to call an expert witness in which case the court was not afforded an opportunity to weigh the evidence of the expert witness against the evidence of the respondent.
46. (2012) LPELR-9830 (SC); (2013) 2 NWLR (Pt. 1338) 383.