BREACH OF DUTY ACCORDING TO MEDICAL NEGLIGENCE LAW IN NIGERIA AND MALAYSIA

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Abstract

Medical negligence is an area that travels across a range of issues in societies today including Nigeria and Malaysia. Medical negligence constitutes an act or omission by a medical practitioner which falls below the accepted standard of care resulting in injury or death of a patient. A breach of duty presumes the existence of this unacceptable standard and therefore, it lies at the heart of negligence claims. With Nigeria and Malaysia being common law countries, similar principles in determining a breach of duty in treatment, diagnosis and information disclosure is expected. In determining the breach of duty to treat and diagnose, both countries share similar principles as they rely on the *Bolam-Bolitho* test. However, Malaysia applies the *Rogers'* principle in determining the duty to disclose information, but Nigeria still shows possibility of applying the *Bolam-Bolitho* principle. This can be attributed to the scanty case laws on medical negligence in Nigeria.

Keywords: Breach of duty, common law, medical negligence.

I INTRODUCTION

Breach of duty has been described to be central to medical negligence cases and common law has adopted various principles in making fair judicial decisions on whether a breach of duty has occurred. Negligence can be defined broadly as the breach of a legal duty by a defendant resulting in foreseeable damage undesired by the defendant to the plaintiff.[1] To prove negligence, there has to be an existence of a duty of care owed by the defendant to the plaintiff, breach of that duty by the defendant, damage to the plaintiff resulting from the breach and the resulting damages that was reasonably foreseeable.[2]

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1 Gilbert Kodilinye, *Commonwealth Caribbean Tort Law* Routledge, 3rd ed, 2013) 63.

2 Rebecca L Cypher, 'Demystifying the 4 Elements of Negligence' (2020). 34(2) *The Journal of Perinatal & Neonatal Nursing* 108, 108.

In certain cases, these elements are usually not separated from each other in determining the cause of action in negligence[3]. Denning L.J in *Roe v Minister of Health*[4] was of this view as he said:

> You will find that the three questions, duty, causation, and remoteness, run continually into one another. It seems that they are simply three different ways of looking at one and the same problem.[5]

However, it is commonly accepted that although the various elements of negligence overlap, they are of separate identities. Therefore, to determine whether negligence has been committed, it will require an analysis of each of these four legal elements.[6]

Particularly for medical negligence, breach of duty is the key ingredient of the tort to the plaintiff[7]as it represents what proving medical negligence entails.-

II COMMON LAW EVOLUTION ON BREACH OF DUTY

On establishing that a duty exists, the plaintiff has to then prove that there was a breach of that duty. A breach of duty suggests the existence of an acceptable standard of behaviour that will prevent undue risks of harm.[8] The general approach in determining a breach in the duty of care is for the court to examine the defendant's conduct using the test of a reasonable man 'who is neither a perfect citizen nor paragon of circumspection.[9]

Deciding whether there is a breach of duty was laid down brilliantly by Alderson B *in Blyth v Birmingham Waterworks* (*Blyth*)[10] where he said:

> Negligence is the omission to do something which a reasonable man guided upon these considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do.[11]

This established the standard of care to be of 'reasonable care' in a normal case.[12] In the context of medical practice, the acceptable standard has been a controversial subject for many years. This stems from the fact that medical negligence cases are different from

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[3] James Goudkamp, 'Breach of Duty: A Disappearing Element of the Action in Negligence?' (2017) 76(3) *The Cambridge Law Journal* 480, 480.

[4] *Roe v Minister of Health* [1954] 2 All QB 66, 86.

[5] Ibid.

[6] Goudkamp (n 3) 480.

[7] Chudi C Nwabachili, 'The Legal Implications of Duty of Care' (2017) 5(4) *Global Journal of Politics* 1, 1.

[8] Dauda Momodu and Tijani Idris Oseni, 'Medical Duty of Care : A Medico-Legal Analysis of Medical Negligence in Nigeria' (2019) 9 *American International Journal of Contemporary Research* 56, 56.

[9] Michael Aondona Chiangi, 'Principles of Medical Negligence: An Overview of the Legal Standard for Medical Practitioners in Civil Cases' (2019) 4(4) *Miyetti Quarterly Law* 53, 57.

[10] [1856]11 EX. 781 (*'Blyth'*).

[11] Ibid.

[12] Puteri Nemie Jahn Kassim, *Medical Negligence Law in Malaysia* (ILBS, 4th ed, 2016) 29.

any other cases. Medical activities are not within judicial knowledge and therefore, it will be difficult for the courts to determine the acceptable standard.[13]

The landmark case of *Bolam v Friern Hospital Management Committee*[14] established the *Bolam* principle that determined the standard of care demanded of a doctor.[15] In *Bolam*, the House of Lords through McNair J. found in favour of the defendant physician stating 'that he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art'.[16] This meant that if a doctor reaches the standard of a responsible body of medical opinion, he is not negligent. It is expected that a medical practitioner lives up to the standard of an ordinary skilled member in his specialty.[17] This was inferred when McNair J. said:

> … A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.[18]

Medical practice has also devised guidelines to determine the competence and standards by which medical professionals should deliver their services.[19] The Medical and Dental Council of Nigeria ('MDCN') is the regulatory body for medical practitioners in Nigeria. This council is guided by the Medical and Dental Practitioners Act ('MDPA')[20] which sets the code of conduct for medical and dental practice. Medical practitioners are bound by these established rules which set an acceptable standard of medical practice concerning patients and the public[21]. Pursuant to the provision of the MDPA, medical practitioners are guided by the provisions of the Code of Medical Ethics 2004 of the MDCN. Rule 28 (A to I) of the Code[22] defines the acts and omissions which constitute medical negligence on the part of a medical practitioner.[23]

In Malaysia, the Malaysian Medical Council ('MMC') is the regulatory body for medical practitioners. This council is regulated by the Medical Act 1971 ('MA'). The MA is the legislation relating to the registration of medical practitioners and the practice of medicine in Malaysia. The Code of Professional Conduct 2019 as adopted by the MMC defines the forms of serious professional misconduct. Although it does not necessarily mention negligence, it states neglect or disregard of medical care to patients as serious

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[13] Ibid.

[14] [1957] 1 WLR 582 (*'Bolam'*).

[15] Jahn Kassim (n 12) 30.

[16] *Bolam* (n 14), 586-7.

[17] Chiangi (n 9) 59.

[18] *Bolam* (n14).

[19] Chiangi (n 17).

[20] Cap M8 2004.

[21] Folake Tafita and Folakemi Ajagunna, 'Accessing Justice for Medical Negligence Cases in Nigeria and the Requisite for No-fault Compensation' (2017) 10 *Journal of Private & Comparative Law* 77, 79-80.

[22] Code of Medical Ethics in Nigeria, 2004.

[23] Ibid,

professional misconduct.[24] This contributes in sustaining the professional standards of medical practitioners in Malaysia.[25]

Each of these medical bodies creates a minimum standard for a medical professional to work with. Furthermore, it is expected that medical practitioners keep up with the latest development in their medical specialties.[26] It should also be stressed that the practice must be judged based on the date of the treatment and not the trial date. This was shown in the case of *Roe v Minister of Health & Anor*[27] where the incident occurred in 1947 but was tried in 1954. The risk of the incident that occurred became known by the medical profession in 1951. Lord Denning had highlighted the case could not be judged with a knowledge that came to light in 1951.[28]

Over the years, the *Bolam* principle has faced criticisms. It has been described to be unfair to claimants and too protective of the medical profession.[29] Challenges have frequently been made to the *Bolam* test to promote the interest of the patient.

The *Bolitho* test is one such challenge to the *Bolam* principle. It originates from the case of *Bolitho v City and Hackney Health Authority* (*'Bolitho'*)[30] where the doctors had not responded to a call made by the night sister. It was argued that if the doctor had intubated the child, the cardiac arrest and brain damage he suffered would not have happened. Medical opinion disagreed about intubation being mandatory in this situation. It was argued successfully by the defendants that the plaintiff could not prove that if the doctor on call had attended to the patient, she would have intubated the patient and there would have been a different outcome. This decision was upheld in the Court of Appeal. On appeal to the House of Lords, the decision of the Court of Appeal was also upheld. This decision was upheld not necessarily because the defendant had acted according to accepted medical practice.[31] Lord Browne-Wilkinson held that:

> The use of these adjectives - responsible, reasonable and respectable - all show that the court has to be satisfied that the exponents of the body of medical opinion relied upon can demonstrate that such opinion has a logical basis…'[32]

This decision by the House of the Lords trumped the 'medical opinion' as seen in the *Bolam's* principle. *Bolitho* appeared to curb the power delegated to medical professionals as there is no guarantee that the medical opinion provided will be accepted.[33] Although this suggests that there will be more avenues for plaintiffs to succeed in negligence cases, it is unlikely it will make a significant difference.[34] To be able to question how

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24 MMC Code of Professional Conduct 2019,
25 Malaysian Medical Association <https://mma.org.my/ >
26 Jahn Kassim (n 12) 37.
27 [1954] 2 QB 66,
28 Jahn Kassim (n 12).
29 Vivienne Harpwood, *Modern Tort Law* (2005). Psychology Press, 6th ed, 139.
30 [1998] AC 232 ('*Bolitho*').
31 Harpwood (n 29).
32 *Bolitho* (n 30), 778.
33 Jahn Kassim (n 12) 44.
34 Harpwood (n 29) 140.

logical a medical opinion is, judges will need to have some medical knowledge. This was acknowledged when Lord Browne-Wilkinson in *Bolitho* stated:

> …it will seldom be right for a judge to reach the conclusion that views genuinely held by a competent medical expert are unreasonable…

Therefore, it will be in 'rare' and 'exceptional' cases that judicial intervention will be justified in medical opinions.[35]

Promoting a patient's interest was further developed in the Australian High Court case of *Rogers v Whitaker*.[36] The case determined that in negligence cases, a medical practitioner's duty is extended to providing advice and information. In this case, the plaintiff had stated that, if she had been warned of the risks, she would not have gone through with the operation. The High Court rejected the medical opinion in determining the disclosure of information. Instead, they formulated the requirement that involved warning of all risks of forgoing or undergoing a treatment especially when these risks are material.[37] This was provided when the High Court concluded that:

> to warn a patient of a *material risk* inherent in the proposed treatment; a risk is material if, in the circumstances of a particular case a *reasonable person* in the patient's position, if warned of the risk, would be *likely* to *attach significance* to it or if the medical practitioner is or should reasonably be aware that a particular patient, if warned of the risk, would be likely to attach significance to it. This is subject to therapeutic privilege.[38] (emphasis added)

The case of *Montgomery v Lanarkshire*[39] in 2015 drew fresh attention to disclosure of advice or information.[40] The case against the consultant was that the potential consequences of the vaginal delivery were not mentioned to Mrs. Montgomery as well as the alternative option - which was a cesarean section. It was therefore alleged that the consultant was negligent in obtaining informed consent from Mrs. Montgomery. However, the consultant stated that the risk of a serious consequence as a result of the shoulder dystocia was 0.2% for a brachial plexus injury and less than 0.1% for hypoxic injury and since the risk of a serious consequence was thought to be small, it was not discussed with Mrs. Montgomery. After the case failed on appeal in the Court of Session and the Inner House, it was heard at the United Kingdom Supreme Court. The argument in this appeal was that it was not appropriate to use the accepted practice of a body of reasonable medical practitioners when disclosure of information is considered. All seven justices at the Supreme Court supported the appeal. The ruling involved the exploration

[35] Jahn Kassim (n 12) 44.

[36] (1992) 175 CLR 479.

[37] Tracey Carver, 'Informed Consent, Montgomery and the Duty to Discuss Alternative Treatments in England and Australia' (2020) 25(5) *Journal of Patient Safety and Risk Management* 187, 188.

[38] *Rogers* (n 36), 490.

[39] [2015] UKSC 11(*'Montgomery'*).

[40] Sarah W Chan et al 'Montgomery and Informed Consent: Where Are We Now?'(2017) *BMJ* 357, 357.

and discussion of both the risks and the options, not just the risks. This was provided when Lady Hale said:

> …it is not possible to consider a particular medical procedure in isolation from its alternatives. Most decisions about a medical care are not simple yes/no answers. There are choices to be made, arguments for and against each of the options to be considered, and sufficient information must be given so it can be done."[41]

The *Montgomery* test became one of not just 'material risk' but also of 'material information'. This concept for materiality allows clinicians to adapt the information to the needs of the patient.[42] It will involve understanding some of the patient's attributes such as the intelligence or anxiety level which will take a substantial number of visits from the patient to be able to be determined. This embraces a more substantive version of autonomy than it was accommodated previously in the law on informed consent.[43] The Montgomery test also recognized that disclosure of information by doctors is subject to a therapeutic exception.[44] The precise scope of the therapeutic exception and its justification has been left to future decisions. There has been just one clear instance of therapeutic privilege in English law - *Pearce v United Bristol Healthcare NHS Trust*.[45] Therefore, the rarity of application has allowed courts to avoid articulating why, when, and to whom, the defence of therapeutic privilege (exception) should apply.[46]

A *Framework in Malaysia*

Before 2006, the Malaysian courts applied the *Bolam* test in determining the standard of care concerning treatment and disclosure of information.[47] *Swamy v Matthews*[48] was one of the earliest cases where the *Bolam* test was applied.[49] In the case, different opinions were presented before the court but the testimony of the defendant doctor (which was that the dosage of the drug given to the plaintiff was based on personal experience) was accepted by the court. The defendant doctor was not found negligent because even though the skill carried out by the doctor might not have been of the highest degree, the *Bolam* test does not expect medical practitioners to possess the highest degree of skill.[50]

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[41] *Montgomery* (n 39).

[42] Emma Cave, 'The Ill-informed: Consent to Medical Treatment and the Therapeutic Exception' (2017) 46(2) *Common Law World Review* 140, 153.

[43] Ibid 158.

[44] Mohsin I Choudry, Aishah Latif, Leslie Hamilton and Bertie Leigh, 'Documenting the Process of Patient Decision Making: A Review of the Development of the Law on Consent' (2016) 3(2) *Future Healthcare Journal* 109, 110-111.

[45] [1999] PIQR P53 (CA).

[46] Rachel Mulheron, 'Has Montgomery Administered the Last Rites to Therapeutic Privilege? A Diagnosis and a Prognosis' (2017) 70 (1) *Current Legal Problems* 149, 186.

[47] Dato' Mah Weng Kwai, 'Approach to Medical Negligence Claims by Malaysian Courts' (*Mondaq,* 28 July 2020) <https://www.mondaq.com/professional-negligence/969990/approach-to-medical-negligence-claims-by-malaysian-courts> accessed 28 January 2021.

[48] *Swamy v* Matthews [1968] 1 MLJ 138.

[49] Jahn Kassim (n 12) 46.

[50] Ibid.

The *Bolam* test went on to be used in the case of *Elizabeth Choo v Government of Malaysia*,[51] *Asiah bte Kamsah v Dr. Rajinder Singh &Ors*,[52] *Hor Sai Hong & Anor v University Hospital& Anor*[53], and *Foong Yeen Keng v Assunta Hospital (M) Sdn Bhd & Anor*.[54]

However, the *Bolam* test was deemed inapplicable in determining the standard of care in providing advice to a patient on the material risks inherent in the proposed treatment.[55] This was established by the apex court in Malaysia in the case of *Foo Fio Na v Dr. Soo Fook Mun & Anor* (*'Foo Fio Na'*).[56] In this case, the plaintiff alleged that the first respondent had negligently performed the surgery on her vertebrae and had also negligently failed to inform her of the risks inherent in the surgery. The trial judge held that the first respondent had been negligent both in performing the surgery and not informing the plaintiff of the risk of paralysis inherent in the surgery. The Court of Appeal however allowed the respondent's appeal even though Gopal Sri Ram JCA (as he then was) noted the attraction of the *Rogers* approach when he nevertheless applied *Bolam*.[57] The Federal Court granted leave to appeal and noted that the main question to be determined was:

> Whether the *Bolam* Test as enunciated in *Bolam v Friern Hospital Management Committee* in the area of medical negligence should apply in relation to all aspects of medical negligence?[58]

In granting the leave application, the Federal Court noted:

> … the particular aspect of medical negligence relates more specifically to the duty and standard of care of a medical practitioner in providing advice to a patient on the inherent material risks of the proposed treatment.[59]

However, it is not exactly clear whether the Federal Court intended to grant leave to determine the application of the *Bolam* test to medical negligence generally (which was the original question or only with respect to the duty to advise or inform (which is the narrow question).[60]

Siti Norma FCJ (as she then was) while delivering the judgment of the Federal Court said:

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51 [1970] 2 MLJ 171.
52 [2002] 1 MLJ 484.
53 [2002] 5 MLJ 167.
54 [2006] 5 MLJ 94.
55 Dato' Mah Weng Kwai (n 47).
56 *[2007] 1 MLJ 593 ('Foo Fio Na')*.
57 *Dr Soo Fook Mun v Foo Fio Na* [2001] 2 MLJ 193 at 207-208.
58 *Foo Fio Na v Dr Soo Fook Mun [2007] 2 MLJ 129 at 130.*
59 Ibid.
60 Kumaralingam Amirthalingam, 'Medical Negligence and Patient Autonomy - Bolam Rules in Singapore and Malaysia - Revisited' (2015) 27 *Singapore Academy of Law Journal* 678.

> …we are of the opinion that the *Bolam* test has no relevance to the duty and standard of care of a medical practitioner in providing advice to a patient on the inherent and material risks of the proposed treatment…[61]

She noted toward the end of the judgment the importance of ensuring that the courts set the standard of care and concluded that the '*Rogers v Whitaker* test would be a more appropriate and a viable test of this millennium than the *Bolam* test'.[62]

After the *Foo Fio Na* case, the cases that followed showed the Federal Court ignoring the *Bolam* test.[63] The case of *Dominic Puthucheary & Ors (personal representatives of the estate of Thayalan s/o Kanapathipillai) v Dr. Goon Siew Fong & Anor*[64] in 2007 was one such example. The claim was that the deceased's death was caused by the failure to diagnose and treat a spinal injury. Two questions were presented before the High Court: (i) whether either or both respondents were negligent; and (ii) even if either or both were negligent, whether their negligence caused the deceased's death. The trial judge dismissed the plaintiff's claim and found for the defendants on both questions posed. The plaintiff then appealed to the Court of Appeal. The Court of Appeal dismissed the appeal as the plaintiff had not discharged the burden of proof with respect to the breach of duty and causation. Although the plaintiff lost the case, Gopal Sri Ram JCA (as he then was) while delivering judgment held that the plaintiff had rightly relied on the decision of the Federal Court in *Foo Fio Na.* This meant that determining the standard of care was not meant for medical opinion alone, but it was for the consideration of the courts.[65] Even though this case involved the duty to diagnose and treat and not to inform, the *Bolam* test was clearly not considered. It seemed to apply the *Rogers v Whitaker* test.[66]

The *Rogers v Whitaker* test went on to be applied in the case *of Dr. Ismail Abdullah v Poh Hui Lin (administrator for the estate of Tan Amoi @ Ong Ah Mauy, dec'd)*[67] and *Hasan Datolah v Kerajaan Malaysia.*[68] It was applied not just for the provision of information but also concerning treatment.[69]

The debate as to whether the ratio in the Federal Court decision of *Foo Fio Na* was purely intended for disclosure of information alone[70] was eventually settled in the recent case of *Zulhasnimar Hasan Basri v Dr Kuppu Velumani & Ors*[71] whereby the High Court dismissed the appellants' claims that the respondents had breached their duty in providing care to them as there was sufficient evidence to show that the first appellant showed a rare form of an abnormal uterus which cannot be seen without

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61 Ibid para 39.

62 *Foo Fio Na v Dr Soo Fook Mun* [2007] 1 MLJ 593 at [69].

63 Kumaralingam Amirthalingam (n 61).

64 [2007] 5 MLJ 552 (*'Puthucheary'*).

65 Ibid [16].

66 Dato' Mah Weng Kwai (n 47).

67 [2009] 2 MLJ 599.

68 [2010] 5 CLJ 764.

69 Dato' Mah Weng Kwai, 'Approach to Medical Negligence Claims by Malaysian Courts' (*Mondaq,* 28 July 2020) <https://www.mondaq.com/professional-negligence/969990/approach-to-medical-negligence-claims-by-malaysian-courts> accessed 28 January 2021

70 Ibid.

71 [2017] 8 CLJ 605.

surgery. Therefore, the first respondent was not able to foresee this damage. The Court of Appeal by a unanimous decision also affirmed the judgment of the High court. The Federal Court then subsequently resolved the uncertainty as to whether the *Bolam's* test or the *Rogers v Whitaker* test should apply in the light of the *conflicting decisions of the Court of Appeal in Malaysia.* The Federal Court restricted the *Rogers v Whitaker* test specifically to the duty to inform of risks and held that the *Bolam* test is to be applied to the standard of care for diagnosis and treatment and it is subjected to qualifications as decided by the House of Lords in *Bolitho*.[72] Since medical opinions frequently differ in diagnosis and treatment, the courts appreciated that it was not well equipped to resolve such issues and the *Bolam* test will make sense.[73] However, for the duty to inform the patients of the risk, the courts will decide whether a patient has been properly advised of the risks associated with a proposed treatment since it would not require any special scientific or medical knowledge.[74] Therefore in Malaysia, the test in *Rogers v Whitaker* is restricted only to the duty to inform of risks, whereas the *Bolam* test plus *Bolitho* is applied to the standard of care for diagnosis or treatment.

B *Framework in Nigeria*

In Nigeria, to determine whether a doctor has acted below the standard of care and breached his duty, it must first be established that there is a usual and normal practice. It must also be shown that the defendant has not adopted that normal practice. Additionally, there has to be proof that the skill adopted by the defendant would not have been taken by a professional of ordinary skill.[75] This explains the *Bolam* principle. This principle has been applied in some cases including *Ojo v Gharoro*[76]. In this case, the respondents had negligently left a broken needle in the appellant's womb which caused her pain. Although the needle was confirmed to be in her womb, the respondents were not found to be negligent because the act was not reasonably foreseeable and was an accident any reasonable doctor could make.

The *Bolam* test was also applied more recently in the case of *Unilorin Teaching Hospital v Abegunde*.[77] In this case, the respondent being the deceased's son, took out a writ of summons in a representative capacity of the family of the deceased, in the lower court and claimed declaratory reliefs as well as special and general damages against the appellant based on negligent treatment. The alleged negligent act in this case was improper record keeping and errors in the hospital's filing system The lower court granted the two declaratory reliefs, awarded ₦3,138,230.00 and ₦5,000,000.00 as special and general damages respectively in favour of the respondent. The appellant, dissatisfied with the decision of the lower court, filed a notice of appeal raising three questions. Firstly, whether the question of improper record keeping by the appellant was an issue at the

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72 Ibid [97].

73 Ibid [95].

74 Ibid.

75 Babatunde Rashidat Aderayo 'Breach of Duty of Care in Medical Negligence: Scope and Limitation' (2018). LLB dissertation, University of Lagos.

76 [2006] 10 NWLR 173.

77 [2015] 2 NWLR (Pt. 1447).

trial when viewed against the background of the pleadings filed by the parties. Secondly, whether the respondent proved the allegation of negligence against the appellant on the preponderance of evidence before the court and whether the trial judge evaluated the evidence properly. Lastly, whether the award of special and general damages against the appellant was erroneous in law and based on irrelevant consideration. The Court of Appeal per Ogbuinya, JCA set aside the decision of the lower court delivered in this case and held that a medical practitioner should be liable in negligence 'when he falls short of the standard of a reasonably skillful medical man, in short, when he is deserving of censure'.[78] The appellant had exercised professional skills which did not fall short of the standard of a reasonably skillful medical man. Therefore, he was held to be not liable for negligence.

However, in *Abi v Central Bank of Nigeria*,[79] Nwodo JCA effectively endorsed the *Bolitho* test while applying the *Bolam* test, with its focus on the question whether a particular professional opinion can be logically supported. In this case the plaintiff, an employee of the first defendant, was admitted in the second defendant's clinic where he was examined by the third defendant. The plaintiff claimed that the third defendant had negligently diagnosed, prescribed, and administered on him drugs, including gentamycin, which made him permanently deaf. The Court of Appeal, Abuja Judicial Division found that the third defendant had conformed to an acceptable standard practice, but stated:

> Where the questio[n] of assessment of relative risks and benefit of adopting a particular medical practice is in issue [, t]he standard of reasonable care will presuppose that the relative risks and benefit have been weighed by the experts in forming their opinion.… The judge is entitled to find the professional opinion reasonable or responsible [;] it is only when the trial judge can be satisfied that the body of expert opinion cannot be logically supported at all that such opinion will not provide the benchmark for reference…[80]

This has been the only recorded case where the *Bolitho test* has been applied but, it can be concluded that *Bolam* along with *Bolitho* could be applied in determining the standard of care of doctors to treat and diagnose following the precedence set by the Court in *Abi v Central Bank of Nigeria.*[81]

Also, in the disclosure of information, the case of *Medical and Dental Practitioners Disciplinary Tribunal v Okwonkwo*[82] is the only applicable case in Nigeria so far. It involved the refusal of a patient to undertake a blood transfusion on religious grounds which was granted, and which eventually led to her death. The medical practitioner was found guilty by the Tribunal of contravening a 'published Code of Ethics' ('Code') and stated that the Code enjoined a doctor 'not to allow anything, including religion to

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78 Ibid 421.
79 [2012] 3 NWLR 1, 35-36.
80 Ibid.
81 Ibid.
82 [2001]3 SCNJ 186 ('*Okwonkwo*').

intervene between him and his patient and that he must always take measures that lead to the preservation of life'.

This led to the medical practitioner being suspended from his practice for 6 months as he was found guilty of contravening the Code. The Tribunal's decision can be likened to a 'body of medical opinion' that *Bolam* stands for. However, on appeal to the Supreme Court, the decision of the Tribunal was overruled. The Court was of the opinion that the Tribunal found the respondent guilty simply because he continued holding onto the patient knowing full well that the correct treatment could not be given to the patient in the face of failure to obtain consent from the patient. The Court stated that the real question was whether a medical practitioner should proceed to administer the medical measure refused by the patient, without the patient's informed consent. Applying Section 35 and Section 36(i) of the 1979 Nigerian Constitution dealing with freedom of conscience and freedom of expression respectively, especially when the adult is of a sound mind, the court criticized the Code. It identified its failure 'to pin down on the conflict between the right of a patient to decide on what medical measures to agree to and the doctor's code of ethics'. Although the Supreme Court made no reference to the *Bolam*, *Bolitho* or *Rogers v Whitaker* principles in coming up with its judgment, it has criticized the 'body of opinion' view, which suggests that it did not find it logical.

It has also been inferred that the Nigerian Supreme Court could take the position in *Rogers*/*Montgomery* for future cases.[83] Even though it is in a different context, the Court favored the decision of the patient over that of the doctor in the choice of treatment which is what *Rogers/Montgomery* have come to emphasize. The apex Court held that:

> the court should not allow medical opinion of what is best for the patient to override the patient's right to decide for himself whether he will submit to the treatment offered him. The patient is free to decide whether or not to submit to treatment recommended by the doctor. If the doctor making a balanced judgment advises the patient to submit to the operation, the patient is entitled to reject the advice for reasons which are rational or irrational or for no reasons'.[84]

The inadequacy of the case laws on medical negligence in Nigeria has prevented the case laws from evolving in determining a breach in the disclosure of information. Therefore, the *Bolam-Bolitho* test could still be applied.

III CONCLUSION

The principles in determining whether there is a breach of duty are generally the same in both Nigeria and Malaysia. However, in Nigeria, judicial decisions are scant as the laws on medical negligence are still developing. This stems from social, cultural, religious, and even economic biases that worsen the already inaccessible litigation system.[85] Also,

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83 Chiangi (n 9) 69.

84 *Okwonkwo* (n 82) 226-227.

85 Okanyi D.O and Gureje G.O, 'Socio-Cultural, Economic, Religious and Legal Impediments to the Implementation of the Law Relating to Medical Negligence in Nigeria' (2019) 1 *International Review of Law and Jurisprudence* 149, 156.

while Malaysia applies the *Rogers v Whitaker* test in determining the standard for giving informed choices, Nigeria applies the *Bolam-Bolitho* test. However, both countries still seem to still rely on the *Bolam-Bolitho* test in determining the standard of care for the duty to treat and diagnose.

REFERENCES

A *Articles/Books/Reports*

Amirthalingam, Kumaralingam, 'Medical Negligence and Patient Autonomy- Bolam Rules in Singapore and Malaysia- Revisited' (2015) 27 *Singapore Academy of Law Journal* 678

Babatunde Rashidat Aderayo 'Breach of Duty of Care in Medical Negligence: Scope and Limitation' (2018) LLB dissertation, University of Lagos)

Cave, Emma, 'The Ill-informed: Consent to Medical Treatment and the Therapeutic Exception' (2017) 46(2) *Common Law World Review* 140, 153

Carver, Tracey, 'Informed Consent, Montgomery and the Duty to Discuss Alternative Treatments in England and Australia' (2020) 25(5) *Journal of Patient Safety and Risk Management* 187, 188

Chan, Sarah W, et al 'Montgomery and Informed Consent: Where are we now?'(2017) *BMJ* 357, 357

Chiangi, Michael A, 'Principles of Medical Negligence: An Overview of the Legal Standard for Medical Practitioners in Civil Cases' (2019) 4(4) *Miyetti Quarterly Law* 53, 57

Choudry, Mohsin I, Aishah Latif, Leslie Hamilton and Bertie Leigh, 'Documenting the Process of Patient Decision Making: A Review of the Development of the Law on Consent' (2016) 3(2) *Future Healthcare Journal* 109, 110-111

Cypher, Rebecca L, 'Demystifying the 4 Elements of Negligence' (2020) 34(2) *The Journal of Perinatal & Neonatal Nursing* 108

Dato' Mah Weng Kwai, 'Approach to Medical Negligence Claims by Malaysian Courts' (*Mondaq,* 28 July 2020) <https://www.mondaq.com/professional-negligence/969990/approach-to-medical-negligence-claims-by-malaysian-courts> accessed 28 January 2021

Goudkamp, James, 'Breach of Duty: A Disappearing Element of the Action in Negligence?' (2017) 76(3) *The Cambridge Law Journal* 480

Harpwood, Vivienne, *Modern Tort Law* (Psychology Press, 6th ed, 2005) 139

Kodilinye, Gilbert, Commonwealth *Caribbean Tort Law* (Routledge, 3rd ed, 2013) 63 Malaysian Medical Association <https://mma.org.my/ >

Momodu, Dauda and Tijani Idris Oseni, 'Medical Duty of Care : A Medico-Legal Analysis of Medical Negligence in Nigeria' (2019) 9 *American International Journal of Contemporary Research* 56

Mulheron, Rachel, 'Has Montgomery Administered the Last Rites to Therapeutic Privilege? A Diagnosis and a Prognosis' (2017) 70 (1) *Current Legal Problems* 149

Nwabachili, Chudi C, 'The legal Implications of Duty of Care' (2017) 5(4) *Global Journal of Politics* 1

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

Puteri Nemie Jahn Kassim, *Medical Negligence Law in Malaysia* (ILBS, 4th ed, 2016)

Tafita, Folake and Folakemi Ajagunna, 'Accessing Justice for Medical Negligence Cases in Nigeria and the Requisite for no-fault compensation' (2017) 10 *Journal of Private & Comparative Law* 77, 79-80

B *Cases*

Abi v Central Bank of Nigeria [2012] 3 NWLR 1, 35-36

Asiah bte Kamsah v Dr. Rajinder Singh & Ors [2002] 1 MLJ 484

Blyth v Birmingham Waterworks [1856]11 EX. 781

Bolam v Friern Hospital Management Committee [1957] 1 WLR 582

Bolitho v City and Hackney Health Authority [1998] AC 232

Dr Soo Fook Mun v Foo Fio Na [2001] 2 MLJ 193

Dr Ismail Abdullah v Poh Hui Lin (administrator for the estate of Tan Amoi @ Ong Ah Mauy, dec'd) [2009] 2 MLJ 599

Dominic Puthucheary & Ors (personal representatives of the estate of Thayalan s/o Kanapathipillai) v Dr. Goon Siew Fong & Anor [2007] 5 MLJ 552

Elizabeth Choo v Government of Malaysia [1970] 2 MLJ 171

Foo Fio Na v Dr Soo Fook Mun & Anor [2007] 1 MLJ 593

Foo Fio Na v Dr Soo Fook Mun [2007] 2 MLJ 129

Foong Yeen Keng v Assunta Hospital (M) Sdn Bhd & Anor [2006] 5 MLJ 94

Hasan Datolah v Kerajaan Malaysia [2010] 5 CLJ 764

Hor Sai Hong & Anor v University Hospital & Anor [2002] 5 MLJ 167

Medical and Dental Practitioners Disciplinary Tribunal v Okwonkwo [2001]3 SCNJ 186

Montgomery v Lanarkshire Health Board [2015] UKSC 11 35

Ojo v Gharoro [2006] 10 NWLR 173

Pearce v United Bristol Healthcare NHS Trust [1999] PIQR P53

Roe v Minister of Health [1954] 2 All QB 66,86

Rogers v Whitaker (1992) 175 CLR 479

Swamy v Matthews [1968] 1 MLJ 138

Unilorin Teaching Hopsital v Abegunde [2015] 2 NWLR (Pt. 1447)

Zulhasnimar Hasan Basri v Dr Kuppu Velumani P [2017] 8 CLJ 605

C *Legislation*

Code of Medical Ethics in Nigeria 2004

Constitution of Nigeria 1979

Malaysian Medical Council Code of Professional Conduct 2019

Medical Act 1971