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Law and the Caregiver: A Review of Nurse-Patient Relationship

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Abstract

The professional autonomy of nursing has spawned a legal framework to regulate the practice of the profession. This legal framework is in the form of professional codes of ethics, statutes and case law relating to the nursing profession. The composite legal rules denote the rights, duties and likely liabilities of nurses in the interaction with patients. It is against this background that this paper examined the rights, duties and likely liabilities of nurses in nurse in–patient relationship. This paper never aimed to portray nurse-patient relationship as one in which only rights of the patient resonate; neither does it intend to present the relationship as that of 'cat and mouse. In this light, the paper endeavoured to address the rights of nurses as against patients too. Based on this, the paper, among other issues, touched on the permissible actions which a nurse can take against an unruly or violent patient in the course of nurse-patient relationship. Accordingly, The paper adopted the doctrinal research methodology and made use of primary and secondary sources with reliance on the analysis an interpretation of statutes and legal doctrines as well as judicial decisions, text books, journal articles, online materials and policy papers. The work observed that legal regulation in the nursing profession is a clarion-call to nurses that every professional conduct should be undertaken with regard to prevailing legal rules. This necessarily entails the need for nurses to be reasonably conversant with the pertinent rules affecting their profession. In ths light, the paper recommended that some sort of continual self-education and development on the part of nurses are desirable. As such the paper stated that professionalization of nursing both in its practice and in its achieving professional status require knowledge of the law and its relation to professional responsibility and development.

Keywords: Law, caregiver, nurse, patient, relationship

Introduction

The nursing profession, to a large extent, is perceived as an appendage of the medical profession in the health care setting. Perhaps, the situation of regarding nurses as "mere assistants in medicine" is influenced by the usual scenarios of nurses traditionally playing supporting roles to doctors. The perceived master-servant situation between doctors and nurses even seems to play out in the legal realm. There are myriads of reported and unreported cases where medical doctors have faced civil suits, and in some instances, criminal charges for medical malpractices or

professional misconducts with regard to dealings with patients. However, while nurses are generally involved in health care giving along with doctors, arguably, they have not had the same level of featuring in the arena of court actions to the same extent as their medical counterparts.

However, it needs to be emphasized that the above comments are not intended to impugn that nurses have not been exposed to court actions as much as doctors is not an indicator that nurses have shown greater professional caution and decorum, rather, arguably, the situation is that because doctors usually occupy the driver's seat in healthcare settings, they naturally attract the fire for mishaps.

Because nurses have had to grapple with court actions in professional context as much as doctors, some nurses may have developed a lethargic sense of immunity from court actions. This feeling may have spurred the following observation by a leading figure in the nursing profession in Nigeria:

> *Most nurses were of the opinion that they will never end up in court as a result of their professional practice. But in a society fast becoming an ever more litigious one, there is always a possibility that even the most innocent of actions may be taken by someone as grounds for lawsuits* [1].

Subservient to any other related profession is the health care setting.[2] Manifestly highlighting the professional autonomy of the nursing profession vis-à-vis provisions of the *ICN Code of Ethics 1973, a writer has noted:* though nurses may have been perceived as a sub-servant and virtually anonymous component of the healthcare providing mechanism, the reality is that nursing stands on an autonomous professional pedestal just like other professions in the healthcare realm. Hence the profession cannot reasonably be considered as subservient to any other related profession in the health care setting. Manifestly highlighting the professional autonomy of the nursing profession vis-à-vis provisions of the ICN Code of Ethics 1973, a writer has noted that:

> *Nurses can use their initiative better than the old traditional ritualistic and stereotyped doctrine that nurses should never take a decision without having it checked by authority or do anything*

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[1] *E. O Adelowo The Nursing Profession in Nigeria (Ikeja-Lagos. Nigeria, Lantern Books 1988) p.40*

[2] *See J.K. Mason & R.A. McCall Smith, Law and Medical Ethics, (London, Butterworths 1987) p.81*

> *that entails even the slightest risk… The new Code has also removed the master-servant relationship between physicians and nurses and has replaced it with a Code that made nurses equal partners to the physician rather than physicians' aids in the delivery of health care.*

The professional autonomy of nursing has spawned a legal framework to regulate the practice of the profession. This legal framework is in the form of professional codes of ethics, statutes and case law relating to the nursing profession. The composite legal rules denote the rights, duties and likely liabilities of nurses in the interaction with patients. It is against this background that this

paper examines the rights, duties and likely liabilities of nurses in nurse in–patient relationship. The paper does not aim to portray nurse-patient relationship as one in which only rights of the patient resonate; neither does it intend to present the relationship as that of 'cat and mouse. In this light, the paper endeavours to address the rights of nurses as against patients too. Based on this, the paper, among other issues, touches on the permissible actions which a nurse can take against an unruly or violent patient in the course of nurse-patient relationship.

Who is a Nurse?

According to section 26 of Nigeria's Nursing and Midwifery (Registration, etc.) Act, a nurse means a person who is registered to practice the profession in accordance with the provisions of this Act. With regard to nursing duties, section 23 (1) of the Act states, "a nurse… shall be entitled to carry out such nursing care as approved by the Council." Obviously, the foregoing provisions cannot be of much help to a layperson in appreciating the roles and essence of nurse or the nursing profession. It is thus considered necessary that other sources should be consulted to throw more light on the nature and essence of nurse and the nursing profession from a practical perspective.

The Oxford English Dictionary[5] defined a nurse as a person trained or charged to look after sick or injured people. Put differently, a nurse can be described as a person who in professional capacity looks after people requiring or undergoing medical care and who, in some cases may be unable to take care of themselves. Generally, nurses fall within the class of people generically referred to as care-givers or, in some cases, health workers. This generic group is associated rather more readily with the medical doctor. As earlier noted, it is now settled that in the performance of his task the nurse just as any other professional caregiver is bound to operate within the scope of specified legal rules. Under the applicable rules, certain duties and minimum standard of behaviours are prescribed for the nurse, breach or violation of which would attract sanctions[6].

The center-point of the nurse's duty is to ensure that the patient under his care received the best care possible in a particular situation. Ancillary to this duty is that a nurse must harness his professional skill to ensure the nursing of the patient to a state of good health. According to The International Council of Nursing (ICN) Code of Ethics 1967, 'that the fundamental responsibility of the nurse is threefold: to conserve life, to alleviate suffering and to promote health".

Nurse-patient relationship can arise consensually or non-consensually. Consensual relationship arises where a patient chooses, by way of contract or negotiation, the nurse that takes

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[3] *E.O Adelowo, p.111 [emphasis added]*

[4] *Nursing and Midwifery (Registration etc) Act Cap. N143, Laws of the Federation of Nigeria 2004 [hereinafter, Nursing and Midwifery (Registration etc) Act]*

[5] *L. Coventry and M. Nixon (eds.) Oxford English Minidictionary (Oxford. England, Oxford University Press, 1999) p.340*

[6] *See e.g. Clause 2 International Council of Nursing (I.C.N), Code of Ethics 1965 and Cluase 5 ICN Code of Ethics 1973. See also section 18 (1) a, b Nursing and Midwifery (Registration etc) Act.*

[7] *Clause 1*

of him. Non-consensual relationship may arise within the setting of a conventional hospital where any nurse can be assigned to a patient or group of patients without any express prior agreement between the nurse and patient; it needs to be clarified that in such a situation there has also been

no manifested rejection of an assigned nurse by the patient. Non-consensual relationship can also arise in situations such as emergency where a nurse assumes the caring for a patient that is not able to give or withhold consent to care for him.

Nurses, just as other healthcare professionals, are liable for any unbecoming act or omission perpetrated in the course of dealing with patients. There can be no advantage of hiding behind a shield of being 'mere appendages' of doctors or 'acting under instruction' of doctors. That nurses would legally be accountable for improper professional conducts has received judicial recognition. For example, in the case of Barnett *v Chelsea and Kensing Committee Hospital Management*, it was stated:

> *That there was shared close direct relationship between the hospital and the watchman that there was imposed on the hospital a duty of care…. Thus, I have no doubt that Nurse Corbett and Dr. Banerjee were under a duty to the deceased to exercise that skill and which is to be expected of persons in such positions acting reasonably.*[9]

Nurse, Law and Human Rights

Generally, Nigerian Law can be classified into statutory law, non-statutory laws, judicial precedents and customary law. Statutory laws are the legislations made by the constitutional legislative organ of government and such other subsidiary legislations made by some other bodies under powers conferred by the primary legislations.[10] In terms of sanctioning and procedure, Nigerian law is also classified into criminal law and civil law. Criminal law action is normally undertaken by the government and sanctions can be in form of fine, imprisonment or even death, depending on the nature of the offense or act. Civil action is normally instituted by any aggrieved member of the public (whose rights have been violated) against any other person, group or authority. The remedies for civil action can be damages or injunctions compelling someone to do or to refrain from doing an act. An act can simultaneously constitute both a crime and civil wrong thereby making the violator liable to criminal prosecution by the government as well as civil action for redress by the aggrieved person.

Nurses' standing in relation to law can be described as two-fold. In the first aspect, the nurse as a citizen or member of the society is subject to all laws as applicable to citizens or members of the society at large. In the second aspect the nurse as member of the nursing professional group is also subject to such laws as are specifically applicable to members of the professional group separate from other members of the public. Prominent among nursing oriented statutory laws in Nigeria are the Nursing and Midwifery (Registration, etc.) Act together with the subsidiary legislations made there under, especially, the Nurses Regulations and nursing profession also has rules of professional conduct or codes of ethics stipulating acceptable standards of professionals for nurses; prominent in this regard are the series of codes of ethics issued by the International Council of Nurses, as the international regulatory body of the nursing profession.

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[8] *(1969) I Q B 42*

[9] *Emphasis added] the emphasis is to highlight the judicial appreciation of the distinct responsibility and accountability of a burse, as distinct from that of a doctor in health care setting.*

[10] *C.O Okonkwo (ed). Introduction to Nigerian Law (London. Sweet and Maxwell. 1980) pp. 8-11.*

Numerous laws and professional rules of ethics may hold nurses liable. The Nursing and Midwifery (Registration, etc.) Act Section 18 (1) states:

(a) If a registered nurse is found guilty of a crime that the tribunal determines is incompatible with the nurse's professional position by a competent court in Nigeria or elsewhere, or

(a) The tribunal has the power to give any of the following orders if it determines that a registered nurse has engaged in notorious professional behaviour:

(i) Give the nurse a written reprimand; (ii) Order the registrar to strike the nurse's name from the relevant register; or (iii) Suspend the nurse from practice, banning them from practicing nursing for a certain amount of time, not to exceed six months. Orders for the return of papers or other objects as required by the specifics of the case, or for the reimbursement of money received, may also fall under this category.

The Nurses Regulations and Nurses (Disciplinary Tribunal and Assessors) Rules also contain the following clause, Rule 18:

18(1) The council must be informed by the convicting court when a nurse is found guilty of malpractice, carelessness, or other misconduct. Following its evaluation, the council will submit the case and its recommendations for suitable disciplinary action to the tribunal.

18(2) The council must submit any other malpractice, carelessness, or misconduct case to the tribunal for disciplinary action as the circumstances may call for, regardless of whether the case is prosecuted.

A significant number of decisions and actions in health care or nursing situation touch upon or involve issues of rights of patients. In this context, it is pertinent to examine the rights of patients and to see how the nurses' acts or omissions with respect to these rights can bring nurses within the scope of the punitive rules noted above.

Rights of the Patient

Rights can be categorized under some headings such as constitutional or fundamental human rights and 'mere' civil rights. Fundamental or constitutional rights are rights which accrue to humans by virtue of being humans. This is why such rights are also referred to as "God-given rights" or basic rights.[11] Civil rights can be described as rights that arise by virtue of the operation of certain laws existing in a country, such as law of tort and so on. By virtue of these rights, an aggrieved person can obtain redress from any person for transgression. As illusion, it is the right of all to be free from injury arising from the negligence of others. In healthcare setting, a patient is entitled to proper health attention from a caregiver and if a patient suffers injury as a result of negligence, the patient can recover redress under law of tort relating to negligence.[12]

It needs to be noted that fundamental rights and civil rights are in many respects interrelated. This is because, largely civil rights are offshoots or variants of fundamental rights. For example, where a patient is wrongfully detained in a hospital against his will, this can

[11] *These rights are referred to as constitutional rights in Nigeria because they have been entrenched in the constitution-see sections 33-46 of the Constitution of the Federal Republic of Nigeria 1999 (hereinafter 1999 Constitution)*

[12] *See generally, G. Kodinliye and O. ALUKO, Nigerian Law of Torts, Rvsd. Ed. (Ibadan, Spectrum Law Publishing 1999) at pp. 38-91.*

amount to a civil claim for *false imprisonment*.[13] At the same time, this same conduct of wrongful detention may qualify as violation of the patient's fundamental right to liberty. Along this line, this paper proceeds to examine the fundamental human rights and civil rights that come into play in nurse-patient relationship.

Every patient in Nigeria is entitled to the fundamental human rights protected by Sections 33–46 of the 1999 Constitution as a citizen. These rights are as follows: (i) the right to life; (ii) the right to human dignity; (iii) the right to personal liberty; (iv) the right to a fair trial; (v) the right to privacy and family life; (vi) the right to freedom of thought, conscience, and religion; (vii) the right to freedom of the press and of expression; (viii) the right to peaceful assembly and association; (ix) the right to freedom of movement; (x) the right to be free from discrimination; and (xi) the right to purchase and possess property anywhere in Nigeria.

These rights are: the right to life, the dignity of the human person, personal liberty, fair hearing, private and family life, freedom of expression, peaceful assembly and association, freedom of movement, and freedom from discrimination—are the ones that are most directly applicable in nursing and healthcare settings.

The following is a summary of the provisions pertaining to healthcare for clarity:

Section 33(1): Every person has the right to life and cannot be denied it, with the exception of carrying out a valid court order following a conviction for a crime.

Section 34(1) states that everyone has the right to dignity, which includes the prohibition of torture, cruel, inhuman, or humiliating treatment, slavery, servitude, and forced labour.

Section 35(1) states that everyone has the right to personal liberty and that it may only be taken away in situations that are allowed by law.

Section 36(1): Every individual has the right to a fair and prompt hearing before an independent and impartial court or tribunal for determining civil rights and duties, including situations involving the government or authorities.

Section 37: Citizens' houses, letters, and conversations are all protected from prying eyes.

Everyone is entitled to freedom of thought, conscience, and religion, including the freedom to practice or teach their religion either individually or collectively, as well as the freedom to alter their beliefs. This is stated in Section 38(1).

Section 39(1): Everyone is entitled to freedom of speech, which includes the unhindered dissemination of information and the expressing of ideas.

Section 40(1): In order to safeguard their interests, citizens have the freedom to congregate and organize organizations, including political parties, labour unions, and other groups.

Every citizen of Nigeria is entitled to live anywhere in the nation, travel about freely, and not be barred from entering or leaving the country, according to Section 41(1).

Section 42(1): Regardless of the law, government action, or practice, no Nigerian citizen should be subjected to discrimination on the basis of community, ethnic group, place of origin, sex, religion, or political viewpoint.

In their interactions with patients, nurses are obliged to respect and maintain these rights as part of their professional practice. According to existing laws and professional regulations, any infraction might result in legal or disciplinary action against them. The protection of patients' fundamental rights has always been a top priority for nurses, and it continues to be essential to moral and legal practice. In similar vein, the ICN Code of Ethics 1973 enjoined that in providing care nurses should respect "the beliefs, values and customs of the individual."[15] Human rights in healthcare is also covered in the 1998 update to the International Council of Nurses' (ICN) policy statement on "The Nurse's Role in the Safeguarding of Human Rights." The declaration asserts that both patients and healthcare providers are entitled to human rights. Regardless of one's financial situation, political affiliation, geographic region, race, or religion, the ICN recognizes that everyone has the right to obtain healthcare. This right includes the freedom to accept or reject care, the freedom to agree to or reject medical treatment or food, the right to confidentially, the right to be treated with dignity, and the right to pass away with dignity.

The ICN further suggests that human rights concerns and nurses' roles in defending them be included into nursing education at all levels, acknowledging the significance of human rights protection in nursing practice. In a similar vein, national nursing societies are responsible for helping to create social and health laws that uphold and defend patients' rights. [16]

Flowing from the above discussion, a patient aggrieved by a nurse's conduct can institute a court action to protect or redress the violation of his rights, be it fundamental human rights or 'mere' civil rights. It has already been mentioned that fundamental human rights and civil rights are interrelated. In that light, one court action can traverse the realms of both fundamental human rights to recover damages. Especially under the common law, various principles have evolved over the ages by which infringements of civil rights can be redressed. Many of these principles have crystallized to constitute Law of Tort. [17] Generally, conduct which are likely to create frictions or spawn court actions in nurse-patient relationships fall within the scope of law of tort. Based on this, it is considered pertinent to discuss some popular concepts under law of tort vis-à-vis the conducts of nurses in health care settings.

Some Basic Concepts

Trespass to the person:
Essentially, trespass to the person connotes unlawful or unauthorized contact in whatever form with the body of another person. It is divided into classes namely: Battery and Assault.

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[15] *It would be observed that this provision seems to encompass the kernel of the provisions in Section 37, 38,39,40,42, of the 1999 Constitution.*

[16] *See Amnesty International Ethnical Codes and Declarations relevant to the Health Professions International Compilation of Selected Ethnics and Human Rights Texts 4th revised edition 2000 p. 43*

[17] *For an explanation of the Law of Tort, see G. Kodinliye and O. Aluko op.cot at pp.1-5*

Battery has been explained as "the application of force to the person of another without lawful justification."[18] "Application of force" in a non-technical sense, connotes touch or contact with the body of a person. Therefore, battery does not necessarily have to involve violence. In general, touching or making contact with the body of another person, however trivial or inconsequential, without lawful justification amounts to a civil wrong of battery. It is immaterial that the person touched suffers no injury or not. It is also immaterial that the person who commits battery does so in good faith or with good intentions; for example, assisting to squash a mosquito on the body of the person touched may still amount to a tort of battery. Related to healthcare setting, the nurse as a caregiver can still be held liable for battery even where he acts with good intentions and in the best interest of a patient. In *Devi v Midlands Regional Health Authority*,[19] a doctor in the course of performing a minor surgery on his patient, discovered that the patient's womb had been ruptured. In the best interest of the patient, the doctor promptly performed an immediate sterilization on the patient without the patient's consent. Subsequently the patient sued for battery in respect of the sterilization process. It was held that notwithstanding that the doctor acted in good faith and in the best interests of the patient, he was still liable. In nurse-patient relationship battery can occur for example where a nurse feels the pulse of the patient or gives injection without the consent of the patient.

Assault connotes the situation of putting someone in reasonable fear or apprehension of an immediate battery. [29] A typical illustration is where 'A' raises and waves his first in the face of 'B'. The raising and waving of the fist by A. and B's anticipation that the fist will land on him constitute the tort of assault. The process becomes a battery if and when the punch lands on B. Usually, but not in all cases, assault and battery you go together.[21]

The Nurse as a Good Samaritan:

Trespass and the issue of Treatment in Emergency

There can be situations where a patient needs to be treated in an emergency, where it would be impossible to obtain consent. A typical example is situation of accidents where victims need to be given urgent life-saving treatment or care. In such situations, the nurse, on humanitarian ground, can legitimately proceed with treatment without the patient's consent. However, treatment or care given is such situation must be more extensive than is required by exigencies of situation.[22] Thus, a nurse cannot take undue advantage for the patient's survival or the regain of consciousness.

Also, where there is anything on the unconscious patient indicating his objection to any form of treatment, if a nurse disregards the unconscious patient's objection, he can be held liable for battery. A typical illustration of this scenario in cases of Jehovah Witnesses who usually carry cards indicating their objection to blood transfusion under whatever condition. If a nurse encounters such a person in an unconscious state and proceed to transfused blood in to him the nurse can be held liable.[23] In a nutshell, treatment in emergency is still subject to the condition that a nurse who assists a patient should respect the rights of such a patient. Also, where there is anything on the unconscious patient indicating his objection to any form of treatment, if a nurse disregards the unconscious patient's objection, he can be held liable for battery.

False imprisonment:
The gravamen of the tort of false imprisonment is the inhibition of the right of a person to move away or out of a particular place as he wishes. It can occur by detaining the person at a place or using any other means to prevent him leaving, or being reasonably able to leave, a

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[18] *R.T.V. Heuston, Salmond in the Law of Torts 15th ed.p. 157. See also, G. Kodiniliye and O. Aluko p. 12*
[19] *(1981) C.A*
[20] *G.Kodinliye and O. Aluko, loc, cit*
[21] *Ibid*
[22] *See e.g British Medical Association, Rights and Responsibilities of Doctors, (London: BMJ Publising Group 1988) p.4. see also J.K Mason& R.A McCall Smith op.cit p. 143*
[22] *see British Medical Association, Ibid.*

Particular place. In the technical legal sense, the tort of false imprisonment amounts to violating the right or freedom of movement of a person in whatever form. A writer sums up the essence of the tort of false imprisonment thus:

> *The wrong of false imprisonment consists in the act of arresting or imprisoning any person without lawful justification, or otherwise preventing him without lawful justification, from exercising his right of leaving the place in which he is, it may also be committed by continuing a lawful imprisonment longer than is justifiable, or imprisoning a person in an unauthorized place* [25]

In most cases, physical constraint is a part of false incarceration. It might happen, for instance, when a lecturer irrationally locks pupils in a lecture hall after class or when a brother locks his adult sister in her room and takes away the key. However, physical confinement in a specific location is not the only instance of false incarceration. False imprisonment can result from any action that illegally limits someone's freedom of movement. According to Coke C.J., "Every restriction of a free man's liberty is an imprisonment, even if he is not inside the walls of any common prison."

Therefore, when a police officer forcibly forces someone to accompany them to the station for questioning and the individual complies—even if no physical force is used—false detention may result. If a nurse utilizes any method to hold a patient against their will when they are no longer in need of medical care, this might be considered false imprisonment in the nurse-patient relationship.

Negligence

The whole essence of this tort has been aptly summed up by Alderson B in the case of *Blyh v Birminghan Water Works Co*.[28] in the following words "Negligence is the omission to do something which a reasonable man, guided upon those consideration which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do". To establish a claim in negligence, an aggrieved patient needs to establish:

a. That the nurse owes the patient duty of care
b. That the nurse has breached that duty, by not doing what the reasonably competent nurse would have done.

c. That the patient has suffered injury as a result of the aforesaid breach of duty.

In health care situations certain fundamental duties have been established. These include

i. Duty to provide adequate counseling[29]
ii. Duty to warn[30]
iii. Duty to conduct proper diagnosis[31]
iv. Duty of proper treatment[32]

The following cases would serve to illustrate the issue of liability for negligence in healthcare setting; though the example were decided in relation to doctors, they are, mutatis

[24] *G. Kodinliye and O. Aluko op. cit at p. 14-15*
[25] *R. F. V. Heuston p.160*
[26] *Ibid*
[28] *(1856) 11 Exch. 781 at 784*
[29] *see Chatterton v Gereson (1981)Q. B.432.*
[30] *See Thake v Maurice (1986) 1 All ER 497.*
[31] *Thurlon's Case (1951) C.C.C 6871; Russel v. Gilford 210 Cal Appl. 2d 141.*
[32] *Keow v Government of Malasia (1961) 1 WLR 813.*

It should not be difficult to imagine situations in which a nurse can display negligence in nurse-patient relationship. Examples would include failure to give medications at the appropriate time or giving wrong dosages of medications. Failure of a nurse to properly make necessary basic checks such as body temperature and blood pressure can also qualify as negligence.

Nervous Shock:

When someone intentionally or carelessly causes mental anguish to another, a claim for nerve shock or emotional distress may be made. The Wilkinson v. Downton case is a well-known legal illustration of this tort. In that instance, the defendant deceitfully told the plaintiff that her spouse had suffered severe injuries in an accident at a public place as a kind of twisted practical joke. The defendant was found responsible for damages after the comment had a significant negative impact on the plaintiff's nervous system and caused long-lasting bodily impairment.

The individual who experiences the shock does not have to be the target of the upsetting act or comment. Even if the defendant's actions are directed at a third party, they may still be liable if they injure another person in the room emotionally and whose suffering may have been reasonably anticipated as a foreseeable result of the defendant's actions. [36] The following principles can be used to understand the essence of the tort of infliction of nervous shock:

(a) A person who willfully or carelessly causes another person to experience extreme emotional distress by excessive and outrageous behaviour is liable if such anguish leads to physical injury.

(b) If the defendant's carelessness puts the plaintiff in reasonable fear of suffering immediate damage, and shock results in bodily hurt, a claim may be made.

(c) In cases when shock is brought on by fearing, seeing, or hearing the immediate harm of a friend or perhaps another person or object, a claim may also be made.

By using these guidelines, it is simple to see how a nurse may be held accountable for causing nervous shock. This tort might be committed, for example, by a nurse casually telling a patient that a loved one has been in a terrible accident—possibly as a misplaced joke.

[33] *The Time, 15 March p.4 (adapted from J.K. Mason & R.A. McCall Smith op.cit*
[34] *(1955) The Time 15 July Court of Appeal.*
[35] *(1899) A.C. 86*
[36] *R.F.V. Heuston p. 271*
[37] *Ibid.*

Breach of Confidence:

Nurses hold duty of confidence to their patients just like some other professionals, notably lawyers and doctors. This principle connotes that a nurse cannot, without the patient's consent or other lawful justification disclose personal information to which the nurse comes across in the course of his professional interaction with the patient to a third party.[38] Any nurse who breaches this duty is liable in damages to the patient for any harm suffered as a result of the disclosure. Such breach may also amount to professional misconduct on the part of the nurse for which appropriate sanctions may attach. Manifestly, in underscoring the importance of duty of confidence to nurses, provision on it has featured in series of International Council of Nursing Codes of Ethics. The 1965 ICN Code of Ethics provides: "Nurses hold in confidence all personal information entrusted to them." Along similar line, the 1973 ICN code of ethics similarly provides: "The nurse holds in confidences personal information in sharing this information."

Criminal Law in Nurse-Patient Relationship

Apart from civil liability, a nurse may also be exposed to criminal liability for his conduct in relation to the patient. One provision, section 300 of the Nigerian Criminal Code 39 is particularly relevant in this respect. The section provides,

> *It is the duty of every person having charge of another who is unable by reason of age, sickness, unsoundness of mind, detention or any other cause to withdraw himself from such charge, and who is unable to provide himself with the necessaries of life, whether the charge is undertaken under a contract, or is imposed by law, or arises by reason of any act, whether lawful, of the person who has such charge, to provide for that other person the necessaries of life; and he is held to have caused any consequences which result to the life or health of the other person by reason omission to perform that duty.*

Consent to Treatment

With the garrisons of right surrounding a patient as earlier discussed, it is legitimate to ask how a nurse would carry out his professional duties without incurring civil or criminal liability. On important source of legal insulation is the patient's consent given by a patient immunizes and shields the nurse from any liability that the nurse would have incurred but for the patient's consent.

Basically, consent to treatment is an offshoot of the generic common law principle of consent, popularly captured by the Latin idiom, Volanti non fit injuria. This principle is illuminated in the

following words of a commentator: “No act is actionable as a tort at the suit of any person who has expressly or impliedly assented to it: Volanti non fit injuria. No man can enforce a right which he has voluntarily waived or abandoned.” [40] In light of the foregoing analysis, it is trite that consent constitutes a legitimate shield to a nurse in respect of activities done to the person or affairs of the patient in the course of nurse-patient relationship. [41]

It bears mentioning however, that consent would only protect the nurse inasmuch as the activities fall within the scope of the valid express or implied consent is not a boundless carte blanche for the nurse; there are limits to consent. One of the limits to consent is that it may not afford a defence in cases where a nurse inflicts serious injuries to the patient in the course of nurse-patient relationship.

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[38] *For a discussion on medical confidentiality see e.g. British Medical Association op.cit at pp. 36-52*

[39] *Cap. C38 Laws of the Federation of Nigeria, 2004*

[40] *R.F. V Heuston p.664*

[41] *For further reading on issue of consent in health care setting, see e.g. British Medical Association pp.1-17*

[42] illustrates that this principle is long established and recognized. Swift J noted in that case, “As a general rule to which there are well established exceptions, it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence and, when such an acct is proved, consent is immaterial.” This issue would be of relevance with respect to the use reasonable force in some situations to make patients treatment-complaint, [43] an issue that is discussed in latter part of this paper. The principle is now statutorily established in Nigeria with respect to the fact that consent does not constitute a valid defense to the willful killing of another. "A person's consent to the causing of his own death does not affect the criminal responsibility of any person by whom such death is caused," states section 299 of the Criminal Code. [44] In similar vein, section 253 of the code provides, “An assault is unlawful, and constitutes an offence it authorized or justified or excused by law. The application of force by one person of another may be unlawful, although it is done with the consent of that other person. [45] In the context of nurse-patient relationship, consent would not avail a nurse who, for example, assists a terminally or painfully ill patient to “die dignity” by way of euthanasia.[46]The relatively old case of R v Donovan 42 illustrates that this principle is long established and recognized. Swift J noted in that case, “As a general rule to which there are well established exceptions, it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence and, when such an act is proved, consent is immaterial.” This issue would be of relevance with respect to the use reasonable force in some situations to make patients treatment-complaint, 43 an issue that is discussed in latter part of this paper. The principle is now statutorily established in Nigeria with respect to the fact that consent does not constitute a valid defence to the willful killing of another. "A person's consent to the causing of his own death does not affect the criminal responsibility of any person by whom such death is caused," states section 299 of the Criminal Code. 44 In similar vein, section 253 of the code provides, “An assault is unlawful, and constitutes an offence it authorized or justified or excused by law. The application of force by one person of another may be unlawful, although it is done with the consent of that other person. 45 In

the context of nurse-patient relationship, consent would not avail a nurse who, for example, assists a terminally or painfully ill patient to "die dignity" by way of euthanasia.46

Rights of the Nurse as against the Patient

The issue of rights in nurse-patient relationship is not a one-sided affair in which only the patients have rights. In like manner, nurses have basic rights which are protected and enforceable under the law. The right of nurses to the preservation of bodily integrity, life and other basic rights are sacrosanct, just as other non-nurse citizens. In nurse-patient relationships, nurses would also be entitled to the legal protection of these rights and they can legitimately adopt legal means to secure and enforce the rights against patients where and when appropriate. Put differently a nurse can exercise his rights or resist the infringement of such rights against any person or authority, the patient inclusive.

Apart from personal rights, nurses also hold some professional rights in relation to patients. These professional rights enable curses to take some measures for the purpose of effectively taking care of the patient or ensuring that the patient does not constitute harm to himself, the nurse or other persons. In the exercise of professional rights there may be encroachment on the right of the patient. Such as the commission of battery without consent. However, a nurse would ordinarily not be liable to the patient in such circumstances if the measures taken are reasonable, having regard to the circumstances of the case. Along this basis, the issue of rights of the nurse against a patient is further examined below in more specific contexts.

Right of the Nurse in Situations of Unruly Patient

In some situations, nurses can encounter difficult patients who make caring for them a nightmarish experience. Apart from the conducts of these patients making it difficult for the nurse to carry out the professional task of caring for the patients, there is also the possibility of harm to the patients, nurses and others. Manifestly, the nurse or an affected third party can obtain legal redress in appropriate cases for injuries suffered in the hands of troublesome patients. However, based on the saying, "prevention is better than cure" it is better than cure", it is better to avert injuries to the

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[42] (1934)2 KB 498

[43] See e.g Herezegfavy v Austriah (1992) 5 EHRR 437 (Adapted from Amnesty Internationl, Ethical Codes and Declarations relevant to the Health Professions-Compilation of selected Ethics and Human Rights text 4th revised edition 2000 at p.43)

[44] See the case of State v Oke 1 (1972) 2 F.C.S.I.L.R 419. in the case, the accused, a native doctor, prepared some charm for the deceased. The deceased then invited the accused test the efficacy of the charms on him by firing a shot at him. The accused shot him in the test and killed him. The accused was convicted of murder.

[45] Emphasis added

[46]For a discussion of euthanasia in the context of Nigerian criminal law, see e.g. S.B. Odunsi "Euthanasia under Nigerian Law – A call for change" Nigerian Law and practice journal vol.5 (2001), pp.61-70.

Patients or other persons which would by extension prevent the need in incur expenses and other inconveniences in the pursuit legal redress. The nurse thus has some liberty to take some measures to prevent or minimize unpleasant consequences from the conducts of an unruly patient.

What then is the scope and operation of the nurse's professional rights against the troublesome patient, especially one disposed to violence? The issue is best addressed with reference to two likely scenarios:

(a) unruly conducts that occur in the course of care or treatment and hamper treatment
(b) unruly conduct that occur outside the course of care or treatment

Unruly Conducts that hamper Care or Treatment: -

It is now largely settled that the caregiver has the right to use such force or means reasonably necessary or required to control a patient's violence in order to facilitate treatment such measures are readily incorporated under the principle of medical or therapeutic necessity. Any reasonable force used by the nurse to neutralize the patient's violence would be legally excused, even if such is ordinary unlawful or outside the scope of the primary or original consent given by the patient. Mason and McCall Smith summed up the situation in the following words:

> *It is widely recognized in both criminal and civil law that there are certain circumstances in which acting out of necessity legitimates an otherwise wrongful act. The basis of this doctrine is that acting unlawfully is justified if the resulting good effect materially outweighs the consequences of adhering strictly to the law.* [47]

In Herczegfalvy v Austria, a prominent case involving the use of justifiable force to control a challenging patient is presented. After being diagnosed with paranoid querculanes, Mr. Herczegfalvy was placed under compulsory detention in Austria from 1972 until 1984, spending some time in prison and sporadically in a mental health facility. He was forced to eat during this time and embarked on several hunger strikes. Additionally, he declined medical testing and care, but sedatives and other drugs were given to him against his will. He was occasionally handcuffed, had a belt around his ankles, or was put on a security bed to allow for treatment despite his hostility and threats of murder.

Herczegfalvy filed charges after being released in 1984, claiming that the use of cuffs, forced eating, and compulsory neuroleptic medication constituted inhuman or humiliating treatment and violated his fundamental rights. However, the court decided that medical authorities had the authority to decide, in accordance with recognized medical research, whether treatment including the use of force was required to protect the physical and mental well-being of patients who were unable to make decisions for themselves. The court also underlined that, generally speaking, actions that were judged therapeutically appropriate could not be regarded as cruel or demeaning as long as there was clear proof of true medical need.

The United Nations' Principles for the Protection of Persons with Mental Illness (1991) implicitly endorse the use of justifiable force to manage challenging patients in specific situations, echoing this viewpoint. Principle 11 states thus: "Physical restraint or involuntary seclusion of a patient shall not be employed except in accordance with

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[47] *J.K. Mason & R. A McCall Smith, op cit p.143*
[48] *Ibid*

the officially approved procedures of the mental health facility and only when it is the only when it is the only means available to prevent immediate or imminent harm to the patient or others" 49

The sum up, it is inferable from the above analysis that, ordinarily, a nurse would not be liable for the use of reasonable and necessary force to prevent a patient from posing or causing harm to himself or others and for the purpose of making the patient treatment complaint. Reflecting on the Herczegfalvy case, it is considered necessary to emphasize that force-feeding or other use of force can only legitimately be adopted in cases of patients, who because of their mental state, are not lucid and cannot decide for themselves or appreciate situation of things. Where a person in a lucid state of mind refuses treatment even at risk of death to him a nurse should not forcefully treat him against his wish. However humanitarian the nurse's gesture or intention is, there is strong possibility of the nurse incurring liability for battery in such a situation. The right of a patient to receive or refuse treatment remains sacrosanct and should always be respected. Where a nurse encounters such a situation, on approach is that the nurse should explain and warn the patient about the risk of refusal of treatment in the presence of witnesses and if the patient still refuses it would be best if he is made to sign a written acknowledgement to the effect that he understands and accepts responsibility for any consequence of his action.

Violence of the Patient occurring outside the course of care or treatment: Nurse's right to self-defense

Generally speaking, anybody, including nurses, is allowed to use a reasonable amount of force to protect themselves or others from illegal force or violence. According to Section 286 of the Nigerian Criminal Code, for example, it is permissible for an individual who has been unlawfully assaulted without having initiated the attack to use any force that is reasonably required to successfully repel the assault, so long as the force is not intended to cause death or serious injury. However, it becomes legal to use any amount of force required for protection, even if it results in death or serious injury, if the nature of the assault causes a reasonable fear of death or serious harm and the defender has a reasonable belief that there are no other options to protect themselves or the person they are defending.

In a similar vein, Section 288 of the Code states that if it is legal for one individual to use a specific amount of force to protect themselves from an attack, it is also legal for another individual acting in good faith to help by using the same amount of force to protect the original victim." [50]

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[49] *Sec British Medical Association, op cit p.3 [emphasis added]*

[50] *See also section 287 of the Criminal Code: "When a person has unlawfully assaulted another or has provoked an assault from another, and that other assault him with such violence as to cause reasonable apprehension of death or grievous harm, to use force in self defence, he is not criminal responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous harm. This protection does not extend to a case in which the person using force, which causes death or grievous harm, first began the assault with intent to kill or to do grievous harm to some person; nor to a case in which the person using force which causes death or grievous harm endeavoured to kill or to do grievous harm to some person before the necessity of so preserving himself arose, nor, in either case, unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable."*

Force used in defense against violence must be reasonable and commensurate to the actual attack or violence used by the attacker. Also, self-defense is not the same as post-attack retaliation or revenge; self-defense only exculpates in case of spontaneous or coterminous reaction to an attacker's violence. Any one who purports to engage in self-defense after attack has abated would be open to liability. The option open to a victim in such situation is to seek appropriate legal redress, not retaliation or revenge under the guise of self-defence.[51]

It would be observed from the phraseology and content of the foregoing statutory provision. That the self-defense options are available to every person in any situation of unlawful aggression. There is no limitation or qualification that a nurse cannot adopt self-defense in nurse-patient situation or that self-defense cannot operate against an unruly patient. It is thus logically conclusive that a nurse can legitimately adopt self-defense to repel or subdue the violent acts of an unruly or violent patient in connection with life, body or property.

While the nurse as a caregiver, indisputably, has the right to adopt self-defense against a violent patient, the nature of the relationship between the two can put the nurse in an ethical or moral quandary in the face of ethical codes of conduct guiding his profession. For example, one can reflect on how proper and comfortable it would be far a nurse to unleash violence on his patient in self-defense in the face of the nurse's fundamental responsibility to 'conserve life, alleviate suffering and to promote health' of the patient.[52] Generally, by nature of his job, the nurse as a caregiver is expected to accommodate some sort of unruly acts from patients by way of occupational hazards. This expectation of nurses to bear and accommodate risks to some extent is further appreciated by the common practice of health institutions, especially mental health institutions, in paying "hazards allowance" to employees including nurses. [53] Thus, generally, the nurse should only resort to self-defense against his patient when it is absolutely inevitable, and no other means of suppressing the violence is available or effective. In addition, self-defense should also only come into play when the aggression from the patient is life threatening or likely to result in grievous harm.

Conclusion

Manifestly, having to operate within a frame of legal regimentation would have certain implications, both positive and negative for nurse. In one respect, legal intervention in nursing would assist in ensuring that the rights of patients who may largely be helpless while under the care of a nurse are safeguarded. This is because there is a notice to the nurse that any transgression of the patient's right in the course of treatment or care can subsequently have serious legal consequences. Generally, legal intervention in nursing practice is a pointer to the

51 See R F V. Heuston op.cit p. 166: "The scope of self-defense has been summed up thus" "it is lawful for any person to use a reasonable degree of force for the protection of himself or any other person against any unlawful use of force…. Force is not reasonable if it is either (i) Unnecessary i.e greater than is requisite for the purpose – or (ii) disproportionate to the evil to be prevented. In order that it may be deemed reasonable within the meaning of this rule, it is not enough that the force was not more than necessary it may be unreasonably disproportionate to the nature of the evil sought to be avoided. A man cannot justify a maim for every assault; as if A strike B.B cannot justify the drawing his sword and cutting off his hand, but it must be such an assault whereby in

probability the life may be in danger,….If you are attacked by a prize-fighter, you are not bound to adhere to the Queensberry rules in your defense. He on whom an assault is threatened or committed is not bound to adopt an attitude of passive defense: I am not bound to wait until the other has given a blow, for perhaps it will come too late afterwards. It was said in the Chaplin of Grav's Inn's Case in 1400. The defendant will be justified so long as he does not go beyond what is reasonable as a measure of self-defense. Nor need he make any request or give any warning, but may forthwith reply to force by force"
52 See note 7 and accompanying not
53 In the course of research for this paper, this writer confirmed the existence of this practice at the Neuropsychiatric Hospital, Aro Abeokuta, Nigeria (a World Health Organization (WHO) affiliated institution) and the institution is hereby cited as an illustration.

nurse that every step he takes in his nursing practice is being legally monitored and there is need to exercise self-restraint so as to avoid untoward legal consequences.

may not ultimately be in the best interest of the patient particularly in situations of emergencies, as the nurse may be more interested in keeping within legal limits instead of giving the best attention required by the patient. To many people, the nursing profession depicts the Florence Nightingale image of an angel of mercy distributing solace and compassion all over. With the legal maze now surrounding nursing, it is quite challenging to effectuate that image because of the possibility of the nurse reaping evil, in form of court actions, for a good deed of bringing comfort to a patient or his family. While it is not intended to posit that law should stay-off be nursing practice, it is desirable that a balance should be struck between application of strict legal rules and the nurse's judgement as to the best interest of his patient in some situations. On another note, an effect of legal intervention in nursing is that nurses and patients are tacitly placed in position of potential combatants – a situation where a pugnacious patient might be constantly watching out for any slip by the nurse to warrant unleashing legal firepower, and one where the nurse in every action might be overcautious in order to avoid stepping on any legal landmine. This may not ultimately be in the best interest of the patient particularly in situations of emergencies, as the nurse may be more interested in keeping within legal limits instead of giving the best attention required by the patient.

In closing, it is observed that legal regulation in the nursing profession is a clarion-call to nurses that every professional conduct should be undertaken with regard to prevailing legal rules. This necessarily entails the need for nurses to be reasonably conversant with the pertinent rule affecting their profession. In that light, some sort of continual self-education and development on the part of nurses are desirable. As Adelowo quite aptly observed:

> *The professionalization of nursing both in its practice and in its achieving professional status require knowledge of the law and its relation to professional responsibility and development. An hour or two of instruction usually given in the senior year is totally inadequate particularly since the consequences of ignorance are so great. The dictum holds true that ignorance is no excuse before the law.*[54]

Nursing regulatory bodies too have alluded to the need for self-development on the part of nurses. For example, the ICN Code of Ethic 1973 declared, "The nurse carries personal responsibility for nursing practice and for maintaining competence by continual learning."

Law is an overseer watching over the temple of the nursing profession just like other callings in Nigeria and beyond. The Nigerian society is becoming more rights conscious and many people are becoming more inclined to enforce their rights in health care and other contexts, especially with the support of human rights activists. In such an atmosphere, no nurse can afford to trivialize the likelihood of facing legal action for professional activities. Put simply, every nurse needs to do away with a dream of: 'it can't happen to me'. The realistic note of caution and advice given by Adelowo should always be borne in mind by the nurse in carrying out his day-to-day professional activities.

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[54] *See E.O. Adelowo op. cit p. 83*

[55] *See note 1: "Most nurses were of the opinion that they will never end up in court as a result of their professional practice. But in a society fast becoming an ever more litigious one, there is always a possibility that even the innocent of actions may be taken by someone as grounds for lawsuits"*