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CONSTITUTIONAL RIGHT TO REMAIN SILENT: A CRITICAL ANALYSIS.

I. INTRODUCTION

The police, apart from their general duties spelt out under the Police Act[1], equally have power to arrest[2], search[3], and prosecute[4] criminal cases in Nigeria. Thus, in the process of prosecution of a suspect or the accused as the case may be, the Police is required to prove its case beyond reasonable doubt[5]. In this regard, the Police usually place heavy reliance on confessional statement of the Suspect/Accused as one of the means of proving the guilt of the accused person to secure conviction at all cost without necessarily following the due procedure. It is on this note that this paper will examine constitutional right of the accused to remain silent, the effect of remaining silent while in police custody and during trial. The paper will also attempt a critical analysis of the Constitutional right of the accused to remain silent. The last part of the paper will contain conclusion and recommendation(s).

II. CONSTITUTIONAL RIGHT TO REMAIN SILENT.

The right to remain silent is a legal protection given to people undergoing interrogation or trial[6].Historically, neither the reasons nor the history behind the right to silence are entirely clear. According to some historical accounts, the right to silence became established in law as a result of excesses of the royal executors of royal inquisitions in the court of Star Chamber and High Commission of the 16th century in England, wherein people coming before these tribunals were forced to make the ex-officio Oath by which they swore to truthful answer questions to be put before them without knowing the question to be put to them thereby subjecting them to face the offence of perjury and harsh punishment for contempt of court. As a result of the evolutionary trend in America and the enshrinement of the right in the Fifth Amendement to the Constitution, the right became increasingly entrenched in Common law legal system throughout the World as other legal systems follow that of United State of America. Due to the development of International Law which saw an increasing universalization of certain due process protections, the right to silence spread across Europe in the 20th century and Africa at large.[7]

The constitution of the Federal Republic of Nigerian, 1999, provides as follow:

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[1] Cap 35, Laws of the Federation of Nigeria 1990. S.4 now Cap P19 Laws of the Federation of Nigeria, 2004.

[2] Criminal Procedure Act, Cap C41 Laws of the Federation of Nigeria, 2004. S.10. See also S. 24 and 25 Police Act Op. Cit. These two Acts give police power to arrest with or without warrant of arrest. See also S.26 and 56 Criminal Procedure Code.

[3] S.28, Police Act Op.Cit See also S 74 & 75 CPC

[4] S.23 Police Act,Opcit,. see also Olusemo v. COP (1998)2 NWLR (pt 575), 547 and FRN v. Osahon (2006)2 Sc (pt 11)1. Note that the power conferred on the police to prosecute criminal matter in Nigeria is subject to the power of the Attorney General of the Federation and State under S. 174 & 211 of the 1999 Constitution.

[5] See S. 138 Evidence Act. Cap E14 Laws of the Federation of Nigeria, 2004. See also Udo v. State (2005)7 SC (pt11)83, The State v. Akpabio (1993)4 NWLR (pt 286)204. Tajudeen Alabi v. State (1993)9 SCNJ 177-178

[6] This right covers a number of issues centered around the right to refuse to answered questioned. This can be right to avoid self –incrimination or the right not to answer any questions. This right usually includes the provision that adverse comment or interferences can not be made by the judge or jury about the refusal to answer questions before or during a trial or hearing : See http://www.gogoole.commng/url?&start=3&q=http://en.wikipedia.org/wiki/Right_to_silence&ei

[7] Ibid.

> "Any person who is arrested or detained shall have right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice"[8]

The constitution further provides

> "No person who is tried for a criminal offence shall be compelled to give evidence".[9]

The implication of the above sections of the constitutional provisions is that arrested person is entitled to remain silent while in police custody or before the court.

In *Daniel Sugh v. The State*[10] the accused had a Phillipino woman with whom he was cohabiting. The woman also had another man as her friend. The accused and that other man were struggling and quarrelling with each other as each one of them wanted to have the woman to the exclusion of other. On 17/10/08, the woman and the man were being droven in a bus with a few other passengers along Makurdi-Gboko road in Makurdi town when the accused forced the bus to a halt and inflicted injury on the deceased with cutlass. The deceased was quickly rushed to the hospital but was later certified dead.

The accused was arrested by the police, in his statement to the police he said he reserved his statement until he had seen his lawyer. The trial court convicted the accused on the ground that he did not believe the defence of the accused because he (accused) did not include it in his statement to the police. On Appeal to the Supreme Court, the appellant counsel contended that the comment made by the trial court on the appellant's failure to make a statement at the earliest opportunity to explain the happenings that resulted in the death of the deceased, is a violation of his fundamental right protected by section 33 (11) of the 1979 constitution. The Supreme Court held that section 33(II) of 1979 Constitution is a provision against compelling an accused person to give evidence in his trial .....!!

The provisions of Philippine Constitution similar to S.35(2) of the Nigerian Constitution, 1999 state as follows:

> "Any person under investigation for the commission of an offense shall have the right to be informed of his right to remain silent and to have competent and independent counsel preferably of his own choice. If the person cannot afford the service of counsel, he must be provided with one. These rights can not be waived except in writing and in the presence of counsel."[11]

In applying the above constitutional provision to the extra-judicial statement, the court in *People v. Demiega*[12] stressed the role of the courts in ascertaining that extra-judicial confessions meet the exact standards of the Constitution thus:

> "Every so often, courts are confronted with the difficult task of taking a hard look into the sufficiency of extra-judicial confessions extracted by law enforcement authorities as the sole

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[8] See S.35(2)

[9] See s.36(11) which is in pari-material with s.33(11) of 1979 constitution. See also s.236 c.p.c. See also Nelson .v. Borno N.A1968, s.c.o.p.E 23. See also Balla & Anor .v. C.O.P(1973)1 N.M.L.R.61

[10] (1988)5SCNJ58

[11] S.12, Article III of Philippines 1987 Constitution extracted from the case of People of the Philippines v. Elizar Tomaquin G.R. No. 133188 (2004) , available at www.supremecourt.gov.ph/jurisprudence/2004/jul 2004/133188.htm Assessed on 21/9/2008.

[12] 251 SCRA 626,641- 641 (1995)

> basis for convicting accused individuals. In cases of crimes notable for their brutality and ruthlessness, the impulse to find the culprits at any cost occasionally tempts these agencies to take shortcuts and disregard constitutional and legal safeguards intended to bringing about a reasonable assurance that only the guilty are punished. Our courts, in the process of establishing guilt beyond reasonable doubt, play a central role in bringing about this assurance by determining whether or not the evidence gathered by law enforcement agencies scrupulously met, the Constitution provides the corresponding remedy by providing a strict exclusionary rule, i.e. that "(a) any confession or admission obtained in violation of (Article III, section 12(1)... hereof shall be inadmissible in evidence."

In applying the above principle as stated in the case of *People v. Demiega*[13], the Supreme Court in *People of the Philippines v. Elizar Tomaquine* (supra) held to be inadmissible an extra-judicial statement made in contravention of section 12, Article III of the 1987 Philippine Constitution.

In that case, the appellant, Tomaquine Elizar was arrested for the murder of Jaquelyn Lucha Vez Tatoy. In the next day, the appellant was investigated by SPO2[14], Mano Monilar of the Homicide section, Ramos Police Station in Cebu city. After being appraised of his constitutional rights, appellant told SPO2 Monilar that he was willing to confess and asked for Attorney Parawan[15]The appellant confessed and his confession was completely taken down in the Cebuano dialect. The trial court convicted the accused / appellant of the crime of murder. On appeal, the Supreme Court held that extra-judicial confessions of the appellant were taken in an unofficial language which is in contravention of Rule 32, section 33 of the Revised Rules on Evidence[16]and that there is no official translation of the appellant's extra-judicial confession in the Filipino or English Language. If the Court were to strictly follow the rule, then the appellant's extra-judicial confession should not have been admitted by the trial court as evidence of prosecution.

Nevertheless, considering that the appellant did not interpose any objection, thereto, and the parties and the judicial authorities or personnel concerned appeared to be familiar with or knowledgeable of Cebuano in which the document was written, such extra-judicial confession was appropriately considered by the Trial Court as evidence for the prosecution.[17] The Court further held that by Article III, section 12 of the 1987 Philippine Constitution, extra- judicial confession made by the appellant with the assistance of Attorney Parawan is deemed a person in authority under Article 152 of the Revised Penal Code[18]. Thus, the extra-judicial confession executed by appellant, even

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[13] Supra

[14] Superior Police Officer 2

[15] Attorney Parawan was the Barangay Captain of Barangay, Lorega, Cebu City, whose duties and functions were spelt out under the 1991 Local Government Code to include among others (i) to enforce all laws and ordinances which are applicable within the Barangay; (ii) to maintain public order in the Barangay and, in pursuance thereof, assist the city or Municipal Mayor and the Sanggunian members in the performance of their duties and functions: Section 389,Chapter 3, Title One, Book III, Local Government Code of 1991, as amended.

[16] S. 33 of Rule 132 of the Revised Rules of Evidence provides: "Documents written in an unofficial language shall not be admitted as evidence, unless accompanied with a translation into English or Filipino. To avoid interruption of proceedings, parties or their Attorneys are directed to have such translations prepared before trial."

[17] See also People v. Salison, Jr., 253 SCRA 758,771 (1996).

[18] Article 152 provides: "In applying the provisions of the proceedings and other articles of this code, any person directly vested with jurisdiction, whether as an individual or as a member of some court or government corporation, board or commission, shall be deemed a person in authority. A barrio captain and a Barangay Chairman shall also be deemed a person in authority." See also people v. Culala 316 SCRA 582 (1999) where the court held that a Municipal

if it is a gospel truth, is deemed an uncounselled confession and therefore, inadmissible in evidence.

Under the United States of America criminal adjudication system, admissibility of Confessional statement is based on the rule propounded from the case of *Miranda .v. Arizona*[19], where the Supreme Court of United States of America held as follows:

a) A suspect in police custody must be advised prior to questioning that he has a right to remain silent and that anything he says can be used as evidence against him;

d)If a suspect indicates in any manner, at any time, that he does not want to be questioned, then questioning must cease immediately. Likewise, if a suspect indicates in any manner, at anytime, that he wants to consult with counsel, questioning must cease immediately and may not resume until counsel is present.

e) Violation of any of the foregoing rules automatically bars the admission of a suspect s statement against him at trial, whether the statements are exculpatory or inculpatory in character;

f) The fact that suspect remained silent or refused to answer questions may not be used by the prosecution at trial.[20]

In that case, Ernesto Miranda was convicted for kidnapping and rapping in 1963. While in police custody, he made no request to consult with counsel while being interrogated, but was also not advised by the police that he has right to do so. At trial ,his confession was rejected by the Supreme Court on the ground that Police had failed to comply with a set of rule governing interrogations that were made for the first time.[2]

Attorney is not better than a fiscal or a Prosecutor who cannot represent the accused during custodial investigations. See also People v. Taliman 342 SCRA 534 (2000) and People v. Velarde 384 SCRA 646 (2002).

[19] 384 u.s.4369 (1966). Note that before Miranda , Confession elicited by the police in state prosecutions were admissible if they were voluntary under the totality of the circumstances. "If the confession was involuntary, its admission to evidence was held to violate the due process Clause of the Fourtheenth amendment .see Brown .v.Mississipi,297 U.S.278(1936). For concise history of Pre-miranda Law of confessions, see Caplon, "*Questioning Miranda"* (1985),38 VAND.L. REV.1417,1427-1443 . See also S.J. Markman: *"Miranda.v.Arizona: A Historical Perspective"(1986)*24 America Criminal Law Review Journal at p. 194-195 at p197. See also G.C, Thomas; *The end of the Road for Miranda.v.Arizona?: on the history and future of Rule for police interrogation*(2000)37, American criminal Law Review Journal at pp.9 at pp5-9. Note that in early 70s and 80s,Miranda rule was overturned to the effect that it does not apply to:(i) interrogation in connection with the probation officer concerning a murder committed by the probation.see Minessota .v. Murphy,465 U.s. 420,433(1984); (ii) the questioning of a targeted witness before a grand jury .see United States .v. Mandujano ,425 U.S.564,579-580 (iii) the questioning of suspected Burglar by a police officer where the suspect would have been free to leave the interview. see Oregan .v. Mathiason,429 U.S.,495(1977) (iv) question of a suspect at his home by IRS Officers concerning criminal tax fraud.see Beckwith .v. United States,425 U.S.341,347(1976). See generally S .J Markan opcit at pp231-232. However, despite the negative comment and overruling of the rule against self incrimination as laid down in Mirianda's case, as stated above, the Supreme Court of the United states reverts back to the old rule against self-incrimination as laid down in the case of Miranda .v. Arizona (supra),and applied same in the case of Maryland .v. Blake 546,U.S.(2005)

[20] see S.J.Markman; opcit.

[21] See S.J Markman, ibid at p194; see also L.Baker, "*Miranda:Crime,Law and Politics"(1985)*24 American Criminal Law Review Journal pp3-14,22-24,49,191-194.see also G.C Thomas: opcit at p9.see also J.D Grano, "*Miranda v. Arizona and The Legal Mind: Formalisms Triumph over substance and reason"* (1985) 24 *American Criminal Law Review Journal*, at pp243-246,267-268 and 276.see also W. H. Erckson "*The Unfulfilled promise of Miranda .v. Arizona* "(1985)24, American Criminal Law Review Journal at p291.See also S.J. Markman, opcit. Note that before Miranda , Confession elicited by the police in state prosecutions were admissible if they were voluntary under the totality of the circumstances. "If the confession was involuntary,its admission to evidence was held to violate the due process Clause of the Fourtheenth amendment .see Brown .v.Mississipi,297 U.S.278(1936). For concise history of

The Application of Miranda Rule[22]

In *Maryland v. Blake*[23], where a Police arrested a suspect young man ,Leander Blake for murder. The Police advised Blake of his Miranda rights[24], and Blake took advantage of them right away by asking to see a lawyer. A little more than a half an hour later, Detective William Johns presented Blake with a copy of the charges against him, and told him to read them carefully. The charges included first degree murder, and listed "Death" as a possible penalty, even though Blake was, in fact, not eligible for death because of his age. The officer said to Blake "I bet you want to talk now huh!" The detective then said "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now." Half hour later, Blake decided to speak to the Police without his lawyer, and he proceeded to make incriminating statements about the murder. At trial, Blake argued that the incriminating statements were the product of an illegal interrogation, and therefore inadmissible. A County Circuit Court agreed with Blake, and ruled the statement inadmissible. On appeal, Maryland argued that Blake's interaction with the officer and the detective did not constitute an interrogation, because the officer's statement was a mere rhetorical question, and in any case was quickly corrected by the detective. An intermediate State Appeals Court agreed and allowed the statement to be admitted in evidence. However, the Maryland Court of Appeal reversed that decision, holding that the detective's correction did not reduce the serenity of the officer's inappropriate statement. Since the officer's statement was ruled an illegal interrogation in violation of Blake's Miranda rights, the incriminating statement could not be used as evidence at trial.[25]

Also in *Edward v. Arizona*[26], the Supreme Court of United States held that Police are prohibited from initiating the interrogation of a suspect who has clearly requested an Attorney. Once the right to counsel is invoked, interrogation is permissible only if an Attorney is present or if the suspect himself initiates communications with the authorities and waives his Miranda rights. It should be noted that the effect of Miranda rights/warning is that failure to invoke this warning renders the extra-judicial statement inadmissible.[27]

Pre-miranda Law of confessions, see Caplon, Questioning Miranda,op. cit. See also S.J. Markman, op.cit. at p197. See also G.C, op.cit at pp5-9.

[22] The Miranda rule or 5th Amendement to the Constitution gives the right to remain silent and protect an individual suspected of a crime. It equally offers protection not to answer questions even when prompted by law officials.See www.ehowcom/how_210667_protect-remain-silent.html.

[23] Supra, available at http://www.oyez.org/cases/2000-2009/2005_04_373 visited on 23/09/2008.

[24] The Miranda rule was developed to protect the individual's Fifth Amendment right against self-incrimination. The Miranda warning ensures that people in custody realize they do not have to talk to the police and that they have the right to the presence of an attorney. The Miranda warning must be read to individuals about to be questioned in custody thus: "you have the right to remain silent. I f you give up the right to remain silent, anything you say can and will be used against you in a court of law. You have the right to an Attorney. If you desire an Attorney and cannot afford one, an Attorney will be obtained for you before Police questioning." Available at http://www.abanet.org/publiced/practical/criminal/mirandarights.html. Assessed on 23/09/2008. see also Miranda v. Arizona 384 US 436 (1966). See also J.D Heydon: "*Evidence cases and material*" Butterworths & Co. Publisher Ltd, London,(1991),at p.186, and at p.214.

[25] See http://www.oyez.org/cases/2000-2009/2005_04_373/ visited on Tuesday September, 23rd, 2008. See also Tomorrow's argument: Maryland v. Blake (supra) on www.oyez.org/cases/2000-2009/2005_04_373. http://lawprofessorstypepad.com/crimprof_blog/confessions_andinterrogation/index.htm. visited on 23/09/2008.

[26] 451 U.S. 477, 101 S. ct. 1880 68 L. Ed. 2d 378 (1981).

[27] Maryland v. Blake (supra), Edward v. Arizona (supra), and Missouri v. Seibert, 124 S. Ct. 2601 (2004) where the court held that if the pre-warning and post-warning interrogation would be seen as one and the same incident, then a resulting confession will be inadmissible.

III. EFFECT OF REMAINING SILENT

Right to silent while in police custody[28]

Whenever a suspect is in the police custody, his constitutional right to remain silent begins, and this right is to the effect that he can not be forced or coerced to say a word unless he volunteered to do so, and shall never be made subject of comment by the prosecution,[29] as the prosecution is required to prove his case beyond reasonable doubt.[30]

Right to silent during trial[31]

Whenever accused is arraigned before the court for prosecution, he shall have three options opened to him. These options are provided for under the Criminal Procedure Act thus:

> "At the close of the evidence in support of the change, it appears to the court that a prima-facie case made out against the defendant sufficiently to require him to make a defence the court shall call upon him for his defence and
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> (a) if the defendant is not represented by a legal practitioner, the court shall inform him that he has three alternatives open to him, namely
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> (i) he may make a statement, without being sworn, from the place where he then is ; in which case he will not be liable to cross-examination; or
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> (ii) he may give evidence in the witness box, after being sworn as a witness; in which case he will be liable to cross-examination; or
>
> (iii) he need say nothing at all, if he so wishes, and in addition the court shall ask him if he has any witness to examine or other evidence to adduce in his defence ....."[32]

Also, Criminal Procedure Code provides as follows:

> "..... (a) the accused shall not be examined as a witness except at his own request;
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> (b) before giving evidence the accused shall be warned by the court that he is not bound to give evidence, and that if he does so, his evidence may be used at the jury or trial;
>
> (c) the failure of the accused to give evidence shall not be made the subject of any comment by the prosecution, but the court may draw such inference as it thinks just;....."[33]

The combined effect of the provisions of sections 36 (11) of 1999 Constitution, 287 of C.P.A, 236 (c) of C.P.C and 160 of Evidence Act is to the effect that the accused has a right to remain silent and can rest his case on that of prosecution to prove his case beyond reasonable doubt.

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[28] See S. 35(2)
[29] See Sugh .v. The State (supra)
[30] See Igabele .v. The State(2006)2SCNJp129
[31] See S.36(11)1999 Constitution FRN.
[32] See S.287(1)(a)(i)(ii)&(iii)CPA
[33] See S.236CPC. Note that provision of S.236(c) is the same with S.160 (b) of the Evidence Act which provides that" the failure of any person charge with an offence to give evidence shall not be made the subject of any comment by the prosecution"

In *Igabele .v, The State,*[34] the accused was tried and convicted for murder of the deceased. At the trial court, the accused pleaded not guilty to the charge. The prosecution called nine witnesses. At the end of the prosecution's case, the counsel to the accused entered no case submission and thereafter elected not to testify and call any witness and rested his case on that of the prosecution. On appeal to the Supreme Court, Per Ogbuagu JSC held:

> "An accused person has the constitutional right to remain silent and leave the trial to the prosecution to prove the charge against him. This is because citizen's right to remain silent even when arraigned for a criminal offence is an inviolable one. The prosecution is bound to prove its case beyond reasonable doubt"

It will however be of great importance to note that although it is a right of citizen to remain silent and say nothing in his defence because he is only a competent witness but not a compellable witness[35], there is need to heed the advice and caution of the Criminal Procedure Code which provides thus:

> ....but the court may draw such inference as it thinks just".[36]

Thus in *Babalola .v. The State,*[37] the Supreme Court cautioned the accused on provision of section 33(11) of 1979 constitution now section 36(11) 0f 1999 constitution thus:

> "Whereas prudence dictates that an accused should not assist the prosecution which has failed to prove every material ingredient in the case against him by giving them the opportunity of extracting it in the witness box under the fire of cross examination, it is a reckless hazard to insist on the exercise of that right when the prosecution has made out a prima-facie case which calls for the accused person's explanation"

Also, in the above case, the Supreme Court further held that:

> "Where an accused parson elected not to give evidence on his own behalf as he is entitled so to do, the provisions of section33(11) of 1979 constitution (now 36(11) of 1999 constitution) will not preclude the trial court from drawing any inference which the quntum and quality of evidence called against such an accused person warrant"[38]

In *Nwede .v. The State*[39] , the Appellant was charged with the offence of murder. At the trial, the prosecution led evidence and tendered two confessional statements[40]

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[34] supra

[35] See S.160 Evidence Act. See also T.A Aguda,'' The Law of Evidence" Spectrum Books Ltd, Ibadan(2001) Pp.307-308

[36] See S.236 CPC

[37] (1989)4NWLR(Pt.115)264,(1989)7SC(Pt1)94@276

[38] Ibid at p264. See also Sugh .v, The State (supra)

[39] (1985)12SC32. See also Ali .v. The State(1988)1SCNJ17. See also Bob Osamor,"Fundamentals of Criminal Procedure in Nigeria", Dee-saga Nig. Ltd,Abuja(2004), at Pp.336-339. See also Imhanria .v. Nig. Army(2007)14NWLR(Pt.1053)Pp.80-81

[40] Confession is a statement made by the accused person expressly or by necessary implication that he committed the offence for which he is being charged. Therefore, confession is an extra-judicial statement by an accused person charged with a crime to the Police containing assertion/admission showing that he participated in the commission of the offence for which he stands charged. Once an accused person makes a statement under caution saying or admitting the charge or creating the impression that he committed the offence with which he is charged, the statement becomes confessional Confessions are either judicial or extra-judicial. Judicial Confession: This is a confessional statement made by the accused person during the course of proceedings in which he is standing trial. While extra-judicial confession: This is a confessional statement made by a person

made by the accused person while in police custody. At the close of the prosecution's case, the Appellant was called to enter his defence. The Appellant chose to exercise his constitutional right to silent and says nothing. The appellant was convicted and sentenced to death. On appeal to the Supreme Court, the court held that:

The legal effect of the fact that the appellant rested his case on that of prosecution, is that the trial court is deprived of the advantage of hearing his own side of the story[41]

IV. CRITIQUE

There is no ambiguity in the provisions of sections 35(2) and 36(11) of the Constitution of the Federal Republic of Nigeria, 1999, revealing the right of accused person(s) to remain silent during police investigation and at the trial. However, the effective interpretation and application of these provisions are seriously in doubt since judicial authority has revealed that these constitutional provisions would not protect the accused person in the face of incriminating allegation, thus accused person is obliged to say what he knew about the allegation leveled against him otherwise it will amount to admission by conduct.[42]

Also, these provisions of the constitution are indirectly giving the judicial officers jurisdiction to draw inference(s) from the silence of the accused person, even though; prosecution is barred from making any comment to that effect. It is therefore stated that this constitutional provisions of right to remain silent does not proffer positive effect on the accused person whenever criminal allegation is made against him and he remains silent. Furthermore, the exercise of these constitutional provisions by the accused person are been turned to sword by the Nigerian police to obtain involuntary confessional[43] statement through the instrumentality of all sort of inhuman tortured or inducement.

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charged with a crime to the Police containing assertion of admission showing that he participated in the commission of the alleged crime for which he stands charged

[41] *Imhanrian .v. Nig. Army(supra)@ P.46*

[42] See Gira .v. The State (supra) Where Adio JSC stated thus: "....The law is that when a clear and direct accusation is made against a person, in his presence, in circumstances which should warrant instant denial, refutation, or protest from him and he does not deny, refute or protest against making the accusation, evidence of such could be given against as evidence of admission by conduct."

[43] See Ss.27 and 28 Evidence Act. Opcit See also Basil Akpa .v. The State(2007)All-FWLR (Pt.351)1578-1579. See also Okeke .v. The State (2000)10 NWLR(Pt.675)423 at 437 See also Dotun Fatilewa .v. The State(2007)All FWLR (Pt.347)719. See also, Akpan v. State (2001)15 NWLR (pt.737)748. Note that both judicial and extra-judicial confession can be used to rightly convict the accused person once they satisfied S.28 of Evidence Act: Fatilewa v. State Supra. See also Ihuebeka v. State (2000) FWLR (pt.11)1827, Akinmoju v. State (2000) FWLR (pt.11)1893. confession becomes inadmissible and the mere fact that the accused is induced to confess is enough: R v. Viapong (1961)NNLR 47, and R v. Fatumani (1963)WACA39. See also Gbadamosi v. State (1992) 9 NWLR (pt 266) 465, Igbinovia v. State (1981) 2 S.C p.5 see also section 28 Evidence Act, op. cit.
The infliction of threat or violence on the person making the confession: Ebhome v. R (1963) All NLR 37. See also Taofeeq Adebayo v. State, Case No. CA/IL/35C/2006 (Unreported) delivered on 21st June 2007. See Rupert Cross and Colin Tapper," Cross on Evidence" *5th ed., Butterworths, London,(1979*)at p. 541. See also T.A Aguda "The Law of Evidence", *8th ed., spectrum law publishing, Ibadan,(1989*)at pp 42-46... Note that the echoe of the corrupt linger on in the notions of torture, and inhumane or degrading treatment, impliedly by the police. See Cross on Evidence, op. cit, at p. 540.

[43] Gbadamosi v. State(Supra), Ibrahim v. R (1914)A.C 599 at 609, Dawa .v. The State S.C.75/1979 delivered on 28/11/1980, Igbinovia .v. The State(supra) at pp 18-19 See also P.A.onamade:"*Documentary Evidence-Cases and Materials"* Philade & Co.Ltd,Lagos,(2002)at Pp.610-611 and 616-617. See also Peter Murphy: " *A practical approach to Evidence",4th ed., Blackstone press Ltd, Britain,(1992) pp. 226-228. See also J .H.Buzzard, Richard May and N.M.Howard" Phipson on* Evidence" *13th ed., sweet and Maxwell, London(, 1982)* at pp 430-435. See also Taofeeq Adebayo v. State (Supra). It should however be noted that where confession is made voluntarily and if it is consistent and probable, is usually regarded as evidence of the highest and most satisfactory proof that a criminal act has been committed. See Akpa v. State (supra).

It merits mentioning that the Nigerian courts commend the police for applying Judge's Rule[44] which is in pari material with the Miranda rights[45] as a desirable practice but where however same is not applied, such can not vitiate the confessional statement because the rule is mere rule of administrative procedure and not rule of law that is mandatory[46].

V. CONCLUSION AND RECOMMENDATION(S).

The article is able to examine the constitutional right to remain silent, the effect of the constitutional right and attitude of Nigerian Courts, Philippines and United States of America Courts toward the application of the constitutional provision of right to remain silent. In Nigeria, the Constitution of the Federal Republic of Nigeria,1999, is the main source of the right of an accused person to remain silent, as the accused person is not bound to say anything before or during the trial. This can be said to be the fall out of the constitutional provision of presumption of innocence[47] in which the accused is presumed innocent until contrary is proved, because accused is not expected to prove the case for prosecution, the need for silence of the accused person. However, judicial authorities have revealed while interpreting the above constitutional provision that the accused is obliged to say something when anything incriminating is said or tendered against him, otherwise, he will be deemed to have admitted the allegation. The right to remain silent is also whittled down where the accused himself wants or raises the defence of alibi to criminal allegation. Hence, sections 35(2) and 36(11) can not be used as a sword but as a shed.

In the light of the above, the following are recommended:

The provision of 1999 constitution, particularly section 35(2) should be interpreted in line with the USA and Philippines courts interpretation. If this is done, it will definitely erase the altitude of obtaining confessional statement at all cost so as to secure the conviction of the accused by all means.

The accused/suspect will be totally barred from raising the issue of involuntariness in the confessional statement, since all the available rights accorded to him under the constitution would have been utilized and exhausted by him.

Further more, the Nigerian Evidence Act should be amended to include the Provisions of Section 35(2) and Section 36 (11) of 1999, Nigerian Constitution.

The present Section 28 of Evidence Act should be retained and read along with Ss. 35 and 36 of 1999 Constitution which are in pari – material with Section 12 Article III of Philippines 1987 Constitution, while considering the issue of voluntariness or otherwise of confessional statement.

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[44] These are rules of Administration and not rule of law applied by the police to the conduct and procedure of obtaining Confessional statement of the suspected person. Failure to apply same does not render the Confessional statement admissible: Abubakar v. The State (1969) NSCC 6.

[45] Op. Cit.

[46] See R v. Voison (1918) 1 KB 531, see also Abubakar v. The State (supra).

[47] See Section 36(5) of 1999 constitution of Federal Republic of Nigeria. See also Ozougwu .v. the State (2006)Q.C.C.R. Vol. 5 at 210, where Per, Adekeye JCA stated thus: " S. 36(5) of 1999 Constitution presumes in favour of the liberty of the subject and his innocence until found guilty.....". See also Shagari .v. C. O.P (2007)5NWLR(Pt.1027)282 S.C.

The judges Rule should be made mandatory as this is in pari – material with the Miranda's Right/Warning under the USA's Fifth Amendment to the Constitution.

The Nigerian Police should be more enlightened on the rule and procedure guiding interrogation and recording of confessional statement, because many confessional statements were obtained by duress and inducement which eventually contravenes the constitutional provision of right to remain silent, the infringement of which may eventually render the proceedings null and void.

Finally, where incriminating evidence or material is tendered against the accused person, he is obliged to say something in order to refute, deny, protest or admit such evidence or material tendered against him.

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THE PROFESSIONAL'S DUTY OF CARE: A DIAGONISTIC APPRAISAL OF THE MEDICAL PRACTITIONER'S LIABILITY OF NEGLIGENCE IN TORT.

I. INTRODUCTION.

Negligence is the most important and dynamic of all torts. It is a species of law which regulates the interactions of all people. Therefore, it is an aspect of tort that is not peculiar to Medical doctor- patient relationship[1], but to other fields like school teachers, legal practitioner, gaolers, etc . All stand in special relationship to take care of their neighbours[2]. Failure to do so may warrant action in negligence.[3] Thus a patient who wish to complain that a Medical practitioner[4] did not tell him or her of the risk or side effect of particular treatment or the medical practitioner has done a shoddy job in trying to treat such patient will have cause of action in negligence[5] .In the light of this, the paper will attempt to examine the general principle of negligence, and its applicability to Medical practice.

II. GENERAL PRINCIPLE OF LAW OF NEGLIGENCE

> ...in strict legal analysis negligence means more than heedless or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person, to whom the duty was owed[6]

In *U.T.B v Ozoema*[7] the Supreme Court of Nigeria defined Negligence to mean:

> Lack of proper care and attention; Carelessness behaviour or conduct; a state of mind, which is opposed to intention; the breach of duty of care imposed by common law and statute resulting in damage to the complaint"

From the above definitions, the following are deductible as the element of negligence:

I. A duty of care owed by the defendant to the plaintiff;[8]

II. Breach of duty of care by the defendant[9]; and

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[1] See J. Devereux, *Medical Law: Text ,Cases and Materials*,(Australia: Cavandish Pub. Ltd, 1997),P.105.

[2] The Neighbour principle was laid down in the case of *Donoghue v Stevenson* (1932) A. C .562, thus:" The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer's question," who is my neighbour? Receives a restricted reply. You must take reasonable care to avoid act or omission which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour?. The answer seems to be persons who are so closely and directly affected by act that I ought reasonably to have them in contemplations as being so affected when am directing my mind to the acts or omissions which are called in question"

[3] R P Balkin ,JLR Davis, *Law of Torts,(2nd Edition*,1996) p:217, and Michael E, *Emergency Law*, available at http:// books gogoole. com.ng/books?id, pp.36-37.

[4] This is a person concerned with maintaining or restoring human health through the study, diagnosis, and treatment of disease and injury; and accomplishes these through a detailed knowledge of anatomy, physiology, diseases and treatment. See http://en .wikipedia. org/wiki/physician accessed on 2/5/09.

[5] See J. Devereux, op. cit.

[6] In the case of *Conchgelly Iron & Coal Co v Mc Mullan* (1934) AC at CP: 25 as cited in Kodilinye & Aluko, *The Nigerian Law of Torts*,(Ibadan: Spectrum Books Limited ,2007) P: 38

[7] (2007) 3 NWLR (pt.1022) 453. See also *Dirisu Abu & Niger construction Ltd. v Ambrose Abulime* (2007) ALL FWLR (pt.396) 683.

[8] The duty of care will be owed whenever in the circumstances it is foreseeable that if the defendant does not exercise reasonable care. This is determined by a-Relationship of Proximity; b- Conditions to negate or reduce the scope of duty .See *Anns v London Borough of Merton*(1979)2ALLER492

III. Damage to the plaintiff resulting from the breach[10].

Although the legal position is that *"He who assert must prove"*[11]. However, in negligence, there are instances where the plaintiff will not be able to adduce direct evidence to prove its case by pleading the doctrine of "*Res ipsa loquitur*"[12]

III. APPLICATION OF THE GENERAL PRINCIPLE OF NEGLIGENCE TO MEDICAL PRACTICE

The application of the principle of negligence to Medical practice can be summarized as follow:

(i) The existence of a duty of care towards a patient reposing in the Medical Practitioner;

(ii) A breach of that duty by the Medical Practitioner;

(iii) Damage caused as a result of the breach of duty; and damage caused was reasonably foreseeable.[13]

(i) Duty of care

High Court of Australia defined duty of care as" the law imposes on a medical practitioner a duty to use reasonable care and skill required is that of the ordinary skilled person exercising and professing to have that special skill"[14]

A medical practitioner, whether as a doctor in a private hospital or public hospital, and the Hospital, in their professional capacity, owe a duty of care to the patient to use caution in undertaking the treatment.[15]

(a) .A medical doctor.

The Medical doctor's duty of care owe to the patient is that of general duty of care. In *R .v. Bateman*[16], Lord Hewart CJ observed:

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[9] Here the court need not considered whether or not a reasonable man placed in the defendant's position would have acted as the defendant act. The court is obliged to apply the following test: (i) The likelihood of the harm; (ii) The seriousness of the injury that risk; (iii) The importance or utility of the defendant's activity; (iv) The cost of and practicability of measures to avoid the harm. See *Bolton v Stone*(1951)AC850.See also *Hilder v Associated Portland cement manufacturers Ltd*(1961)1WLR1434. Note that reasonableness is determined by the following factors: (a) Intelligence; (b) Knowledge; (c) Skill. See Kodinlinye and Aluko ,op. cit at Pp42-47

[10] In proving this element, the defendant must show that the act complained of, in fact, caused the damage. See *Sanyaolu v Farinbe* (1978) LRN 327. See also *Bernett v Chelsea and kesington Hospital Management Committee* (1986) 1 ALL ER 1068; and that the consequence of the defendant's act is not too remote in law. See *Overseas Tankship (U.K) Ltd v Morts Dock & Engineering Co. Ltd.*(1961)AC 388.

[11] .See S135-138 Evidence Act, CapE14,LFN, 2004. See also

[12] This literally means "Fact speaks for itself" .See *Ojo v Gharoro* (2006) 3 SCNJ 52.See also,*Scott v London and St. Katherine's Docks Co.*(1865) 159 ER 665.Note that where *Res ipsa Loquitor* is successively invoked, it shall have the following effect: (i) establishment of prima-facie case ; and (ii) Shifting of onus proof to the defendant. See Kodinlinye and Aluko, op.cit at p.49. The court will only apply the doctrine where (a) that the thing that caused the damage was under the full control of the defendant; and (b) That the accident would not have happened in the ordinary course of thing, without negligent act of the defendant or his servant. See Kodinlinye and Aluko, op. cit at p.49

[13] See J. Devereux, *Medical Law: Text, Cases and Material,* op. cit, at p105 .See also J .K. Mason and R. A. McCall Smith, *Law and Medical Ethics, (London:* Butherwort and Co. Publishing Ltd.,1983), p.130. see also I. Kennedy & A. Grubb, *Medical Law, Text with materials(*,2nd ed., London: Butherworth and Co. Publishing Ltd.,1994), pp.397-398.

[14] See *Roger v Whitaker* (1992) 175 CLR 479 at 483, *See also* http://www.haffmans.com.au/medical/negligence, assessed on 1/5/09.

[15] See R .v. Bateman (1925)94 LJK791(CCA). See also Barnett .v. Chelsea and Kesington Hospital Management Committee , supra, at p428. See also Picard," *The Liability of Hospitals in Common Law Canada*(1981)26 McGill LJ997 cited in I Kennedy and A Grubb, op. cit at pp.402-403. Note that the existence of duty of care between the medical practitioner is independent of contractual agreement. See Jones, M, *Medical* Negligence,(London:Sweet and Maxwell, 1991), cited in J. Devereux, op. cit at p.106, See also I Kennedy and A Grubb, op. cit at p. 400.

[16] Supra. See also I Kennedy and A Grubb, op. cit at p. 400. See also J .K. Mason and R. A. McCall Smith, *Law and Medical Ethics,* op. cit at pp.130-131

> " If a person holds himself out as possessing special skill and Knowledge, and he is consulted, as possessing such skill and Knowledge, by or on behalf of a patient, he owes a duty to the Patient to use due caution in understanding the treatment..."

The gist of the above is that if a medical practitioner undertook to be patient's doctor, he must exhibit standard degree of care and competency in treating his patient, otherwise , he will be liable in Tort of Negligence.

In *Barnett .v. Chelsea and Kesington Hospital Management Committee*[17] where the three watchmen started vomiting after drinking some tea. The three men approached defendant's hospital for treatment. The Nurse telephone the doctor, who is a casualty officer. The doctor without seeing them, advice them to go home and see their own doctors. The Court held that there was the necessary undertaking on the part of the doctor such that he had thereafter to behave reasonably.

It merits mentioning that a medical practitioner is not expected to behave unreasonably, but to a certain degree of reasonable and ordinary standard of care and skill as stated in R .v. Bateman[18] where Mc Nair stated thus:

> ...the Jury should not expect the highest or very high standard, nor should they be content with a very low standard

In Bolam .v. Friern Hospital Management Committee[19] .The Court in applying the principle stated in Bateman's case observed as follows:

> The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is a well- established law that it is sufficient if he exercises the ordinary skill of an ordinary man exercising that particular act."

Base on the authority cited above, a Medical practitioner is not expected to be a miracle worker guaranteeing a care or a very highest skill in his calling.

Instances where a medical practitioner had failed to exercise normal standard of care and skill are: Failure to diagnosis[20] where required; Errors relating to consent and advice[21]; Substandard treatment[22]; Drug and Anaesthetic accidents[23]; Retained surgical products[24]; and Childbirth, Sterilization and Conception[25] .

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[17] Supra
[18] Supra.
[19] supra
[20] Diagnosis is the basis of clinical judgement as it determines, firstly whether there is a need to treat, the mode of treatment required, to make proper diagnosis, the medical practitioner must take (a) full history; (b) conduct proper examination; and (c) proper test, if possible. See http: //www.injury-advice-solicitors.co.uk/pages/medical-Negligence-claim.aspx.
[21] This is the failure to give the patient adequate advice and warning whether in a therapeutic or a non-therapeutic context. See http: //www.injury-advice-solicitors.co.uk/pages/medical-Negligence-claim.aspx.
[22] This arises in cases involving retained swabs and other instruments after operations, burns, anaesthetic mishaps and cases where the wrong operation was performed. See http: //www.injury-advice-solicitors.co.uk/pages/medical-Negligence-claim.aspx.
[23] This is the administration of an incorrect drug or an incorrect volume of the drug. See http: //www.injury-advice-solicitors.co.uk/pages/medical-Negligence-claim.aspx.
[24] For example, swab left in after a caesarean operation,, a drain tube left in after a mastectomy, etc. See http: //www.injury-advice-solicitors.co.uk/pages/medical-Negligence-claim.aspx.
[25] Examples are, accidents in the use of Forceps and accidents during caesarean section(*Whitehouse v Jordan*), anaesthetic mishaps, etc See http: //www.injury-advice-solicitors.co.uk/pages/medical-Negligence-claim.aspx.

(b) **The Hospital**[26].

The Hospital shall have duty of care to the patient in the following:

a. Selection of competent and qualified medical practitioner and other supporting staffs;
b. Instruction and supervision of the employees;
c. Provisions of proper facilities and equipment; and
d. Establishment of systems necessary to safe operation of the hospital.[27]

The standard of care required of the Hospital is that the Hospital has to carry out the above duties as competent as the reasonable hospital in the circumstances and, even if found substandard.[28]

(ii) The Breach of Duty of Care

Failure of a Medical practitioner, and/or Hospital to observe their respective duties of care as required by law will result in breach of a specified duty. Example of situations where the required duty have been breached are:

a. **Failure to take medical history and later results to damage.**

For a medical practitioner to properly treat or diagnose a patient, he needs to take full medical history of that patient. If a doctor fails to take such history, he will be liable in negligence.[29]

In *Chin Keow v Government of Malaysia & Anor*[30], a doctor treated the deceased without enquiring into the medical history of the deceased. The Court held him liable for negligence as a result of the breach of duty to enquire into the medical history of the deceased.

It merits mentioning that the duty to take medical history is an ongoing process, in that it is part of medical practitioner's duty to always enquire as to progress of medical history of a patient whenever he is to diagnose or treat the patient. A medical practitioner who fails to listen and act on the complaint of complications made by a patient shall be liable in negligence.[31]

In *Guirelli v Girgis,*[32]the plaintiff consulted a Surgeon, the defendant concerning a broken leg. The plaintiff was subsequently referred to a physiotherapist. The patient made several complaints of pain in the leg and commented on its inability to bear any weight. The plaintiff had been a 'difficult' patient, constantly complaining, so the defendant dismissed the patient's view concerning his own leg. When the steel plate was removed, the leg gave way. Another surgeon had to perform an operation on the plaintiff. As a result of this, the plaintiff sued for negligence. The court held:

> ...I find that it was not a gross tendency, and that in the circumstances it was within the competence of a specialist orthopedic surgeon exercising ordinary competence to discover the truth about the degree of pain experienced by this patient on

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[26] Herein referred to as Private and Public hospitals.
[27] All these duties are referred to as Non-delegable duties. See I Kennedy and A Grubb, op. cit at p. 403. See also *Wilson & Clyde Co. v English* (1938) AC 57. See also *Roe v Minister of health* (1954) 2ALL ER131. Note that hospital may directly be liable to a patient or vicariously liable for the act of its employee. See *Albrighton v Royal prince Albert Hospital* (1980) 2 NSWLR 542 at561. See also *Cassidy v Minister of Health* (1951) 2 KB 343.
[28] See I Kennedy and A Grubb, op. cit at p. 403.
[29] See J. Devereux, opcit at p. 114.
[30] (1967)1WLR813
[31] See J. Devereux, opcit at p. 115.
[32] (1980) 24 SASR 264.

full weight bearing from time to time... I find that Dr Girgis was negligent in the treatment of the plaintiff's fractured tibia,...[33]

b. **Causing an injury to a patient while undergoing surgery.**

In *Paton and Anor v Parker*[34]. In that case, the plaintiff was admitted to hospital for operation. She sustained burns while in operating theatre when a bottle where a bottle that was being used as anesthetic was split and the exposed wire of electric radiator used to heat the room ignited the spirit vapour. She sued for negligence. The court was of the opinion that the doctor in charge ought to know the danger with the radiator

c. **Errors in treatment.**

Many issues have been addressed as errors in medical treatment. Errors such as failure to ensure adequate sterilization, the choice of the wrong drug treatment, premature discharge of patient from hospital, failure to spot the warning signs of infection.[35]

d. **Failure to remove foreign objects inserted into a patient**

Foreign object may include; Scalpel, Forceps, Retractors or Swabs.[36]

e. **Error in diagnosis**

Failure to diagnose is not actionable per se, unless the plaintiff can prove that failure to properly diagnose results into injury[37]

(iii) Consequential damage

It is not enough that a medical practitioner owes a duty of care; the breach of the duty of care, it is also important to show that there is consequential damage as a result of the breach; otherwise, the claim of the patient will fail.[38]

In *Barnett v Chelseal and Kensington Hospital Management Committee*[39], a widow's action for negligent against medical practitioner failed not because even though the doctor was negligent in failing to diagnose his condition. Yet medical evidence revealed that her husband will still not survive even if proper medical treatment had been rendered.

It merits mentioning that the legal burden of prove is placed on the patient, however, there are instances where the patient will be unable to proffer or difficult to provide direct evidence to prove negligence, hence, such a patient can rely on the doctrine of Res ipsa loquitor[40].

In Canadian case of *MacDonald v York County Hospital Corporation*[41]. In that case, the plaintiff was admitted for treatment of a fractured ankle and left with an amputated leg. The court held that although the plaintiff is unable to explain what really happened, all the requirement of Res ipsa loquitor are present, hence the defendant is liable in negligence.

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[33] Jbid at p.22. See also *Locher and Anor v Turner* (unreported, supreme court of Queensland, 22 December 1994.
[34] (1941)65CLR 187.
[35] *Geisman v Okefe and Anor.* SCNSW, unreported, 25 Nov. 1994.
[36] See *Mahon v Osborne* (1939) KB 14.
[37] See *Barnett v Chelsea and Kesington Hospital Management Committee* (supra)
[38] See O. Olapade, op. cit, at p.114.
[39] Supra
[40] See J .K. Mason and R. A. McCall , opcit at pp. 138-139. For the meaning of the doctrine of Res ipsa loquitor, see (n 12.)
[41] (1972)28DLR(3d)521. See also *Cassidy v.Ministry of Health*,(supra), *Mahon v Osborne*(supra).

V. DEFENCES

(i) *Contributory negligence*

In this defence, the Medical practitioner would have to prove that it was basically the negligence of the plaintiff himself which combines with his in bringing about the actual damage. On this Kodlinye and Aluko said

> A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable[42] prudent man, he might be hurt himself; and his reckonings he must take into account the possibility of others being careless[43].

We must note however that, this defence is not all encompassing because :

> Where any person suffers damage as a result of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage but the damages recoverable in respect thereof, shall be reduced to such extent as the court thinks just and equitable, having regard to the claimant share in the responsibility for the damage[44]

The defence of contributory negligence in medical practice is to the effect that a patient has certain duties of care towards a medical practitioner and to himself with particular standard of care of a reasonable patient. If he breaches this duty and results into damage to himself, he shall be liable in contributory negligence and his damages will reduce accordingly.[45]

In *Crossman .v. Stewart*[46], a patient obtained prescription drug from an unorthodox source, using hem on prolonged basis, and not consulting her. The patient later became blind s a result of continuance usage of the drug. The court held that the patient was liable in contributory negligence as a result of obtaining drug from unorthodox source, using them on a prolong basis without consulting her doctor.

(ii) *Volenti non fit injuria*

On the defence of *volenti non fit injuria* (no injury is done to one who consents). Consent itself is a defence to intentional torts[47] as such, it may also be a defence to an action in negligence. It is a defence where the patient relieved the medical practitioner of his professional duty of care without recourse to standard of care. If a defendant is successful in his plea of *volenti*, he will have complete defence, and the plaintiff will be unable to recover any damages[48].However, consent should not be obtained by means of fraud, threat, intimidation, deceit and duress.[49]

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[42] For what constitute reasonabness in such circumstances, see the decision in *Vaughan v Menlove* (1837) 132 ER, 490

[43] Quoting Lord Dening L.J in *Jones v Livox Quarries Ltd* (1952) 2 QB 608 at P: 615

[44] See section 1 (1) of the Law Reform (Contributory Negligence) Act 1945.

[45] See I Kennedy and A Grubb, op. cit at pp.492-497.

[46] (1977)5CCLT45. See also *Robitallie .v. Vancouver Hockey Club Ltd* (1979)19BCLR158(S. C).

[47] Kodilinye & Aluko, Op Cit, P: 89

[48] Ibid, see also Babara .H," Cases and Commentary on Tort", Pitman Publishing London (1996) generally on the practical way of putting up a defence in the Tort of Negligence

[49] See O. Olapade, op. cit at p119.See also R .v. Flattery(1877)2QBD. 410. See also R .v. Case(1850)4CoxCC220.

(iii) *Mistake*

The distinction has to be made between medical mistake which is excusable in law and mistake which will constitute negligence. In medical mistake, the law regards as excusable this is because the court accepts that ordinary human fallibility preclude liability, while in mistake that constitutes negligence, the conduct of the defendant is considered to have gone beyond the bounds of what is expected of the reasonably skilful or competent doctor.[50]

In Whitehouse v Jordan[51] the court states thus:

> The true position is that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant holds himself out as having, and acting with ordinary care, then it is negligence. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligent.[52]

It should be noted that gross mistake is always treated as medical negligence.[53]

V. CONCLUSION AND RECOMMENDATIONS

This paper has examined the principle of negligence as it relates to medical practice. Generally, in negligence, both the legal burden and evidential burden of prove is placed on the claimant. Therefore, in medical practice, a patient who is aggrieved from the way he/she was treated; or he/she does not give consent to treatment shall have cause of action in negligence. In the light of this, a patient is expected to prove that the medical practitioner owes him a duty of care; he has breached this duty, and the breach result in consequential damage.

On duty of care, a medical practitioner is not expected to be a miracle worker who will guarantee cure, but he is expected to carry out the duty of care owed to the patient on the standard of care set by law. However, if a medical practitioner treats in contrary to the standard of care set by law, he may be liable in negligence. Also, a Hospital equally has its own duty of care owe to a patient on administrative matters, such as employment of competent staffs, provision of safe equipment, etc. the standard of care expected of a Hospital is that of a reasonable hospital placed in the same category. It merits mentioning that failure of a medical practitioner or Hospital to exhibit respective standard of care will amount to breach of duty of care which may result in to damage.

As stated earlier, the burden of proving negligence is placed on the patient, however, there are instances where the patient will be unable to prove or proffer evidence to prove negligence, hence, the need for the doctrine of *Res ipsa loquitor.* And if successively pleaded and upheld, the medical practitioner or the Hospital shall be liable in negligence.

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[50] J .K. Mason and R. A. McCall Smith ,op. cit at p. 134.
[51] supra
[52] Ibid, Lord Fraser at 281.
[53] J .K. Mason and R. A. McCall Smith, op. cit at p.135.

It merits mentioning that justice is not a one way traffic. In the light of this, a medical practitioner or Hospital will have opportunity to defend itself and plead certain defence (Contributory negligence or *Volenti non fit injuria*) in order to mitigate or completely exonerated from liability in negligence.

In negligence generally, it is not in doubt that to prove negligence is not an easy task, at times it requires calling of Expert witness to give expert evidence before a patient will succeed in an action in negligence.