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The Practice of Nursing, Midwifery and the Tort of Negligence within the Ghanaian Laws: An Analysis of the Ghanaian Medico-Legal Jurisprudence

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ABSTRACT

This paper on the practice of nursing, midwifery and the tort of negligence within the Ghanaian Laws provided a comprehensive analysis of the Ghanaian medico-legal Jurisprudence. The legal analysis probed two issues: 1) What are the jurisprudential positions of the Ghanaian laws on negligence in nursing, midwifery and other specialists practices? 2) Whether Ghanaian jurisprudence elucidates on the patient's rights of privacy and information without recourse for nursing, midwifery and other specialists practitioners to withhold such medical records? The analysis found that legal jurisprudence in Ghana had recognized several categories of negligence including: lateness to duty; indeterminate duty founded on the defense of res ipsa liquitor; practicing without licence; refusal to treat patient and practicing out of scope. Thus, the Ghanaian medico-legal Jurisprudence presume a prima facie evidence on these duty categories as stated. Moreover, the analysis revealed that Bolam principle and Res ipsa liquitor had been extensively applied in the Ghanaian courts to hold practitioners to their standards of care. While noted from the analysis that the common law position had been reluctant in the acceptance of liabilities toward the unborn child, the Ghanaian medico-legal context recognizes expressly duty towards the unborn child and the mother of that unborn child. It was found through the legal analysis that the Ghanaian laws recognize the concurrent "tortfeasance" and multiplicity in negligence actions on practice. The material contribution principle in the common law had long being applied in Ghanaian case laws before it's application in toxic negligence cases. Thus, from this findings, two or more practitioners may be held to have materially contributed to the wrongful acts or negligence treatment of a patient. The medico-legal analysis further indicated that the Ghanaian Constitution and the accompanying laws have guaranteed the privacy and information rights of the patient to his

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medical records and thus the jurisprudence recognise the privacy and information rights of patients to their medical records and that practitioners cannot withhold such data when requested for use by the patient. The paper concluded that the Ghanaian Medico-legal Jurisprudence presume that negligent act in treatment can only succeed if the patient is able to proof the negligence and the causal link between the negligence and the breach of the duty the practitioner had towards him. Except in the circumstances where Res Ipsa Liquitor as a defence on the part of the patient is raised. More so the Medico-legal Jurisprudence and the Ghanaian Constitution provisions guarantee the rights of privacy and information to the patient. Thus, the patient has the unqualified access to his or her record for any reason whatsoever for retrieval of that same records for any purpose of his or choice without question in the Ghanaian law context.

Keywords: *Medical Records, Privacy Right, Right to Information, Tortfeasance, Medico-legal Jurisprudence, Criminal Law, Civil Liability Act, Ghanaian Constitution, Negligence, Multiplicity of Actions, Concealment, Duty of Care, Breach of Duty, Causation, Bolam Principle, Res Ipsa Liquitor, Ghanaian Jurisprudence, Nursing and Midwifery, Practitioner, Practice, Scope of Practice, Standard of Care.*

I. INTRODUCTION

There are multiple medico-legal issues in the field of nursing and midwifery in Ghana that had been relegated to the background for many years without an attempt for comprehensive legal analysis to ascertain the jurisprudential answers proffered in the Ghanaian law. The medico-legal jurisprudence of the negligence on practice of nursing and midwifery are yet to be determined in the legal literature and notwithstanding the position of the Ghanaian jurisprudence on access to medical records and the constitutional grounds for such determinable right of the patient are tenuous at large. The practice and cross-functional medical practice beyond the determinable scope leading to negligence in practice of nursing and midwifery is another issue of crucial importance. The contentious new scope of duty of care expansion in negligence liabilities towards the unborn child and the born child on the practice. Further medico-legal issues of the material contribution test in the Ghanaian Civil liability Act and it's constitute concurrent tortfeasance and multiplicity in negligence actions on the practice of nursing and midwifery in Ghana begs to be ascertained from the Ghanaian jurisprudence. These medico-legal issues hidden in the Ghanaian criminal and civil jurisprudence shall reveal the legal context in which the practitioner must operate else the practitioner without these jurisprudential understanding may safely conclude that they were licensed to be persecuted. In fact, as there are more advanced studies in the field of nursing and midwifery there had been

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thin line in scope of duties between the practice and other medical practice and thus the more likely medico-legal contention in law prove negligence to the disadvantage of the nursing and midwifery practitioner than the medical doctor or the like. Therefore, this legal analysis focusses on the medico-legal questions addressed: 1) What are the jurisprudential positions of the Ghanaian laws on negligence in nursing, midwifery and other specialists practitioners? 2) Whether Ghanaian Jurisprudence elucidates on the patient's rights of privacy and information without recourse for nursing, midwifery and other specialists practitioners to withhold such medical records? These questions shall be addressed in a comprehensive legal analysis within the Ghanaian case laws, civil and criminal jurisprudence to put the nursing and midwifery practice into the opportune perspective.

II. MEDICO-LEGAL JURISPRUDENCE OF GHANA

The medico-legal jurisprudence of the negligence law discusses the scope of practice and the applicable laws, applicable laws in negligence practice, liabilities towards the unborn child and the born child on practice. Finally, concurrent tortfeasance and multiplicity in negligence actions on the material contribution principle in the Ghanaian civil law.

(A) Scope of the Practice and the Applicable Laws of Ghana

The definitional issues of this paper is contextualized with the part three of Health Professional Regulatory Bodies Act[1]. Section 75[2] provides that "fault means a wrongful act; negligence includes breach of statutory duty; wrong means a tort (including a tort which is a crime), breach of contract or breach of trust; wrongdoer means a person who commits or is otherwise responsible for a wrong. Board means governing body of the council; Council means the nursing and midwifery council. Midwife means a person who has been registered as a midwife under Part III of Health Professional Regulatory Bodies Act; Midwifery means the supervision, care an education of women on how to live healthy life during pregnancy, labour, including the care of the newborn baby and the post-partum period by the registered midwife. Nurse means a person who has been registered as a nurse under part III Health Professional Regulatory Bodies Act; Nursing means the promotion of health, prevention of illness and care of the physically ill, mentally ill and persons with disability in health care and other community settings by a registered nurse. Practice means the profession of nursing or midwifery as under Part III of Health Professional Regulatory Bodies Act; Practitioner means a person registered to practice under Part III of Health Professional Regulatory Bodies Act."[3]

Where practicing within scope is construed as any practice outside Nurse and Midwife Practice Regulations[4], sub-regulations 37-42[5] and sub-regulation 47[6], Offences of practices are offences

as elucidated Section 73 under part three of Health Professional Regulatory Bodies Act. Section 73 provides "73 a) makes a false declaration in an application for registration as a practitioner b) willingly and falsely uses a name, title or addition implying a qualification to practice as practitioner c) practices or professes to practice as a practitioner d) fails to renew registration and continue to practice e) provides unauthorized service in a licensed facility f) provides service in an unlicensed facility g) fails to conform to practice standards of nursing and midwifery h)fails to cease practicing after suspension, cancellation or revocation of registration i) fails to comply with disciplinary sanctions of the Board j) engages unqualified persons to practice k) willfully destroys or damages a register kept under this part or l) contravenes any other provision of this part III commits an offence and is liable on summary conviction to a fine of no less than 5000 penalty units or to a term of imprisonment of not more than ten years or to both and in the case of a continuing offence to a further fine of 20 penalty units for each day during which the offence continues after written notice has been served on the offender personally by the council."[7]

III. APPLICABLE LAWS IN NEGLIGENCE PRACTICE

(A) Definitional issues on negligence

In section 12, Criminal and Other Offences Act[8] negligence had been explained as: "A person causes an event negligently if, without intending to cause the event, he causes it by voluntary act, done without such skill and care as are reasonably necessary under the circumstances." These provisions of section 12 (a)[9] is illustrated as follows: "12 (a) A [practitioner] having no knowledge of midwifery, acts as a midwife, and through her want of skill she causes death. Here, if [practitioner] knew that a properly qualified midwife or surgeon could be procured, the fact of [practitioner] so acting without possessing proper skill and without any necessity for so acting, is evidence of negligence, although it appears that she did her best. But if the emergency was sudden, and no properly qualified midwife or surgeon could be procured, [practitioner] is not guilty of negligence, provided she did the best she could under the circumstances."[10]

In the Ghanaian case laws, as stated in Allasan Kotokoli v Moro Hausa[11] he pointed out that negligence as a tort connotes a triadic concept: duty of care;[12] breach of that duty; and resultant damage, damage consequential from the breach of the duty.[13] [14] [15] Negligence is an action on the case. One general consequence is that liability depends on damage so in absence of proof of damage, action in tort of negligence will never succeed. In the field of nursing and midwifery, the test for determining whether a practitioner is negligent connotes a fault based liability principle, not strict liability principle, so we are not looking for perfection. We are measuring

practitioner's conduct against community's standards, measured in the concept of the reasonable man. This objective standard does not take into account particular circumstances of the practitioner. It is what community is expecting rom a practitioner in those circumstances/practitioner may have done his best but we are measuring it by community's standards. This test of negligence on community standards (White v Turner[16]) involves the consideration of five basic factors in determining the standard of care: 1) likelihood of injury;[17] 2) magnitude/seriousness of injury[18] 3) social value of practitioner's conduct or usefulness of end to be achieved;[19] [20] 4) difficulty, things involved in seeing the foreseeable risk[21] and; 5) compliance with approved and general practice (skill).[22] [23] [24] Furthermore, there are special duties imposed on practitioners to disclose material risks – this includes serious problems with low probability of occurring; and non-serious problems with a high probability of occurring to the patient as a result of the treatment. Also, as held in Haughian v Paine[25], a practitioner must tell patients of all reasonable alternatives and their risks. Both material risks and options must be disclosed so they can be weighed against each other. Thus, in Reibl v Hughus[26], the issue of what test of causation was to be applied was determined. It held that it can be important to determine what action the patient would have taken if they had have been informed of other options. The reasonable person test may apply – would the reasonable person have made a different choice if they were fully informed? This test does not account for individual preference and circumstances. Therefore, it was reasoned that a modified objective standard should apply – what would the reasonable person in the position of the patient have done? Exception to the burden of proof, in Snell[27], it was held that judges have some discretion where the burden of proof should lie. Generally, the burden of proof should lie with the party who has the ability to prove the point, in the instance of res ipsa liquitor, because a practitioner is in the best position to explain the injury, practitioner should be the one to do so. This is not a burden shift – judge can give a weighting factor to the evidence produced by the parties. If evidence is weighed evenly, the evidence of the party with expert evidence will be weighted lower because they should be better able to adduce evidence to refute that of the other party. Res ipsa liquitor was applied in the case of Asafo v Catholic Hospital of Apam[28] "The plaintiff's six-week-old daughter was admit-ted at the defendant's hospital. On or about 14 January 1970 the child disappeared, and nobody knew her whereabouts. The court held that the doctrine of res ipsa loquitur could be applied."[29] The court usually apply the causation in fact or But-for Test as preliminary causation of a damage as held in Kaufman v TTC.[30] In this case, the but-for test was applied to discharge the defendant of negligence. In contrast, in the case of Walker v York Finche General Hospital[31], there were multiple independently sufficient causes, which made the

But-for test unworkable. This problem was resolved by the court in Resurfice Corporation v Hanke[32]. The court in Resurfice v Hanke[33] stated two conditions for the material contribution test, that is an indivisible harm caused by independent sufficient causes: 1) impossibility in proving causation through the but-for test because of factors beyond the patient's control and; 2) the practitioner must have been negligent, and patient's injury falls within the risk of harm created by the practitioner. This often arises in situation with two or more sufficient tortfeasors. In Cook v Lewis[34], the court reasoned three categories in multiple indivisible or joint causes where the causes are examined in tandem and the tortfeasors are treated as one party: 1) agent acting on principal's behalf; 2) employee acting on employer's behalf and; 3) multiple parties acting together to bring about a common illegal, dangerous, or inherently negligent result. In rebutting Cook v Lewis[35], the court in Price v Milawski[36], used the instance of error treatment in practice in determining the remoteness or proximity of the cause of negligence. It was reasoned that if it's foreseeable that there could be subsequent negligence as a reasonable result of one's own negligence, then that person will be held liable.

(B) Duty establishment under the Ghanaian Jurisprudence

In Heaven v Pender[37], the court defined duty of care as "whenever one person is by circumstances placed in such a position with regard to another that, every one of ordinary sense who did think would at once recognize that, if he didn't use ordinary care and skill in his own conduct with regards to those circumstances, he would cause danger or injury to the person … a duty arises to use ordinary care and skill to avoid such damage/danger."[38] The decision in Heaven v Pender was founded upon the principle, that a duty to take due care did arise when the person was in such proximity to the person that, if due care was not taken, damage might be done by the one to the other. This stance was reiterated in the Ghanaian case, Allasan Kotokoli v Moro Hausa[39]. The court in Allasan Kotokoli v Moro Hausa[40], said that all that it is not enough for plaintiff to show that he had sustained injury under circumstances which may lead to suspicion that there may have been negligence on the part of the person against whom he seeks compensation. For the plaintiff to succeed, he must establish the existence of a legal duty, breach of that duty and damage suffered as a result of the breach.

IV. RECOGNIZED DUTY CATEGORISES IN THE GHANAIAN CASE LAWS

(A) Practicing without a licence

Within section 73 (j) (l) under part three of Health Professional Regulatory Bodies Act[41] practicing without a licence is provided " …73(j) engages unqualified persons to practice… 73(l) contravenes any other provision of this part commits an offence and is liable on summary

conviction to a fine of no less than 5000 penalty units or to a term of imprisonment of not more than ten years or to both and in the case of a continuing offence to a further fine of 20 penalty units for each day during which the offence continues after written notice has been served on the offender personally by the council."[42]

The court in State v Nkyi[43] held that "the student nurse was practicing without possessing the requisite registration as a nurse or under the supervision of a qualified practitioner, when he administered a drug to the sick child."[44] This act of the student nurse was in contravention of the section 73 of Part III, Health Professional Regulatory Bodies Act[45]. It is construed within the section 73 of Part III for the nurse to have being said to have "b) willingly and falsely uses a name, title or addition implying a qualification to practice as practitioner c) practices or professes to practice as a practitioner."[46] Contrary to section 73(l) of the Act.[47] Notwithstanding, the court in State v Nkyi[48] held "the student nurse for manslaughter."[49] Previous case laws in other jurisdictions involving healthcare trainees or inexperienced staff have held that they are judged by the same standards as their experienced colleagues. For instance, In Wilsher v Essex Area Health Authority[50], the Court of Appeal rejected "the claim that an inexperienced junior physician owed a lower duty of care."[51] Though the case involving the State v Nkyi[52] happened outside the hospital, there is a potential that student nurses may face a similar challenge during clinical placement particularly in the Ghanaian setting where placement support systems are generally lacking, and student nurses may be left on their own with limited supervision.

(B) Practicing out of scope

The Nurses and Midwives Practice Regulations[53] provided the grounds that presumed practicing out of scope in sub-regulations s. 37-42[54] that there are "treatment which nurse may perform with sanction of a registered medical practitioner (not necessarily in his presence) given in writing and dated on the patient's treatment form."[55] With sub-regulation s.47[56] expressly providing that there are practice that must be performed in the presence of the registered medical practitioner and with sanction this is as stated in ss. 47[57] "Administration of anaesthetics."[58] Therefore a practitioner who undertakes these exceptional treatments without the written sanction or performed in the presence of a registered medical practitioner is presumed to have acted outside the scope of practice and contravenes the section 73 (e)(g) of Part III of Health Professional Regulatory Bodies Act 2013[59]. Thus, "… liable on summary conviction to a fine of no less than 5000 penalty units or to a term of imprisonment of not more than ten years or to both and in the case of a continuing offence to a further fine of 20 penalty units for each day during which the offence continues after written notice has been served on the offender personally by the council."[60]

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The court in the case of Gyan v. Ashanti Goldfields Corporation[61], held a nurse to be liable for practicing beyond the prescribed scope. In Gyan v. Ashanti Goldfields Corporation[61] "The plaintiff took his one-year-old son to the defendant company's hospital with a complaint of high body temperature. A senior nurse who believed that the child's presenting history was suggestive of malaria infection administered a chloroquine injection without prior test or consultation with the doctor on duty. As a result of the injection, the child suffered paralysis of his right leg. It was later confirmed that the child rather had polio and the chloroquine injection complicated the condition thereby causing paralysis."[62] The defendant "denied liability on the ground that under normal conditions where there was no polio epidemic, as was the case at the material time, the incidence of polio was so low as compared with that of malaria because of the small risk of paralysis from polio. Therefore, there was nothing irregular about the decision of the nurse to administer the chloroquine injection which was the proper remedy for malaria." The trial court held that "the plaintiff failed to prove that the paralysis was attributable to any omission or negligent act of the defendants as he failed to lead any evidence to substantiate his allegation that the nurse had failed to follow the medical regulations in place."[63] However, in the Court of Appeal, "the nurse was found negligent for playing the role of the doctor. The hospital was also held vicariously liable."[64] The ruling in FB v Princess Alexandra Hospital NHS Trust[65] emphasise "the need to practice within one's scope of professional training."[66] The ruling in Gyan v. Ashanti Goldfields Corporation[67] particularly raises an interest regarding areas in Ghana that may not have access to some healthcare professionals such as physicians, requiring practitioners to "play the role of a doctor."[68]

(C) Lateness to duty

The Ghanaian courts have recognized lateness to duty or abuse of official time to duty in the case laws. In the case of Somi v Tema General Hospital[69] the court affirmed the findings of CHRAJ. In Somi v Tema General Hospital[70] "a 36-year pregnant woman was rushed to hospital with an ante partum haemorrhage. The doctor on night duty had finished earlier than expected at 4.00 a.m. in-stead of 8.00 a.m. and the morning doctor on day duty did not report until 10.00 a.m. The nurses tried to keep the patient alive, but they could not hear the heartbeat of the unborn child. Neither the mother nor the baby survived the operation."[71] It was held that "the failure of a public hospital to ensure that an emergency caesarean section operation was carried out on a patient, thus leading to her death, constituted a violation of her human right to life."[72]

(D) Refusal to treat patient

The Criminal and Other Offences Act, section 67[73] provides that "(1) where any person does an

act in good faith, for the purposes of medical or surgical treatment, an intent to cause death shall not be presumed from the fact that the act was or appeared likely to cause death."[74] Notwithstanding, this provision in section 67[75], the caveat in section 42(e)[76] put a limitation on treatment unless proper consent is procured from the patient or a legal representative. It further must be noted that consent given precludes improper or negligent medical or surgical treatment. Though in Darko v Korle-Bu Teaching Hospital[77], the court found no negligence on the part of the practitioners as provided in section 67 (1)[78], however, enforced the fundamental right to treatment as provided by the Ghanaian constitution.

In Darko v Korle-Bu Teaching Hospital[79] "A young male reported for treatment at the defendant hospital with a history of pain in his right knee, which on assessment was diagnosed as torn patella ligament. He was requested to sign a consent form to allow a surgical repair of that ligament. Instead of the right knee being operated on, the surgeons operated on the left knee of a patient. The hospital refused to further attend to the patient as a protest over a medical negligence suit the patient had initiated against them The court did not find the doctors or the hospital liable for negligence in operating on the left knee instead of the right but did find that the hospital was liable for refusing the claimant further treatment after the legal action had been initiated."[80]

V. STANDARD OF CARE, BOLAM PRINCIPLE AND RES IPSA LIQUITOR

For a duty to be established, the plaintiff must prove that the defendant was in fact breach of duty. This is a question of fact not law, this involves consideration whether the act or omission of which the defendant complained, amounts in aw to a negligent act. Breach is about duty of care which the defendant owes plaintiff. It is about the standard of care we expect person to reach in order to say that he has been careful. The standard of care is the standard of the reasonable man. The reasonable man is not perfect. It is not expected that he will never make a mistake in judgment. He must, however, take reasonable care. The test for deciding whether there has been a breach of duty is laid down in the oft-cited dictum of Alderson B. in Blyth v Birmingham Waterworks Co.[81] "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."[82] The principle held in law to the standard of care of practitioners was elucidated in Roe v Minister of Health[83] that: "The damage must be foreseeable. A reasonable man, even if he is a professional, is only expected to have such knowledge as is available at the time of the incident. A defendant is not expected to have anticipated future developments in knowledge or practice but will be

judged by reference to the state if knowledge at the time of the event."[84] This rule in Roe v Minister of Health[85] was restated in Wells v Cooper[86] as "where a person undertakes a task which requires a particular skill, she or he will be judged by the standards of a person who is reasonably competent in the exercise of that skill." In Condor v Basi[87] the standard of care in the professional community was put down in this question "The overall test was whether the defendant showed that degree of reasonable regard for the safety of others to be expected of a competent player of his class?"[88] Thus negligence act without necessary intent or recklessness could still be proven with the objective test in Condor v Basi[89]. In the Ghanaian case, Gyan v. Ashanti Goldfields Corporation[90] the nurse was "liable for negligence for practicing out of scope." In the Court of Appeal, the nurse was found "negligent for playing the role of the doctor."[91]

More so, when anyone practices a profession or is engaged in a transaction in which he holds himself out as having professional skill, the law expects him to show the amount of competence associated with the proper discharge of the duties of that profession, trade, or calling, and if he falls short of that and injures someone in consequence, he is not behaving reasonably (Imperitia culpae adnumeratur)[92] In the Ghanaian case, State v Nkyi[93] the maxim imperitia culpae adnumeratur was applied "A student nurse mistakenly injected a baby with Arsenic instead of Mepacrine. The child's condition immediately deteriorated and died within a few hours. A post-mortem examination revealed that the death of the sick child was caused by arsenic poisoning." The court held "the student nurse liable for the charge of manslaughter."[94]

Even in the same field of activity, we have the general practitioner and the specialist. The law on general and approved practice is that the defendant is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of professional opinion skilled in the particular form of treatment, even though there is a body of competent professional opinion which might adopt a different technique.[95]

These cases below summarized the Bolam principle as applied in the Ghanaian Jurisprudence.

In Agyire-Tettey v. The University of Ghana[96], the court applied the Bolam principle based on the expert witness, Dr. Maya in reacting to the Plaintiff's allegation that "the deceased should not have been discharged at the time she was discharged,"[97] Dr. Maya said "discharging patients who are deemed medically fit on post-operative day three (both obstetric and gynaecological major case) is not peculiar to the maternity ward of the Hospital. Throughout my postgraduate training and beyond, and in all the facilities I have worked, patients are discharged on post-operative day three if they are deemed medically fit."[98] Other physicians testified for the

Defendant as the case in Bolam principle. The Court, in their decision, ruled out any act of negligence on the part of the Physicians.

Furthermore, Darko v Korle-Bu Teaching Hospital[99] adopted the Bolam principle[100] and found that "the hospital had not been negligent when the left knee was rather operated on." It was observed by the court that "the patient had signed a broad consent form which empowered the surgical team to take any necessary measures for the purpose of the operation. Accordingly, if there was a medically justifiable indication for the operation of the left knee, the hospital could not be found negligent for treating it."[101] The court also pointed out "the failure of the plaintiff's lawyer to advance arguments on the scope of the consent given vis-à-vis the medical complaint reported by the boy." However, the hospital was found in "breach of its duty to provide the boy care when it refused to honour his review and physiotherapy appointments during the pendency of the suit as a protest to his legal action."[102]

In practice, the doctrine of Res Ipsa Loquitur (the matter itself is speaking)[103] has been applicable for the proof of damage in the practice.[104] [105] [106] The doctrine is applicable in cases where there is prima facie evidence of negligence, the precise cause of the incident cannot be shown, but it is more probable than not that an act or omission of the practitioner caused it and the act or omission arose from a failure to take proper care of the patient's safety. In this circumstances, the patient must succeed where 1) things causing damage is shown to have been under the control of the practitioner[107]; 2) it does not happen is used proper care[108] [109] and; 3) where there is absence of explanation by the patient.[110] [111] In Ghana, the courts have consistently followed the English Authorities, Decker v Atta and Dumgya v SCC[112]. However, in the Criminal and Other Offences Act[113], the presumption of voluntary assumption of risk, Volenti Non Fit Injuria, in the context of treatment is rebuttable in negligent treatment. The provisions are that a patient is not presumed in the same provision to have assumed risk of injury for negligent medical or surgical treatments. Section 42 (c) of Criminal and Other Offences Act[114] provides that "consent … for the purposes of medical or surgical treatment does not extend to any improper or negligent treatment."[115] CHRAJ for the plaintiff in Somi v Tema General Hospital[116] that "the defendant hospital to have unjustly caused a patient's death in violation of Article 218(a) of the Constitution."[117] Even though explicit consent was obtained for the treatment, but in accordance to the spirit of section 42 (c) of Criminal and Other Offences Act[118] such consent precludes improper or negligent treatment. Therefore, the extent of this defence of Volenti Non Fit Injuria[119] be used by practitioners is constrained in the Ghanaian constitutional and criminal law context. In the cases where Res Ipsa Liquitor was raised on the part of the patient and instances of negligence on the part of the practitioner, the burden of

persuasion falls on the practitioner to rebut the negligent presumption of the Ghanaian laws. In contrast to the cases stated under the maxim Res Ipsa Liquitor, the court in Klutse v Nelson[120] observed the misapplication of the doctrine. The court in Klutse v Nelson[121] allowing the appeal said that "the maxim res ipsa liquitor applies only where the causes of an accident are unknown. In this case, since the plaintiff professed to know the cause of the accident, the trial judge was wrong in applying the maxim to throw the burden of disproof of negligence defendants."[122] The court further opined that "the maxim res ipsa liquitor applies only where the cause(s) of the occurrence are unknown but the inference of negligence is clear from the nature of the accident and the defendant is therefore liable if he doesn't produce evidence to counteract the inference. If the causes are sufficiently known, the case ceases to be one where the facts speak for themselves and the Court has to determine whether from the facts, negligence is to be inferred."[213] Moreover, in Brown v Saltpond Ceramics Ltd[124], the court dismissing the appeal held that "in the instant case, no direct evidence was led to establish negligence and in the absence of objective facts from which negligence could be inferred the maxim was inapplicable."[125]

(A) Breach of duty, causation and resultant damage

In negligence claims, the burden of proof is on the claimant to establish that the negligent act caused, or substantially contributed to, the damage or injury which he or she suffered. The law will not provide compensation for damage that it regards as too remote from the accident itself. As noted by Winfield and Jolowicz[126] "Even if the plaintiff proves every other element in tortious liability he will lose his action or, in the case of torts actionable per se, fail to recover more than nominal damages, if the harm which he has suffered is too remote a consequence of the defendant's conduct, or, as it is somewhat loosely said, if the damage is too remote. Remoteness of damage is thus concerned with the question whether damages may be recovered for particular items of the plaintiff's loss."[127] This observation by Winfield and Jolowicz[128] was affirmed by decision in Agyire-Tettey v. The University of Ghana[129] "The plaintiff's late wife underwent treatment for fertility issues at the University of Ghana Hospital before she got pregnant and utilised ante-natal services at the same hospital where she was booked to undergo a caesarean section."[130] According to the plaintiff, his wife with "her knowledge of customer service in the medical field from her previous job as a Customer Service Lecturer for Doctors and Nurses enquired from both consultants if there were any risks associated with the removal of fibroid during Caesarean delivery and was told it was a normal and regular practice without any risks."[131] Following the surgery, "the plaintiff's wife was discharged around the third post-operative day. Some complications resulted following discharge which led to readmission of

the plaintiff's wife but later died at the Korle-Bu Teaching Hospital." [132] The court found that "based on all of the evidence that on the balance of probabilities there is no credible evidence that the Defendants' servants were negligent when they treated the deceased as a patient at the University of Ghana Hospital. It is clear that the deceased death cannot be attributed to the doctors who treated her because they fell short of the standard required of them. There is no cogent evidence that the 1st Plaintiff's wife death was due to the negligent actions and/or in actions of the Defendants' servants. In arriving at the above conclusion, I reject the sole evidence of the Plaintiffs proffered by the 1st Plaintiff as bald allegations which were not backed by any acceptable cogent evidence" [133] The Court, in their decision, ruled "out any act of negligence on the part of the Physicians." [134]

In Re Polemis[135] the court held that "where a duty of care is owed, a defendant is liable for all the direct consequences of negligent conduct, no matter how unusual or unexpected." [136] This principle was applied in Smith v Leech Brain and Co. Ltd.[137], the court held that "the amount of damage that a victim suffers as the result of the negligence depends upon the individual's characteristics and constitution. This is known as the 'egg-shell skull' principle: tortfeasors must take their victim as they find them." [138] However, in Wagon Mound Case[139] this principle in Re Polemis Case[140] and the Egg-shell skull rule was objected to and the court said that "it is not sufficient to have shown there to be breach; but the breach must also be shown to be a reasonably foreseeable for the incidence to occur and the consequence thereof." [141] These two decisions had been contentious in determining consequences of damage in the courts. The Supreme Court of New South Wales [142] held "defendant liable for the extensive damage caused …"[143] and in so doing followed Re Polemis but the Privy Council[144] reversed their decision and held that "Re Polemis should no longer be regarded as good law. It is the foresight of the reasonable man which alone can determine responsibility. The Polemis rule by substituting 'direct' for 'reasonably foreseeable' consequence leads to a conclusion equally illogical and unjust."[145] Therefore, the crucial factor that was emphasized by the Privy Council[146] was that "the kind of damage must be reasonably foreseeable, although neither the extent of the damage nor the precise manner of its occurrence need be reasonably foreseeable."[147] In practice, the courts tend to follow Re Polemis Rule[148] when it comes to personal injury cases[149] but Wagon Mound rule[150] [151] when it comes to property damage.[152]

The courts have held in the following Ghanaian cases as prima facie evidence establishing breach of duty and causation in fact and law: practicing without a licence (State v Nkyi [1962] GLR 197)[153]; abuse of official time-absence/lateness to duty[154]; refusal to treat patient[155] indeterminate cause [res ipsa loquitur][156]; practicing out of scope[157]. However, the Ghanaian

court when found negligence without causation awards nominal damages as in the case of Agyire-Tettey v. The University of Ghana[58]

VI. DUTY TO THE UNBORN CHILD IN THE GHANAIAN LAWS

There are special duties of care categories to the unborn child. These include prenatal injuries, preconception wrongs, wrongful birth/wrongful life and wrongful pregnancy. In the case of Arndt v Smith[159] [160], a mother contracted chicken pox and was not warned of the potential harm to her unborn child. The court would not find wrongful life in this case. But that of Bovingdon v Hergott[161] [162] found that the taking of fertility drugs that led to twins being born prematurely made practitioner liable. In the issues of wrongful pregnancy, the courts have found that it devalues human life to call this a loss and compensate for it. The court in Asafo v Catholic Hospital of Apam[163] held that "…on the evidence the plaintiff was entitled to damages but to place a monetary value on a human being was against public policy." Notwithstanding, the court in Kealy v Berezowski[164] held that there is a possibility for recovery for wrongful pregnancy if he client can show that a lack of finance is the reason the parents did not want to have a child. It has to be noted here that motive comes into play, despite normally not being considered in civil cases.

The common law recognise no claim for "wrongful life"[165] whereby a child claim that she or he would not have been born at all, but for the defendant's negligence. In McKay v Essex Area Health Authority[166], "the plaintiff was born disabled as a result of an infection suffered by her mother, whilst plaintiff was in her womb. Plaintiff alleged that but for the negligence of the defendants – the Health Authority and the practitioner – the mother would have had an abortion under the Abortion Act to terminate the child's life. Plaintiff claimed damages on grounds that the practitioner's failure to diagnose the disease and to treat it accordingly and against the Health authority for her having suffered entry into life in which her injuries are highly debilitating and distressful loss and damage."[167] It was reasoned that "though it was lawful for a doctor to advise and help a mother to have an abortion under the abortion Act, the doctor was under no legal obligation to the foetus to terminate its life and he is not liable for negligence."[168] The court commented further "as a matter of policy no action lay for negligently bringing a child into the world even if the risk of the child being born deformed should have been known; that any case no possible measure of damage could be found which would evaluate the difference between plaintiff's present condition and non-existence."[169] In contrast to the common law position, the Ghanaian law explicitly establishes a prima facie case for wrongs to unborn child, as stated in the Civil Liability Act, section 34[170] provides "For the avoidance of doubt it is hereby declared

that the law relating to wrongs shall apply to an unborn child for his protection in like manner as if the child were born, provided that child is subsequently born alive." [171] And that of the stance in the Criminal and Other Offences Act, Section 58(2) (b) (c) [172] provide "(2) It is not an offence under subsection (1) of this section if an abortion or a miscarriage is (b) where the continuance of the pregnancy would involve risk to the life of the pregnant woman or injury to her physical or…(c) where there is substantial risk that if the child were born, it may suffer from, or later develop, a serious physical abnormality or disease." [173] Therefore, the common law position has been modified by the Ghanaian laws and thus the Ghanaians laws presume that duty on the part of practitioner not facilitate a situation that could endanger the life of a pregnant woman and that of deformities that may ensue as a result of omission or inaction of a practitioner to have prevented such occurrence. This is a prima facie presumption of the Ghanaian laws on negligence on the part of the practitioner and had to be rebutted on the balance of the probabilities to discharge him or her of negligence. Consistent with section 58 (2) (b) (c) [174] the mother who might lawfully have had an abortion may still claim for the expense of bringing up the child conceived owing to the negligent failure of a sterilization operation. In these case of Emeh v Kensington and Chelsea-Westminster[175], the facts were that "the plaintiff who had 3 normal children underwent a sterilization operation at the defendant's hospital. Later, she discovered that she was pregnant and she refused to have an abortion. She subsequently gave birth to a child with congenital abnormalities who required constant medical and parental supervision. Plaintiff instituted the action to claim damages for the pregnancy, birth and upkeep of the child. The court of first instance held that the operation was performed negligently and the plaintiff was entitled to damages accrued before she discovered the pregnancy; that by reason of the failure to have an abortion, she was entitled to recover damages after the pregnancy." [176] It was held on appeal that "the sterilization operation was for the object of avoiding further pregnancy and birth, it was unreasonable after the period of pregnancy which had elapsed to expect the plaintiff to undergo abortion. Therefore, the plaintiff's failure to have an abortion was not unreasonable as to eclipse the wrongdoing of the defendants. It was not contrary to public policy to recover damages for the childbirth and that plaintiff was entitled to damages for her financial loss caused by the negligent sterilization operation." [177]

Notwithstanding, Article 13 (1) [178] that provides that: "no person shall be deprived of his life intentionally…"[179] The question had been whether abortion violate this act? The exceptions to this Ghanaian constitutional provision were laid down in sections 58 and 67, Criminal and Other Offence Act.[180] The law provides at section 58[281] that "(2) It is not an offence under subsection (1) of this section if an abortion or a miscarriage is caused in any of the following circumstances

by a registered medical practitioner specialising in gynaecology or any other registered medical practitioner in a Government hospital or in a private hospital or clinic registered under the Private Hospitals and Maternity Homes Act, 1958 (No. 9) or in a place approved for the purpose by legislative instrument made by the Secretary: (a) where the pregnancy is the result of rape, defilement of a female idiot or incest and the abortion or miscarriage is requested by the victim or her next of kin or the person in loco parentis, if she lacks the capacity to make such request; (b) where the continuance of the pregnancy would involve risk to the life of the pregnant woman or injury to her physical or mental health and such woman consents to it or if she lacks the capacity to give such consent it is given on her behalf by her next of kin or the person in loco parentis; or (c) where there is substantial risk that if the child were born, it may suffer from, or later develop, a serious physical abnormality or disease.

(3) For purposes of this section 'abortion or miscarriage' means the premature expulsion or removal of conception from the uterus or womb before the period of gestation is completed."[182]

Furthermore, Criminal and Other Offences Act made a saving in case of treatment of ailment as stipulated in section 67[183] that "(1) where any person does an act in good faith, for the purposes of medical or surgical treatment, an intent to cause death shall not be presumed from the fact that the act was or appeared likely to cause death. (2) Any act which is done, in good faith and without negligence, for the purposes of medical or surgical treatment of a pregnant woman is justifiable, although it causes or is intended to cause abortion or miscarriage, or premature delivery, or the death of the child."[184] Noteworthy is that in this provision as made in section 67[185], the caveat in section 42(e)[186] put a limitation on treatment unless proper consent is procured from the patient or his or her a legal representative in cases of disability or drunkenness. Section 42 (e)[187] provides that "if a person is intoxicated or insensible, or is from any cause unable to give or withhold consent, any force is justifiable which is used, in good faith and without negligence, for the purposes of medical or surgical treatment or otherwise for his benefit, unless some person authorised by him or by law to give or refuse consent on his behalf dissents from the use of that force."[188] However, if must further be noted that consent given precludes improper or negligent medical or surgical treatment[189] (Section 42 (c) of Criminal and Other Offences Act).

(A) Liability in causing harm to the child

Causing harm to child at birth has been explained in section 61 of Criminal and Other Offences Act[190] thus "(1) Where harm is caused to a child during the time of its birth, or where, upon the discovery of the concealed body of the child, harm is found to have been caused to it, such harm

shall be presumed to have been caused to the child before its death. (2) The time of birth includes the whole period from the commencement of labour until the time when the child so becomes a person that it may be murder or manslaughter to cause its death."[191] The penal sanction on section 61[192] was provided by section 60[193] as "whoever intentionally and unlawfully causes harm to a living child during the time of its birth shall be guilty of second degree felony."[194]

(B) Liability in child concealment

Concealment of body of child can be explained in the language of section 63 of Criminal and Other Offences Act[195] as "(1) any secret disposition of the body of a child, whether it be intended to be permanent or not, may be a concealment. (2) The abandonment of the body of a child in any public place may be a concealment, if the body is abandoned for the purpose of concealing the fact of its birth or existence. (3) Section 62 shall not apply to the case of a child of less than six months growth before its birth. (4) Section 62 shall not apply to the case of intent to conceal the birth, existence, or death of a child, or the manner or cause of its death, from any particular person or persons only, but it is requisite that there should be an intent to conceal the same from all persons, except such persons as abet or consent to the concealment. (5) Section 62 applies to the mother of the child as to any other person."[196] Therefore, if a practitioner conceals or abet to conceal a body of a child, section 62 of Criminal and Other Offences Act[197] sanctions "Whoever conceals the body of a child, whether such child was born alive or not, with intent to conceal the fact of its birth, existence, or death, or the manner or cause of its death, shall be guilty of misdemeanour."[198] Concealment of a child's body can be illustrated as in subsection (4) (a) of Section 63, Criminal and Other Offences Act[199]: "A woman conceals from her father or mother the body of her child. She is not guilty of concealment of birth unless she intended to conceal it from persons, generally. (b) a woman conceals the body of her child from all persons except a nurse who helped her in the concealment. The woman is guilty of concealment of birth notwithstanding that she did not conceal it from her [nurse] accomplice."[200] In the case of Asafo v Catholic Hospital of Apam[201] "The plaintiff's six-week-old daughter was admitted at the defendant's hospital. On or about 14 January 1970 the child disappeared, and nobody knew her whereabouts. The hospital failed to offer a sound explanation for the occurrence."[202] The court reasoned that "a child of six weeks old was no different from an inanimate object which was incapable of independent movement but depended on the support of whoever had its custody."[203] The court held "the nurses to have abetted concealment of the missing six weeks old child."[204]

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VII. CONCURRENT "TORTFEASANCE" AND MULTIPLICITY IN NEGLIGENCE ACTIONS ON PRACTICE

Section 4, Part II of Ghanaian Civil Liability Act[204] explained concurrent tort as "the wrongs of two or more persons which result in the same damage to another person; while concurrent tortfeasors wrongdoers who are responsible for the same damage to another person whether by reason of the same or several wrongs."[205] In the section 5, Part II of Ghanaian Civil Liability Act[206] indicated that "judgment recovered against a wrongdoer shall not be a bar to an action against any concurrent wrongdoer in respect of the same damage."[207] Thus on the bases of section 4 and section 5, Part II of Ghanaian Civil Liability Act[208] multiplicity of action in negligence against the tortfeasor(s) are not precluded from the jurisprudence. Therefore, multiple actions in negligence are actionable in the court against tortfeasors. This position of the Ghanaian laws were reiterated in section 29, Part II of Ghanaian Civil Liability Act[209] that "the fact that a person— (a) had an opportunity of avoiding the consequences of the act of another but negligently or carelessly failed to do so; or (b) might have avoided those consequences by the exercise of care; or (c) might have avoided those consequences but for previous negligence or want of care on his part, shall not free that other from responsibility for such consequences."[210] This position of the Ghanaian law reflect the recent decision held in Resurfice Corporation v Hanke[211] principle for material contribution. Thus, the Ghanaian law had taken the position in the past even as far back as 1963 (section 29, Part II of Ghanaian Civil Liability Act) [212], before the early 2000s decision in Resurfice Corporation v Hanke.[313] Therefore as held in section 30, Part II of Ghanaian Civil Liability Act[214] "(1) The fact that a person causing and a person suffering injury are fellow workmen engaged in a common employment and under a common employer shall not relieve the employer from responsibility for the results of the injury. (2) Any provision in a contract, whenever made, relieving him from responsibility or limiting his liability is void."[215] The health facilities are therefore not absolved of liability even if the facilities expressly state such clause in the contract of employment of the practitioners employed. The law declares such contract void ab initio and has no effect if the practitioner were to be held liable in negligence (section 30(2), Part II of Ghanaian Civil Liability Act) [216] The facility or employers will be held vicariously liable for the act or omission of the practitioner (section 30(1), Part II of Ghanaian Civil Liability Act).[317] In Gyan v. Ashanti Goldfields Corporation[218] "The plaintiff took his one-year-old son to the defendant company's hospital with a complaint of high body temperature. A senior nurse who believed that the child's presenting history was suggestive of malaria infection administered a chloroquine injection without prior test or consultation with the doctor on duty. As a result of the injection, the child

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suffered paralysis of his right leg. It was later confirmed that the child rather had polio and the chloroquine injection complicated the condition thereby causing paralysis. The defendant denied liability on the ground that under normal conditions where there was no polio epidemic, as was the case at the material time, the incidence of polio was so low as compared with that of malaria because of the small risk of paralysis from polio. Therefore, there was nothing irregular about the decision of the nurse to administer the chloroquine injection which was the proper remedy for malaria."[219] The trial court held that "the plaintiff failed to prove that the paralysis was attributable to any omission or negligent act of the defendants as he failed to lead any evidence to substantiate his allegation that the nurse had failed to follow the medical regulations in place."[220] However, in the Court of Appeal, "the nurse was found negligent for playing the role of the doctor. The hospital was also held vicariously liable."[221]

The Ghanaian laws posit that actions on negligence if caused death then the persons in locus standi can pursue such action against the tortfeasor(s) (Section 15 (a), Part III of Ghanaian Civil Liability Act).[222] As provided for in Section 16 part III of the Civil Liability Act[223], on action where death caused by wrongful act provides "(1) Where the death of a person is caused by the fault of another such as would have entitled the party injured, but for his death, to maintain an action and recover damages in respect thereof, the person who would have been so liable shall be liable to an action for damages for the benefit of the dependents of the deceased."[224] Section 15 (a), Part III of Ghanaian Civil Liability Act[225] indicated that persons in locus standi to sue as a dependent "when used in relation to a citizen of Ghana anyone of those persons mentioned in the First Schedule [of Ghanaian Civil Liability Act] according as the family is based on the paternal or maternal system."[226]

(A) Medico-Legal Jurisprudence on patients' medical records

There are constitutional grounds for right of information, Article 18 (2) of the Ghanaian Constitution[227] states that "18(2) No person shall be subjected to interference with the privacy of his [right]… for the protection of health or … for the… protection of the rights or freedoms of others."[228] This privacy provided by the Ghanaian constitution was mentioned in University of Cape Coast v. Anthony[229], thus in the course of protection of the rights or freedoms of others another person's privacy shall not be used as a shield for the others freedoms or rights. Moreover, in Article 21(1)(f)[230], the Ghanaian Constitution provided the guaranteed right to information to the citizen. Therefore, violation of right to personal medical records of a patient is not countenanced by the Ghanaian laws. In the Ghanaian case laws the courts have held that medical records are not properties of the health care facilities and that the patients has that right to information if demanded of the facility make same available to him or her. In Vaah v Lister

Hospital and Fertility Centre [231] "A client who was under the care of the defendant hospital sued the hospital, relying on the right to information guaranteed under Article 21(1) (f) of the 1992 Constitution of Ghana (the Constitution), when she sought to recover her medical record to clarify the cause of death of her stillborn baby."[232] The applicant's case is that "her fundamental human rights have been violated by the respondent when the latter refused to release her medical records to her." The court analysed "the constitutional provision on freedom of information and noted that the excuse provided by the respondent in denying access to the applicant was not covered by the qualifications contemplated by the Constitution for limiting freedom of information."[233] It was held that "the plaintiff was entitled to a copy of her medical record from Lister Hospital."[234] Furthermore, the court did not only enforced the constitutional rights of the patients to its medical records in the case of Jehu Appiah v Nyaho Healthcare Limited[335], but awarded the plaintiff compensation for the refusal to be given access to her medical records as a matter of right. In Jehu Appiah v Nyaho Healthcare Limited[236] "The plaintiff accused the facility of allegedly dam-aging her fallopian tube, which nearly led to her death. According to the case, the plaintiff, upon conception utilised antenatal care services at the respondent hospital. But at a point, she claimed she had to undergo a life-saving surgery at a different health facility due to the 'actions and inactions' of the Nyaho hospital. After the life-saving surgery, she made a formal complaint to Nyaho Healthcare Limited, after which she was promised investigations into the matter and the results communicated to her."[237] The plaintiff noted that "all efforts to compel the respondent hospital to release her medical documents (including scans, tests, diagnosis, and treatment) proved futile." The court found that "the healthcare service provider had not in its defence denied possession and custody of the documents, as such, must release the information." The court held that "the complete medical records be released to the patient. An award of 2000 Ghana Cedis was awarded to the patient."[238]

VIII. CONCLUSIONS

This paper expounded that the Ghanaian laws categorises negligence cases based lateness to duty, indeterminate duty, practicing without licence, refusal to treat patient and practicing out of scope. The Ghanaian medico-legal Jurisprudence had applied the common law principles in Bolam and that of Res ipsa liquitor to hold practitioners to their standards of care. The Ghanaian laws had modified the common law position that had not consistently applied the duty or liabilities toward the unborn child. The Ghanaian medico-legal context expressly stipulated in both the Civil Liability Act and Criminal and Other Offences Act the explicit duty towards the unborn child and the mother of that unborn child. Multiple actions are allowed under both the criminal and civil laws of Ghana against practitioners who materially and independently

contributed to the injuries or death of a patient and that facilities shall be held vicariously liable as well. The Ghanaian laws makes contract of employment that provides clauses to limit or absolve employers from liabilities of employees void and initio and of no effect in law. The application of the material contribution test had been codified in the Ghanaian Civil Liability Act to deal with concurrent tortfeasance. Thus concurrent tortfeasance and multiple negligence actions are allowed in the Ghanaian medico-legal jurisprudence. The Ghanaian Constitution and other laws have granted and guaranteed the privacy and information rights of the patient to his medical records. Therefore, the Ghanaian courts would not feel reluctant in enforcing these rights of the patient or client who undergoes any form of treatment, because the Ghanaian laws do not countenanced the violations of these guaranteed rights. Thus, practitioners should note that the patient has the unqualified access to his or her record for any reason whatsoever for retrieval of that same records for any purpose of his or choice without question in the Ghanaian law context.

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