MEDICAL NEGLIGENCE ERROR AND MALPRACTICE AS VIOLATION OF THE RIGHT TO THE PROHIBITION AGAINST TORTURE, CRUEL, INHUMAN AND DEGRADING TREATMENT OF PATIENTS IN NIGERIA*

Abstract

The Nigerian medical system on which a large percentage of Nigerians depend for healthcare is bedeviled with numerous challenges which cause systemic dysfunction and inefficiencies for safe quality healthcare delivery. This problem worsens with the incidents of medical negligence, error and malpractice which are caused by medical practitioners on the one hand and government on the other through institutional weaknesses with the consequences for patients amounting to the violation of the Prohibition against Torture Cruel Inhuman and Degrading Treatment of Patients. As regards Nigerian medical professionals, the occurrence of harm to patients is prohibited under a medical rights enforcement mechanism. However, in the face of the continuing occurrence of these events, the objective of this study was to determine whether patients have fundamental rights and whether harm to patients through medical negligence, error and malpractice was in violation of their fundamental right to the Prohibition against Torture Cruel Inhuman and Degrading Treatment of Patients. Pursuant to this, the doctrinal research method was employed to undertake the evaluation through reliance on available Library literature, Journal publications and Internet sources. It was found that the harmful consequences due to medical negligence, error and malpractice are in violation of the fundamental right to liberty in Nigeria. Furthermore, it was found that although there is the problem of the significant violation of the fundamental right to the Prohibition against Torture Cruel Inhuman and Degrading Treatment of Patients in medical practice in Nigeria, fundamental rights law was not been enforced to prevent this from happening or provide remedy upon occurrence. The identification of this problem, offered the opportunity for the use of fundamental rights enforcement procedure as a basis for medical malpractice claim. Accordingly, it was recommended that the fundamental right be enforced in medical practice in Nigeria through the fundamental rights enforcement procedure.

Keywords: Right to the Prohibition against Torture Cruel Inhuman and Degrading Treatment of Patients, Medical Negligence, Error, Malpractice, Fundamental Rights, Fundamental Rights Enforcement Procedure

1. Introduction

Experience demonstrates that patients suffer harm when receiving treatment in Nigerian hospitals in many different ways. Practically, one of the ways is through the violation of the prohibition against Cruel, Inhuman and Degrading treatment of patients which offends their fundamental rights in terms of the fundamental rights rules provided for in the Constitution of Nigeria, 1999 (as amended).[1] The fundamental rights of patients include the right to life,[2] the prohibition against torture, inhuman and degrading treatment and punishment,[3] the right to liberty,[4] the right to privacy and confidentiality[5] and the prohibition against discrimination.[6] This study will analyze and spell out clearly how medical malpractice claims can be made under the fundamental rights enforcement procedure as it pertains to the fundamental right to the prohibition against Cruel, Inhuman and Degrading treatment of patients in Nigeria.

2. Medical Negligence, Error and Malpractice

Medical negligence derives its origins from the tortious principle of negligence.[7] The essence of the tort of negligence was that a person should be subject to liability for carelessly causing harm to another.[8] Relatedly, medical negligence constitutes an act or omission by a medical practitioner which breaches the duty of care the practitioner owes to the patient resulting to injury or death of the patient.[9] Generally, errors are unintentional

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[1] The 2009 Rules was made by the then Chief Justice of Nigeria, Hon. Justice, I. L. Kutigi, CJN (as he then was) pursuant to S. 46 (3) of the 1999 Constitution, which empowers the Chief Justice of Nigeria to make Rules with respect to practice and procedure of a High Court for the purpose of Enforcement of Fundamental Rights. Flowing from the above, breach of Fundamental Rights in Nigeria can now be redressed under the Fundamental Rights (Enforcement Procedure) Rules, 2009.

[2] Section 33 Constitution of Nigeria, 1999 (as amended).

[3] Section 34 Constitution of Nigeria, 1999 (as amended).

[4] Section 35 Constitution of Nigeria, 1999 (as amended).

[5] Section 37 Constitution of Nigeria, 1999 (as amended).

[6] Section 42 Constitution of Nigeria, 1999 (as amended).

[7] Ojo v. Gharoro & Ubth Management Board (2006)10 NWLR, 987

[8] JH, Deering, *The Law of Negligence*, (Book on Demand Ltd, 2020), p. 45.

[9] FN, Chukwuneke, 'Medical Incidents in Developing Countries: A few case studies from Nigeria' [2015] (18(7) *Niger J Clin Prac;* 20

because an error occurs 'when someone is trying to do the right thing, but actually does the wrong thing'.[10] Thus, a medical error is a commission or an omission with potentially negative consequences to the patient that would have been judged wrong by skilled and knowledgeable peers at the time it occurred, independent of whether there were any negative consequences.[11] A hospital, doctor, or other health care professional is expected to provide a certain standard of care. Thus, medical malpractice is a legal cause of action that occurs when a medical or health care professional, through a negligent act or omission, deviates from standards in their profession, thereby causing injury to a patient.[12]

3. Medical Malpractice Claims under the Prohibition against Cruel, Inhuman and Degrading Treatment

The prohibition against Cruel, Inhuman and Degrading treatment (CIDT) has its forerunner in the concept of medical torture. Ordinarily, torture is an extreme form of maltreatment of individuals using different types of physical and psychological techniques.[13] Torture and other forms of ill-treatment have been recognized as one of the worst crimes against humanity and violation of human rights. As rightly observed, 'Torture is not only one of the vilest act that one human being can inflict on another, it is also among the most insidious of all human rights violations.'[14] In this regard, some authorities are of the view that the general aim of torture is to destroy a human being, destroy his/her dignity and self-esteem.[15] The problem of torture is commonly associated with the security and other relevant agencies of state.[16] However, torture also occurs in medical practice and is referred to as medical torture. Medical torture is used to describe the involvement and sometimes active participation of medical professionals who are agents of state in acts of torture, either to judge what victims can endure, to apply treatments which will enhance torture, or as torturers in their own right.[17] Medical torture may be called medical interrogation if it involves the use of expert medical knowledge to facilitate interrogation or corporal punishment, in the conduct of torturous human experimentation or in providing professional medical sanction and approval for the torture of victims.[18] The term 'medical torture', also covers torturous scientific experimentation upon unwilling human subjects.[19]

Apart from torture, cruel, inhuman and degrading treatment (CIDT) also occur in medical practice, however, it is distinguishable from torture. As rightly observed by Nowak, 'CIDT can be distinguished from torture in that it may occur out of intentional and negligent actions.'[20] In terms of the violation of the prohibition against cruel, inhuman and degrading treatment (CIDT)[21] it is submitted that patients are sometimes injured due to the negligence, error and malpractice of medical practitioners. Conduct such as withholding care or engaging in treatment that intentionally or negligently inflicts severe pain or suffering for no legitimate medical purpose, failure to ask about distressing symptoms from injured patients, ignoring or dismissing patient as inevitable, offering inadequate pain treatment to injured patients, or openly avoiding injured patients[22] will implicate cruel, inhuman and degrading treatment. Pursuant to this, Article 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), and the United Nations special

[10] B, Runciman, et al, *Safety and Ethics in Healthcare: A Guide to Getting it Right,* (Ashgate, 2007), p. 5.
[11] JO, Lokulo-Sodipe, 'An Examination of the Legal Rights of Surgical Patients under the Nigerian Laws' [2009] (4)(1) *J Law Conflict Resolut.;* 79.
[12] Physician Weekly, 'Proving a Medical Malpractice Case I – Proving Negligence (Part I)' <https://www.physiciansweekly.com/proving-a-medical-malpractice-case-i-proving-negligence-part-i> Accessed 29/09/2021.
[13] B, Karumi, 'Protection of the Right against Torture under International Human Rights Law: A Critical Appraisal' [2015] (37) *Journal of Law, Policy and Globalization;* 204-205.
[14] Statement made by United Nations Secretary-General, Koffi Annan on the International Day in Support of Victims of torture on June 26, 2000; Quoted in Study on the Domestication of the UNCAT by Legal Research Initiative (LRI)
[15] DJ, Miller, 'Holding States to their Convention Obligation: the United Nations Convention against Torture, Cruel, Inhuman and Degrading Treatment and the need for Broad Interpretation of State Action' [2003] (17)(2) *Georgetown Immigration Law Journal*; 229.
[16] L, Wendland, *A handbook on state obligations under the UN Convention against Torture,* (Geneva, 2002), pp. 28-29.
[17] MG, Piwuna, 'The Acts of Torture and Other Forms of Ill-Treatment of Citizens by Some Institutions and the Role of Criminal Justice System in Nigeria' [2015] (5)(10(1) *International Journal of Humanities and Social Science*; 216.
[18] Ibid.
[19] Ibid.
[20] M, Nowak, E, McArthur, *The United Nations Convention Against Torture. A Commentary* (Oxford University Press, 2008), p. 553.
[21] Section 34(1), Chapter IV: Fundamental Rights, Constitution of Nigeria, 1999 (as amended); Article 1, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987; Article 7, International Covenant on Civil and Political Rights (ICCPR). Article 37, United Nations Convention on the Rights of the Child (CRC). Article 15, Convention on the Rights of Persons with Disabilities (CRPD). Article 5, African Charter on Human and Peoples' Rights, (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986).
[22] Human Rights Watch, 'Torture and Cruel Treatment in Health Settings' <https://www.hrw.org/news/2010/01/20/torture-and-cruel-treatment-health-settings> Accessed 16/02/2019.

rapporteur on torture and other cruel, inhuman or degrading treatment or punishment suggest that, at a minimum, CIDT covers treatment as deliberately causing severe suffering, mental or physical, which in the particular situation is unjustifiable.[23] In this regard, the United Nations Human Rights Committee has stated that prohibitions against torture and CIDT apply not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.[24]

The legal basis for addressing the violation of the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment in Nigeria will now be discussed.

4. Prohibition against Torture, Cruel, Inhuman and Degrading Treatment under the Nigerian Constitution, National, International and Regional Law

Torture, cruel, inhuman and degrading treatment is prohibited under international, regional and national instruments. Nigeria being a signatory to most international and regional human rights instruments has reflected the prohibition into its local legislations starting with its *grund norm*, the constitution. In this regard, section 34 of the Constitution of Nigeria, 1999 (as amended). provides that:

(1) Every individual is entitled to respect for dignity of his person, and accordingly-
  (a) no person shall be subjected to torture or to inhuman or degrading treatment.
  (b) no person shall he held in slavery or servitude; and
  (c) no person shall be required to perform forced of compulsory labour.

Clearly, section 34 provides for the right to the dignity of human person. In terms of legislative measures, apart from relevant provisions of the Evidence Act, the Penal Code and the Criminal Code, Nigeria also enacted the Geneva Conventions Act[25] which domesticated the 1949 Geneva Conventions which prohibits among other things, 'torture or inhuman treatment, including biological experiments'.[26] Importantly, the Anti-Torture Act 2017 was passed by the 8th National Assembly and signed into law by President Muhammadu Buhari on 29th December, 2017. The Anti-Torture Act is an Act that makes comprehensive provisions for penalising the acts of torture and other cruel, inhuman and degrading treatment or punishment, and prescribes penalties for the commission of such acts; and for related matters.

Regionally, Article 5 of the African Charter on Human and Peoples' Rights, 1981 prohibits all forms of exploitation and degradation of man, particularly torture, cruel, inhuman or degrading punishment and treatment. In this regard, Article 5 provides:

> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of particularly slavery, slave trade, torture, cruel, inhuman or punishment and treatment shall be prohibited.

Importantly, victims of torture and ill-treatment have a right to redress. This right is reflected in a host of international and regional human rights instruments.[27] In addition to these, the UN Committee Against Torture issued a General Comment on Article 14 of the Convention, which concerns the right to redress whereby it stated that States should have the necessary legislation in place to implement their obligations to afford victims an effective remedy and the right to obtain adequate and appropriate redress.[28] At the same time, it highlighted the importance of States ensuring that victims are able to pursue redress through transparent and accessible procedures that enable and foster victim participation.[29] Added to this, the African Commission's Committee for the Prevention of Torture in Africa has also developed a General Comment on the right to redress for victims of torture.[30] To give teeth to these provisions, it is the requirement that States need to ensure that their legal and institutional frameworks enable victims of torture and ill-treatment to access and obtain reparation, including

[23] M, Nowak, 'What Practices Constitute Torture?' [2006] (28) *Human Rights Quarterly;* 821.

[24] United Nations Human Rights Committee, General Comment 20, Article 7 (forty-fourth session, 1992). Compilation of general comments and general recommendations adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev1 at 30, paragraph 5.

[25] Cap 162, Laws of the Federation of Nigeria, 1990

[26] Articles 50, 51, 130 and 147 of the second, third and fourth Geneva Conventions, 1949 respectively.

[27] This include the United Nations Convention on Torture, (UNCAT), the International Convention on Civil and Political Rights, (ICCPR), the African Charter on Human and Peoples' Rights (ACHPR), the African Fair Trial Standards, the Robben Island Guidelines and the UN Basic Principles on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, General Assembly resolution 60/147 of 16th December, 2005. ('UN Basic Principles and Guidelines').

[28] UN Committee Against Torture, General Comment No.3.

[29] Supra, paras. 29-30.

[30] African Commission, Report on Technical Meeting on Drafting a General Comment On The Right To Redress For Victims Of Torture And Ill-Treatment Under Article 5 Of The African Charter On Human And Peoples' Rights, July, 2015, at http://www.achpr.org/news/2015/09/d191

restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. In relation to medical practice, prohibitions in international human rights law forbidding torture and other cruel, inhuman or degrading treatment (CIDT) apply to conditions of confinement, including in medical and other institutions. In this regard, Article 2(1) of the CAT provides that: 'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'.[31] Also, the International Covenant on Civil and Political Rights (ICCPR), provides in Article 7, that: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation'. In its interpretation of Article 7, the UN Human Rights Committee stated that it protects in particular patients in teaching and medical institutions. Pursuant to this, Article 1 of the Declaration of Tokyo[32] provides that doctors shall not countenance, condone or participate in the practice of torture; or other forms of cruel, inhuman or degrading procedures, in all situations, including armed conflict and even civil strife.

5. Exceptions to the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment under the Nigerian Constitution

There are no exceptions to the prohibition against Torture, Cruel, Inhuman and Degrading Treatment. This is to ensure that bodily dignity is never violated. The absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment (ill-treatment) is non-derogable under international law which is binding on Nigeria. Thus, even in times of war or other emergencies threatening the life of the nation the state is not to derogate.

6. Medical Negligence, Error and Malpractice as conduct in violation of the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment

Evidence demonstrates that Torture, Cruel, Inhuman and Degrading Treatment are conducts that are in violation of the fundamental right to prohibition against torture, inhuman and degrading ill treatment of patients. Examples include victims of state torture are denied needed medical care. Prisoners lack basic health services and are forced to subsist on very little food and with inadequate clothes and no heat during the cold and unfriendly weather. Mentally ill prisoners are punished for symptoms of their illness, including self-mutilation and attempted suicide. National laws restricting opioid availability and access cause cancer and AIDS patients to suffer unnecessary pain.

International Practice

As it concerns the fundamental rights of patients under International Human Rights standards, Article 12(1) International Covenant on Economic, Social and Cultural Rights provides: 'The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. In interpreting this provision as it relates to the violation of the human rights of patients through torture, inhuman and degrading treatment, the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No. 14(8) explained that the right to health includes 'the right to be free from torture, non-consensual medical treatment and experimentation.' Relatedly, Article 7 International Covenant on Civil and Political Rights provides: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation'. Furthermore, Principle 2 of the Principles of Medical Ethics Relevant to the Role of Health Personnel, particularly Physicians Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states: 'It is a gross contravention of medical ethics…for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment…'.[33] In its consideration of state practice of Russia under its Reporting Mechanism, the Committee Against Torture (CAT) noted that overcrowding, inadequate living conditions, and lengthy confinement in Russian psychiatric hospitals, may be 'tantamount to inhuman or degrading treatment.'[34]

Regional Practice

Regional practice provides evidence of the violation of the human rights of patients through torture, inhuman and degrading treatment arising from medical negligence, error and malpractice.

Practice under the European System for the Protection of Human Rights

Under the European system for the protection of human rights, Article 3 of the European Convention on Human Rights (ECHR) provides that: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. Article 3 ECHR is similar to section 34 the Constitution of Nigeria 1999 (as amended) that deals with the fundamental right to prohibition against torture, inhuman and degrading treatment. The case of P and S

[31] United Nations Convention against Torture, 1465 UNTS 85.
[32] Adopted by the World Medical Assembly in its Twenty Ninth Session in 1975.
[33] Adopted by the United Nations General Assembly on 18 December 1982.
[34] CAT/C/RUS/CO/4 (CAT, 2006), para. 18.

v Poland demonstrate how the European Court of Human Rights has relying on the European Human Rights Convention protected the rights to the prohibition against torture, inhuman and degrading treatment of patients.

Case of *P and S v Poland*

The case of case of *P. and S. v Poland*[35] originated in an application against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms by Polish nationals, Ms P. ('the first applicant') and Ms S. ('the second applicant'), on 18 November 2008. The Vice-President of the Section acceded to the applicants' request not to have their names disclosed (Rule 47 § 3 of the Rules of Court). The applicants alleged, in particular, that the circumstances of their case had given rise to violations of Articles 8, 3 and 5 of the Convention. The applicants were born in 1993 and 1974 respectively and live in Lublin. The facts of the case were that on 9 April 2008 the first applicant went with a friend to the Public University Health Care Unit in Lublin. She said that she had been raped on 8 April 2008 by a boy of her own age. The medical staff told her that they could neither examine her nor provide medical assistance because she was a minor and the consent of her legal guardian was necessary. Dr E.D. reported the case to the police and notified the first applicant's parents. Later that day, after reporting that an offence of rape had been committed, the applicants attended the Public University Hospital no. 4 in Lublin, accompanied by a female police officer. The second applicant gave her consent for an examination of her daughter to be carried out. The first applicant was in a state of emotional shock. At the hospital, psychological help was offered to her. Bruises on her body were confirmed by a family doctor several days after the alleged event took place, between 9 and 14 April 2008. The rape resulted in pregnancy. The applicants decided together that an abortion would be the best option, considering that the first applicant was a very young minor, that the pregnancy was the result of forced intercourse, and that she wanted to pursue her education. On 19 May 2008 the first applicant was questioned by the police. Her mother and the alleged perpetrator's defence lawyer were present during the questioning. The first applicant stated that the perpetrator had used force to hold her down and to overcome her resistance. On 20 May 2008 the District Prosecutor, referring to section 4 (a) item 5 in fine of the Law on Family Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination) ('the 1993 Act') issued a certificate stating that the first applicant's pregnancy had resulted from unlawful sexual intercourse with a minor under 15 years of age. The second applicant went to the Ministry of Internal Affairs and Administration Hospital in Lublin to ask for a referral for an abortion. She was advised there to contact Dr O., the regional consultant for gynecology and obstetrics. Other doctors whom the second applicant contacted privately were also of the view that a referral from the regional consultant was necessary. The second applicant also went to another public hospital in Lublin (the Jan Boży hospital) and contacted a chief medical practitioner there, Dr W.S., who suggested that the applicants meet with a Catholic priest. The second applicant refused. The second applicant then contacted Dr O. He told her that he was not obliged to issue a referral and advised the second applicant to 'get her daughter married'. She left his office, but returned shortly afterwards as she was afraid that without the doctor's referral it would not be possible to obtain an abortion. He told her to report to the Jan Boży hospital. On 26 May 2008 the applicants reported to that hospital. They were received by the acting chief physician. They clearly stated their intention to have the pregnancy terminated. They were told that they would have to wait until the head of the gynecological ward, Dr W.S., returned from holiday. They were told that it would be best for the first applicant to be hospitalised, with a view to blood and urine tests and an ultrasound scan being carried out. On the same day the first applicant was admitted to that hospital. On 30 May 2008 Dr W.S. returned from holiday and told the applicants that she needed time to make a decision. She asked them to return on 2 June. She then called the second applicant separately to her office and asked her to sign the following statement: 'I am agreeing to the procedure of abortion and I understand that this procedure could lead to my daughter's death.' On the same day the first applicant was discharged from the hospital for the weekend. On the morning of 2 June 2008, the first applicant returned to the hospital alone as her mother was working. The applicants submitted that Dr W.S. took the first applicant for a talk with a Catholic priest, K.P. The first applicant was not asked what her faith was or whether she wished to see a priest. During the conversation it transpired that the priest had already been informed about the pregnancy and about the circumstances surrounding it. During the conversation the priest tried to convince the first applicant that she should carry the pregnancy to term. The first applicant told him that she could not make the decision herself and that she relied on her parents in the matter. The priest asked her to give him her mobile phone number, which she did. She was given a statement written by Dr W.S. to the effect that she wanted to continue with the pregnancy and she signed it. The applicants submitted that she had signed it as she had not wanted to be impolite to the doctor and priest. When the second applicant arrived later, the priest spoke to her. She told him that it was the family's decision to terminate the pregnancy. Dr W.S. told the second applicant that she was a bad mother. She presented her with the document signed by the first applicant and told her that the first applicant had decided to continue with the pregnancy. An argument took place between the doctor and the second applicant. The first applicant, who

[35] Application No. 57375/08; See also findings by the ECtHR of substantive and procedural violations of the prohibition against torture, cruel, inhuman and degrading treatment of patients under Article 3 ECHR due to medical negligence, error and malpractice in the following cases: Case of R.R. v Poland Application No. 27617/04 (May 26, 2011); Case of Gladkiy v Russia Application No. 3242/03, Eur. Ct. H.R. (2010); Case of Musial v Poland Application No. 28300/06 (January 20, 2009).

was present in the room, started to cry. The doctor said that she would adopt both the first applicant and the baby. 21. Subsequently, Dr W.S. told the applicants that she would not perform the abortion, that under communism when abortion had been freely available no one had made her perform abortions, and that no doctor would have given permission for an abortion to be performed. According to the applicants, she also implied that none of the other doctors in the hospital would perform an abortion. The applicants left the hospital. The second applicant contacted the Federation for Women and Family Planning in Warsaw for help, as after their experience in Lublin she was afraid that no one in that town would perform an abortion. On an unspecified date the Jan Boży hospital issued a press release to the effect that it would not perform an abortion in the applicants' case. Journalists who contacted the hospital were informed of the circumstances of the case. The case became national news. A number of articles were published by various local and national newspapers. It was also the subject of various publications and discussions on the internet. On 3 June 2008 the applicants went to Warsaw and contacted a doctor recommended by the Federation. They were informed about the procedure and about the available options. In the afternoon the first applicant was admitted to a hospital in Warsaw. She submitted to the hospital the certificate issued by the prosecutor, and a medical certificate issued by the national consultant in gynecology to the effect that she had a right to a lawful abortion. She signed a consent form to undergo an abortion and her parents also gave their written consent. Shortly afterwards the deputy head of the gynecological ward informed the applicants that he had received information from the Lublin hospital that the first applicant did not wish to have an abortion.

On 4 June 2004 the applicants were told that the first applicant was obliged by law to wait another three days before having an abortion. On the same day the first applicant received a text message from Catholic priest K.P. that he was working on her case and that people from all over the country were praying for her. She also received numerous text messages along the same lines from a number of unknown third parties. The priest came to the Warsaw hospital later in the day together with Ms H.W., an anti-abortion activist. They were allowed to see the first applicant. They talked to her in her mother's absence and tried to persuade her to change her mind. In the evening an unidentified woman came to her room and tried to convince her to continue with the pregnancy. The first applicant was upset about this and about the fact that the hospital apparently had no control over who could approach her. On the same day the first applicant's father came to the hospital, apparently as he had been informed that his consent to the abortion was also necessary. A psychologist spoke with the first applicant's parents and then with the applicant. She apparently prepared an opinion on the case. The first applicant's parents were not given access to it. The doctor who had admitted the first applicant to the hospital told her that a lot of pressure had been put on the hospital with a view to discouraging it from performing the abortion, and that the hospital was receiving numerous e-mails from persons criticising the applicants for having decided to allow the first applicant to have an abortion. On 5 June 2008, feeling manipulated and helpless, the applicants decided to leave the hospital. As they were leaving, they were harassed by Ms H.W. and Mr M.N.-K., anti-choice activists waiting at the hospital entrance. The mother stopped a taxi but the activists told the driver that her parental rights had been taken away and that she was trying to kidnap the first applicant. The driver refused to take them. Ms H.W. called the police. The police arrived promptly and took both applicants to the police station. At the police station the applicants were questioned on the same day, from approximately 4 p.m. until 10 p.m. No food was offered to them. The officers showed the applicants the family court decision which the police had received by fax at about 7 p.m. from the Warsaw hospital. That decision, given by the Lublin Family Court, restricted the second applicant's parental rights and ordered the first applicant to be placed in a juvenile shelter immediately. Subsequently, the police took the first applicant to a car. She was driven around Warsaw in search of a juvenile shelter that would accept her. The second applicant was not permitted to accompany her daughter. As no place was found in Warsaw, the police drove the girl to Lublin, where she was placed in a shelter at approximately 4 a.m. on 6 June 2008. She was put in a locked room and her mobile phone was taken from her. On 6 June 2008 priest K.P. visited her there and told her that he would lodge an application with the court requesting it to transfer her to a single mother's home run by the Catholic Church. A psychologist and an education specialist talked to her. She summarised the conversation thus:

> They wanted to know the entire story and the Assistant Principal was present. I told them again about the entire affair with the hospitals and the abortion. They said that it would be better for me to give birth. They did not ask me about my view. I stayed locked in the room all day. I felt as though I was in a correctional facility, I had bars on the window and a locked door, it was not very pleasant.

Later in the morning of that day the first applicant felt pain and experienced bleeding. In the late afternoon she was taken to the Jan Boży hospital in Lublin. She was admitted to the maternity ward. A number of journalists came to see her and tried to talk to her. On 3 June 2008, acting upon a letter from the Lublin III Police Station and two letters from the headmaster of the school attended by the first applicant dated 26 and 27 May, and a note drawn up by a non-identified authority, apparently a court supervisor, the Lublin Family and Custody Court instituted proceedings to divest the second applicant of her parental rights. In these letters the headmaster referred to a text message sent to a friend of the first applicant in which the first applicant had expressed serious distress and said that she could not count on her mother's assistance as she saw abortion as the only solution, and to a

conversation between the first applicant and one of her teachers in which she had said that she wished to carry the pregnancy to term. She had also been concerned about the consequences, including psychological ones that an abortion might have. The headmaster was of the view, relying on a conversation he had had with the class teacher and with the school social pedagogue that the first applicant might be under pressure from her family. He was concerned that the second applicant had not sought psychological assistance for her daughter, who, it had been suggested by the school, might have suicidal tendencies. The second applicant had been requested to attend at the school; she had been shown the text message and told to make an appointment with a psychologist immediately and given all the necessary information for contacting a therapist. Enclosed with the letter was a print-out of a chat between the first applicant and her friend dated 7 May 2008. It transpired therefrom that in reaction to the news about the minor's pregnancy her father had become violent and had told her that if she wanted to keep her baby she would have to move out of the house; she also said that she did not know what to do and wanted her friend to help and the school to intervene. On the same date that court, sitting in camera, ordered the first applicant's placement in a juvenile shelter as an interim measure. In its decision the court stated that the documents referred to above demonstrated that the first applicant's parents did not take appropriate care of their daughter. She was pregnant; she had been admitted to the Lublin Jan Boży hospital, which had refused to carry out an abortion having regard to the first applicant's statement that she did not wish to have recourse to it. The court had regard to text messages she had sent to her friend. Doctor W.S. had informed her about the consequences of an abortion. It was reported that the first applicant had travelled to Warsaw with her mother in order to have an abortion performed there. The first applicant was under pressure from her mother and was unable to take a decision independently. Her hospital stays and the atmosphere in the family were harmful to her. She had to be separated from her family in her own interest. The court relied on Article 109 para 1 (5) of the Family Code.

On 6 June 2008 the second applicant appealed against that decision. On 9 June 2008 she filed with the court a written consent to her daughter's abortion, which she also submitted to the Lublin hospital. On 10 June 2008 she submitted a declaration by the first applicant stating that she wanted to have an abortion and that she was not being coerced into it. On 13 June 2008 the first applicant was questioned at the hospital by a criminal judge in the presence of a prosecutor and a psychologist, in the context of proceedings concerning allegations of coercion with a view to making her terminate her pregnancy. The first applicant testified that she had been forced into a sexual act which had resulted in pregnancy and that her mother had not forced her to make the decision to have a termination. The questioning started at 7.30 p.m. and lasted for three hours. The first applicant's parents were not permitted to be present. The first applicant did not have legal assistance or any other adult present to represent her as a minor. Later the same day the court allowed the second applicant to take her home. On 14 June 2008 she was discharged from the hospital.

On 18 June 2008 the Lublin Family Court quashed its decision concerning the first applicant's placement in the shelter. On 18 February 2009 the Lublin Family and Custody Court, relying mainly on an expert opinion prepared by the Family Diagnostic and Consultation Centre, held that there were no grounds on which to divest the first applicant's parents of their parental rights. It discontinued the proceedings. Between 9 and 13 June 2008 the second applicant filed a complaint with the Office for Patients' medical rights of the Ministry of Health asking them to help her daughter obtain a lawful abortion, and submitted relevant documents, in particular the prosecutor's certificate. An official of the Ministry, K.U., informed the second applicant that her daughter's statement consenting to an abortion would have to be witnessed by three persons. When the second applicant informed him that the statement had in fact been signed in the presence of three witnesses, he told her that the witnesses' identification numbers were required and that the faxed copy had to be notarised. On 16 June 2008 the second applicant was informed by telephone by a Ministry official that the issue had been resolved and that her daughter could undergo an abortion. She was notified that she would have to go to Gdańsk, in northern Poland, approximately 500 kilometers from their home in Lublin. On 17 June 2008 the Ministry of Health sent a car for the applicants and they were driven to Gdańsk. The first applicant had an abortion in a public hospital there. The applicants submitted that the trip to Gdansk and the abortion were carried out in a clandestine manner, despite the termination being lawful. When the applicants came back home, they realised that information about their journey to Gdańsk had been put on the Internet by the Catholic Information Agency that day at 9 a.m. The applicants complained that the facts of the case had given rise to a breach of Article 3 of the Convention in respect of the first applicant. This provision, in so far as relevant, reads as follows: 'No one shall be subjected to ... inhuman or degrading treatment ...'

In its assessment, according to the Court's well-established case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among many other authorities, *Price v the United Kingdom,* no. 33394/96, § 24, ECHR 2001-VII; *Kupczak v Poland,* no. 2627/09, § 58, 25 January 2011; *Wiktorko v Poland,* no. 14612/02, §§ 44 and 54, 31 March 2009 *and R.R. v Poland,* cited above, § 148). Treatment has been held by the Court to be 'inhuman' because, inter alia, it was premeditated, was applied for

hours at a stretch, and caused either actual bodily injury or intense physical and mental suffering (see, among many other authorities, *Labita v Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV). Treatment has been considered 'degrading' when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (see, among many other authorities, *Iwańczuk v Poland,* no. 25196/94, § 51, 15 November 2001, and *Wiktorko v Poland*, cited above). Although the purpose of such treatment is a factor to be taken into account, in particular, whether it was intended to humiliate or debase the victim, the absence of any such purpose does not inevitably lead to a finding that there has been no violation of Article 3. Moreover, it cannot be excluded that acts and omissions on the part of the authorities in the field of health-care policy may in certain circumstances engage their responsibility under Article 3 (see, for example, *Powell v the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V). The Court has also made findings of a breach of this provision in the context of reproductive rights (see *VC. v Slovakia,* no. 18968/07, §§ 106-120, ECHR 2011 (extracts).

For the Court's assessment of this complaint, it is of a cardinal importance that the first applicant was at the material time only fourteen years old. The certificate issued by the prosecutor confirmed that her pregnancy had resulted from unlawful intercourse. The Court cannot overlook the fact that the medical certificate issued immediately afterwards confirmed bruises on her body and concluded that physical force had been used to overcome her resistance. In the light of the above, the Court has no choice but to conclude that the first applicant was in a situation of great vulnerability. However, when the applicant was admitted to Jan Boży hospital in Lublin pressure was exerted on her by the chief doctor who tried to impose her own views on the applicant. Furthermore, the applicant was obliged to talk to a priest without being asked whether she in fact wished to see one. Considerable pressure was put on her and on her mother. Dr W.S. made the mother sign a declaration acknowledging that an abortion could lead to the first applicant's death. The Court has already noted that no cogent medical reasons have been put forward to justify the strong terms of that declaration. The first applicant witnessed the argument between the doctor and the second applicant, the doctor accusing the second applicant that she was a bad mother. The Court found that information about the case was relayed by the press, also as a result of the press release issued by the hospital. The first applicant received numerous unwanted and intrusive text messages from people she did not know. In the hospital in Warsaw the authorities failed to protect her from being contacted by various persons who tried to exert pressure on her. The applicant was harassed. The authorities not only failed to provide protection to her, having regard to her young age and vulnerability, but further compounded the situation. The Court notes, in particular, that after the first applicant requested protection from the police when she was accosted by anti-abortion activists after leaving hospital in Warsaw, protection was in fact denied her. She was instead arrested in the execution of the court's decision on her placement in the juvenile center. The Court was particularly struck by the fact that the authorities decided to institute criminal investigation on charges of unlawful intercourse against the first applicant who, according to the prosecutor's certificate and the forensic findings referred to above should have been considered to be a victim of sexual abuse. The Court considers that this approach fell short of the requirements inherent in the States' positive obligations to establish and apply effectively a criminal-law system punishing all forms of sexual abuse (see, *M.C. v Bulgaria*, no. 39272/98, § 184, ECHR 2003-XII). The investigation against the applicant was ultimately discontinued, but the mere fact that they were instituted and conducted shows a profound lack of understanding of her predicament. On the whole, the Court considers that no proper regard was had to the first applicant's vulnerability and young age and her own views and feelings. In the examination of the present complaint it is necessary for the Court to assess the first applicant's situation as a whole, having regard in particular to the cumulative effects of the circumstances on the applicant's situation. The Court concluded, having regard to the circumstances of the case seen as a whole, that the first applicant was treated by the authorities in a deplorable manner and that her suffering reached the minimum threshold of severity under Article 3 of the Convention. The Court concludes that there has therefore been a breach of that provision. For these reasons, the Court holds unanimously that there has been a violation of Article 3 of the Convention in respect of the first applicant. The first applicant requested the Court to award her just satisfaction in the amount of 60,000 euros (EUR) in respect of non-pecuniary damage. She submitted that the impact on the events concerned in the case had been extremely severe on her. She had been the object of comments expressed in public, in the media and directly to her. A book on the case by an anti-choice activist had been published, describing the events in a malicious and distorted manner. Her true identity and details of her private life had leaked to the media. She had suffered because her mother, who had tried to protect and help her, was vilified in public. She had also been deprived of liberty. Her suffering during the summer of 2008 when the main events took place was intense, but she also suffered later when, for example, her teachers had made inappropriate comments and disclosed to her classmates what had happened to her. The second applicant requested the Court to award her just satisfaction in the amount of EUR 40,000. She argued that she had suffered immense stress and anxiety caused by the treatment to which her daughter was subjected. She herself had fallen victim of hostility and hateful comments on the part of the hospital staff, anti-choice activists, the police, the general public and certain media. As the story leaked to the media and their identity had been disclosed, she had been unable to protect her child. Her own identity had been disclosed as well. She had to appear before the courts several times and was subjected to humiliating interrogations. The Government did not comment.

The Court, having regard to the applicants' submissions, is of the view that in the circumstances of the case they must have experienced considerable anguish and suffering, not only in respect of the difficulties which arose in the determination of access to a lawful abortion, in so far as the 1993 Act allowed it, but also because of the unlawful disclosure of information about their case to the public and the unwelcome publicity it caused. The Court, having regard to the circumstances of the case seen as a whole, to the differences in the applicants' situations and deciding on equitable basis, awards EUR 30,000 to the first and EUR 15,000 to the second applicant. The respondent State was therefore ordered to pay the applicants, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement: (i) EUR 30,000 (thirty thousand euros) to the first applicant plus any tax that may be chargeable, in respect of non-pecuniary damage; (ii) EUR 15,000 (fifteen thousand euros) to the second applicant, plus any tax that may be chargeable, in respect of non-pecuniary damage; (iii) EUR 16,000 (sixteen thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses; (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

7. Conclusion

This study involved an analysis on the enforcement of the fundamental right to the prohibition of torture, inhuman and degrading treatment of patients under the Fundamental Rights Enforcement Procedure in the context of medical negligence, error and malpractice. In the course of the analysis, it was shown that patients have the right to the prohibition of torture, inhuman and degrading treatment and that this right is protected under the Fundamental Right Enforcement Procedure Rules. It was demonstrated that medical negligence, error and malpractice are conduct that violates the right to the prohibition of torture, inhuman and degrading treatment of patients in Nigerian hospitals. In the main, it is recommended that the Fundamental Rights Enforcement Procedure Rules be used by Legal Practitioners as a medical malpractice claims regime to enable the enforcement of the right to the prohibition of torture, inhuman and degrading treatment of patients in Nigeria.