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ADR IN MEDICAL MALPRACTICE: A COMPARATIVE ANALYSIS OF ADR IN MEDICAL MALPRACTICE IN THE USA, AUSTRALIA AND NIGERIA

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ABSTRACT

Cultural misconceptions about the infallibility of medical professionals left patients at the mercy of medical practitioners. Defining the roles and duties of medical practitioners, alongside patients' corresponding rights, gave patients a legal basis to seek redress for medical injuries. Medical practice problems are broadly classified worldwide as medical negligence and medical malpractice. While the epistemology of medical negligence may be civil or criminal and is well known, the adversarial court process prompts the use of alternative dispute mechanisms to resolve such cases. In more advanced climes, such as the US and Australia, most medical malpractice issues are resolved via ADR. Hence, beyond the obvious benefits of ease and speed, ADR can be argued to facilitate the healing process because of its non-contentious and private nature. In Nigeria, medical malpractice cases are either litigated through the regular court system or they are addressed by the Medical and Dental Practitioners Disciplinary Committee, which on its own exercises quasi-judicial functions that are largely inept at providing justice. Therefore, this research advocates that medical malpractice cases in Nigeria should be resolved by ADR by providing a comparative analysis of ADR in the US and Australia.

Keywords: *Alternative Dispute Resolution (ADR,) Bioethics, Code of Ethics, Court, MDCN, Mediation*

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1. INTRODUCTION

The development of the body of ethics now commonly known as bioethics has coincided with the proliferation of court cases arising from medical injuries, alongside a clear discourse and public appreciation of the Patient Bill of Rights. Against this backdrop, factors not unique to Nigeria alone hindered medical malpractice litigation. For instance, medical malpractice cases are a technical and specialised field that remains unclear in terms of legal enforcement, and the regular courts may be inherently incapable or ill-equipped to handle them.[1] In the available literature on medical malpractice, the US, for instance, treats medical malpractice as medical negligence or medical error.[2] Because medical practice is governed by municipal laws, Nigerian medical law distinguishes between medical negligence and medical malpractice, as declared by the MCDN Code of Conduct.[3] Still, medical malpractice, especially in Nigeria, remains shrouded in mystery.

Commonly, the jurisprudence of medical malpractice is largely unknown and indeterminate. These uncertainties stem from the nature of actions that can be termed medical malpractice. Most resources use medical malpractice and medical negligence interchangeably, while some authors try to distinguish between the two concepts.[4] Unfortunately, this distinction adds confusion rather than clarity because these acts are not fortuitous; the deliberateness of the act itself shows intent. Medical malpractice, in general, refers to deviant and unethical medical practices that ordinarily may not result in any apparent injury but are more likely to destroy a patient's trust in the medical practitioner. In essence, this patient may or may not know about the unethical practice and, as such, may not initiate institutional inquiries into the defaulting medical practitioner's actions. On the other hand, litigating these actions as medical negligence may be an unproductive journey and a waste of time and resources. However, it becomes increasingly challenging where loss or injury cannot be accurately assessed; the court may be unable to award compensation in such situations. In this sense, alternative dispute resolution may be used to resolve the issues that arise, especially after the decisions of fact-finding administrative panels.[5]

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[1] Biola Olayinka Pedro 'Policy Paper on the Need for the Establishment of a Specialized Tribunal for Medical Negligence Cases in Nigeria: An Imperative for Fair and Efficient Adjudication' *Open Access Library Journal* (2025) <**DOI:** 10.4236/oalib.1113770> accessed 17/07/26

[2] Syahdan Alim Usemahu, and Junifer Dame Panjaitan 'Analyst Types of Malpractice In Health Law' *International Journal of Social Research* (2024) 2(3) < https://share.google/LvnYpLdCYJrcJ8jQC> accessed 01/02/26

[3] Oludamilola Adebola Adejumo and Oluseyi Ademola Adejumo 'Legal Perspectives on Liability for Medical Negligence and Malpractices in Nigeria' *Pan Afr Med* (2020 Feb 17) 35:44 <doi: 10.11604/pamj.2020.35.44.16651> accessed 17/07/26

[4] Ibid.

[5] Daniel P. Kessler 'Evaluating the Medical Malpractice System and Option for Reform' *Journal of Economic Perspectives* <doi=10.1257/jep.25.2.93> accessed 01/02/26

Besides this, ADR is an alternative dispute mechanism originating from customary or indigenous practices in tribes across the globe,[6] The United States of America formalised it and has since gained worldwide recognition and adoption for its many benefits.[7] ADR includes mechanisms like arbitration, negotiation, and conciliation, with each method tailored to the legal issue it is meant to resolve. ADR is meant not to oust the jurisdiction of regular courts but to assist them, especially in civil matters. Because medical injuries may be criminal or civil, including alternative dispute resolution mechanisms ensures that civil medical cases can be resolved through ADR. The problems and challenges of the regular court system make ADR an eligible, reliable, viable, and feasible option for navigating medical malpractice. With its many benefits, it can uncover unethical medical practices and provide a healthy environment for peaceful resolution, particularly for victims of medical malpractice. Again, ADR effectively enforces arbitral awards, and parties remain fully involved at every step. Therefore, exploring this option, particularly for resolving medical malpractice issues, reveals a wide range of benefits, including the inherent therapeutic environment that addresses medical injuries and promotes, encourages, and strengthens the patient-doctor relationship. This is highlighted by juxtaposing judicial practices in common law countries such as the United States of America and Australia.

2. CONCEPTUAL CLARIFICATION, THEORETICAL FRAMEWORKS, AND HISTORICAL ANTECEDENTS

In litigating medical malpractice, one must examine the nature of an existing patient-doctor relationship. This is imperative because, in medical malpractice jurisprudence, an aggrieved party must show the existence of such a relationship before an injury is legally assessed. Therefore, it is pertinent to unbundle the epistemology of the subject matter of this research to achieve clarity below;

2.1 Conceptual Clarification

2.1.1 *Alternative Dispute Resolution*

Generally, alternative dispute resolution mechanisms are set up where 'liability is clear, but both parties cannot agree on the damages needed to settle the case, or damages have been agreed upon, but the parties disagree on the distribution of liability or where both parties wish to avoid costly discovery or where both parties want to keep the dispute private and out of the

[6] Ifunaya Amasiatu 'Comparative Analysis of Customary Arbitration Practices Across Cultures' (2025) *Madonna Journal of Law and Society* Vol 9 No 1<https://madonnauniversity.edu.ng/journals/index.php/Law> accessed 01/02/26

[7] Michael McManus and Brianna Silverstein 'Brief History of Alternative Dispute Resolution in the United States'
Cadmus (2011) 1(3) <https://www.cadmusjournal.org/files/pdfreprints/vol1issue3/Reprint_McManus_Silverstein_Brief_History_ADR.pdf> accessed 01/02/16

public eye or where the cost of litigation could exceed the value of the case ', amongst others.[8]In such instances, the ADR mechanisms employed are strictly procedural in accordance with their enabling legislation or by agreement of the parties. But whatever the case, ADR may be defined as 'a set of practices and techniques aimed at permitting the resolution of legal disputes outside the courts.'[9]ADR is preferred because it is expedient and cost-efficient.[10]Disputes naturally arise from social and civil interactions among humans in a system. Disputes therefore may be 'defined as a disagreement, controversy, contention, altercation, quarrel, conflict, strife, discord, antagonism or argument between two or more individuals or groups.'[11]

In the USA, various forms and types of ADR are practiced, ranging from formalized to quasi-judicial and informal, including round-table conference discussions. These forms fall into three broad classes: adjudicative, evaluative, and facilitative. In its adjudicative function, ADR involves participation in a quasi-judicial function. In this genre, there is arbitration, which is used in situations 'where the parties cannot agree on the facts of a dispute…' or in cases that are '…highly technical, requiring an expert decision.'[12]Arbitration proceedings are often court-like, involving hearings and evidence, and their decisions are binding; an arbitral decision may be challenged in a regular court.[13] Under the adjudicative function, neutral fact-finding also involves using a neutral party to unravel the particulars of a case.[14] For the evaluative ADR function, mechanisms include peer evaluation, summary jury trial or lay evaluation, judicial evaluation, and expert or specialist evaluation. The crux of any form of evaluation is to present the case of each party to neutral attorneys, a jury, a retired judge, or a specialist or expert to accurately weigh the legal strengths and weaknesses of the case of each party. This step occurs before resolving any case and determines not only the judicial interpretation of the conflict, but also the best legal action to resolve it.[15] Mediation facilitates negotiations between parties with highly conflicting interests. It remains the least adversarial form of ADR. Mediation aims to provide a "win-win" resolution, enabling both parties to arrive at a consensus. Mediation can

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[8] National Arbitration and Mediation (NAM) 'Alternative Dispute Resolution (ADR) Primer' (2009) <www.namadr.com> accessed 01/02/26

[9] Robert Mnookin 'Alternative Dispute Resolution' (1998). *Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series*. Paper 232. <http://lsr.nellco.org/harvard_olin/232> accessed 01/02/26

[10] Ibid.

[11] Okonkwo Raphael Valentine, Odigbo Ben. Ejikeme, and Rose Ada 'Alternative Dispute Resolution (ADR) Mechanisms and Public Relations Social Conflicts Management in Nigeria (2022) *Journal of Global Peace Marketing and Communications (JGPMC)* 1(1) <https://parojournals.com/index.php/jgpmc/article/view/11/7?utm_>accessed 06/-2/26

[12] N:8 Michael McManus

[13] Ibid.

[14] Ibid.

[15] Ibid.

be used in cases such as divorce proceedings and medical malpractice cases. In mediation, the mediator is an impartial, neutral third party who lacks the authority to make decisions.[16] Mediation is usually cost-efficient and time-saving.[17] Other facilitative ADR mechanisms recognized are consensus building and conciliation. In conciliation, a conciliator focuses on building mutual friendships and relationships among the warring parties.[18] Mending a broken relationship focuses on facilitating discussion, dialogue, and settlement. [19]Usually, conciliation rarely stands alone; it is often used alongside other methods such as facilitation or mediation. These integrations give rise to other recognized ADR systems, such as Med-Arb (mediation and arbitration fused).[20] These ADR measures determine solely civil issues.

In Australia, ADR mechanisms are facilitative, advisory or determinative processes. In facilitative ADR, the dispute resolution practitioner helps the conflicting parties identify the issues, generate options, propose alternatives, and reach an agreement. Recognized in this class are ADR options such as mediation, conciliation, facilitation and facilitated negotiation.[21] In Advisory ADR, the dispute resolution practitioner appraises the dispute, examines the facts through the lens of the law, and presents advice on possible or desirable outcomes. This process involves case appraisal, some forms of conciliation, and neutral evaluation.[22] The Determinative process involves a dispute resolution practitioner who evaluates the dispute, including hearings of evidence from the parties, and makes a determination therefrom. ADR mechanisms such as arbitration, expert determination, and private judging fall within the Determinative ADR process.[23] In practice, core ADR mechanisms such as Arbitration, Conciliation, and Mediation are applied and administered similarly in most jurisdictions. However, the Australian legal system also includes mechanisms such as neutral evaluation and case appraisal.[24] In the former, a neutral third party is involved who may be a legal professional or an expert in a specialized area of the dispute. The evaluator's function is to evaluate a dispute based on materials from both parties. The evaluator then provides a non-binding assessment of

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[16] Alternative Dispute Resolution Handbook<https://www.opm.gov/policy-data-oversight/employee-relations/employee-rights-appeals/alternative-dispute-resolution/handbook.pdf?utm_> accessed 01/02/26

[17] N:7 Amasiatu

[18] N: 14 ADR Handbook

[19] N: 8 Michael McManus

[20] N:14; Brian A. Pappas 'Med-Arb and the Legalization of Alternative Dispute Resolution' (2015) *Harvard Negotiation Law Review* Vol.20:157<https://journals.law.harvard.edu/hnlr/wp-content/uploads/sites/91/HNR104_crop.pdf?utm_> accessed 01/02/26

[21]Australian Government Attorney-General's Department 'Alternative Dispute Resolution: Providing Advice on Alternative Dispute Resolution (ADR) Issues and Policy to Australian Government Agencies <https://www.ag.gov.au/legal-system/alternative-dispute-resolution> accessed 6/02/26

[22] Ibid.

[23] Ibid.

[24]Australian Government 'What is Alternative Dispute Resolution?' <https://www.asbfeo.gov.au/sites/default/files/2024-08/What%20is%20Alternative%20Dispute%20Resolution_0.pdf> accessed 06/02/26

the case, including potential outcomes if the dispute progresses to a court or tribunal. In neutral evaluation, the focus is on early, open, and direct communication about the key issues in dispute, especially technical or scientific matters.[25] Case appraisal differs from neutral evaluation in that a legal professional is usually employed to assess the merits of the positions and the likely outcome if heard by a court or tribunal.[26]

ADR in Nigeria is generally categorised into arbitration, conciliation, mediation and negotiation systems. The mediator in Mediation strives to help the parties reach an agreed resolution through negotiation. The mediator does not determine the rights and wrongs of each party but controls the process, assisting the parties to a desired outcome. Arbitration is a quasi-judicial function because it permits the arbitrator to decide the case on its merits.[27] Arbitration may be initiated by the court or by agreement, and its decisions are binding but may be set aside only by a competent court. Conciliation refers to a process that does not necessarily require a prior formal agreement and involves negotiations. The conciliator, in unbundling issues between the parties, draws up terms of settlement which are non-binding on the parties.[28] In negotiation, the warring parties, through dialogue and without the assistance of a third party, settle issues amicably in person or through their representatives.[29] As practised in most jurisdictions, ADR mechanisms are usually a court-annexed procedure.[30]

2.1.2 *Medical Practice*

Medical practice has been defined in various ways to reflect current realities. Therefore, no single definition exists; each definition highlights a necessary aspect of medical practice that should be recognised. In view of this, the American Society for Dermatologic Study defined medical practice as:[31]

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[25] Ibid.
[26] Ibid.
[27] Festus Okpoto Agbo 'Assessing the Dangers of Unregulated Practice of Arbitration and other Alternative Dispute Resolution Mechanisms in Nigeria' <file:///C:/Users/ICT25/Downloads/NAU.JCPL+9+(3)+2022_5_AGBO.pdf> accessed 06/02/26
[28] Ibid.
[29] Usman, I. Ahmed, T. M., Odobo, S. O. Achieving Effective Conflict Resolution Through Alternative Dispute Resolution (ADR) Mechanisms in Nigeria (2025) *Journal of Guidance and Counseling Studies* 9(2) <https://journals.unizik.edu.ng/index.php/jgcs/en> accessed 6/02/26
[30] N: 27; Alternative Dispute Resolution in the US District Courts <https://www.fjc.gov/sites/default/files/2015/Alternative-Dispute-Resolution-English-2014-08-07.pdf?utm> accessed 06/02/25; The Interaction Between the Courts and Alternative (or Assisted) Dispute Resolution Australian Disputes Centre Inaugural Northern Territory ADR (An Address by Chief Justice Michael Grant Supreme Court of the Northern Territory) 30 May 2019 <https://supremecourt.nt.gov.au/_resources/documents/publications/speeches/the-interaction-between-the-courts-and-alternative-dispute-resolution.pdf?utm> accessed 06/02/25
[31] ASDS 'Position on the Definition of the Practice of Medicine' <chrome-extension://kdpelmjpfafjppnhbloffcjpeomlnpah/https://www.asds.net/Portals/0/PDF/asdsa/asdsa-position-statement-definition-of-the-practice-of-medicine.pdf> accessed 10/02/26

> *The practice of medicine involves diagnosis, treatment, or correction of human conditions, ailments, diseases, injuries, or infirmities whether physical or mental, by any means, methods, devices, or instruments. The practice of medicine includes, but is not limited to:*
>
> *a. Undertaking to perform any surgical operation upon any person; and*
>
> *b. Performing any act or procedure that uses a biologic or synthetic material, or chemical application of any kind if it alters or damages or is capable of altering or damaging living tissue; and*
>
> *c. Performing any act or procedure using a mechanical device, or displaced energy form of any kind if it damages or is capable of damaging living tissue. Such acts or procedures include, for example, the use of all lasers, light sources, microwave energy, electrical impulses, chemical application, particle sanding, the injection or insertion of foreign or natural substances, cryoablation or soft tissue augmentation. Living tissue is any layer below the dead cell layer (stratum corneum) of the epidermis. The epidermis below the stratum corneum and the dermis are living tissue layers. Certain FDA-approved Class I and II devices, by their intended or improper use, can damage tissue below the stratum corneum. Therefore, their use and the diagnosis and treatment surrounding their use constitute the practice of medicine.*

This definition prioritises medical treatment within the healthcare centre; that is, medical practice is, in effect, any nature or manner of medical treatment. In other words, medical practice is defined in the clinical and diagnostic sense, and no more.

Under the Medical Subject Headings (MeSH) definitions,[32] medical practice may be a private, partnership, and group medical practice.[33] Still considering the MeSH definitions, private practice is simply 'a practice in which one sole physician works' while a partnership practice is 'voluntary contract between two or more doctors who may or may not share responsibility for the care of patients, with proportional sharing of profits and losses' and lastly, a group medical practice is a group of 'three or more full-time physicians organised in a legally recognised entity for the provision of healthcare services who share space, equipment, personnel and records for both patient care and business management, and who have a predetermined arrangement for the distribution of income.'[34] The MeSH definition underscores the underlying business, economic and employment realities and indices or arrangements incidental to setting up a medical practice.

[32] MeSH (Medical Subject Headings) is the 'National Library of Medicine controlled vocabulary thesaurus used for indexing citations in MEDLINE and PubMed.' PubMed < https://library-guides.ucl.ac.uk/pubmed/mesh> accessed 12/02/26

[33] Elizabeth Brown 'Defining the Elusive 'Medical Practice'' RIMJ <http://www.rimed.org/rimedicaljournal/2013/08/2013-08-15-medpractice.pdf> accessed 12/02/26

[34] Ibid.

Again, medical practice is '…applying of medical or surgical agencies for the purpose of preventing, relieving, or curing disease, or aiding natural functions, or modifying or removing the results of physical injury.'[35] By presenting the objective of all medical treatment as the patient's curative and restorative health, this definition implicitly aligns with the provisions of the Hippocratic Oath. Still, the definition of medical practice depends on existing municipal regulations and the law in the territories where it is practised.[36] In Nigeria, medical practice may be private practice (physician-owned, individualised services), group practice (involving multidisciplinary collaboration), hospital-based practice (secondary and tertiary care delivery), or academic practice (combining research, teaching, and patient care).[37] Notwithstanding the fact that the Medical and Dental Practitioners Act failed to define medical practice, it determines medical practice from the standpoint of registration, the payment of annual practice fees and other such stipulations.[38]

2.1.3 *Medical Malpractice*

Malpractice is ordinarily defined by Black's Law Dictionary thus: 'An instance of negligence or incompetence on the part of a professional.'[39] Medical malpractice is defined by the same dictionary as 'a doctor's failure to exercise the degree of care and skill that a physician or surgeon of the same medical specialty would use under similar circumstances'.[40] The normative intermingling of medical malpractice and medical negligence can overshadow or subsume acts that do not create overt injuries that can be measured or quantified but are compelling and persistent enough to create a contentious relationship between a medical practitioner and his client. Such actions should ordinarily be classified as medical malpractice. The Nigerian Code of Medical Ethics[41] determines medical malpractice to include acts such as extortion, practice with unqualified persons, etc.[42] Notably, medical malpractice is used to mean medical negligence in jurisdictions such as the United States and Australia.[43]

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[35] Harry B. Hutchkins 'What Is the Practice of Medicine?' *Mich. L. Rev. 4* (1906): 373-9. < https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2038&context=facarticles> accessed 12/02/26

[36] Ibid.

[37] H. Eboreime, O. Eboreime, W. Imongan 'Enhancing Medical Practice While Mitigating Medico-Legal Risks in Nigeria's Healthcare System' *Nig J Med Dent Educ;* (2026) 8(1):26-30. < file:///C:/Users/hp/Downloads/Practice.pdf> accessed 15/02/26

[38] Medical and Dental Practitioners Act <chrome-extension://kdpelmjpfafjppnhbloffcjpeomln> accessed 15/02/26

[39] Bryan A. Garner (ed) *Black's Law Dictionary* (12th ed West Publishing Co) pg 1145

[40] Ibid pg 1145

[41] Code of Medical Ethics in Nigeria 2008 <https://www.mdcn.gov.ng/page/discipline/the-code-of-medical-ethics-in-nigeria> accessed 20/02/26

[42] Part C Ibid.

[43] LSACT June 2024 <https://www.actlawsociety.asn.au/for-the-public/fact-sheets/medical-negligence> accessed 20/02/26

2.2 Theoretical Frameworks

ADR is a creation of the law. This roots it in positivist legal theory. It also reflects inherent societal needs. This means that ADR reflects existing customs in resolving disputes. Lastly, it is a Byproduct of the natural school because it affirms the right of man to free and fair trials. It also affirms the right of man to expression, amongst others. These core legal theories are the natural law theory, the positivist theory, and the sociological legal theory.

i. Natural Law Theory of Therapeutic Jurisprudence

Natural law posits that the law is given by a Divine authority and adhered to by man through the exercise of his reason and will.[44] This engenders the law as universal and egalitarian. Conflicts and conflict resolution on their part are universal. For this purpose, every society establishes a judiciary to bring justice and enforce peace.

By its nature, ADR, as a private arrangement method, is a form of social control.[45] This means the law recognises citizens' need to resolve contentious disputes amicably, without the theatrics involved; i.e., it is non-adversarial. It also recognises the need for privacy while resolving these issues. This indicates the theory of therapeutic jurisprudence. Therapeutic Jurisprudence, for its part, '… emphasises the psychological and emotional well-being of parties in legal disputes.'[46] Essentially, 'Therapeutic jurisprudence posits that legal processes should promote healing and reconciliation rather than exacerbate conflict.[47] That is, therapeutic jurisprudence focuses on restoring strained or broken relations. Therefore, the restorative and rehabilitative functions of ADR are suitable for resolving medical malpractice cases.[48]

ii. The Positivist Legal Theory

Law, as defined, is '…a rule addressed to, and for the guidance of an intelligent being having power over him or a command for which a sanction is attached.'[49] Proponents of positivist legal theory divest law of elements such as morality.[50] Law, laid bare, is simply what the law is. This supports the proposition that medical malpractice and ADR are functions of the law. Where provided for, or recognized, medical malpractice must be determined via ADR. Positivist Legal theory also proclaims that law is the 'Grundnorm' from which all other laws are derived.[51] In essence, ADR in medical malpractice will derive its legitimacy from the

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[44] Maxwell M. Gídado and Sylvester S. Shikyil *the Province of Legal Method (*Mono Publishers, 2010)
[45] Ibid.
[46] Raphael Nyarkotey Obu and Grace Akoah Nkuah 'Alternative Dispute Resolution (ADR) as a tool for Addressing
Medical Litigation in Ghana: A Comparative Global Analysis' *WJPMR* 11(1) <www.wjpmr.com> Accessed 12/04/26
[47] Ibid.
[48] Ibid
[49] 'Funso Adaramola *Jurisprudence* (4th Edition, LexisNexis Butterworths, 2008)
[50] Ibid.
[51] N:45 Gidado and Shikyil

Nigerian Constitution or any Act of the Parliament. Barring this, it may never become a part of the Nigerian Legal System.

iii. Sociological Legal Theory

Sociological legal theory investigates the function of law in society by examining the law-making process, legal institutions, and the disparate, personalized practice of the law.[52]All of this is often called 'social engineering'. The underlying principle of sociological legal theory is that societies are ever-changing and ever-evolving, and therefore the law must be dynamic to meet those needs. When the law fails to do so, it becomes repressive and creates more hardships than it intended. In this context, with the rising cases of medical malpractice, it is imperative to provide a system guaranteed to assist all parties in peaceful resolution.

2.3 Historical Antecedents of ADR Standards in Medical Malpractice in Nigeria

The concept and practice of Alternative Dispute Resolution (ADR) is as old as man himself. ADR existed in various forms in many remote societies. For instance, ADR practices were evident in ancient Mesopotamian society over 4,000 years ago.[53] In Africa, forms of ADR were also used to settle tribal issues long before colonization. Central to African ADR practices was dispute settlement by the elderly or the community.[54] The development of ADR practices as we know them today in most advanced Western countries can be traced to ancient Greece. In that era, ADR supported formal court processes.[55] Here, arbitrators were tasked with resolving issues first through mediation and, when mediation failed, arbitration was the last resort.

The history of Arbitration in Nigeria can be detailed in three phases: the pre-colonial, the colonial, and the post-colonial. During the pre-colonial period, ADR mechanisms were indigenous systems and policies instituted across various tribes, determined by the custom and tradition of the host community.[56] Since most tribes were settled in a social hierarchical system comprising settlements, communities, families, villages, and hamlets, disputes were resolved at each level, usually by the elders within those levels.[57] This indigenous ADR, now known as Customary Arbitration, remains relevant today.[58]

Colonization introduced the English adjudicatory system, which established the courts and also Arbitration. Nigeria's first step in arbitration was to enact the Arbitration Ordinance

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[52] Ibid
[53] N:30 Usman Ahmed
[54] N:7 Amasiatu
[55] Ibid.
[56] C. J. Ubanyionwu 'Analysis of the Evolution of Arbitration and other Alternative Dispute Resolution Modes in Nigeria' *(AJLHR)* (2023) 7 (2) < file:///C:/Users/hp/Downloads/2723-3520-1-PB.pdf> accessed 12/04/26
[57] Chima Josephat Ubanyionwu 'Legal and Historical Frameworks of Alternative Dispute Resolution in Nigeria' *Nigerian Journal of Legal Studies* 139 < file:///C:/Users/hp/Downloads/12.pdf> accessed 12/04/26
[58]N:38 Eboreime and others

of 1914, a federal Act governing all states. Afterward, then came the Arbitration Ordinance Act of 1958. This Act applied to domestic and international arbitration. After that came the Arbitration Act of 1990, then the Arbitration and Mediation Act of 2004, which incorporated the UNCITRAL Model Law on International Arbitration of 1985, followed by the Arbitration and Mediation Act of 2023.[59] The 2004 Arbitration Act was reenacted after the Arbitration and Conciliation Decree of 1988.[60] This 1988 Arbitration Decree recognized and domesticated the New York Convention provisions.[61]

The first mention of ADR in the United States of America is attributed to Abraham Lincoln, who described ADR as less acrimonious, less time-consuming, and requiring mutual consent and cooperation from all parties.[62] In 1906, following spirited legal reforms, jurist Roscoe Pound further advocated more modern developments in ADR, which the American Bar Association approved and adopted.[63] As part of these reforms, the American Arbitration Association was established in 1926.[64] Subsequent conferences and lectures were held to indoctrinate the society and effectively adapt the ADR system into academia. ADR in the US remains a formidable but flexible system designed to serve across various industries without usurping court jurisdiction. However, it is strictly limited to administrative and civil cases.[65]

In Australia, a formal recognition of ADR mechanisms in disparate traditional societies produced the Conciliation and Arbitration Act of 1904 and the Commonwealth Court of Conciliation and Arbitration.[66] Initially, this court resolved all employment issues, and by 1956, the Commonwealth Court of Conciliation and Arbitration was divided into the Conciliation and Arbitration Commission and the Industrial Court.[67] By 1975, the Institute of Arbitrators (now known as the Institute of Arbitrators and Mediators) was established.[68] At present, ADR functions have been maximally utilized in Australia to settle civil disputes; the courts are more inclined to refer matters first to ADR without seeking the consent of the litigants.[69]

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[59] Lovette Osavie Patrick 'Alternative Dispute Resolution in Nigeria: Breaking New Boundaries' *Journal of Alternate Dispute Resolution* (2023) Volume 2 (3) < https://thelawbrigade.com/wp-content/uploads/2023/09/Lovette-Osavie-Patrick-JADR.pdf> accessed 12/04/26

[60] Akin Akinbote 'Arbitration in Africa - The State of Arbitration in Nigeria' A Paper Presented at the 2008 Colloquium of The Association for the Promotion of Arbitration in Africa held at Djeuga Palace Hotel, Yaounde, Yaounde from 14th – 15th January, 2008 <https://www.ohada.com/uploads/actualite/261/the-state-of-arbitration-in-nigeria.pdf> accessed 12/04/26

[61] Ibid.

[62] Abida Hassan and Dil Muhammad Malik 'Dispute Resolution Practices in USA, Australia and UK/EU' *GSSR* (2019) 4(1) 373-379 <DOI:10.31.2019(IV-I).48> accessed 12/04/26

[63] Ibid.

[64] Ibid.

[65] Ibid

[66] Ibid

[67] Ibid.

[68] Ibid

[69] Ibid.

3. COMPARATIVE ANALYSIS OF MEDICAL MALPRACTICE IN ADR MECHANISMS IN THE UNITED STATES AND AUSTRALIA

The core of this section is to put forward positive and compelling arguments to advance the invocation, administration and utilization of ADR in Nigeria by comparing both the US and Australian legal systems as regards medical malpractice. Reiterating that medical malpractice and medical negligence are terms used to denote the same thing. This research, however, argues that sufficient disparities exist to clearly distinguish the two concepts. For those purposes, the term medical negligence should govern all actions that breach patients' trust, whether criminal or civil; medical malpractice should apply to acts that attack the ethics and integrity of the medical profession. For such actions, patients should seek civil redress through the ADR system. Notwithstanding this, it is worth highlighting favourable ADR practices in selected jurisdictions below.

3.1 Medical Malpractice and ADR in the USA

ADR is part of a nation's court system. Thus, its functionality does not override or oust the powers of the judiciary. On the contrary, it was recognized primarily to mitigate hardships in the court system, dispense justice according to the parties' dictates, and reduce the burden on the court. Therefore, to satisfy the demands of justice particularly in medical malpractice, ADR is invoked in various forms;

Negotiation

Negotiation traditionally involves an exchange of conflicts or contentious issues by a neutral third party to achieve an amicable resolution.[70] Building therefrom, medical malpractice cases may be resolved in the United States by what is known as 'apology'.[71] This means setting up a meeting between the two conflicting parties to mitigate painful or hurtful emotions without the fear of an inevitable future lawsuit against the medical practitioner.[72] The beauty of negotiations in medical malpractice cases is that they usually provide the atmosphere needed to ensure patients are fully involved in the process by reducing the distance between a professional and his patient. That is, it lifts the cloak of mystery and myth around medical practice and frames the medical practitioner as an individual. In the long run, having safe conversations will ultimately reduce the amount of the settlement.[73] Unfortunately, as with traditional negotiations, ADR is non-binding; that is, the case may be returned to court.[74] This makes this ADR system essentially short-lived and may become a tool for future witch-hunting.

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[70] N:30 Usman Ahmed and another
[71] David H. Sohn and B. Sonny Bal 'Medical Malpractice Reform: The Role of Alternative Dispute Resolution' *Clin Prthop Relat Res* (2012) 470 (5) 1370-1375 <DOI 10.1007/s11999-011-2206-2> accessed 12/04/26
[72] Ibid.
[73] Ibid.
[74] Ibid.

Arbitration

Arbitration binds all parties. This in essence applies to medical malpractice cases. Also, arbitration involves legal representation and a neutral arbiter. Resolving medical malpractice cases through arbitration, especially in the United States, ensures finality. However, it has the reputation of being highly contentious and acrimonious -this has been blamed on the presence of legal representation-and expensive. Nonetheless, it is as effective as regular court.[75] Most states in the United States use pretreatment agreements, which immediately invoke arbitration if malpractice is alleged.[76] In the US, the Federal Arbitration Act regulates ADR, as the US Supreme Court affirmed in *Kindred Nursing Centers, L.P. v. Clark*.[77] Here, the Supreme Court reversed the judgment on the basis that the Federal Arbitration Act '…preempts any state rule that facially discriminates against arbitration or that covertly accomplishes the same objective by disfavoring contracts that contain the features of arbitration agreements.'[78] Again, the court had ruled in *Ruiz v. Podolsky*,[79] '…that when a person seeking medical care contracts with a health care provider to resolve all medical malpractice claims through arbitration, that agreement applies to the resolution of wrongful death claims even when the wrongful death heirs did not sign the agreement.'[80] In that case, before receiving medical treatment, the patient Podolsky entered into an arbitration agreement with his medical practitioner. The agreement itself contained a clause intending that '…the patient's spouse and heirs to arbitrate any claims, including wrongful death and loss of consortium claims, that may arise out of or relate to treatment or service provided by the physician.'[81] Upon the death of the patient, his family sued, arguing that they could not be compelled to undergo arbitration with the medical practitioner involved in the medical malpractice claim; the court overruled them by holding that the parties were indeed bound by the supposed arbitration agreement.[82]

However, the court has in some cases invalidated arbitration agreements on public-policy grounds. In *Hernandez v. Crespo*, the court rejected the arguments of Women's Care

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[75] Ibid

[76] Ibid: on the legitimacy or otherwise of pretreatment arbitration agreement please the following cases: *Estate of Ruszala v Brookdale Living Communities* 415 N.J. Super. 272 (App. Div. 2010) and *Moore* v *Woman to Woman Obstetrics & Gynecology* A.3d 535/416 N.J. Super. 303

[77] Federal Arbitration Act of 1925; No. 16-32; Daniel E. Pulliam and Brian J Paul 'Supreme Court Decides Kindred Nursing Centers, L.P. v. Clark' *Faegre Drinker* (2017) < https://www.faegredrinker.com/en/insights/publications/2017/5/supreme-court-decides-kindred-nursing-centers-lp-v-clark?utm_> accessed 12/04/26

[78] Ibid Daniel E Pulliam

[79] 2010 Cal. LEXIS 8292; Lori C. Ferguson and Hanson Bridgett 'Enforcing Arbitration Agreements: California Supreme Court Expands Enforceability of Arbitration Agreements in Healthcare Context' *Arbitration* (2010) www.hansonbridgett.com> accessed 15/04/26

[80] Ibid

[81] Ibid

[82] Ibid.

Florida, a healthcare provider, on the basis that its arbitration agreement with the patient, Ms. Crespo, ousted the court's jurisdiction and was therefore void.[83] No ADR mechanism should oust the court's jurisdiction, and where it does, such agreements are void. This is because ADR does not replace the court; it was established to assist it. Aside from arbitration and mediation, other ADR forms prevalent in the United States are risk management, early neutral evaluation, screening panels, and summary jury trials.[84]

3.2 Medical Malpractice and ADR in Australia

ADR is organized by state under each state's existing provisions and occurs in various forms. Notably, court procedures such as pre-action counseling are an ADR typology usually initiated to resolve medical malpractice cases and, where it fails, become the springboard to initiate proper court process. These phenomena are adumbrated below.

Mediation/Pre-Trial Conference

Subject to available resources, States such as New South Wales use mediation by consent or by court order.[85] Cases referred to mediation are either 'indefensible, arguably defensible or defensible.'[86] In Queensland, parties to an action must participate in a pre-trial conference under the Personal Injuries Proceedings Act.[87] In Western Australia, ADR is a prerequisite before a formal court process. As a result, such cases may undergo a pre-trial conference or mediation.[88] However, only personalized accounts of ADR outcomes are available online.

4. LESSONS FOR NIGERIA

The Medical and Dental Practitioners Act,[89] by Section 15 creates and regulates the Medical and Dental Practitioners Disciplinary Tribunal.[90] It is the duty of the Tribunal to determine cases referred to it by the Medical and Dental Practitioners Investigation Panel.[91] Subsection 5 of the same Section 15, however, refers to matters incidental to the establishment of a tribunal, to wit: the composition, quorum, determination of a dispute, etc. As a result, the Rules under the Second Schedule to the Act, by their interpretation, are intended to set up an

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[83] Russo Law 'Arbitration Agreement held Unconstitutional in Stillbirth Case' < https://www.chrisrussolaw.com/florida-supreme-court-asked-reconsider-arbitration-agreements/?utm> accessed 15/04/26; Case Number SC15-67 (December 22, 2016)

[84] Thomas B. Metzloff 'Alternative Dispute Resolution Strategies in Medical Malpractice' *Alaska Law Review* (1992) 9 (2)

[85] Don Munro, Katharine Philip and Erica Dobson 'Alternative Dispute Resolution in Medical Negligence Cases' *HWLB Lawyer*s <https://hwlebsworth.com.au/alternative-dispute-resolution-in-medical-negligence-cases/?utm> accessed 16/04/26

[86] Ibid

[87] Ibid.

[88] Ibid

[89] N:39 Medical and Dental Practitioners Act

[90] Ibid

[91] Ibid

administrative body concerned only with effecting discipline among members of the medical profession in Nigeria and nothing more.

On the other hand, the Nigerian judiciary has been upgraded to provide core ADR services to the public. This is known as the multi-door courthouse accessible in most state judiciaries. Given the nature of medical malpractice, it is apposite to convert or upgrade the Medical and Dental Practitioners Disciplinary Tribunal to include ADR functions. By doing so, while the Tribunal still satisfies its quasi-judicial function of maintaining discipline and punishing infractions, it also helps parties resolve medical malpractice cases. Ultimately, the goal becomes tripartite: maintaining professional discipline while ensuring professional confidence among members, retaining and restoring public trust in the Nigerian healthcare system, and mitigating the burden on the courts.

Also, in these times, it is trite that justice is rarely achieved through formal court determinations. Existing precedents show that monetary claims or reliefs do not truly assuage the hurting patient. Pursuing action in formal court systems tends to turn the medical practitioner against the patients he swore to care for. Therefore, to avoid future recurrences, medical professionals, as a matter of survival, prefer to obliterate or doctor traces of medical actions taken. Or, in the extreme, such medical professionals may seek the silent cooperation of colleagues to frustrate the patient. Together, these acts widen the relational gap between the medical practitioner and his patient. It further subjects the profession to mysticism, emboldened again by the professionals themselves.

5. CONCLUSION

The nomenclature of medical malpractice is distinct from medical negligence. For this minute distinction, it becomes necessary to adjudicate on matters arising therefrom distinctly. Medical malpractice is an act tied to the ethics of the profession. Medical negligence has its foundations flowing from tort law. While legal elements must be proved to establish medical negligence, medical malpractice focuses on actions. Both, however, may occasion harm or loss to the patient. Both stem from enabling laws or codes.

The Nigerian legal system now includes an alternative dispute resolution mechanism. Traditionally, ADR has roots in customary practices across Nigeria's various tribes. As a statutory provision, it runs parallel to the court system. Invoked through various mechanisms, it does not override or oust the court's jurisdiction. It is both cost-effective, time-effective, and usually therapeutic. Because of these benefits, it is a suitable option for resolving medical malpractice, since the regular court system creates more misery and reinforces the silence of medical professionals. Also, beyond time, medical malpractice cases require expertise.

Therefore, because of the flexibility and therapeutic nature of ADR, Nigeria should set up structures that encourage the resolution of medical malpractice through ADR.

6. RECOMMENDATION

The death of the son of Chimamanda Adichie has further strained the already strained relationship between medical professionals and their patients.[92] This does no good to boost public confidence and morale in the healthcare system. The Nigerian healthcare system is already facing an existential crisis. Beyond existing institutional and social problems of corruption, the system also faces recurrent issues of quality and quantity. Quality reflects the skills of current professionals in solving health problems; quantity refers to the required number of professionals per 1000 patients.[93] Together, these factors, if not handled properly, contribute to the prevalence of medical errors. To encourage both professionals and citizens, it is important to facilitate, encourage, and promote ADR across boards, regardless of the institution.

Firstly, efforts should be made to educate both professionals and citizens alike on the benefits and procedures for initiating ADR. Second, ADR should be included in the school curriculum to help address longstanding customs. Third, legal practitioners and medical personnel should be trained to advocate for medical malpractice.

[92] BBC News Pidgin 'Two Euracare doctors chop suspension ova death of Chimamanda Adichie' *BBC News Pidgin* 4th March 2026 < BBC https://share.google/d0Fzd3N8OrLIyyqRq> accessed 20/05/26

[93] Godsgift Onyedinefu 'Doctors Practicing in Nigeria Fall by nearly 17% in One Year' Business *Day* January 27 2026 <https://businessday.ng/news/article/doctors-practising-in-nigeria-fall-by-nearly-17-in-one-year/> accessed 20/05/26