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Determining the Settlement of Personal Injury Claims by Arbitration in Nigeria

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Abstract

Personal injury claims arising from road traffic accidents, defective products, work accidents and medical negligence are subjects of litigation in Nigeria with attendant problems of long delay and lack of confidence in the national court. This paper attempts to ascertain the suitability of settlement of personal injury claims by arbitration and alternative dispute resolution methods in Nigeria by analysing relevant statutes and explores the possibility of accommodating third party beneficiaries claiming whether as family members or as persons directly affected by the claims. The paper finds that it is possible to expand the frontiers of arbitration which is ordinarily based on contract to cover personal injury claims and it recommends legislative reforms especially on the relevant provisions of the National Health Insurance Scheme Act in order to promote alternative dispute resolution mechanisms as viable means for settling personal injury claims in Nigeria.

Keywords: *Arbitration, National Health Insurance Scheme, Nigeria, Personal Injury Claims, Settlement.*

1. Introduction

As one of the two core interests recognized as protected by tort law, protection from injuries has been significantly inefficient in Nigeria.[1] It can hardly be said that tort law has met either of the goals of corrective justice or deterrence. This is disturbing as several Nigerians are victims of injuries in tort, some of which had resulted in death of the victim.[2]The victims of personal injuries which can take the physical, emotional or mental form are expected to be protected under the law of torts in Nigeria. When injuries are suffered by patients, employees, road users or consumers of products, such victims usually seek to be compensated. However, it is extremely difficult in Nigeria to receive compensation due to the problems of access and administration of remedies that are available. Consequently, compensation for personal injury claims is based on law of torts

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[1] Nigeria is a federation with 36 states. Each state has the legislative power to enact Torts Law. See for instance, Torts Law, Cap 150, Laws of Enugu State 2004; Torts Law, Cap124 Laws of Oyo State 1978; Torts Law, Cap 126 Laws of Ogun State 1978; Torts Law, Cap140 Laws of Anambra State 1991.

[2]*Oluwakemi Mary Adekile,*'Compensating Victims of Personal Injury in Tort: The Nigerian Experience So Far', *JURIDICA*, AUDJ, [2013], 9(2),144 -176, https://ro.vlex.com/vid/compensating-victims-injury-tort-nigerian-468153490, accessed 21 March 2023.

although there are a few social security arrangements in place. It is therefore not a surprise to observe that tort law in most jurisdictions has been relegated to a secondary position in the area of personal injury most especially with the emergence of social security, for example, under the Nigerian Social Insurance Trust Fund Act 1993[3] and the Employee's Compensation Act 2010.

Nigerian law of torts straddles the uneven divide between strict liability and fault liability. The fault liability is anchored on two principles: first, that the person who causes injury by fault must compensate the victim; second that a person who causes injury, loss or damage without fault should not be required to compensate the victim. Furthermore, the proof that a defendant was negligent is necessary to establish fault. It is settled law that negligence connotes failure to take that degree of care which is reasonable in the circumstances of the case or failure to act as a reasonable person. **Establishing negligence has been likened to finding a needle in a haystack and hence every case must be managed with certain skill.**[4]The tort of negligence requires that defendant is at fault in failing to prevent the harm, not that he intended the harm.[5]The second dominant tort principle is that of strict liability. Strict liability in tort imposes a duty not to injure without more on the defendant. Strict liability is not liability in the absence of fault but liability regardless of the absence or presence of fault.[6]

Under the law of tort, the mode of obtaining compensation is through litigation.[7] The failure of the Nigerian adjudicatory system to quickly dispense with cases is well-known. This is because litigation of all forms of personal injury claims is not only time consuming, but expensive and cumbersome.[8] According to Metzloff,[9] medical malpractice claims just like other personal injuries claims are contentious. Unlike other litigation contexts where pre-litigation settlements are possible, personal injury claims are usually filed in court and are often heavily litigated. Hence, it is possible to have a case lasting in court for over 10years.[10] Such lengthy period of continuous visits to the court, coupled with the uncertainty of the strenuous judicial process is a lot of distractions to the litigants. Hence, several claimants had been discouraged from seeking redress in court, thereby promoting injustice and impunity in securing compensation arising from personal injury claims.

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[3] Cap N88 Laws of the Federation of Nigeria (LFN) 2004.

[4] Sally Gleeson and Alicia Wong 'Australia: Managing costs in medical negligence claims', *Mondaq*, (Australia, 27 August 2020), available at https://www.mondaq.com/australia/personal-injury/980000/managing-costs-in-medical-negligence-claims, accessed 21 March 2023.

[5] Richard Posner, 'A Theory of Negligence', [1972] *J Leg Studies*(1) 29; Ying Yi Lim, Philip Poronnik.Tim Usherwood and Belinda Reeve, "Medical negligence laws and virtual reality in healthcare", [2020]*AJGP*, 49(8), available at https://www1.racgp.org.au/ajgp/2020/august/medical-negligence-laws-and-virtual-reality-in-hea, accessed on 21March 2023.

[6] Adekile, above n 2, at 146.

[7] O. Agbonkhese, G. L. Yisa, E. G. Agbonkhese, D. O. Akanbi, and E. B. Mondigha, 'Road Traffic Accidents in Nigeria: Causes and Preventive Measures', *Civil and Environmental Research*, [2013] 3(13),available at http://iiste.org/Journals/index.php/CER/article/viewFile/9369/9590 , accessed 21March 2023.

[8] Parker Laryisson, 'Over view of ADR in Car accident personal injury cases', *Law Firm*, [2014], available at https://layrisson.com/mediation-and-arbitration-adr-in-car-accident-personal-injury-cases/ , accessed 21 March 2023.

[9] TB Metzloff, 'The Unrealized Potential of Malpractice Arbitration', *Wake Forest Law Review*, [1996](31) 203 - 230.

[10]*Shell Petroleum Development Company Nigeria Limited v Federal Board of Inland Revenue* (1996) 8 NWLR (Pt 466) 256 which lasted for a period of 23 years.

Arbitration and Alternative Dispute Resolution (ADR) mechanisms effectively avoid the shortcomings of litigation.[11] Unfortunately, it appears the scope of section 26 of the National Health Insurance Scheme Act[12] (NHIS Act) which relates to settlement of personal injury claims in Nigeria by arbitration is limited to claims arising only from the operation of the Act.

As noted, a claim under the law of tort would only succeed if the claimant is able to prove the tortfeasor's fault. This could be difficult, time consuming, expensive and in some cases an unjust process. In such a situation, arbitration could serve as a suitable alternative to litigation.

This paper therefore seeks to determine the challenges encountered in resolving disputes arising from personal injury claims through litigation. It will ascertain the suitability of arbitration and other ADR methods in resolving such personal injury claims which is essentially based on the law of tort. It will further examine the right of third parties to benefit from such arbitral proceedings and their rights if any in instituting such proceedings. It will discuss the existing relevant legal regimes in Nigeria from comparative perspective and suggests ways of bringing them to align with international best practices.

2. Liability Arising from Personal Injury Claims

2.1 Medical Negligence or Malpractice

Medical negligence can occur in an infinite number of ways.[13]A doctor will be in breach of the duty owed to a patient if the doctor fails to exercise the degree of care which the law requires. The standard required would be the degree of care, skill and judgment which an average doctor of that experience is expected to show when faced with a similar circumstance.[14] Once a doctor undertakes to treat a patient, whether or not there is an agreement between them, a duty of care arises. The doctor must then exercise reasonable care and skill in treating the patient. It is immaterial that the doctor is rendering such service out of charity.[15]

The court must be satisfied that a medical practitioner failed to exercise a duty of care and that the plaintiff suffered damages as a result of the breach, before an action for negligence can succeed. The medical science and practice require a lot of research and devotion. A particular symptom could be attributable to various classes of diseases. New illnesses which were not common spring up and it is the duty of doctors and others in the field to find the best way to treat such illnesses and utmost attention of the practitioners is brought to bear on very intricate medical ailments of patients. It would be a terrible situation for the growth of medicine if with all the risks doctors have to take in curing an ailment, once the desired result is not attained; such doctors are under the threat of law suits. This type of situation has led to the practice of defensive medicine whereby doctors

[11]Arbitration as an alternative adjudicatory system is treated differently from other ADR methods such as negotiation, conciliation, mediation e.t.c. which are non-adjudicatory.

[12]Cap N42, Laws of the Federation of Nigeria (LFN) 2004.

[13] For instance, misdiagnoses, failure to diagnose on time, surgical error, failure to carry out necessary tests, failure to follow up with treatment, failure to attend to patients promptly, anaesthesia error, medication or prospective error, failure to sterilize surgical equipment, failure to cross match blood transfusion, use of out-dated techniques or procedure, use of patient for experimentation, incompetence in the assessment of the patient, deficient treatment arising from inadequate pre-operative investigation, deficient operative procedure and poor and faulty post-operative management. See *Akintade v Chairman Medical and Dental Practitioners Disciplinary Tribunal (MDPDT)* (2005) 9 NWLR (pt930) 338 5.

[14]Ibid

[15]*Id* 123-124.

do not give what they necessarily consider the best medical treatment; rather, they give the treatment that would prevent them from having lawsuits arising after the treatment is over. Also, patients who go into a hospital desire and deserve the best treatment.

The approach to compensation for medical claims remains individualistic.In *Roe v Minister of Health,*[16] the anaesthetist injected the two plaintiffs with contaminated anaesthetic, which caused them paralysis from the waist downwards. The anaesthetist was held not to be negligent because the risk of such contamination was not generally appreciated by competent anaesthetists at that time. Hospital authorities may be vicariously liable for unauthorised treatment by doctors in their employment. To safeguard against this, it is usual to obtain the patient's signature to stereotype consent inside a folder before an operation.

2.2 Road Traffic Accident

The tort of negligence imposes a duty of care on motorists for the benefit of all road users[17] and a breach of this duty, can lead to a road traffic accident claim. Although Nigeria has a system of compulsory liability insurance in this area,[18] which should promote a more efficient compensation model for victims of road traffic accidents, it is not necessarily so as the insurance sector is beset with its own challenges.

The fallout of "fault" as the theoretical basis of liability for road traffic accident is that many victims are excluded from compensation. These include victims of uninsured or under-insured tortfeasors or where the tortfeasor cannot be traced, as in typical hit and run cases (which is very rampant in Nigeria) or where it is a pure case of accident. Thus, it is evident that most of the victims involved in the accidents never file any claim in court and are left with the burden of treating their injuries and subsequently dealing with whatever permanent disabilities that may result from the injury.

The key issue that motor accident claims generate in Nigeria is in establishing fault on the part of the defendant. Establishing fault in this type of cases in Nigeria is a difficult one in the absence of technologies such as Closed-Circuit Televisions (CCTV) that automatically takes pictures of road traffic offenders and record videos of day to day occurrences on the road. The absence of appropriate technology leaves the establishment of fault at the mercy of assumptions, the testimonies of the parties and sometimes eye-witness reports when it is possible to get such.

In the United Kingdom (UK), road traffic accidents are dealt with under the general law of negligence. Drivers of motor vehicles owe a duty of care towards one another, and pedestrians. The standard is that of a reasonable driver, and everyone is expected to attain this standard, even learner drivers.[19] It is a completely objective standard. Drivers have been found liable for injuries caused while suffering a heart attack[20]or a diabetic attack[21] at the wheel based on the standard of

[16] [1954] 2 QB 66.

[17]*Fenton v Thorley* (1903) AC 443 at 453; *Ezeigbe v Agholor* (1993) 9 NWLR (pt 316) 128.

[18]Motor Vehicle (Third Party) Insurance Act Cap M22 LFN 2004, Section 3 (2) thereof provides that any person who contravenes the law is liable on conviction to a fine of four hundred naira or imprisonment for one year or both and a person convicted shall be disqualified from holding or obtaining a driving license for a minimum of twelve months from the date of the conviction.

[19]*Nettleship v Weston* [1971] 2 QB 691.

[20]*Roberts v Ramsbottom*[1980] 1 WLR 823.

[21]*Broome v Perkins* [1987] RTR 321.

a reasonable driver. The successive Road Traffic Acts[22] have imposed compulsory third-party insurance covering owners and drivers of vehicles against liability for both personal injury and property damage. The intention is to ensure compensation for victims of accidents.[23]

Unfortunately, in Nigeria, victims of road traffic accidents have largely depended on family support, the benevolence of private persons, government bodies, religious bodies, corporate organizations or non-governmental organizations for relief from their misfortune. A well-structured Alternative Dispute Resolution in the context of the socio-economic environment of Nigeria can bring succour to parties in road traffic accident claims.

2.3 Defective Products

Product liability in tort is a manufacturer or seller's liability for any damage or personal injury suffered by a buyer, user, or bystander as a result of a defective product.[24] The duty owed by the manufacturer, is to take reasonable care to see that no injury is done to the consumer or ultimate purchaser[25] and a breach of this duty gives rise to a defective product claim. Instances of the application of tort principles to product defect include compensation for mental injury suffered on the discovery of decayed tooth in biscuit[26] and the presence of screwed up piece of paper in a bottle of sprite.[27]

The basis of liability in tort is not just that the product is defective but that the defect has resulted in an injury to the claimant.[28]In situations where scientific or technical knowledge has not advanced to make defendant aware of possible dangers, the action in negligence will fail based on the "state of the art" or "development risk defence".[29] This is a very potent danger in the light of Nigeria's low level of technological development.

In the United Kingdom, traditional liability for defective products is dealt with either under contract law (if it happens that there is a contract between the claimant and the defendant),[30] or under the general law of tort, after *Donoghue v Stevenson*[31] expanded the "privity principle" (a case which recognised that the ultimate consumer of a product could sue the manufacturer or indeed anyone else in the supply chain whose fault has caused a defect) in tort. These bases for a cause of action in contract and tort still exist, despite the recent legislation in the area. It may still be necessary to rely on these grounds should the Consumer Protection Act 1987 not cover the

[22] Now regulated by the English Road Traffic Act 1988.

[23]SimonDeakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (5th edn, Clarendon Press, 2003) 172.

[24] MS Madden, *Products Liability* (London: West Publication Co, 1988) 1-2.

[25] Lewis J in *Daniels v Williams* [1938] 4 All ER 258.

[26]*Osemabor v Niger Biscuits (Nig) Ltd* (1973) NCLR 382.

[27]*Soremi v Nigerian Bottling Co Ltd* (1970) 12 CCHCJ 2735.

[28]Above n 24

[29]*Roe v Minister of Health* (1954) 2 QB 66. There is now a line of cases which establish that if a danger becomes apparent after products have been put in the market-place, a manufacturer has a duty to warn potential users and in extreme cases to operate a system of product recall. This risk is insurable and a lot of manufacturers insure against it. An efficient system of product recall is also imperative. The Japanese manufacturers of Toyota brands of cars have recently exercised this option to recall some of their faulty brands alleged to be responsible for some deaths and personal injury in the United States.

[30]Sale of Goods Act 1979 provides for the seller's implied undertakings as to comply with description, satisfactory quality, fitness for purpose and comply with sample in the contract of sale. The standard is strict liability.

[31] [1932] AC 562.

particular situation the claimant finds himself in. Suing in negligence can prove difficult for a claimant. The courts have however found negligence "...as a matter of inference from the existence of the defects taken in connection with all the known circumstances",[32] the relevant circumstances being that the defect could not have occurred without some fault during the manufacturing process. However, the inference is not always used (for example if the fault could have been the suppliers'[33]), and there has been debate over the strength of the inference, and what is required to rebut it. If the negligence claim is successful, the claimant can recover compensation for personal injury and property damage caused by the defect, but not for economic loss (ie, the price of the faulty product).

2.3.1 Occupational Hazard

This covers injuries which occur in the course of work. A work-related injury is one that occurs while an employee is doing something on behalf of the employer or otherwise in the course of employment. Most injuries that can be classified as work-related are those that occur at the workplace, but also may occur in company-owned trucks and other locations as long as the employee was doing something covered by the terms of employment. This includes social events on behalf of the company or sponsored by an employer, but not necessarily on company-owned property.

Occupational hazard claims can arise out of poor working conditions, inadequate safety or protection offered by employers, negligence of a co-worker which could lead to loss of ability to work or function.

At common law, workers injured in the course of employment had a right to compensation from their employer under a system of negligence liability which imposed personal liability and vicarious liability on such employers. Four duties are recognized within this personal duty ambit[34] the employer must provide safe plant and machinery, a competent staff, a safe system of work and a safe place of work. In Nigeria, the tort system has proved inadequate as a compensatory regime for work injuries due to its required need to establish fault against the employer before liability can arise. A case in point depicting the pathetic plight of the worker in Nigeria is *Chaguary & Anor v Yakubu.*[35] The claimant worker was employed as a driver by the second appellant and was attached to the first appellant. His work required that he drove two cooks of the first appellant to their residence daily between 8 and 9pm. One day after dropping them off he was attacked by robbers, who shot him in the face. At the trial of his claim for compensatory damages from his employers the trial court held that appellants were not negligent but went ahead to award the sum of three hundred thousand naira as general damages. On appeal, the Court of Appeal held that in the circumstances, the employers had done all that a reasonable employer should do and damages could not legitimately be awarded against them. In other words, the employer was not at fault in causing the injury and should not shoulder the loss. The fallout of this decision was that the loss had to be borne by the worker since no form of social security was available in the country to accommodate the loss.

[32] *Grant v Australian Knitting Mills* [1936] AC 85, per Lord Wright AC 85 101.
[33] *Evans v Triplex Safety Glass Co* [1938] 1 All ER 283.
[34] *Wilsons and Clyde Coal Co v English* [1938] AC 57.
[35] (2006) 3 NWLR (pt 966) 138.

The Employee's Compensation Act, 2010 repeals the Workmen's Compensation Act[36] and makes comprehensive provisions for payment of compensation to employees who suffer from occupational diseases or sustain injuries arising from accident at workplace or in the course of employment. Under the 2010 Act which created a publicly administered no fault compensation regime for employment injury and death, it is mandatory for injured worker or complainant to report the particulars of his claim to the Nigeria Social Insurance Trust Fund Management Board whose duties it is among others to formulate policies and strategies for assessment of compensation, rehabilitation and welfare of employees who sustain injuries or contact occupational diseases at the workplace or in the course of employment.

Primarily, every employer is under a duty to provide a safe means of access and a safe place of employment by virtue of section 28 of the Factories Act[37]. There is an obligation to ensure that every machinery in a factory should be fitted with safeguards to prevent injury to workers or any person who may come in contact with such dangerous part of the machinery.

The need for an efficient and adequate compensation regime for injured workers or their dependence cannot be over emphasised. For instance, where the victim's fingers are cut off, the victim loses the ability to write or even sign his signature amongst others. The injury might as well have affected his eyes or other aspect of his body which may lead to permanent sensory impairment or disability. This is the reality which the victim may face for the rest of his life, with grave implications for his livelihood and that of his dependants.[38]The employer is better able to compensate the victim, and better able to spread losses through insurance. One might also add that the employer gains the benefits from the enterprise and therefore should also bear the risk of torts that occurred in the course of business.[39]

3. Arbitration of Personal Injury Claims

A person who suffers personal injury rarely has contractual relationships with the tortfeasor.Arbitration is a "creature of contract"[40] and this implies that parties cannot ordinarily be forced to arbitrate claims and disputes. The Nigerian Arbitration and Conciliation Act[41]presupposes that arbitration must arise from a written agreement[42] between parties. Not only must it be based on a written agreement, it must also be commercial in nature[43]. Therefore, under

[36]Cap. W6, LFN, 2004.

[37] Cap F1, LFN 2004.

[38]Ewere Odiase, 'Factory Related Injury and Employee Compensation under Nigerian Law', (Asaba, 6 September, 2013) available at http://www.nairaland.com/1428498/factory-related-injury-employee-compensation,accessed 22March 2023.

[39]*Imperial Chemical Industries v Shatwell*(1965) AC 656.

[40]*Steelworkers v American Mfg. Co.* 363 U.S. 564 (1960); *Ashbey v Archstone Property Management, Inc.*, No 12-55912, 2015 U.S. App LEXIS 7819 (9th Cir. May 12, 2015).

[41] CAP A18 LFN, 2004, (Hereinafter referred to as 'The Nigerian Act').

[42]*Ibid*, section1. Domestic arbitration may appear to be prevalent in the settlement of personal injury claims but in Nigeria, such claims can also be settled by international arbitration upon the agreement of the parties by virtue of section 57(2)(d) of the Nigerian Arbitration Act which provides that an arbitration is international if , "the parties despite the nature of the contract, expressly agree that any dispute arising from the commercial transaction shall be treated as an international arbitration".

[43] Section 57(1) of the Nigerian Act defines commercial as 'all relationships of a commercial nature including any trade transaction for the supply or exchange of goods or services , distribution agreement, commercial representation or agency, factoring, leasing, construction of works, constructing, engineering licensing, investment, financing,

the Nigerian Act, only disputes arising out of relationships of a commercial nature are arbitrable. Actions in tort are not usually borne out of contract. It is doubtful if the courts will enforce an arbitration agreement to refer claims in tort to arbitration, where there is no underlying commercial contract.[44]

However, situations exist where an arbitration clause provides that: *"*any dispute arising out of or inconnectionwith this contract shall be submitted to arbitration*…".* In such situations, it is possible for a tort to arise out of or in connection with such a contract.[45]The issue is whether such a class of tort claims arising out of contract are arbitrable. It is safe to argue that such tort claims fall under the scope of an arbitration clause which provides for "any dispute arising out of or in connection withthis contract". As a result, parties to an arbitration agreement may end up in prolonged litigation arguing over the scope of the arbitration agreement where both contract and tort claims are alleged. Attacks on arbitration clauses have often been successful because of the issue of lack of consent to the clause and the prohibitive expense of arbitration*[46]*.

As noted, personal injury claims can arise from intentional torts, negligence and strict liability and a person who claims for damages in litigation or arbitration is required to prove four ingredients namely: existence of a duty of care, breach of that duty, causation and injury. Some of the problems encountered when proving personal injury claims through litigation are also prevalent in arbitration which is essentially adjudicatory. They include problems associated with proof of *mens rea*, failure to identify the real defendant and limitation of the compensation of the plaintiff such as when contributory negligence is proved. Even though arbitration has the advantage of speedy settlement and reduction of costs, a major constraint of the suitability of Arbitration for tort claims stems from enforcement of arbitral awards. Considering that enforcing arbitral awards requires the machinery of the court, a successful party is again routed back to the civil courts and is at the risk of being subjected to the rigours and delays of enforcement procedure.[47]Arbitration in a personal injury case in the absence of a prior contract is usually based on the agreement of the parties after the occurrence of the injury. Since arbitration is based on agreement, it is possible for parties to agree to arbitrate after the personal injury has occurred. Thus, it should be possible for the court to order parties to seek alternative dispute resolution mechanisms in resolving their disputes before coming to court.[48]

4. Relevant Legal Regimes in Nigeria

banking, insurance, exploitation, agreement or concession, joint venture and other forms of industrial or business corporation, carriage of goods or passengers by air ,sea, rail, or road'.

[44]*Dennis v CMH Mfg., Inc* 773 So 2d 818 (La. Ct. App 2000); *Boone v Etkin* 771 So 2d 559 (Fla. Dist. Ct. App 2000).

[45]*Onwuchekwa v NDIC* (2002) LPELR-2714(SC); *United Bank for Africa PLC v Ogundokun* (2009) 6 NWLR (Pt 1138) 450.

[46]See *Armendariz v Foundation Health Psychare Services*, 99 Cal. Rptr. 2d 745 (2000). In Nigeria, section 129 of the Federal Competition and Consumer Protection Act of 2018 prohibits agreements aimed at defeating the general purpose and policy of the Act. Any contract aimed at depriving consumers of their rights under the Act shall be declared void. Therefore, the courts are unlikely to enforce any arbitration agreement contained in contracts entered into in contravention of the Act.

[47]*IPCO v NNPC (2017) UKSC 16.* Where an arbitral award that was made on 28 October 2004 in Nigeria has not been enforced seventeen years after. As at the time of writing this paper, the application for challenging the award is yet to be determined by the Nigerian courts.

[48] One of the objectives of the compulsory case management conference (CMC) under order 27 of the High court of Lagos State (civil procedure) Rules 2019 is to promote amicable settlement of the case or adoption of ADR. Failure to participate in CMC attracts heavy sanction under order 27 Rule 5.

The Nigerian Act only recognizes an arbitration borne out of the agreement of parties. As such it limits the possibility of a tort claim where there is no prior contract from which the dispute arises. However, the Nigerian act does not forbid the arbitration of claims under any other law.[49]

Interestingly, the National Health Insurance Scheme (NHIS) Act[50], which is applicable to both public and private health care providers, seems to create a leeway for arbitration of disputes arising out of medical malpractice. Section 26 of the NHIS Act provides that each State of the Federation and the Federal Capital Territory, Abuja, shall have a State Health Insurance Arbitration Board and a Federal Capital Territory Health Insurance Arbitration Board, respectively, "as and when necessary". The duty of the Arbitration Board is to consider complaints of violation of any of the provisions of the Act made by any aggrieved party[51] against any of the agents of the Scheme;[52] or against an organisation or a health care provider.[53] From the relevant provisions of the NHIS Act, it is clear that cases involving medical malpractice are arbitrable under the Act. Such cases do not necessarily arise out of a contract but are made arbitrable by the provision of NHIS Act.

Unfortunately, till date, no state in Nigeria has or has ever had an arbitration board set up to handle disputes under the NHIS Act. This is not a good testimonial in favour of the Scheme as to its effectiveness. Rather, it is as a result of the caveat in the provision which states that the board is established "as and when necessary". The question that arises is the issue of who is to determine when it is necessary to set up the arbitration board. Also, it is necessary to determine the conditions for ascertaining if a situation is necessary enough for the establishment of the Board. The constitution of the Board is rather cumbersome.[54] The total number of persons present on the Board is eight. This is not inclusive of the aggrieved parties or their counsel if they would be so represented. This number defeats the very nature of arbitration which is known for the privacy it affords the parties. Thus, the provisions of sections 26 and 27 of the NHIS Act have not been put into use in Nigeria. This may therefore be the high time to put appropriate statutes in place to reform the modes of seeking redress of medical malpractice as efforts are being made to expand the scope of the NHIS scheme.

5. Relevant Legal Regimes in other Jurisdictions

Many jurisdictions now favour ADR, especially arbitration, for personal injury claims. Most have embraced the approach of court ordered arbitration. Some jurisdictions have statutes guiding the arbitration of tort claims. Some other jurisdictions have established agencies or organisations to deal with arbitration in cases of medical negligence.

In England and Wales, the modern and efficient system for claimants and insurers to resolve personal injury and clinical negligence claims is through a binding civil arbitration. In some cases,

[49] Section 35 of the Nigerian Act provides that 'This act shall not affect any other law by virtue of which certain disputes (a) may not be submitted to arbitration; or (b) may be submitted to arbitration only in accordance with the provisions of that or another law'.

[50] Cap N42, LFN 2004, sections 26 and 27.

[51] NHIS Act Section 26(2)(a).

[52] *Id*, section 26(2)(b).

[53] *Id*, section 26(2) (c).

[54] *Id*, section 27(l). By virtue of section 27(2)(b) of the NHIS Act, members of the Board are to be paid such sitting and other allowances as the Council may decide. This is a welcome provision as it means that the whole arbitration process would be largely subsidized for both parties.

the courts impose penalties against parties who refuse ADR or arbitration.[55]Furthermore, the Pre-Action Protocol for personal injury claims[56] in its No. 9 provides for alternative dispute resolution stating that litigation should be a last resort. As part of the Protocol, the parties are to consider whether negotiation or some other form of ADR enable them to resolve their dispute without commencing proceedings. No 9.1.1 provides that some of the options for resolving disputes without commencing proceedings are discussions and negotiation, mediation, arbitration, and early neutral evaluation. According to No 9.1.3, if proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR but unreasonable refusal to consider ADR will be taken into account by the court when deciding who bears the costs of the proceedings.[57]

In Korea, it is hard to seek compensation from medical accident due to the length of lawsuits.[58] To solve medical disputes within a designated period by an impartial party, the Korea Medical Dispute Mediation and Arbitration Agency (K-Medi) was established in 2012.[59] The government also passed the Relief of Medical Accident Damages and Mediation of Medical Dispute Act on 8 April 2012.[60]

In June 1996, the Mexican government decided to create, by a presidential decree, a functionally independent national institution attached to the Ministry of Health to arbitrate in cases of medical

[55]The Court of Appeal in *Hasley v Milton Keynes General NHS Trust* (2004) EWCA Civ 576, (2004) 1 WLR 3002, opened the door for costs penalties against parties who unreasonably refuse ADR. In *PGF II SA v OMFS Co Ltd* [2013] EWCA; Civ 1288, [2014] 1 W.L.R. 1386, the Court of Appeal approved a costs penalty imposed on a winning defendant for refusing ADR. In *Reid v Buckinghamshire Master O'Hare* (2015) EWHC B21, the court ruled that if the party unwilling to mediate is the losing party, the normal sanction is an order to pay the winner's costs on the indemnity basis. The same rule applies to refusal to arbitrate. Thus, courts are taking the position that personal injury cases should be solved through arbitration. In the absence of statutes to guide and regulate this process, parties can by their subsequent agreement choose to arbitrate their personal injury claims where no prior contract to arbitrate exists between them.

[56]'Pre-Action Protocol for Personal Injury Claims' (April 2021) available at http://www.justice.govuk/courts/procedure-rules/civil/protocol/prot_pic, accessed 22March 2023.This protocol is primarily designed for injury claims which are likely to be allocated to fast track those claims; not even limited to the elements of a personal injury claim but also includes property damage.

[57]Flowing from this, a body known as the Personal Injury Claim Arbitration Service (herein after PIcARBs) was launched in 2015 in the United Kingdom by the Personal Injury Bar Association Chairman to deal with claims worth over 50,000 pounds. The arbitrators under this service are specialist Queen Counsel with personal injury experience. PIcARBS arbitrations are run under the English Arbitration Act 1996. There is also the PIcARBS Rules which became effective on 27 April 2016.

[58] 26 months on the average, unlike in Australia where it takes within 6 to 12 months.

[59]SS Ryu, HJ Bok, and CH Lee, 'The Mediation Precedent Analysis of Medical Dispute and Improvement'*International Journal of Clinical Preventive Dentistry*[2015] 11(3) 185-190 at 186 available at http://dx.doi.org/10.15236/ijcpd.2015.11.3.185, accessed 23March 2023.

[60]Act No 10566, 7 April 2011 Amended by Act No 11141, 31 December 2011 (hereinafter referred to as the Korean Act). Article 1 of the Act on Remedies for Injuries from Medical Malpractice and Mediation of Medical Disputes states that the purpose of this Act is to promptly and fairly redress injuries caused by medical malpractice and create a stable environment for medical services of public health or medical professionals by providing for matters regarding the mediation and arbitration of medical disputes. The first section of the Korean Act covers mediation, the procedure for mediation under the Act and its requirements. These provisions span through from articles 6 to 42. As it speaks of mediation in certain instances, it simultaneously speaks of arbitration. Article 43(4) of the Korean Act provides that as to the procedure for arbitration, the provisions governing the procedure for mediation in the Act shall apply primarily, and the Arbitration Act shall apply mutatis mutandis supplementary.

malpractice. The words "conciliation" and "arbitration" were used as paradigms that equally combine legal and medical expertise; it is called the *Comisión Nacional de Arbitraje Medico* (National Commission of Medical Arbitration).[61] It is governed by the Rules of Procedure for Medical Care Complaints and Management National Expert: Medical Arbitration Commission (hereinafter referred to as the Mexican Rules). All the staff and reviewers are entirely paid by the government and the proceedings are entirely free for the parties.[62] The main goal of this institution is to give specialised attention to conflicts between doctors and patients using all sorts of forms to resolve controversies.[63]

In the United States, New Jersey has a Personal Injury Arbitration Statute. It is a court-based rule which sets arbitration in personal injury cases when the matter in contention is at a certain amount benchmark of $20,000. In New Jersey, arbitration is mandatory state wide for civil cases involving automobile negligence, personal injury, contracts and commercial matters, product liability and personal injury protection suits against one's own insurance carrier for unpaid insurance benefits.[64] Some states in the United States of America have medical malpractice arbitration statutes.[65]

In India, the Supreme Court *in M.R Krishna Murthi* v *The New Indian Assurance Co ltd*[66] directed the government to examine the feasibility of setting up a motor accident Mediation authority in every district so that road accident claims can be settled in a speedy and amicable manner. This is also to be supported with the enactment of India Mediation Act[67]. Finally, In South Africa, there

[61]Carlos Tena-Tamayo and Julio Sotelo, 'Malpractice in Mexico: Arbitration not Litigation', [2005] 331(7451) 448-451 available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1188117/#ref14, accessed23March 2023.

[62]Mexican Ministry of Health, Rules of Procedure for Medical Care Complaints and Management National Expert: Medical Arbitration Commission (Government of Mexico 2015) hereinafter the Mexican Rules, article 6. See also *Comisión Nacional de Arbitraje Médico*.www.conamed.gob.mx, accessed 23March 2023.

[63]*Id*, Article 34.

[64]Karim Arzadi'Personal Injury Arbitration in New Jersey' (2 April 2015)available at https://www.avvo.com/legal-guides/ugc/personal-injury-arbitration-in-new-jersey, accessed 23March 2023. Arbitration takes place at the superior court where the case is filed and is held in a conference room, not a court room. The arbitrator is an attorney who has extensive experience in motor vehicle accident cases. It is up to the arbitrator(s) whether or not testimony will be given at the arbitration. After the arbitrator(s) have heard from both attorneys and the plaintiff, they will ask everyone to leave the room so they can put a value on the case. This value represents what the arbitrator thinks the case should settle for. Each party has 30 days to reject the arbitration award. If neither side rejects, the case is settled for the amount of the award. If one side rejects the award, by filing a form with the court called a Trial de Novo, the case will be placed on the trial list. See also Stark & Stark 'What to Expect at your Arbitration' (18 May 2011)available at http://www.personalinjurylawjournal.com/injury-law/what-to-expect-at-your-arbitration/ accessed 24 March 2023. In Maryland, arbitration is now regarded as a preferred means of conflict resolution. Md Code Ann, Cts & JudProc§§3-2A-01et seq., The Maryland Health Claims Arbitration statute (HCA) mandates the submission of medical malpractice claims as a condition precedent to the institution of an action in court. The legislative intent behind Maryland's Health Claims Arbitration Act was to maximize the number of medical malpractice cases resolved in the arbitration stage.

[65]For example, Alabama has 2006. Alabama Code - Section 6-5-485 — Settlement of disputes by arbitration., applied in *Thomasson* v *Diethelm*, 457 So 2d 397 (Ala1984). Similar provisions are contained in Maryland Health Claims Arbitration Act, Maryland code Annapolis, Courts & Judicial Proceedings. Sections 3-2A-01 et seq.

[66]Suit No. 2476-2477 of 2019 delivered on 5 March 2019.

[67] Mridul Godha 'A Renewed Interest In Mediation In India', *Kluwer Mediation Blog*(30 March 2019), http://mediationblog.kluwerarbitration.com/2019/03/30/a-renewed-interest-in-mediation-in-india/, accessed24March 2023.

are statutes that make ADR a compulsory tool,[68] whereas, there are others that make mediation a voluntary ADR tool.[69]

6. Suitability of ADR For Settlement of Personal Injury Claims

Victims of personal injury are compensated under the law of tort. The process of litigating these claims is wrought with many disadvantages. Some of the disadvantages include the "enhanced" costs and delays created by civil litigation. The case of *Raimi Jenyo & Anor v. Akinsanmi Akinreti & Anor,*[70]which involved a road traffic accident was instituted in 1973. The final decision was given in 1990 – 17 years from the period the case was instituted. Worse still, the plaintiff only received a paltry sum of ₦1,000 as compensation. The time and cost spent on such a heavily litigated case was so high to produce an outcome of no compensation in favour of the plaintiffs. Also, the case of *Nigerian Bottling Company Plc v Edward Okwejiminor,*[71]which involved a claim against product defect, it took a total of 17years to arrive at the decision. The action was instituted in 1991 but the judgment at the Supreme Court was delivered in 2008.Even though the Supreme Court upheld the judgment of the trial court, the amount awarded would have lost significant value. Also, the cost of litigating the case for a period of 17years, if properly assessed may amount to a value more than that which was awarded by the court. On 14 July 2000, the Social and Economic Rights Action Centre (SERAC) filed a lawsuit,[72] against the Imperial Centre and its Chief Medical Director, to challenge the termination of the employment of Georgina Ahamefule, who was a nurse; on the ground that she was suffering from HIV/AIDS. The case lasted for 12 years before it was finally decided at the trial court.

From the examples above, the option of adopting ADR by way of settlement or mediation would have saved the parties time and money,[73] especially if it was ordered by the court or guided by a form of statute. Settlement out of court produces costs savings and avoids court fees. Although blue chip companies like the Nigerian Bottling Company in this case can afford such a long law suit for many years, the victim in most cases cannot. Nonetheless, the defendant companies can also benefit from ADR as there may be less negative publicity that can impact on the corporate image and sales of the company.

The position of Nigerian law on the settlement of personal injury claims through ADR appears to be clearer due to available relevant legislative frameworks. Some rules of court contain provisions

[68]The health profession Act 1974 provides that minor transgressions must be referred to professional boards established by the Act – section 42 of the health professions Act and section 21L of Act 11 of 1970 which provides that when the court considers the circumstances appropriate, it is authorized to refer any matter to Mediation with or without the consent of the disputing parties. Section 110k of the Supreme Court Act 52 of 1970.

[69]The Consumer protection Act– states that when disputes arise, a consumer may seek resolution through an ADR agent providing Mediation services among other dispute resolution process made available by the Act – Act 68 2008.

[70](1990) NWLR (Pt135) 663; (1990) 4 SC 196; see also *International messengers Nig Ltd v Engineer David Nwachukwu* (2004) LPELR SC 132/2000, a road accident case which lasted for 11years.

[71](2008) 5 NWLR (pt1079) 172.

[72]*Georgina Ahamefule v Imperial Medical Centre and Anor* (2004) LPELR CA /L/225/2001.

[73] Tony Allen, 'Advancing ADR In Personal Injury Claims'*Mondaq*(29 September 2019), available at http://www.mondaq.com/uk/x/86714/Personal+Injury/Advancing+ADR+In+Personal+Injury+Claimsaccessed 24March 2023; Super Lawyers Staff, 'WHEN ARBITRATION AND MEDIATION MEET PERSONAL INJURY: What to know if your case goes to alternate dispute resolution in Colorado'(Colorado, 8 February 2021), available at https://www.superlawyers.com/colorado/article/when-arbitration-and-mediation-meet-personal-injury/d6652a57-1a63-4682-8739-062de284b485.html, accessed 24 March 2023.

referring personal injury claims to settlement through ADR. For instance, personal actions in tort are eligible for reference to the Court of Appeal Mediation Centre at any time before an appeal is set for hearing.[74]

Where at any time, the Federal Environmental Protection Council is of the opinion that a project is likely to cause significant adverse environmental effects that may not be mitigable or public concerns respecting the environmental effects of the project warrants it, the council may, after consultation with the Nigerian Environmental Protection Agency, refer the project to mediation or a review panel in order to help the parties reach a consensus on the likely environmental effects and any appropriate measures to be taken.[75] Prior to the enactment of the Federal Competition and Consumer Protection Act of 2018, Section 2 of the Consumer Protection Council (CPC) Act[76] made it mandatory for CPC to provide speedy redress to consumers' complaints through negotiation, mediation and conciliation. The Administration of Justice Commission shall ensure that congestion of cases in court is drastically reduced.[77]Where an action is pending, the court may promote reconciliation among the parties, thereto encourage and facilitate amicable settlement.

Some advantages of ADR over arbitration in settlement of personal injury claims are as follows:

A. Parties who reach an agreement in accordance with their own terms are more likely to comply with the terms than those whose resolutions are imposed by a third party (an arbitrator).[78] Thus, there is a higher likelihood of compliance with terms of settlement rather than a challenge to the terms of settlement. This is especially advantageous in personal injury claims

B. ADR may be faster and cheaper than arbitration for the settlement of tort claims. ADR may be desirable as a means of producing rapid results, especially where parties are eager to move on with their lives.

C. Parties have a greater degree of predictability and control of the outcome of ADR proceedings. This is because damages for tortuous claims could be unliquidated, parties are more likely to predict the extents of their gains or losses.

7. Third Party Beneficiary

Where in a contract of employment, there is an arbitration agreement requiring the parties to arbitrate in the event of any dispute and an accident in the course of work occurs which leads to the death of the employee, is it possible for the family members of such an employee to go to arbitration based on the arbitration clause signed in the contract of employment which they were

[74]Court of Appeal Rules 2016, order 16; Federal Capital Territory (Civil Procedure Rules), 2004, Order 17; Federal High Court Act, capF12 LFN, 2004, section 17. Some forms of mediation are now provided for in some High Court Civil Procedure Rules under the institutional administration of a Multi-Door Court House, to facilitate the resolution of civil disputes. In Nigeria, a lawyer shall not in his representation of his client, fail or neglect to inform his client of the option of ADR mechanisms before resorting to or continuing litigation on behalf of his client. See Rules of Professional Conduct for Legal Practitioners, 2007, Rule 15.

[75] Environmental Impact Assessment Act, Cap. E12, LFN2004, sections 29, 33 & 35.

[76] Cap. C25, LFN 2004.

[77]Administration of Justice Commission Act, Cap. A3, LFN 2004, section 18.

[78]In *Abey v Alex*[78] the Supreme Court in recognition of settlement out of court held that an agreement supersedes the original cause of action altogether and that the court has no further jurisdiction in respect of the original cause of action which has been superseded. See Paul Obo Idornigie, 'Re-thinking Business Disputes Resolution: The Mediation/Conciliation Option', *Ambrose Ali University Law Journal*,[2002]1(1), 38-57 at 57.

not privy to? It has often been supposed that since arbitration agreement is essentially based on contract, it binds only signatories or parties who consent to it. But when an arbitration agreement is viewed through a jurisdictional approach, then it will be easy to appreciate the essence of arbitration and other ADR as efficient procedural mechanisms for resolution of disputes.

Case laws from some several jurisdictions reveal that third party beneficiaries are bound by arbitration agreement.[79]Invariably, if spouses and heirs are bound by such arbitration agreements then they can apply to the courts to compel such arbitration and benefit from it. This will be very suitable in cases of death occurring in the course of employment. The deceased spouse and children will have the right to bring a claim in arbitration where an arbitration agreement subsists between the employer and the employee in question.[80]

8. Conclusion

This paper discourses personal injury claims such as road traffic accidents, defective products, occupational hazards and medical negligence which are more suitable for settlement through ADR. The paper points out the global trend in favour of using ADR to settle claims arising from personal injury liabilities. It notes that the use of the phrase "as and when necessary" under Section 26 of

[79] In *Cook v GGNSC Ripley, LLC* No3:10CV018, 2011 WL 1439458 (N.D Miss Apr.14, 2011), the district court of the Northern District of Mississippi granted a nursing home's motion to compel arbitration in a suit alleging negligence and medical malpractice following the death of Willie Adkins in a nursing home. The court based its decision on the Federal Arbitration Act, which required examination into Mississippi state contract law. Even though Adkins did not agree to arbitration herself, the court held that she was bound as a third-party beneficiary by the arbitration agreement signed by her daughter when Adkins was admitted. The court stated that though Adkins did not sign the admission agreement, she was named as the resident to be admitted in the facility. The terms of agreement refer to benefits and responsibilities of both the resident and the responsible party and as such, Adkins was an intended third-party beneficiary. Also, in In *Mendez, Jrv Hampton Court Nursing Center* (NoSC 141349), the patient's son (who did not have power of attorney) went ahead and signed health care documents and an agreement on his father's behalf. These documents contained an arbitration clause. While the father was still admitted to the nursing home, his eye became infected, and it had to be taken out. The son eventually filed a negligence lawsuit against the nursing home for the care given to his father. The nursing home filed a motion to compel arbitration. The facility stated that the father was bound to the arbitration clause contained in the documents the son had signed earlier. The son claimed that his father was in no way a part of the arbitration agreement and thus was not bound by it. The trial court granted the nursing home's motion. In this case, the Third District looked at the father`s status as a third-party beneficiary of the contract. The relevant issue was whether the father accepted the benefits of the contract and was a third-party beneficiary of it. Since the father continued to live at the nursing home and accepted care due to the contract, the court determined that he was indeed a third-party beneficiary who was bound to the entire contract, including its arbitration provision. The recent California Supreme Court case of *Ruiz v Podolsky* (2010) 50 Cal.4th 838, determined that heirs in a wrongful death action can be bound to arbitration agreements they did not sign. In reaching that decision the court found that allowing patients who signed arbitration agreements to bind their heirs in wrongful death actions did not violate the heirs' state constitutional right to a jury trial. The court reasoned that even though the patients' spouse and adult children had not consented to the arbitration, the agreement could be enforced because a contrary holding would defeat the physician's reasonable contractual expectations. The court also noted that requiring a patient's heirs to sign arbitration agreements would infringe upon a patient's privacy rights under the California Constitution.

[80]The primary test to ascertain a third-party beneficiary interest is whether the non-signatory can file a claim against one of the signatory parties. See James Hosking, 'Non-Signatories and International Arbitration in the United States: The Quest for Consent', *Arbitration International*,[2004] 20(3) available at http://arbitration.oxfordjournals.org/content/arbint/20/3/289.full.pdf, last accessed on 24March 2023. See also, KunalMimani and IshanJhingran, 'Extension of Arbitration Agreements to Non-Signatories: An International Perspective',*India Law Journal*[2007] 4(3)<http://indialawjournal.com/volume4/issue_3/references.html>last accessed on 24March 2023.

the NHIS Act in respect of the establishment of the Arbitration Board appears to be permissive and perhaps responsible for the non-establishment of the prescribed medical Arbitration Board in any of the states of the Federation including Nigeria's Federal Capital Territory. This paper therefore recommends that the establishment of such Arbitration Boards should be made mandatory and that the composition of the Arbitration Board be limited to three members in order to enhance cohesiveness and smooth arbitral proceedings as obtainable under the Nigerian Arbitration Act.

It also recommends that the scope of parties that can arbitrate under the NHIS be expanded to cover willing parties who may not necessarily be registered with any of the health care providers but who voluntarily agree to submit differences arising between them to the Arbitration Board. Thus, a more encompassing National Medical Arbitration Act should be considered to cover all aspects of medical practice.

It is apparent that even where a person is not a party to an arbitration agreement; the law extends the arbitration agreement to such a person if it can be deemed that such a person has benefits or an interest in such a case. Therefore, even in personal injury cases, where arbitration agreements exist, there is no reason why family members or representatives of a party privy to the agreement cannot participate in the settlement of such claims.

Discussions in this paper have shown that that even where a person is not a party to an arbitration agreement the law extends the arbitration agreement to such a person if it can be deemed that such a person has benefits or an interest in such a case. Therefore, even in personal injury cases, where arbitration agreements exist, there is no reason why family members or representatives of a party privy to the agreement cannot move to commence arbitration or employ other ADR mechanisms.

Furthermore, the paper suggests that in recognition of the significant roles of medical practitioners in the socio-economic wellbeing of its citizens, Nigerian law courts may *suo motu* suggest alternative dispute resolutions to parties in medical civil litigation claims.