



INFORMED CONSENT IN NIGERIA'S HEALTHCARE: LEGAL ANALYSIS AND IMPLICATIONS

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Abstract

The patient's right to consent to any medical treatment proposed by medical personnel is now internationally recognized. The principle of the right of the inviolable right of the individual to choose and to decide the circumstances of his health necessitates this consent. The consent must be free, prior and informed. Free implies that consent is not valid if obtained by manipulation or coercion. Where consent is obtained involuntarily, by duress or coercion, it may result to an action for battery. The consent must be voluntarily given by a patient who has legal capacity to give such consent. Prior implies that consent must be sought sufficiently in advance of any authorization by the medical or hospital authorities or commencement of activities by a hospital that affects the health of the patient. Informed means that the patient's consent must only be sought after full and legally accurate disclosure of information concerning the proposed medical procedure. The disclosure must be in a form which is both accessible and understandable by the patient regarding inter alia the nature, scope, duration, potential risks and foreseeable implications of the medical procedure. There must be full disclosure of information relating to treatment, benefit, risk involved, the complication and consequences of such procedure. The physician provides all the necessary information regarding a procedure or treatment to be carried out on the patient. In Nigeria, the issue of free, prior, informed consent in medical practice is poorly implemented. Several factors are responsible for this. Firstly, there is the problem of low level of literacy in Nigeria. Illiterate patients tend to rely completely on the judgment of the physician. The second factor is the fact that the right to informed consent is poorly enforced. Using the doctrinal research methodology, this paper, examines the limited remedies available under the Nigerian law to patients whose rights to informed consent have been breached and the legal implications thereof. Furthermore, the mechanisms for the enforcement of the right to informed consent are hampered by bureaucracy. This paper argues that Nigeria's laws on informed consent is inadequate.

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Introduction

Globally, the recognition of the patient's right to consent to any medical treatment proposed by medical personnel is paramount in the medical profession.¹ The principle of the right of the individual to choose and to decide the circumstances of his health necessitates this consent.² Mills opined that an individual who is an adult and of sound mind has an absolute right over his or her mind and body.³ *Black's Law Dictionary*⁴ describes informed consent as 'a person's agreement with a recommended medical procedure with full knowledge of the risk involved and the alternatives.'⁵ It is the patient's consent that gives the mandate for any form of treatment or procedure to be administered on him.⁶ The consent required in medical cases is of very high standard. It is akin to the consent that is required by the international human rights instruments on indigenous rights.⁷ The consent must be free, prior and informed.⁸ Free implies that consent is not valid if obtained by manipulation or coercion. Where consent is obtained involuntarily, by duress or coercion, it may result to an action for battery.⁹ The consent must be voluntarily given by a patient who has legal capacity to give such consent.¹⁰ Prior implies that consent must be sought sufficiently in advance of any authorization by the medical or hospital authorities or commencement of activities by a hospital that affects the health of the patient.¹¹ Informed means that the patient's consent must only be sought after full and legally accurate disclosure of information concerning the proposed medical procedure. The disclosure must be in a form which is both accessible and understandable by the patient regarding *inter alia* the nature, scope, duration, potential risks and foreseeable implications of the medical procedure.¹² There must be full disclosure of information relating to treatment, benefit, risk involved, the complication and consequences of such procedure. The physician provides all the necessary information regarding a procedure or treatment to be carried out on the patient.¹³ In Nigeria, the issue of free, prior, informed consent in medical practice is poorly implemented. Several factors are responsible for this. Firstly, there is the problem of low level of literacy in Nigeria.¹⁴ Illiterate patients tend to rely completely on the judgment of the physician.¹⁵ The second factor is the fact that the right to informed consent is poorly enforced. There is limited remedy available in Nigerian law to patients whose rights to informed consent have been breached. Furthermore, the

¹ S.D Pattison, *Medical Law and Ethics* (Sweets & Maxwell 2006) 97.

² J. Cutan, „Informed Consent: An Ethical Obligation or Legal Compulsion“ *Journal of Cutaneous and Aesthetic Surgery* (2008) 1 (1) 33 at 35.

³ J. S. Mills „On Liberty“ (Ontario Barouche Books Limited, 2001) 13.

⁴ *Black's Law Dictionary* (8th Edn. St Paul M.N USA) 323..

⁵ Ibid.

⁶ F.O Esiri „Medical Law and Ethics in Nigeria“ (Malt house Press Limited. Lagos 2006).

⁷ J Anaya *Indigenous Peoples in International Law* (Oxford University Press.

⁸ L B Fontana, J Grugel, „The Politics of Indigenous Participation through “Free, Prior, Informed Consent”: Reflections from the Bolivian Case,” (2016) 77 *World Development*.

⁹ *United Nations Development Group Guidelines on Indigenous Peoples Issues* (U.N. Development Group Publication 2008).

¹⁰ Battery is the application of unlawful force or contact to the person of another. J G M Tyas, *Law of Torts* (Macdonald and Evans 1973) 36. ¹¹ S.D Pattison(n 1) 98.

¹² United Nations (n 9); Preliminary Working Paper (n 9)..

¹³ United Nations (n 9); Preliminary Working Paper (n 9)..

¹⁴ United Nations (n 9); Preliminary Working Paper (n 9)..

mechanisms for enforcing the right to informed consent are hampered by bureaucracy. This paper argues that Nigeria's laws on informed consent are inadequate.

Importance of Consent

The Supreme Court of Nigeria recognised the importance of consent in the case of *Medical and Dental Practitioner Disciplinary Tribunal v Okonkwo*¹⁵ thus: The patient's consent is paramount...the patient's relationship with a doctor is based on consensus,... the choice of an adult patient with a

sound mind to refuse informed consent to medical treatment, barring state intervention through judicial process, leaves the practitioner helpless to impose a treatment on the patient.

The recognition of a patient's right to give consent is not unique to Nigeria. The English Common Law recognized the right of every person to bodily integrity and its protection against invasion by others.¹⁶ Similarly, Carlos J, in the United States case of *Schloendorff v Society of New York Hospital*¹⁷ stated the capacity to give informed consent thus: 'Every human being of adult years and sound mind has a right to determine what should be done to his body...' It is important for a patient/ client to be adequately informed about his/ her medical condition.

Furthermore, there is a distinction between consent obtained for clinical practice and that for medical research. Informed consent for clinical practice involves medical procedures, treatment or surgery while informed consent for medical research is regulated. The Belmont Report and the Nuremberg Code regulates informed voluntary consent for human subject research. This research must be explained to the patient involved that the consent obtained is for research and not for therapeutic purposes, so the patient has a right to withdraw at any point in time from such research.¹⁸ The focus of this article is consent for clinical purposes.

Forms of Consent in Nigeria

There is no statute that defines the categories of consent in Nigeria. However, in practice, consent to medical treatment may be express or implied.

(i) Express Consent

Consent is said to be express where a patient either by written or oral means agrees to a medical treatment or procedure to be carried out on him or her. Express Consent is important in conditions, procedure which has attendant risk, for instance:

- Surgery which requires administration of anaesthetic;
- Procedure which involve extensive gynaecological examinations
- Cases of major diagnostic procedure²⁰

¹⁵ Ibid.

¹⁶ D. Goguen „What is „Informed Consent“ in Medical Malpractice Case“. Accessed 15, August 2016; J.A Dada,, *Legal Aspect of Medical Practice in Nigeria* (University of Calabar Press, Nigeria 2006)p 257- 218.

¹⁷ A 2015 survey of the United Nations Educational, Scientific and Cultural Organization showed that almost 51% of Nigerians are illiterate“. *The Nigerian Vanguard*' (17 December, 2015)8.

¹⁸ B.C Umerah *Medical Practice and the Law in Nigeria* (Longman Nigeria Ltd 1989) 132.

²⁰ (2001) 7 NWLR(Part 711)79..

In the above situation, written consent is preferable but adequate information and explanation of the procedure must be explained by the physician in order for the patient to make an informed decision. Therefore, a witness is required to attest to such consent, the person could be a family member or members of staff of the hospital.

(ii) Implied Consent

Implied consent comes to play with the action or demeanor of the patient in agreeing to take part in a procedure or treatment.¹⁹ Implied consent is more common in medical or general practice. Where a patient walks into a hospital, stretches out his hands for a procedure or examination without uttering a word but just action, is a form of implied consent. Implied consent is limited in nature as it applies only to minor procedures. Where invasive procedure or examination is to be carried out on a patient, a written consent must be obtained after a detailed explanation of the importance of why such a

procedure or treatment has to be given to the patient. However in cases where implied consent is in doubt, a verbal consent is imperative.

(ii) Extra Verbal Consent

Extra verbal consent needs to be obtained where implied consent is in doubt especially in cases where sensitive and private parts of the body such as the breast or genitals are to be examined. Procedures where verbal consent is imperative include: - Insertion of urethral catheter

- Chest x-ray
- Insertion of intravenous cannula
- Wound dressing
- Insertion or removal of drainage tubes
- Examination of genitals, breast or rectum.
- Insertion of Naso gastric tubes

Furthermore, informed consent can only be given by a competent adult in the right mental state. In the case of a minor or other person incapacitated in mind or body, a close relative, guardian in locus parentis may sign on behalf of such patients but the interest of the minor must be paramount. The absence of a statute defining the nature of consent that medical personnel are required to obtain implies that disputes as to issues of consent would be addressed on the basis of standard professional practice and not by what the law provides. Therefore, obtaining the consent of a patient is not a legal requirement but a standard professional practice.

¹⁹ Mason & Mc Call Smith *Law and Medical Ethics* (7th Edition Butterworth London 2006)349.

Capacity to Give Consent in Nigeria

A valid consent or a refusal to give consent requires a capability to make such decisions²⁰ after adequate information has been given about the type of treatment or procedure, benefits, risks involved, alternative treatment if any and possible complication. A competent adult with sound mind and body has the capacity to give consent to treatment or procedure to be carried out on him or her. However, where the examination or procedure involves marital issues such as sterilization, termination of pregnancy or removal of sex organs (breast or uterus) both couple must give their consent. However, this is also not a legal requirement but it is a desired practice.²¹ But an unconscious person, a minor or patient in an unstable state of mind may not be able to consent to treatment.

(i) Unconscious Patients

An unconscious patient has no capacity to give consent but it is presumed that if he were capable of giving such consent, he will do so to save his/ her life. In this circumstance, the Doctrine of Necessity will apply. In criminal and civil law, the doctrine of necessity give legitimacy to an otherwise wrong act but the intention is of paramount importance, which is to save or preserve a human life.²² Therefore, a physician who carries out a procedure or treatment on an unconscious patient to save his/ her life should not incur criminal liability; hence necessity is a defence for non- consensual treatment especially in an unconscious patient.²³ Pointedly, a physician should not take undue advantage of unconscious state of a patient to carry out a procedure more extensive than what is immediately required to save the life of the patient. This position was established in two renowned Canadian cases where a distinction was made between procedures justified by necessity and that of mere convenience. In *Marshall v Curry*²⁴ the plaintiff sought for damage for battery against a surgeon who removed a testicle in an operation of hernia. The surgeon claimed that the testicle was diseased and would affect the life of the patient if not removed immediately. The court held that the action of the surgeon was necessary at the point.

However, in the case of *Murray v Mc Murdy*,²⁷ the action of battery succeeded where the surgeon sterilized a female patient by removing her uterus without her consent during a caesarian section operation. The court held that the procedure of sterilization is not detrimental to the life of the patient and could be decided later. Therefore, a physician in the course of duty must obtain a valid consent before invasive procedures or treatments are carried out on a patient to avert criminal liability.

(ii) Consent of a child/ Minor

The ability to give consent is not limited to the statutory age of majority.²⁸ In medical examination or treatment, a competent minor of less than the statutory age of majority can give a valid consent in as much as he/ she is fully informed and totally understands the implication of such treatment or procedure. It is believed that parents have the capacity and

²⁰ Informed Consent in Human Subject Research (Office for the Protection of Research Subject) Available @<http://oprs.usc.edu/education/booklets>. Accessed 1 February 2017.

²¹ J.A Dada *Legal Aspect of Medical Practice in Nigeria* (University of Calabar Press 2013) 257-218..

²² Ibid 218.

²³ S D Pattinson, *Medical Law and Ethics* (Sweet & Maxwell Ltd. London 2006) 129.

²⁴ J.K Mason & Mc Call Smith *Law & Medical Ethics* (7th Edn Oxford University Press 2006) 350-411.

²⁷ (1933) 3 DLR 260. ²⁸ (1949) 2 DLR 442.

wisdom to make accurate and informed decisions that affect the lives of their children.²⁵ This may be premised on the fact that parents bear the long time effect or consequences of choice of treatment on behalf of their children.²⁶

In spite of the rights of parents to take decision on behalf of incapable minors, they do not have the legal right to solely make decisions regarding some medical procedures such as sterilization and removal of vital organs of a living child for donation, as well as choosing for the minor the right to die-martyr.³¹ It means that parents' rights to make decisions on behalf of their children are not sacrosanct. However in the case of a mature minor who has the capacity to understand the choice of treatment and its consequences, then he/she can give a valid consent to care as though he were an adult. This principle of a mature minor was determined in the supreme court case of *Re Ernestine Gregory*²⁷. In that case, Ernestine, a 17-year old Jehovah Witness was on admission for Leukemia²⁸. The age of maturity in Illinois was 18 years. He refused blood transfusion as it was against his faith; his mother was in support of his decision. Because he was a minor, the Child Welfare Officials in Chicago sued his mother for medical negligence. The trial court ordered blood transfusion in spite of the evidence that the patient had sufficient maturity to make such decision.

The patient appealed against this decision. The Court of Appeal affirmed the decision of the mature minor. The Supreme Court also re-affirmed the position of the appellate court overruled the decision of the trial court on the ground that the patient has shown enough competence to make such decision and hence cannot be forced to submit to blood transfusion, his right of self-determination must be respected. In addition, it is established under Common Law that parents in the absence of neglect or incapacity make all the necessary choices as it pertains to the wellbeing of their children.²⁹

Furthermore, there are essentials that must be taken into consideration in implementing the best interest principle, they include:

- a) Is the decision likely to improve the condition of the child?
- b) Can the treatment prevent further deterioration of the child's condition?
- c) If the benefit involved in the treatment outweighs the risks on the child?
- d) Whether there is an option of a less invasive treatment?³⁰

(iii) Mentally Incapacitated Persons

Generally speaking, a person with a sound body and mind is competent to give informed consent. However, patients with mental diseases or impairment may be incapable of giving informed consent to treatment or medical procedures. Mental impairment could also be due

²⁵ The constitution of the Federal Republic of Nigeria prescribes 18 years as age of majority where a citizen can exercise his/her franchise.

²⁶ F. O Esiri *Medical Law and Ethics in Nigeria* (Malthouse Press Ltd. 2012} p304. ³¹ D.W Brock „Children for Health Care Decision Making“ in J.A Dada *Legal Aspect of Medical Practice in Nigeria* op cit.

²⁷ *Re T* (1992) WLR 782, 4 ALL ER 649.

²⁸ *Re Ernestine Gregory* 133 IU 2d 98549 NE 2d 322(1989).

²⁹ A medical condition: cancer of the blood resulting in frequent breakdown of the blood cells in the body.

³⁰ A. Dada (N 14) 223.

to dementia arising from degenerative processes in the brain as a result of aging process. Davis³¹ classified lack of competence as temporary (in children); transient (as in unconscious patients); or permanent (in some mentally handicapped patients, except the patient is in the lucid stage where he is capable of understanding the information given to him). The issue therefore is to determine when a patient is competent to give informed consent to treatment or surgical procedure.

Competence, Consent and Refusal of Treatment

Competence implies that a person has sufficient cognitive reasoning to make a decision on a particular issue. Cognitive ability to make rational thought or decision is limited and it varies from simple to complex decisions.³²

The competence to give informed consent is determined by two parameters namely status and capacity. A patient may be physically competent but mentally incompetent to appreciate the issues at stake as established in the case of *Re C*, where a 68 year old medical doctor suffering from schizophrenia (a mental disorder) refused to give consent for a surgery to remove a gangrenous foot. He sought and obtained an injunction from the court restraining the hospital from amputating his leg without his express consent.³³ In this case, the court established that a patient has the right to refuse a treatment, even a lifesaving treatment. A patient has a right to autonomy or selfdetermination and can chose which ever option he prefers, whether to accept or to refuse treatment.

It is however noted that, in spite of the individual's right to autonomy and self determination, the state also recognises the strong public interest to protect and preserve life. However, the notion that an individual has unfettered right to determine what happens to his/ her life can be rebutted.³⁴ Where a patient lacks capacity or incompetent to make an informed decision, the physician has a duty to act in the best interest of the patient. In Britain, the Mental Health Act Code sets out the criteria for assessing capacity, regrettably, the Mental Health Act is not applicable in Nigeria and there is no law on the issue in Nigeria.

It is also argued that a patient has a right to determine the type of treatment desired and offer informed consent, this right super cede the physician's duty to preserve life. This position was affirmed in the case of *Randolph v City of New York*³⁵ where the court held that a patient has the right to determine medical treatment including refusal of blood transfusion based on religious beliefs. The court went on to add that a physician could not be held liable for adhering to the patient's order, though he later administered the blood transfusion after receiving permission to do so by the hospital administrators. Consequently, it is the choice of the patient that is important, it is irrelevant if such decision or choice is illogical, irrational or dangerous and the choice of the patient overrides the interest of the medical profession.

³¹ M. Davies *Textbook on Medical law* (Blackstone Press Ltd. London, 1998) 131-139.

³² S D Pattinson (n 1)131..

³³ Ibid.

³⁴ The Mental Capacity Act 2005 is a legislation which governs capacity.

³⁵ NTS. 2d Series 837(App. Division 1986); See also *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo* (2001) 7NWLR(Part 711) 206.

In the same light, can a patient refuse medical treatment after due information has been given by the physician?

Refusal of Treatment

All competent adults have the right to determine what happens to his or her body. This brings us to the concept of autonomy and self-determination. A person can refuse any form of treatment, even a lifesaving treatment. This position was established in *A.G of British Colombia v Astaforuff*³⁶ where a prisoner refused feeding and was forced by the prison warden to prevent suicide. The court held that the prison authority had no moral or legal justification to force feed a prisoner to eat against his wish.

Similarly, the right to self-determination or autonomy when juxtaposed with society's interest to protect the sanctity of life brings about conflict in making crucial decisions affecting the life of an individual. It is argued that the preservation of life is subject to the principle of self-determination. Further, the right to refuse any form of treatment is fundamental as it constitutes the right to privacy which is protected by the law. Therefore, where a doctor carries out any procedure on a patient without his or her express consent, it is an offence of battery which is actionable in law.

In the same vein, refusal of treatment cannot be viewed as suicide but merely a choice about how one intends to live, suicide or refusal of treatment is distinguishable. Suicide means ending one's life while refusal of treatment is merely a choice of how one chooses to live.³⁷ In *Airedale NHS Trust v Bland*⁴² the court took this illuminating position as regards the right of a patient to refuse a treatment even when it is life saving: If the patient is capable of making a decision on whether to permit treatment and decide not to permit it, his choice must be obeyed, even if on any objective view it is contrary to his best interest... Thus it is that the patient who is undergoing life maintaining treatment and decides that it will be preferable to die must be allowed to die, provided that all necessary steps have been taken to be sure that it is what he or she really desires'

It is therefore submitted that a patient has an absolute right to take any decision that may affect his/ her life even where it appears irrational, dangerous or otherwise. His decision must be respected over and above state interest to preserve the sanctity of life. However, for there to be a legal refusal of treatment, the physician and the patient according to law must complete a Refusal of Treatment Form which is usually part of the records of the hospital. It must be stated that the physician must respect the autonomy of patients in making decisions that are crucial to their lives based on religious or cultural beliefs.

Factors Inhibiting the Effective Practice of Informed Consent in Nigeria's Health Care Delivery System

Nigeria is a multi-ethnic country and her people are influenced by sociocultural and religious beliefs. These factors include: poverty; low educational background; trust; myth of diseases; religious beliefs and familiar influences have a huge impact on the peoples' perception about the practice of informed consent in Nigeria's health care delivery system. These issues will be addressed seriatim.

³⁶ (1983) 6 WWR 322, On Appeal [1984] 4WWR 385.

³⁷ *Bovia v Supreme Court* (1986) 225 Cal.Rptr 297(Cal. CA)per Beach J..

⁴² (1993) 1 All ER 821.

(i) Low Educational Background/Illiteracy as a factor

Nigeria is said to have over fifty percent of its population as illiterates. This high level of illiteracy also influences the capacity of patients to understand and make informed decisions as it pertains to their health in the health care delivery sector of the country.³⁸ Education helps to reduce the impact of cultural and social practices which influence decision in health related matters. It been observed that physicians are more careful when dealing with educated patients when compared with less or uneducated patients. The reason is not farfetched; the educated patient would have researched extensively into their condition and are ready with plethora of questions for their physician. This prior research enable the patients to understand the causes, benefit of a particular treatment, complications and alternative treatment if any which will guide the patient in making an informed decision and consent for procedures or treatment to be done. The uneducated patient on the other hand lacks understanding of his or her medical condition and so puts absolute trust on the physician to make a decision in his best interest; this privilege may be abused by the physician in going beyond what is expected of him at that particular time.

It is submitted that the educational status of a patient may determine the quality of the decision made after comprehensive information has been given regarding health issues. It is observed that the uneducated patient is incapacitated intellectually to appreciate information given by the physician and hence unable to make informed decisions in health matters.

(ii) Poor Economic Status

Informed consent in Nigeria's health care service is hampered by economic challenges experienced by patients. Studies have shown that people with poor economic status are likely to accept and obey instructions without questioning it.³⁹ At present, Nigeria is passing through a period of economic recession where an average individual is unable to cater for basic needs; can such a person institute a legal action for breach of fundamental right to informed consent? However, improved economic status will reduce the challenges of patients being unable to go to court seek for redress when their right to informed consent is breached.

(iii) Autonomy or Self Determination

The right an individual has to decide what happens to his or her body, life as the case may be is called autonomy or selfdetermination. There are several factors which can influence the right to autonomy; these include socialization, culture and religious practices. The concept of autonomy is limited in the sense that a person who has been gender socialized may find it difficult to appreciate the will to make decisions even when it is crucial to her survival. The challenge faced by such person is the resolution for others to make decisions on their behalf even when they are neither minor nor incapacitated in mind or in an unconscious state.

³⁸ K.A Agu, E.I Obi, B.I Eze and O.O Okonwa „Attitude Towards Informed Consent

Practice in a Developing Country: A Community based Assessment of the Role of Educational Status" (BMC Medical Ethics 2014 Vol. 15(77)) Available @ bmcmedethics.biomedcentral.com Accessed 1 February 2017..

³⁹ K.P. Virk „ Clinical Trials in South Africa" cited in O. Aniaka *Patients Right and Socio- Cultural Challenges to Informed Consent in Nigeria* [www.languageconnections.com/descarges/clinical trials in South Africa.pdf](http://www.languageconnections.com/descarges/clinical%20trials%20in%20South%20Africa.pdf) Accessed 2 February 2017. ⁴⁵ O. Aniaka (n 46).

This scenario is common in paternalism where the influence of fathers, brothers and males generally are domineering. This concept affects the quality and effectiveness of informed consent not only in Nigeria but in other male dominated customs. In cases of minors, unconscious and mentally ill patients, the degree of autonomy is also reduced, but the best interest of the patient must be of upmost priority.

(iv) Religious Beliefs

In Nigeria, there is a strong belief in a supreme being which controls both the living and the dead. This belief constitutes a challenge to the effective practice of informed consent in the health care service delivery in Nigeria. It is believed that deities, predestination affect the life of the people; all these are hinged on customs and tradition. According to Aniaka⁴⁵ ‘the absolute dependence on supernatural beings makes it easy to hinge failure, illness and woes on abstract entities’ This belief vitiates the purpose of informed consent as the essence of informed consent is to enable patients to take control of their situation by being involved in decisions relating to their lives rather than submitting their fate to a supreme being. Where a person believes that his illness is caused by a supreme being, he is unlikely to seek orthodox care.

(v) Family Influence

In Nigeria, the family system is closely knitted and custom plays a very important role. The family is communal in nature unlike in the western world where the family unit is individualistic. The family is involved in making decisions that affect the health and lives of each and every member of the family.⁴⁰ Where a family member is ill, relatives contribute to decisions affecting the life of that member since they are all involved in the care.

Arguably, a patient is the one who bears the complication or consequences of the procedure or treatment should be allowed to voluntarily to give consent to treatment without external influence of members of the family.

(vi) The Absence of Laws on Consent in Nigeria

There are inadequate statutes governing the health sector in Nigeria. Therefore, medical personnel are not legally compelled to get the patient’s consent and where they do not get it there is limited remedy available to the patient. In the United Kingdom and the United States, the laws governing the health sector evolve continuously and there are several laws on the issue of consent.

The Question Of Future Risk

This raises the issue of a situation in which a patient’s consent is obtained for a particular treatment and subsequently, the patient suffers injury that was not disclosed to him because at the time of the treatment that risk was not known to the medical world. This is illustrated by the incident of the *Thalidomide case* in the United Kingdom. The Thalidomide Case involved women who after they had been delivered of babies in several hospitals discovered that their babies were born deformed as a result of the application of the drug Thalidomide as pain relief during the delivery process. Although these women had consented to the use of the drug Thalidomide they were not given adequate information on the harmful effect of the drug because at the time the medical community was unaware of the risk involved in the

⁴⁰ J.M Breshi „Autonomy and the Role of the Family in Making Decisions at the end of Life“ (2005) 16 J Clin. Ethics 11.

drug. These women brought a joint action in negligence against the distributors of the drugs in the United Kingdom in the case of *S v Distillers (Biochemicals) Ltd.*⁴¹ Although the action ended in an agreed compromise payment in exchange of the withdrawal of negligence claims,⁴² there was consensus among legal analysts that the mothers would have been unable to prove breach of duty even though the injury was attributable to product design. Even if the mothers had successfully proved their case, the manufacturers would have been exempted from liability on the grounds that the risk was unforeseeable at the time. According to Stapleton, the mothers were required to establish within existing medical and scientific knowledge that the manufacturers were negligent in ‘the procedures of manufacture of the product or failed to warn of foreseeable risk’ – a ‘very costly and difficult’ exercise.⁴³

These criticisms of Negligence resulted in the passing of the European Community Directive 85/374/EEC of 25 July 1985 and the United Kingdom’s Consumer’s Protection Act 1987.⁵⁰ This Act created strict liability for those manufacturing products for consumption. Under this Act, a person bringing an action for a defective product had only to prove that:

The Product manufactured by the defendant was defective;

That using the product as recommended by the defendant resulted in injury.

In Nigeria, the law is not developed to address these issues.

The Legal Implication of Inadequate or Lack of Informed Consent in Nigeria’s Health Care Delivery Services

Informed consent involves a full disclosure of some vital information as regards medical procedure, its benefits, associated risks and or complications and alternative treatment if available. There is a legal obligation on a physician to obtain informed consent before carrying out a procedure on a patient or client. Failure to obtain such consent can result to a medical malpractice claim in a situation where a patient suffers harm in connection with such treatment or procedure.⁴⁴

Furthermore, where a patient is not given adequate and essential information related to the medical procedure as it is most commonly practiced in health care services in Nigeria, it poses a lot of challenges as the patient has inadequate knowledge of the condition and hence unable to make an informed decision as to whether or not to go on with such proposed treatment.⁴⁵

In medical practice, there is a fundamental principle that every individual has a right to determine what happens to his or her body and the law must protect such rights.⁴⁶ It can be argued that a patient knows little or nothing about medicine hence the physician can go ahead and make decisions in the interest of the patient. This proposition however violates

⁴¹ [1970] 1 WLR 114..

⁴² Ibid 123.

⁴³ C J Miller, R S Goldberg, *Product Liability* (2nd edn, Oxford University Press, 2004) 209 – 211, 214 - 215; J. Stapleton, *Product Liability* (Butterworths, London, 1994) 4344. ⁵⁰ Stapleton(n 54)43..

⁴⁴ Miller (n 54) 303 -321..

⁴⁵ D. Goguen “What is Informed Consent in a Medical Malpractice Claim?”
www.medicalmalpractice.lawyer.com/proffessional-duty-care/lack-ofinformedconsent.html assessed 5th January, 2017.

⁴⁶ Ibid..

the principle of selfdeterminism or right of autonomy. In examining the legal implication of lack or inadequate informed consent in Nigeria's health care delivery, we shall explore the essentials of informed consent in relation to the crime of assault, battery and to lesser extent the tort of negligence.

The essentials of a valid informed consent include disclosure, understanding voluntariness, competence and consent. Where these elements are vitiated, then a consent is said to be invalid and the physician may be liable for an offence of battery and or murder depending on the circumstance of the case. Informed consent protects both the client and his patient as both parties are aware of their scope of duty, The importance of informed consent is elucidated in the case of *Medical and Dental Practitioner Disciplinary Tribunal(MDPDT) v Okonkwo*⁴⁷, it is pertinent to briefly explain the facts of the case, one Martha Okorie, a pregnant Jehovah Witness came to the hospital in a critical condition which requires blood transfusion. She declined the offer based on religious ground. She was discharged against medical advice from this hospital, She was later admitted in hospital of Dr. Okonkwo, a Jehovah witness, he treated her without blood transfusion and she later died. Her relatives made a formal complaint of medical negligence to the MDPDT. Okonkwo was found guilty of breach of the ethics of his profession and was suspended from practice for 6 months. His appeal went from the Court of Appeal to the Supreme Court.

The Supreme Court overruled the tribunal as it held as follows:

The patient was free to decide whether or not to submit to a treatment by a doctor... if the doctor making a balanced judgment advises the patient to submit to the operation, the patient is entitled to reject the advice for reasons which are rational or irrational or for no reason...⁴⁸

This establishes the principle of self-determinism, the right of a patient to determine what happens to his or her body. The apex court also stated that it is only the court which can override the decision of a patient not to give informed consent. It can be argued that the court will take such decision based on overriding public interest and the right to protect and preserve the life of its citizen.

Similarly, in the case of *Schloedorff v New York Hospital*⁵⁶, a woman allowed her physician to administer anaesthesia on her to determine if a diagnosed fibroid tumour was malignant. The physician went ahead to remove the tumour whilst the patient was under the influence of the anaesthetic drug without her consent. She sued. The court held as per Cardozo J as follows: Every human being of adult years and sound mind has the right to determine What shall be done with his own body: a surgeon who performs an operation Without his patient consent commits an assault and is liable to damages⁴⁹

⁴⁷ F.O Emiri *Medical Law and Ethics in Nigeria* (Malthouse Press Ltd. Lagos 2012)325. (2001) 7 NWLR (Part 711) 206..

⁴⁸ *MDPDT v Okonkwo* (2001) 7 NWLR(Part 711) 79..

⁵⁶ (1944) 105 NE 92 at 93.

⁴⁹ Ibid as per Cardozo J..

It is submitted however that where a physician performs a procedure on a patient without consent, he will be liable for an offence of assault and monetary compensation will be awarded in favour of the patient.

A physician may be exempted from such liability in emergency cases where a patient is unconscious and there is urgency to preserve life, consent may be expended with. Conversely, the right to self-determinism may be dispensed with in cases of overriding public interest. In *Esabunor v Faweya*⁵⁰ the appellant withhold consent to transfuse her child with blood based on her religion (Jehovah Witness). The commissioner of Police got an order from the magistrate court to transfuse the child with blood. The court held that the child being an infant would prefer to live rather than to die and that the appellant has no right to determine the fate of the child. A cursory look at the judgment: would it not amount to a violation of the right of the appellant as a guardian to the minor as well as violation of the right of the appellant to freedom of religion and association? ⁵¹ It is our humble submission that whichever way it is explored, the interest of the child remains paramount (the right to life) and the law must protect and preserve it.

Furthermore, every competent adult has the right to decide what happens to his/ her body even when such claim may seem irrational or senseless or she is unable to give her consent at that time, but has a document in her possession which determines what her decision may be as shown in the case of *Malette v Shulman*⁵². In this case, a doctor administered blood transfusion on a Jehovah Witness patient with a card in her purse indicating that she will not consent to blood transfusion in any circumstances. The patient sued the doctor on recovery for disregarding her wish. The doctor argued that the patient was in a critical condition and could not give consent and moreover, he had a duty to save life. He went further to say that the interest of the society is the preservation of life and that this reason overrides the patient's decision not to receive blood transfusion. The court held in favour of the plaintiff, she had the right to make decision that affects her life though rational or irrational. The plaintiff was awarded damages of \$20, 000. The doctor was found guilty of the offence of trespass. It is pertinent to quote a portion of the decision of the court, it states thus:

A competent adult is generally entitled to reject a specific treatment or all treatment or select an alternative form of treatment, even if the decision may entail risk as serious as death and may appear mistaken in the eyes of The medical profession or of the community...it is the patient who has the final say on whether to undergo a treatment.⁵³

Sometimes in emergency situation, a surgeon may take a decision during an operation which the patient had not consented to but was discovered during the surgical operation. Can the doctor be held liable for trespass for carrying out such procedure without the consent of the patient? This point is elucidated in the decision of the court in *Marshall v Curry*⁵⁴, a surgeon obtained consent from a patient to cure a hernia. During the surgery, the surgeon found a deceased testicle which is dangerous to the health of the patient and removed it. The patient sued the doctor for removing his testicle without his consent. The court held that in emergency

⁵⁰ (2008) 12 NWLR (Part 1102) 794 at 810- 811 Para. E-B..

⁵¹ Section 45, The Constitution of the Federal Republic of Nigeria 1999(as amended).

⁵² (1990) 47 DLR. 18.

⁵³ (1999) 47 DLR.18..

⁵⁴ (1933) 3 DLR 260 (NS.SC).

situations where it is impossible to obtain consent, the doctor can intervene to save the life of the patient. The doctor was not held liable.

The court had a contrary view from the case of *Marshall v Curry*⁵⁵ as decided in *Murray v McMurchy*⁵⁶ as the surgeon was held liable. In the instant case, a pregnant woman gave consent for a Caesarian Section to be performed on her. During the surgery, the doctor found a tumour in the abdomen; he then tied up the fallopian tubes as future pregnancy may prove dangerous. The woman sued. The court held that it was not an emergency situation; the decision ought to be taken by the patient whether or not she wants her tubes tied. The doctor had no legal right to tie up her fallopian tubes without her consent. The doctor was held liable.

Furthermore, it is an obvious fact every competent adult has a right of self determination, however, the choice of an individual can be overruled by the overriding interest of the state as decided in the case of *Fosmire v Nicoleau*⁵⁸, the plaintiff a Jehovah Witness delivered through caesarian section and had complications which resulted in profuse loss of blood which crashed the haemoglobin level to 4gms/dl.⁶⁶⁶⁷ The plaintiff with the consent of her husband refused blood transfusion based on religious grounds. The hospital made an application to the New York Supreme court to make an order for blood to be administered on the patient. The application was granted. The patient sued the hospital for the violation of their fundamental rights and autonomy to make a choice about what happens to her body. The court held that though the patient had a right to self-determination, but such rights affects and the state which has the overriding an innocent 3 . party, interest to protect the lives of its citizens. The court held in favour of the state.

Similarly, in *Re S (Adult Refusal of Medical Treatment)*,⁵⁹ the state has overriding interest to preserve the lives of persons irrespective of their religious beliefs/doctrines. A pregnant Nigerian living in England was admitted in labour, there was poor progress in labour as a result of the abnormal lie of the baby⁶⁰ and therefore caesarian section was the only option to save the life of the baby as well as that of the mother. The defendant and her husband refused to give their consent claiming to be 'Born Again Christians.' The hospital made an application to the president of Family Court Division for an order to carry out caesarian section on the patient, the court obliged them. The interest of the unborn child and that of the public overrides the decision of the defendant and her husband.

On the other hand, the state do not have untrammelled power to override the decision of a person by virtue of the principle of self-determination and fundamental human rights. In *Application of the President and Director of George Town College*⁶¹, the defendant, a Jehovah witness was brought into a hospital after a ruptured ulcer which caused her to lose a copious amount of blood⁶², she refused blood transfusion due to her religious beliefs. As

⁵⁵ *ibid.*

⁵⁶ (1949) 2 DLR 442 (BC. SC).

⁵⁷ NY.S. 2d 876 N.Y 1990(Court of Appeal of New York).

⁵⁸ The hemoglobin level indicates the level of the available red blood cells in the body. The normal level is 12- 14gms/dl. ⁶⁷ F2d 1000 (D.C.Cr 1964).

⁵⁹ [1992] 4 All E.R 671-72; [1992] 9 BMLR 69; [1992] 3 NLR 806.

⁶⁰ F.O Emiri *Medical Law and Ethics in Nigeria* op cit(n51); 325.

⁶¹ B.C Umerah (n 16).

⁶² (2001) 7 NWLR (Part 711) 206..

death became imminent due to refusal of blood transfusion, the hospital made an application to the federal court for permission to administer blood transfusion to the patient. The court held that it can only grant the request if the competence of the patient has been compromised by the illness. However, in this instant case, the court is of the view that the patient is now willing to take the transfusion as she had come to the hospital seeking medical attention. The court therefore granted the order authorizing the hospital to administer blood transfusion to the patient. It is submitted that consent is authority which the doctor has to carry out a procedure on a patient, where such consent is withheld, the patient has a right of self-determination to say what happens to his body as far as it does not directly affect the right of another.

Conclusion

In medical practice, there is a fundamental principle that every individual has a right to decide or determine what happens to his/ her body and the law owes an obligation to protect such rights.⁶³ A person therefore must give express consent before any procedure is carried out on him/her. That individual also has an unfettered right to accept or refuse medical treatment. However, the exception is in emergency situations and or overwhelming interest of the public. It is observed that in medical practice in Nigeria, consent to treatment is grossly inadequate because necessary information is withheld from patients, some necessary information or details are taken for granted. The reason adduced for this lapse is the poor educational status of many patients in Nigeria which makes it difficult for them to appreciate certain medical information thus, making it difficult to make informed medical decisions. There is also the issue of the confidence placed on the physician by the patient which results in heavy reliance on the decision of the physician.⁶⁴ Other factors adversely affecting consent in medical practice in Nigeria include: poverty, influence of family and religious belief. The Supreme Court of Nigeria emphasizes the importance of consent in the case of *Medical and Dental Practitioner Disciplinary Tribunal v Okonkwo*⁶⁵, when it stated that patient's consent is paramount in doctor/ patient relationship and the choice of a competent adult with a sound mind should be respected. It is of fundamental importance that the physician must give detailed explanation of the procedure as a patient has the right to know what procedure he intends to go through. All material facts ought to be explained, the risks involved, the benefit and complication of such procedure or treatment to enable the patient make an informed decision. In addition, factors which inhibit the practice of informed consent in Nigeria health care delivery services such as low educational status, poor economic status should be improved upon and religious beliefs which prevent persons from seeking medical care should be abolished to encourage the practice of informed consent. This article also argues that Nigeria ought to enact laws that would make the duty of medical practitioners to get the consent of the patient a binding legal obligation. This would ensure greater enforceability of this right by patients.

⁶³ S.D Pattison, *Medical Law and Ethics* (Sweets & Maxwell 2006) 97.

⁶⁴ J. Cutan, „Informed Consent: An Ethical Obligation or Legal Compulsion“ *Journal of Cutaneous and Aesthetic Surgery* (2008) 1 (1)33 at 35.

⁶⁵ J. S. Mills „On Liberty“ (Ontario Barouche Books Limited, 2001) 13.