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DOES ABSENCE OF INFORMED CONSENT CONSTITUTE A VIOLATION OF  
HUMAN RIGHTS?

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ABSTRACT

When medical care or treatment is provided, medical practitioners are required in many situations to obtain a patient's informed consent. The question is, what does this term mean? What can happen if proper informed consent is not given? The concept of informed consent is based on the principle that a physician has a duty to disclose information to the patient so that he or she can make a reasonable decision regarding treatment. This concept ensures the autonomy and independence of the patient. In the United States of America, some states have developed informed consent laws to govern certain types of communication between health providers and patients. These laws list the types of information that patients must be given so they can make an informed decision about getting medical care, diagnostic tests, or treatment. Nigeria does not have laws on informed consent, but certain provisions in the constitution as well as penal laws may be helpful in assessing the position of informed consent in Nigeria and evaluating the adequacy of these laws in addressing the effect of absence of informed consent in Nigeria.

*Keywords:* Informed Consent, Law, Human Rights, Medical Law, Physicians.

1. INTRODUCTION

It is an agreement to do something or to allow something to happen only after all the relevant facts are known by the persons involved. It is the standard and best practice in civilized countries for medical doctors to fully inform their patients about the risks involved in any proposed medical procedure or treatment. In both medical and legal terminology, this is called "informed consent." If a doctor does not get informed consent from a patient, and the patient is injured, the patient may have grounds to sue the doctor for medical malpractice. Most medical procedures or treatments involve some risk. It is the doctor's responsibility to give the patient information about a particular treatment or procedure so the patient can decide whether to undergo the treatment, procedure, or test. This process of providing essential information to the patient and getting the patient's agreement to a certain medical procedure or treatment is called informed consent<sup>1</sup>. Informed consent may be defined as 'the legal term describing a patient's

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<sup>1</sup> Medical Malpractice: Informed Consent, <http://www.nolo.com/legal-encyclopedia/medical-malpractice-informed-consent-29872.html>, accessed on 23/7/2014

voluntary agreement to a doctor performing an operation, arranging drug treatment, or carrying out diagnostic tests<sup>2</sup>.

In contracts, an agreement may be reached only if there has been full disclosure by both parties of everything each party knows which is significant to the agreement. A patient's consent to a medical procedure must be based on his/her having been told all the possible consequences, except in cases of emergency when such consent cannot be obtained. A physician or dentist, who does not tell all the possible bad news as well as the good, operates at his/her peril of a lawsuit if anything goes wrong. In criminal law, a person accused or even suspected of a crime cannot give up his/her legal rights such as remaining silent or having an attorney, unless he/she has been fully informed of his/her rights. The question therefore is whether lack of informed consent in a medical treatment amounts to a violation of human rights of the patient or an assault and the consequences thereof in Nigeria?

## 2. CONCEPTUAL FRAMEWORK AND DISCUSSION

### 2.1 *Informed consent*

Informed consent is the process by which a fully informed patient can participate in choices about his or her health care. It originates from the legal and ethical right the patient has to direct what happens to his or her body and from the ethical duty of the physician to involve the patient in his or her health care. In general, informed consent assumes that you are legally able to make your own decisions. If you are not, the person who is legally allowed to make decisions for you goes through the same process on your behalf.

Informed consent is an agreement to do something or to allow something to happen, made with complete knowledge of all relevant facts, such as the risks involved or any available alternatives. Therefore a patient may give informed consent to medical treatment only after the health care professional has disclosed all possible risks involved in accepting or rejecting the treatment. Invariably a health care provider or facility may be held responsible for an injury caused by an undisclosed risk.<sup>3</sup>

Informed consent is more than simply getting a patient to sign a written consent form. It is a process of communication between a patient and physician that results in the patient's authorization or agreement to undergo a specific medical intervention.<sup>4</sup> In the communications process, the physician providing or performing the treatment and/or procedure (not a delegated representative), should disclose and discuss with the patient: For informed consent to take place, the information that is given must be understood. The patient must have the chance to review the information and ask questions and decisions are freely made without pressure based on what is best for the patient. Various forms of consent are in use by physicians around the world. Informed consent is probably the most versatile and the most commonly used form of consent. Another name for informed consent is *knowledgeable consent*.<sup>5</sup>

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<sup>2</sup> Peters M. In: The British Medical association Illustrated medical dictionary. Second edition. Peters M, editor. London: Dorling Kindersley; 2008. p. 142

<sup>3</sup> <http://www.cancer.org/treatment/findingandpayingfortreatment/understandingfinancialandlegalmatte> accessed on 23/7/2014

<sup>4</sup> [InformedConsenthttp://www.ama-assn.org/ama/pub/physician-resources/legal-topics/patient-physician-relationship-topics/informed-consent.page](http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/patient-physician-relationship-topics/informed-consent.page), accessed on 23/7/2014

<sup>5</sup> Lawal Y Z, Garba E S, Ogirima M O, Dahiru I L, Maitama M I, Abubakar K. The doctrine of informed consent in surgical practice. Ann Afr Med [serial online] 2011 [cited 2014 Oct 2];10:1-5. Available from: [http:// www. annalsafarmed. org/ text. asp?2011/10/1/1/76558](http://www.annalsafarmed.org/text.asp?2011/10/1/1/76558) accessed on 23/7/2014

## 2.2 Human Rights

The phrase human rights have been commonly used to mean, violation or restriction of freedom, yet the word has no precise definition as it ordinarily defies simple articulation and in truth it has been difficult to properly conceptualize in jurisprudential parlance. Epiphany Azinge<sup>6</sup> agreed with the above observation when he argued, “that to postulate a precise definition of human rights may prove a Herculean or highly elusive task.” This view is supported by the submission of Eze Ngwakwe<sup>7</sup> when he said: “Human Rights do not yield to easy definition, and so there is no unimpeachable certainty and precision about its meaning. Despite the elusiveness of the word, some definitions have been proffered by notable jurists in the area.” Osita Eze, on his part had this to say on the meaning of human rights:<sup>8</sup> “Human rights represent demands or claims, which individuals or groups make on society, some of which are protected by law and have become part of *ex lata* while others remain aspirations to be attained in the future.” By the same reasoning, U.O. Umzurike, observed that:

Human rights are those claims, which are invariably supported by Law, made on society, especially on its official managers, by individuals or groups on the basis of their humanity. They apply regardless of race, colour, sex or other distinction and may not be withdrawn or denied by governments, people or individual.<sup>9</sup>

In *Uzoukwu v. Ezeonu*,<sup>10</sup> Nasir, PCA explained that, “human rights are the rights which every civilized society must accept as belonging to each person as a human being.” This was supported by P.C. Onumajulu who observed that the “rights, which project the dignity of man and emphasize the inherent equality of all are not conferred by any human person or institution but are direct concessions from and bestowed by God.”<sup>11</sup>

Human rights have also been defined as “basic moral guarantees that people in all countries and cultures allegedly have simply because they are people.”<sup>12</sup> Human rights are frequently held to be universal, they are rights usually attached to all humans who should enjoy them and who ordinarily can invoke them whenever such rights are violated. Human rights are rights that a person is entitled to claim and enjoy simply by reason of birth and which are inalienable. They are rights recognized by the state and enforceable by law. Commenting on human rights, Kayode Esho JSC in *Saude v. Abdullahi*<sup>13</sup> said: “Human rights are not just mere rights, they are fundamental. They belong to the citizen. These rights have always existed even before orderliness prescribed rules for the manner ... sought.” Certain international instruments and constitutions of different countries contain provisions with respect to human rights guaranteed under such constitutions. These provisions are called fundamental rights, constitutional rights, bill of rights and these rights have the same intents and purposes with human rights, and so they are also seen as human rights. In several countries including Nigeria<sup>14</sup> these rights can be found in the constitution and other legal instruments.

The concept of informed consent is not popular neither is it a rule in Nigeria as it is the case in other civilized countries even though it is practiced in Nigeria. However, looking at what

<sup>6</sup> Azinge, E. *Decisions on Human Rights in Perspectives in Human Rights*, Fed Min of Justice 1992.

<sup>7</sup> Ngwakwe, E. C. *Issues in Human Rights Guarantees*, Hudson Jude Press, Nigeria, 2008, P. 25.

<sup>8</sup> Eze, O. C., *Human Rights in Africa, Some Selected Problems*, Nigeria Institute of International Affairs and Macmillan Publishers Limited, Lagos, 1984, P 5.

<sup>9</sup> Umzurike, U. O. *The African Charter on Human And Peoples' Rights*, Kluwer Law International, Netherlands, 1997, P 5.

<sup>10</sup> (1991) 6 NWLR (Pt 200).

<sup>11</sup> Onumajulu P. C., *Perceptions on Law and Society*, Career Publishers, Owerri, 2010, p. 41.

<sup>12</sup> IEP, *Human Rights*, @ <http://www.iep.utm.education/hum-rt/s/>, accessed on 2/ 7/ 2011.

<sup>13</sup> (1989) 4 NWLR (part 116) 387.

<sup>14</sup> See Constitution of the Federal Republic of Nigeria, Cap. C23, LFN, (2004) as amended.

it embodies, the question is, can its absence in the treatment of a patient in Nigeria constitute a violation of human rights in the face of the constitutional provisions or amount to assault as defined by the Criminal Code? For instance, under the fundamental human rights provisions of the Constitution of the Federal Republic of Nigeria<sup>15</sup>, section 33 provides for the right to life which states as follows: (1) Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria. Under this section therefore a doctor or medical personnel cannot treat a patient in such circumstances that can result in death without thoroughly explaining to the patient the pros and cons of the procedure and the fact that death can result from it and having the consent of the patient in writing or a person acting on behalf of the patient.

Section 34 also provides for the right to dignity of human person and it states in subsection (1) paragraph (a) thus: (1) Every individual is entitled to respect for the dignity of his person, and accordingly- (a) No person shall be subjected to torture or to inhuman or degrading treatment; It is my candid opinion that under the provisions of this section, as much as it is expected of a physician to treat a patient with courtesy and respect by informing him/her the procedure to be carried on and get the consent of the patient before the treatment, the lack of informed consent before a patient is treated by the physician will not amount to torture or to inhuman or degrading treatment as envisaged by the law. The position may however be different if without proper information and consent given freely by the patient certain procedures are carried out like removal of organs for purposes of research or other laboratory tests, that will amount to degrading treatment and definitely a violation of the human rights of the patient.

Section 37 provides that the privacy of citizens, their homes, correspondence, telephone conversations, and telegraphic communication, is hereby guaranteed and protected. Section 38 (1) provides that every person shall be entitled to freedom of thought, consciences, and religion, including the freedom to change his/her religion or belief, and freedom, either alone or in community with others, and in public or in private to manifest and propagate his religion or belief in worship, teaching, practice, and observance. These provisions can also be seen as constitutional safeguards to the right of a patient to reject a form of medical treatment based on religious beliefs. For instance a Jehovah's Witness or a member of the apostolic faith can, on the basis of section 37 and 38 of the 1999 Constitution, object to a blood transfusion on religious grounds. Surgical intervention against the consent of such a patient would be an invasion of his right to privacy. This is regardless of the fact that the doctor may be of the opinion that such treatment would have the effect of prolonging life or that the refusal of treatment seems unwise, foolish, or ridiculous as it were. The provisions of section 252 of the Criminal Code<sup>16</sup> dealing with assault provides as follows:

A person who strikes, touches, or moves or otherwise applies any kind of force to the person of another, either directly or indirectly, without his consent, or with his consent, if the consent is obtained by fraud, or who by any bodily act or gesture, attempts, or threatens to apply force of any kind to the person of another without his consent, in such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect his purpose, is said to assault that other person and the act is called an assault. The term "applies force" includes the case of applying heat, light, electrical force, gas, odour, or any other substance or thing whatever, if applied in such a degree as to cause injury or personal discomfort.

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<sup>15</sup> Constitution of the Federal Republic of Nigeria, Cap. C23, LFN, (2004) as amended.

<sup>16</sup> Cap 38, Laws of the Federation of Nigeria, 2004.

Section 252 of the Criminal Code has relevance to the issue of informed consent as it relates to doctor/ patient relationship. From the provisions of the Criminal Code, it shows that if a person does not give consent after proper information, any act carried out on him or her, which causes injury or personal discomfort can amount to assault as envisaged by the law. The forerunner to informed consent began to evolve in England in 1767 in a case where a certain level of professionalism was required in treating orthopaedic patients in *Slater v. Baker and Stapleton*.<sup>17</sup> In the US, the earliest litigation on informed consent reached the Supreme Court of Minnesota in 1905. In this case, a patient consented to an operation on the right ear. During the operation, the surgeon discovered that the left ear was in worse condition than the right. He proceeded to operate on the left ear and was held liable for battery.<sup>18</sup>

Over the last few decades, patients and their lawyers have tried creatively to expand this basic doctrine of informed consent. In a case in the US, *Truman v. Thomas*<sup>19</sup>, a physician recommended that a woman should undergo a Pap smear. She refused and later developed cervical cancer. She sued the physician on the ground that he is by obligation supposed to inform her of the risk she faces by refusing the Pap smear. The court upheld her application and this case is popularly referred to as the doctrine of informed refusal.

Similar situations were agreed upon and followed by the Nigerian Supreme Court in the case of *MDPDT v. Okwonkwo*,<sup>20</sup> Uwaifo, JSC, (as then was) said 'I am completely satisfied that under normal circumstances, no medical doctor can forcibly proceed to apply treatment to a patient of full sane faculty without the patient's consent, particularly if the treatment is of a radical nature, such as in amputations or other radical surgery.' So the doctor must ensure that there is a valid consent and that he does nothing that will amount to a trespass to the patient.

Again, in 1996, the Wisconsin Supreme Court in *Johnson v. Kokemoor*<sup>21</sup> extended the doctrine by requiring that a physician may have a legal duty to disclose his or her level of experience with a given technique when compared to other surgeons. In this case, the court determined that the surgeon provided misleading information by not letting the patient know his level of performance.

In *Hidding v. Williams*<sup>22</sup>, the court required that the surgeon should disclose his alcoholism. This case suggests that the court may consider factors other than the risk of surgery, even including the personal and professional characteristics of the attending physician, as part of informed consent. The courts have also construed the doctrine of informed consent to include disclosure of a surgeon's HIV (human immunodeficiency virus) status. The case dealing with this matter was *Scoles v. Mercy Health Corporation of Southeastern Pennsylvania*<sup>23</sup>. Scoles was an orthopedic surgeon who became HIV positive. The hospital learned of this and conditioned his clinical privileges upon his agreement to inform his patients of his HIV status prior to any invasive procedure. Scoles brought a suit against the hospital based on the Americans with Disabilities Act. The court ruled that the hospital had acted reasonably by asking the doctor to disclose his HIV status.

For a physician to protect himself in litigation, in addition to carrying adequate liability insurance, it is important that the communications process itself be documented. Good documentation can serve as evidence in a court of law that the process had indeed taken place. A timely and thorough documentation in the patient's chart by the physician providing the treatment and/or performing the procedure can be a strong piece of evidence that the physician engaged the patient in an appropriate discussion. A well-designed, signed informed consent form may also be useful, but an overly broad or highly detailed form actually can work against you. Forms that

<sup>17</sup> 2 WILS. K.B. 359, 95 Eng. Rep. 860 (1767)

<sup>18</sup> Gradwhol's legal medicine. Camps FE, editor. 3<sup>rd</sup> ed. Bristol John: Wright and sons; 1976. 419-29.

<sup>19</sup> (165 Cal. Rptr. 308) 1980

<sup>20</sup> (2001) 7 NWLR (pt. 711) 206.

<sup>21</sup> (545 N.W.2d 495) 1996.

<sup>22</sup> (578 So. 2d 1192) 1991.

<sup>23</sup> 887 F Supp 765 (ED Pa 1994). 45.

serve mainly to satisfy all legal requirements (stating, for example, that "all material risks have been explained to me") may not preclude a patient from asserting that the actual disclosure did not include risks that the patient unfortunately discovered after treatment. At the other extreme, listing all of the risks may not be wise either.

### 3. CONCLUSION

Medical law is highly regulated by a set of complicated rules, which vary considerably from state to state in the United States of America and most civilized countries. Whether or not a patient gave his or her informed consent to a treatment is crucial in the law of medical malpractice. If a doctor does not get a patient's informed consent, and the patient would not have opted for the treatment if he or she knew about the risks, the patient may be able to sue the doctor for medical malpractice. These laws apply to doctors and sometimes to nurses. They vary from state to state. Some states have very specific laws about certain situations. For instance, some states dictate certain information be given about clinical trials (scientific studies of promising new treatments). Another difference is that some states call only for "reasonable" information; but others require "full and complete disclosure."<sup>24</sup>

The truth is that Nigeria has no laws on the subject of informed consent. Other available instruments seem to be used to regulate the subject matter such as the provisions of the Constitution as well as the provisions of the Criminal Code. Also, as earlier noted, it is not every situation of absence of informed consent that amounts to a violation of the human rights of the patient. It is, however suggested that as it is in consonance with international best practices, the National Assembly as well as States should take steps in making laws on the subject so that certain careless medical treatments carried out without the informed consent of patients will be addressed and patients compensated as it is the position elsewhere, particularly this will also check the complacent and nonchalant attitude of medical personnel in this country.

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<sup>24</sup> What are the legal requirements of informed consent?  
<http://www.cancer.org/treatment/> Retrieved 2/7/2014.