

CONFIDENTIALITY IN HEALTH CARE- REFLECTING ON THE RIGHTS OF COVID 19 PATIENTS

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ABSTRACT

One of the rules regarding medical practice in Nigeria is the obligation to protect patient's confidentiality and privacy. This is an ethical as well as a legal duty incumbent upon medical practitioners for the benefit of the patients. This obligation is sacrosanct and aims at the protection of the patients, as well as maintain patient – physician relationship based on trust. Currently, questions begging for answers and raising controversies in the country are: Firstly, whether physicians' obligation not to disclose patients' confidences is absolute? Secondly, if the identity of patients diagnosed with the recent Coronavirus can be disclosed to help warn the public of the impending danger? Finally, whether the news of the virus (COVID-19) in the country is a scam or a reality? These are the crux of this research. This paper attempts an answer to these trifling issues bogging the minds of millions of Nigerians. In addition, look at the position of human rights in disclosing patient's confidential information. The methodology is doctrinal while the approach is analytical. Reliance is placed on both primary and secondary data. Primary data consists of case law, law reports, statute, international conventions and treaties. Secondary data include constitution, journal articles, internet posts, newspapers and so forth.

Keywords: Confidentiality, Privacy, Patients, Physicians, Patients Health Information and COVID- 19

I. BACKGROUND

On March 2020, Nigerians were embraced with the news of a deadly virus in the country. The novel virus Corona- popularly known as COVID-19 started as an outbreak of an uncommon pneumonia in Chinese City of Wuhan, Hubei Province first reported in late December 2019.¹ Before the presumed arrival of the index case in Nigeria which emerged through a foreign carrier into Lagos on 27th February 2020, the rapid response, and the ‘Nigerian think tank’ – the National Centre for Disease and Control (NCDC) was at their best, slow footed.² Since then, the virus has spread in the country as well as internationally and has triggered a pandemic.³ The World Health Organization (WHO) as a result declared the outbreak, ‘a global public health emergency of international concern’.⁴ As at the time of this research, the number of confirmed cases in Nigeria was 13, 873; active cases were 9,140 while the mortality rate has risen to 4,351. The number has risen globally to a total of 7,526,784 active cases, mortality rate at 421, 695.⁵ Since the index case in the country, the swift rise according to the pronouncement by

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¹Enitan, Seyi Samson, et al.’ The 2019 Novel Coronavirus Outbreak: Current Crisis, Controversies and Global Strategies to Prevent a Pandemic’ International Journal of Pathogen Research (2020) 1-16.

²Ibid,8

³Ibid;8

⁴Ibid;10

⁵CNN News, 12 June 2020

the NCDC has caused widespread alarm that Nigerians have been clamouring angrily for the disclosure of the confidences of the carriers but not much has been disclosed, leaving the public in a confused state as to the reality or otherwise of the existence of the virus in the country. Disturbingly, this has placed the physician in a dilemma between maintaining his ethical and legal duty toward his client and the disclosure for the protection of public interest. This has motivated the author to research in this topic that has stirred up a cacophony of issues in the minds of millions of Nigerians. This paper consists of five parts. Following this introduction, part two analyses the concept of privacy and confidentiality in health law. It discusses peculiar features of each concept and points out relevant distinctions. The third part discusses circumstances physicians can disclose confidential information of patients while part four discusses the position of human rights. Finally, part five concludes and projects the way forward.

II. ANALYSIS OF THE CONCEPTS OF PRIVACY AND CONFIDENTIALITY

Privacy

Privacy in healthcare means that any information shared and written about a patient regarding the medication and other personal information is private.⁶ The patient has a legal right to this privacy.⁷ The Nigerian Constitution is explicit on this. It stipulates that: the privacy of citizens, their homes, correspondence, telephone conversations and telegraph is hereby

⁶Better Health Channel, Confidentiality and Privacy in Healthcare' <www.betterhealth.vic.gov.au> accessed 5 April 2020

⁷ Ibid; 13

guaranteed and protected.⁸ The broad tone of this provision clearly evidences that private information, including patient's related information, is constitutionally protected in Nigeria. This shows that certain behavioural conducts or choices made by an individual ought not to be the concern of others. This is innate to humanity. Entitlement to "private space" is a universally shared value, observed even in primitive societies. The principle of self- autonomy, which is the right to bodily or personal autonomy, is a core element of human rights and the essence of human freedom.⁹ The concept "privacy" originates from the Latin maxim '*privatus*' and '*privo*' meaning "cut off from others; apart from the state... peculiar to one self... not public, an opportunity in ones favour, secret."¹⁰ It was first introduced by Warren and Brande in 1980.¹¹The word privacy has four major usages, corresponding to four distinct forms of privacy, they include: physical privacy, informational privacy, proprietary privacy, and decisional privacy. Physical privacy denotes preference to or freedom from contact with other people.¹² It is the desire for limited physical accessibility- for seclusion and solitude conducive to peace of mind and intimacy of a patient. An informational privacy, synonymous with secrecy, confidentiality, data protection, or anonymity- requires limits on the accessibility of personal information. The third dimension of privacy is the proprietary privacy which relates to the appropriation and ownership of human personality- for example

⁸ s.37 CFRN, 1999

⁹ Obiajulu Nnamuchi,' Physicians' Handling of Patients' Health Information: Ethics and Law of Confidentiality (2015) Journal of Comparative Health Law and Policy, 117

¹⁰ Ibid;117

¹¹Ibid ; 117

¹²Ibid; 117

to appropriate a persons' DNA without consent may be regarded as a breach of privacy.¹³The fourth dimension of privacy is decisional privacy. That is a person's autonomous right to make choices regarding personal and intimate matters that concern him\her. It further signifies the ability to stand by such decisions, free from governmental or other unwanted interferences. In healthcare context, it relates to the responsibility to make important decisions about medical treatment and the allocation of scarce medical resources to those in urgent need of it.¹⁴That said, this paper is concerned with the fourth dimension being decisional privacy which could be either negative or positive. A positive right to privacy denotes right to "control access to and/or distribution of personal information, property, and/or knowledge of personal behaviours."¹⁵Each individual is entitled to a 'zone of privacy' upon which no one may intrude in absence of his or her permission.¹⁶ Eating habits, sexual preferences of a person or choice of dressing are considered private matters that may not be interfered with except for a justifiable cause.¹⁷Thus, everyone has the right to restrict access to, and distribution of, his personal health related information or otherwise. On the other hand, negative right to privacy refers to the freedom from interference in one's freely lawfully made choices, decisions or actions. It is the right of the individual to be free from unwanted intrusion; whether by the government, private individuals or any other entity.¹⁸ In clinical

¹³Ibid; 117

¹⁴ Encyclopaedia, Privacy in Healthcare www.encyclopedia.com (13) (1) 2020 {accessed 6 May 2020}

¹⁵Obiajulu Nnamuchi; *ibid* ;

¹⁶Ibid; 116

¹⁷Ibid ; 116

¹⁸Ibid;117

or health care context, privacy is assured to patients by providing consultations and treatment in appropriately secluded areas (behind closed doors or pulled curtains) away from the prying eyes and ears of those not involved in providing care.¹⁹ That is the building block of the concept of privacy which dates back centuries ago. The line for privacy in healthcare was set in the famous case of *Semayne's per Sir Edward Coke* where he declared that the house of everyone is his “castle and fortress” as well as for defence against injury and violence; as for his response.²⁰ Privacy was firmly established in the subsequent case of *Entick v. Carrington* a leading case in English Law and UK Constitutional law which established an individual's civil liberties or rights to protect his privacy or interest. The facts of the case are as follows: On 11 November 1762, the King's Chief Messenger Nathan Carrington, and three other King's messengers: James Watson, Thomas Adrian, and Robert Blackmore, broke into the home of the Corub Street writer... John Entick in the Parish of St. Dunstan Stepney. ‘With force and arms; ’over the course of four hours, they broke locks and doors and searched all the rooms before taking away 100 charts and 100 pamphlets, causing 2,000 (euros) of damage equivalent to 413,906 Euros in 2020. The Kings messengers were acting on the orders of Lord Halifax, a newly appointed Secretary of State for the Northern Department, ‘to make strict and diligent search for ... the author, or one concerned in the writing of several weekly very seditious papers entitled, ‘The Monitor or British Freeholder.’

¹⁹Ibid;117

²⁰Semayne's Case All ER Rep.62;5 Co Rep91a;Cro Eliz 908, Moore KB 668;Yelv 29;77 ER194

Entick brought an action in court against Halifax's messengers for trespassing on his land.

The Court held per Lord Camden; that Halifax's messengers who claimed to have acted on his warrant were liable for the tort of trespass because Halifax had no right under statute or under any precedent to issue such a warrant. The court therefore gave judgement in favour of the plaintiff, *Entick*. In its further explanation, the court held that:

The great end, for which men entered into society, was to secure their property. That right is preserved, sacred and incommunicable in all stances, where it has not been taken away or abridged by some public law for the good of the whole... By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon any ground without any licence; he is liable to an action, though the damage be nothing.²¹

Other instances of decisional privacy key to this paper is the freedom to choose or refuse medical treatment, the right to die (Euthanasia- Assisted suicide)²², the right to possess obscene material²³ and more recently, the right to consensual

²¹*Entick v. Carrington* 19 Howell's State Trials 1029 (1765)

²²See the case of *Re Quinian*, 70 NJ 10, 355 A21 647(1976) Court held that the right to privacy entitles the parents of a patient in a persistent vegetative state to turn off the life support system for their daughter.

²³*Stanley v. Georgia*, 394 US 557, 565 (1969); The court noted that if the First Amendment means anything, it means that a state has no business telling a man, sitting in his house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at

homosexual relationship.²⁴ Today privacy rights are protected constitutionally and statutorily in all democratic nations as well as by regional and international human rights instruments, such as the Universal Declaration of Human Rights (UDHR) 1948, International Covenant on Civil and Political Rights (ICCPR) 1966, International Covenant on Economic Social and Cultural Rights (ICESCR) 1966 and other international documents related to this right.²⁵

Confidentiality

Medical Confidentiality is a set of rules that limits access to information discussed between a patient and physician.²⁶ It is an obligation for a physician to keep secret patients records or communication.²⁷ Confidentiality is related to privacy and security of persons though with different connotations but confidentiality remains more ancient. Protecting the private detailed information of a patient is not only a moral duty but essential to retain the bond of trust between the physician and the patient.²⁸ To warrant confidentiality protection, the information, transaction or conduct in respect of which the claim

the thought of giving government the power to control men's minds; see also the Nigerian case of Sony Kahushiki Kaisha v Hahani & Co Ltd, FHC/L/35/81..

²⁴Lawrence v. Texas, 539 US 558 (2003), Bowers v. Hardwick 478 US 186 (1986)

²⁵ICCPR Art.17;ICESCR Art. 17.

²⁶Better Health Channel, Confidentiality and Privacy in Health Care <[http:// www.betterhealth.vic.gov.au](http://www.betterhealth.vic.gov.au)> accessed 5 April 2020

²⁷Valeri S. Prater, Confidentiality, 'Privacy and Security of Health Information: Balancing Interest' <www.healthinformatics.uic.edu> 2014 accessed 20 May 2020

²⁸Ibid;

is made must be of a private nature. In other words, only private matters merit confidentiality protection. Rightly put by Lord Goff (of Cheverly) in the case of *Attorney General v. Guardian Newspaper (No. 2)*;

“(A) duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed that the information is confidential with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.²⁹

Actual knowledge of the confidential nature of the information is not essential. Constructive knowledge would suffice in an action for breach of confidentiality. To regard information as private or confidential, it must include:

- Name, date of birth, age, sex and address
- Current contact, details of family, guardian.
- Medical history or record of the patient.³⁰

The distinction between the concepts lie on the nature of their breach, privacy allows self-autonomy over a person’s health information while confidentiality refers to the duty of anyone trusted with private health information to keep that information private.³¹ A breach of confidentiality occurs upon failure on the part of the recipient of sensitive information (physician or hospital) to protect it or when there is a deliberate disclosure of

²⁹[1990] 1 AC 109

³⁰Obiajulu Nnamuchi; 116

³¹ CDC, Privacy and Confidentiality, <[Shttps://www.cdc.gov/?/en](https://www.cdc.gov/?...../en)> accessed 20 May 2020

the information without the consent of the originator (patient).³² Violation of private information on the other hand, is when an unauthorized person gains entrance to a record room or access to the data of a health facility.³³ The obligation to respect patient's confidentiality is rooted in the *Hippocratic Oath* to the current code of medical ethics emanating from Hippocrates the father of medicine. *The Hippocratic Oath* expressed the physicians' obligation in the following terms:

I SWEAR by Apollo the physician, and Aesculapius, and Health and All- heal, and all the gods and goddess, that ... whatever, in connection with my professional practice or not, in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret.³⁴

This oath, described as 'the most admired work in Western European Medical Ethics', survived till this day and is administered in modified forms, throughout the world.³⁵

A new version of this oath was adopted on September 1948 by the 2nd General Assembly of the World Medical Association in the Geneva Declaration. It was last reviewed in 2006. It is the new version of the Hippocratic Oath that most countries including graduating medical and dental students in Nigeria subscribe. This oath is now contained in the Medical and Dental Council of Nigeria (MDCN) popularly known as the Code of Medical Ethics. Simply restated as follows:

³²Nnamuchi Obiajulu, *ibid*; 117

³³ *Ibid*.

³⁴ Hippocrates, *The Corpus; The Hippocratic Writings* (New York: Kaplan Publishing, 2008), 1, 2

³⁵ Obiajulu Nnamuchi; *ibid*, 117.

“I solemnly pledge to consecrate my life to the service of humanity.... I will PRACTISE my profession with conscience and dignity. THE HEALTH OF MY PATIENT WILL BE my first consideration. I WILL RESPECT the secrets which are confided in me, even after the patient had died.”³⁶

Aside from recognizing the duty to maintain patients’ confidences, the *Code of Medical Ethics* in Nigeria lays down three useful guidelines for physicians asked to disclose medical information. To comply with the guidelines, the physician must seek the consent of the patient in writing before making the disclosure, must also anonymize the data where disclosure is permitted except where the patient’s identity is needed. Nonetheless, the disclosure should be kept to the minimum required to achieve the purpose.³⁷ Where the patient is illiterate, before obtaining a written consent, the information must have been read and the contents explained in the language he understands. However, where the signature is impossible to obtain, a thumbprint or any other mark that the patient intends to represent his signature with would suffice.³⁸

This duty of confidentiality can either be created or imposed by law or by professional ethics. For example the *Code of Professional Conduct for Nurses and Midwives* in Nigeria mandates them to keep information and records of the client confidences except in consultation with other members of the health team to come up with suitable intervention strategies or in

³⁶Medical & Dental Practitioners Act [Cap 221] LFN 1990 [Decree No. 23 of 1988] s. 2(a)

³⁷Art 7&8Code of Medical Ethics, Nigeria, 2004.

³⁸Ibid.

compliance with the court ruling or for protecting the consumer and the public from danger.³⁹ Furthermore, the code mandates them to respect the confidences of their patient(s) even after death.⁴⁰ In fact, the best interest of the patients is the driving force for every action performed by the physician or nurse at all times.⁴¹ The primary obligation is to do no harm - '*pre non nocere*'

In law, to bring an action for a breach of medical confidentiality for improperly disclosed patient information to an unauthorized individual or institution, onus lies on the patient to prove that disclosure is detrimental to him and that he has suffered harm as a result. In ethics, action for disclosure of confidential information is rooted in morality therefore, harm caused in this respect, would not be treated as under the law, because law does not concern itself with trifles.⁴² In other words, action considered inadequate to sustain a legal claim could stand in ethics but not in law. More so, the *Code of Medical Ethics* in Nigeria prohibits physicians as well as their employees from accepting employment which would involve the use of patient confidential information for the benefit of either the physician or that of the employees. In addition, any act of the physician or its employees detrimental to the patient by reason of information disclosure to the advantage of the latter is prohibited. Death does not extinguish the obligation to protect.⁴³ Nevertheless, with the

³⁹Art.5

⁴⁰Art 5 Para (3)

⁴¹Art 4

⁴² The Legal Principle of *De minimis non curate lex* - the law does concern itself with....therefore information about a patient should not be disclosed where it is not beneficial for the patient.

⁴³Obiajulu Nnamuchi, *Ibid*.

consent of the representatives of the deceased the obligation can be extinguished. Accordingly, Baroness Hale summed it up in *Campbell v. MGN Ltd*; with the following words:

It has always been accepted that information about a patient's health and treatment for ill-health is both private and confidential. This stems not only from the confidentiality of the doctor-patient relationship, but from the nature of the information itself.⁴⁴

Consequently, there are three justificatory factors to confidentiality in healthcare based on autonomy-self-governance or self-rule; liberty and self-choice⁴⁵. First, the moral principle of autonomy requires that so long as an individual is a rational and competent being, the right to choose of actions or decision making must be permitted.⁴⁶The second justification for confidentiality is the binding obligation. Physicians are mandated to treat all information obtained in the course of their duties as confidential.⁴⁷ The third is based on trust relationship-which is an essential element in patient physician relationship. Liability for wrongful disclosure attracts a fine not less than ₦20,000 or imprisonment for a term of two years or both.⁴⁸

Part three discusses exceptions to the rule of privacy and confidentiality. It also looks at the circumstances that may

⁴⁴*Salmon Engineering Co. Ltd v. Campbell Engineering Ltd* (1948) 65 RPC 203,(1963) 3 All ER413at 414.(Ct of App, UK, per Lord Greene MR). {Saltzman Engineering}.

⁴⁵*Dr. Rom Okekearu v. Danjuma Tanko* (1993) 2 SCR 119(Can).

⁴⁶*Obiajulu Nnamuchi*, *ibid*;

⁴⁷*Ibid*.

⁴⁸NHA s.38(2).

trigger disclosure of confidential information by physician; to whom such disclosure should be made and how it should be made.

III. EXCEPTIONS TO THE RULE OF PRIVACY AND CONFIDENTIALITY

Much was not mentioned about the exceptions to privacy. The only law that recognized exception to privacy in health care is the Patients' Bill of Rights (PBOR).⁴⁹ Notwithstanding, certain circumstances may trigger the demise of the non-disclosure of confidential information. These circumstances include:

- a) Where the originator (patient) consents to the disclosure of the information: an originator of confidential information could consent to the information whether implicitly or explicitly for the sake of their own care or for the sake of others around him.⁵⁰
- b) Emergency situations: where a patient is brought to the hospital under emergency in an unconscious state the rule that consent be given in a written form, can be overruled. It is permissible at this stage to obtain the patients records from any source so long as the information would aid treatment. This could occur with a victim of an automobile accident or any other victim of the physician at that point has the right to seek for pervious information on the patient

⁴⁹Patients Bill of Rights (PBoR) 2018, Ensuring EasyAccess to Quality Health Care Services in Nigeria.

⁵⁰MENU, 'Disclosing Patients 'Personal Information: A Framework' <<https://www.gmc.uk.org/>>accessed 8 July 2020

illness to enable him administer proper treatment and determine treatments that may affect his client negatively.⁵¹

- c) For the protection of health professionals': confidentiality obligation may be breached to protect the health care professionals. An attending physician whose patients suffers from chronic disease or contagious disease such as, HIV/AIDS or Hepatitis which are highly infectious diseases would not be at fault for disclosing the positive status of the patient to protect those involved in treatment of such patient. Given that the illness is highly transmissible and to reduce the risk of exposure to the patient's bodily fluid.⁵²
- d) For Coroner's Investigations: Where a coroner is required to investigate the circumstances of a death which occurred in a violent manner or in custody (autopsy), the physician with the confidences of the deceased is obligated to disclose relevant information to assist investigation.⁵³
- e) Disclosure in the Public Interest: Disclosure of patient information without their express consent may be justifiable if public interest outweighs patient's interest. However, in disclosing, possible harm on the patient- physician relationship must be considered. The information to be disclosed must be only relevant to the purpose of the

⁵¹Obiajulu Nnamuchi ; Ibid. ; 124

⁵²Ibid. ; 124

⁵³Explore ; Confidentiality- Disclosure without Consent, Journal of Medical Protection,,<www.medicalpractice.org> accessed 10 July 2020

disclosure. Only in exceptional circumstances should non-anonymized data be disclosed.⁵⁴

- f) Disclosure to Report Gunshots and Other Suspicious Wounds: A physician shall make certain disclosures to the police when a person arrives with a gunshot or an injury from an attack with knife or sharp instrument which he is unsure of. An experienced colleague should be contacted to collaborate his statement. In this instance, personal information or confidences of patient such as name, address and so forth needs to be disclosed to aid investigation.⁵⁵
- g) Legally Required Disclosure: The courts have the power to order the disclosure of information in various circumstances, a judge or a presiding officer of a court may require a physician to disclose privilege information of his patient under compulsion in matters that are relevant. A physician can decline if the request is for irrelevant matters for example matters relating to relatives or partner of the patient who is not a party to the proceedings.⁵⁶
- h) Disclosure for Patients of DVLA⁵⁷: Under the Driver and Vehicle Licensing Agency (DVLA), it is legally the

⁵⁴Ibid.;

⁵⁵According to Child Protection Guidance for all Doctors 2007, children between 0-18 years who visited the hospital presenting a gunshot, knife or other sharp instrument wound, the physician must inform appropriate child protection authority. In addition, knife or blade cut from domestic or occupational accidents might also raise concerns about the safety of children and young people.

⁵⁶Ibid.

⁵⁷DVLA means Driver and Vehicle Licensing Authority

responsibility of a doctor to disclose the health situation of the patient to decide if the patient is medically fit or unfit to drive.

- i) Prevention of Crime or Iniquity: Another ground for breach of confidentiality is to prevent crime for the interest of the public. This exception evolved from the case of *Gartside v Outram*⁵⁸. In this case the court gave the following judgement:

...the true doctrine is that there is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a crime or a fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part. Such a confidence cannot exist.

This is known as the rule of iniquity which means ‘a crime’ civil wrong or serious misdeed of public importance’.⁵⁹In addition, the *Nigerian Code of Medical Ethics* specifically excludes from disclosure obligation situations in which breach of confidentiality is a sine qua non for the protection of the community from danger or harm.⁶⁰ Where a patient confides in the physician his intention to commit a crime,

⁵⁸(1856) 26Ljch 113 (Gartside)case where an action to prevent defendants who were former employees of plaintiffs from publishing information obtained in the course of employment which revealed That the plaintiffs fraudulent acts in the conduct of their business failed.

⁵⁹Obiajulu Nnamuchi, Ibid ; 125

⁶⁰Ibid ; 125

the physician has no obligation to keep the information secret going forward would amount to conspiracy in law.⁶¹

- j) Disclosure for Medical Research.: For the purpose of medical research (biomedical), physicians are not constrained by confidentiality protection in disclosing medical information to researchers.⁶² This is a public interest exception with roots in utilitarian considerations. But this disclosure must be approved by the International Review Board or some other designated entity or authorities of the hospital.
- k) Disclosure for the Protection of Public Health: Akin to the preceding exception is the duty to disclose for the public interest. Sometimes, certain prevailing health challenges raise a number of problems. For instance in times of emergency, such as an outbreak of infection or virus diseases, with the need to contain the spread of the diseases, it may warrant extraordinary measures which in some cases may adversely impact certain segments of the population. There might be need for isolation of infected individuals. This act, although regarded as infringement on fundamental rights but the values are not inviolable in the circumstance because the duty to protect public interest is paramount over

⁶¹W Verdell (1990) IALL ER 835

⁶² Infringement on their rights to freedom of movement, association, liberty and privacy as well as confidentiality protection although justified for the protection of public interest and safety. .Chapter 4CFRN 1999

any duty owed an individual. ⁶³The focus of this article rests on this exception.

l) Disclosure under the National Health Act: Summarily, the National Health Act, 2004 forbids the disclosure of medical information except in the following circumstances:

- a. If the user consents in writing to such disclosure.
- b. By an order of court
- c. To protect public health and prevent serious threat to public health.
- d. Disclosure for legitimate purposes
- e. Disclosure to give access for legal basis
- f. Health record to be used for research⁶⁴

m) Disclosure under the National Health Insurance Scheme.

The National Health Scheme creates a secrecy obligation binding the officials and other employees of the scheme. The officials are mandated to treat all information obtained in the exercise of their duties as confidential. Disclosure of these confidences can only be made in the above outlined circumstances and to maintain an arbitration board and the court of law.⁶⁵

⁶³Worldometer reports that the current population of Nigeria is 206, 139,589, Tuesday 2 June, 2020. Worldometer Elaboration of the latest United Nations Data on Population. 2.58% of the total world population

⁶⁴s.25, 27, 28 & 29 NHA, 2004

⁶⁵s.38 (1) NHIS Act (2005), launched in Nigeria in June 2005 and covers public civil servants in Federal Establishments

Part three looks at the position of human rights and the physicians' duty to disclose in the event of a pandemic.

IV. POSITION OF HUMAN RIGHTS ON PHYSICIANS DUTY TO DISCLOSE

Implicit in this part four is the case of *Z v Finland*⁶⁶. The European Court of Human Rights in this case warned emphatically:

It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmittable diseases that of the community.⁶⁷

The court is suggesting that upholding individual confidences is important for the protection of the society from threat to serious health issues. It will be detrimental to the community if an individual who is suffering from communicable disease such as COVID-19, HIV/AIDS and so forth refuses to seek for treatment because of stigmatization.

⁶⁶(1997) 25 EHRR, 371,405 & 951

⁶⁷Attorney- General of Federation v. Guardian Newspapers Ltd (No. 2) (1990)1AC 109 ;Ademolokun v. Council of University of Ibadan (1968) NMLR

In addition, Lord Goff (of Cheverly) stressed, in the protection of confidences, the court must strike a balancing operation, weighing the public interest in maintaining confidence against a counter railing public interest favouring disclosure.⁶⁸ Furthermore, more concrete restatement of the non-absolute nature of confidentiality obligation was provided by the European Convention on Human Rights,⁶⁹ that there should be interference on the right to privacy where the interference is in accordance with the law and in order to protect national interest, security and public safety or the economic wellbeing of the country, for the prevention of disorder of crime, to protect health or moral, or for the protection of rights and freedom of others.⁷⁰

Restating the words of the European Courts of Human Rights on privacy and confidentiality of patients information in a pandemic, the Human Rights Acts stressed that although it is right to respect the right of every individual and that of his family held in confidence but this right is not absolute and can be overridden to safeguard public safety and public interest.⁷¹ The Health and Social Care Act of England explains s that information can be shared for individuals who use health and social care services⁷² Thus, the physician can disclose the confidences of a patient in the interest of the public and for

⁶⁸Convention for the Protection of Human Rights and Fundamental Freedom, 213 UNITS222; entered into force on 3 September 1953

⁶⁹Art. 8 (1) & (2) Human Rights Convention ; ibid

⁷⁰Ellie Collier, 'A Guide to Confidentiality in Health and Social Care,' (2019) (4) (1) Journal of Health Law ; 18

⁷¹The Human Rights Act of England 1998

⁷²The Health and Social Care (Safety & Quality) Act UK 2015, s.5 <[https:// www.navigator.health.org.uk](https://www.navigator.health.org.uk)>

public safety especially in the event of a pandemic and to protect the public when a patient poses a risk of harm to another.

That said, the Court of Human Rights is emphatic on the duty of the physician to disclose private and confidential information because the duty to disclose is not absolute and the first duty of a physician is that of care -*Prenon non micere* that is the duty to save lives. The question as to whether the physician has the duty to disclose confidences of a patient to protect public safety will be considered in the concluding part of this work which is part five (5).

V. CONCLUSION

In this paper, the major discussion has been whether the physician has the duty to disclose confidences of his patient to protect public safety.⁷³ In responding to this, in the light of the recent COVID-19 pandemic, we found that the physician's paramount duty is to the patient. However, the physician owes the duty to protect the public from harm; especially in a pandemic. In addition, maintaining the privacy of an individual's medical records should not be at the detriment of the health risk of the public. Thus, protecting communal or public health needs is paramount when the benefit to public health are high and the risks to individual are low not disregarding that as a matter of social policy and constitutional protection, the protection of individual privacy is fundamental. A patient's privacy and confidences should be overruled cautiously and only with a strong show of the need to disclose for the public safety. Although considerations should be made as

⁷³ Jacobson P. D,' Medical Records and HIPAA : Is It Too Late to Protect Privacy',(2002) <<https://scholarship.law.unn.edu>>mtr ; 1511

to what is in the patient's best interest. This decision to disclose Patient's Health Information (PHI) should be focused on the patient's clinical needs and legitimate need for sharing information to maintain continuity and quality of care. Since the right to privacy is not an absolute right, any scheme must make room for times when privacy of patient's confidences must yield to other competing public policy objectives. However, a physician should strike a balance between the protections of communal or public safety. According to Gostin and Hodge on standard to PHI; where public benefits are high and the risks of harm to individuals are low, privacy should not restrict disclosure. But in all, individual rights must yield to protect community's right. For example; disclosing identities of a COVID-19 patient is important to contain the spread of the virus and also to warn the public of the reality of the virus.⁷⁴ The reality on ground is that COVID is in existence in Nigeria considering the number of health facilities and isolation centers set up to curb the virus but the question that bugs the minds of millions is whether the hike in the number of cases pronounced daily by the NCDC is actually what it is or is there an ulterior motive behind the hike?.

The onus of proving the above lies on the NCDC as well as the Presidential Task Force (PTF)⁷⁵ a special body set up to analyse the situation of the pandemic in the country. Furthermore, there is no best way to instil the conviction in the minds of Nigerians than to disclose the full identity of those infected with the virus. The ability to cope up with this task by the Nigerian government in order to deal with these issues trending the minds of most

⁷⁴Jacobson P.D,Ibid ; 1511

⁷⁵ Presidential Task Force, a special body set up by Nigerian Government to analyse the situation of the pandemic in the country

Nigerians is key to avoid continued increase of the virus in the country.⁷⁶

Finally, the PHI must be made for the protection of public safety to the public through the media in such a way as not to deny the survivors of their life benefits in both private and public spheres. This is one of the worries of privacy advocates; that the PHI may be used to deny employment or life insurance.⁷⁷ Therefore measures to ensure patient safety must be put in place. On balance, the medical duty of care and the fiduciary relationship between the patient and physician is to be maintained even as the public health safety interest must not be left to suffer. In sum, the writer favours the regime that still places privacy and confidentiality of patient's health confidences at the top of the hierarchy.⁷⁸

⁷⁶New York Times; 'When Genes are Decoded, Who Should see the Results?' February 29, 2002.

⁷⁷Gostin IO and Hodge JG., 'Personal Privacy and Common Goods : A Framework for Balancing under the National Health Information Privacy Rule', (2001) (86) Minnesota LawReview, 2002 ; 86 :1439. [Pub Med] [Reflist]

⁷⁸Most preferable is the view of authors like Gostin& Hodge