

## **RIGHTS OF PATIENTS TO SELF DETERMINATION IN THE MEDICAL CONTEXT UNDER ENGLISH AND NIGERIAN LEGAL SYSTEMS\***

### **Abstract**

*It is a fundamental principle of Medical law and Ethics that a medical practitioner should obtain the informed consent of a competent patient. This is in line with the principle of self determination and best interests of a patient as gone are the days when a trust me, I am a doctor approach justified the imposition of treatment on a patient. Treating a competent patient without obtaining his consent would amount to a contravention of a patients' rights not to suffer, torture or inhuman and degrading treatment. This work, therefore, considers the rights of patients to self determination in the course of his treatment.*

**Keywords:** Patients, Self Determination, Medical Context, English Law, Nigerian Law

### **1. Introduction**

Persons have the capacity to make choices about their care, treatment and how they wish to live. This is within their right to self determination. A person's right to self determination is grounded in the value of human dignity. Persons who acts autonomously, take decisions relevant to themselves, in accordance to their values, preferences and interests, after understanding what they are about to do and without any form of controlling influence. This respect for patient autonomy (self-determination) in clinical practice is embodied in the requirement of informed consent for any medical intervention and for the patient to participate in healthcare decision making. The free and informed consent of the patient is a fundamental right of every citizen, derived from the right to integrity of the person and is entrenched in the Fundamental Human Rights Charters. The values of a person concerned and his or her conception of a meaningful life assume importance in deciding whether to consent to a treatment or refusal to initiate or continue treatment. Giving a treatment without patient's consent would thus be a violation of the physical integrity of the person and on his personal identity. This right to informed consent also includes the possibility for the patient to refuse an intervention, a decision which might adversely affect their health or shorten their life. Moreover, it makes clear patients autonomy in their relationships with healthcare professionals.

### **2. Patients Right to Self-Determination**

Self determination is bound up with two legal concepts, informed consents and capacity to treatment.

#### **Definition of informed consent**

According to the dictionary, informed means to tell, to inspire, and consent is defined as the agreement, compliance, permission. Thus, informed consent is a legal condition whereby a person can be said to have given consent based upon an appreciation and understanding of the facts and implications of any actions. The individual needs to be in possession of all his faculties, such as not being mentally retarded or mentally ill and without an impairment of judgment at the time of consenting. Impairments include sleep, illness, intoxication, drunkenness, using drugs or other health problems. Some act cannot legally take place because of lack of informed consent. In other cases, consent of someone on behalf of a person, not considered able to have informed consents is valid. Examples of this include the parents or legal guardians of a child and caregivers for the mentally ill.

#### **What are the elements of full informed consents?**

The most important goal of informed consents is that the patients have an opportunity to be an informed participant in his health care decisions. It is generally accepted that complete informed consents include a discussion of the following elements:

1. A fair explanation of the procedures to be followed and their purposes including identification of any procedure that is experimental.
2. A description of any attendant discomfort, risks and uncertainties reasonably to be expected.
3. A description of any benefits reasonably to be expected.
4. A disclosure of reasonable alternatives procedures to the proposed intervention that may be advantageous for the subject.
5. An offer to answer any inquiries concerning the procedures.
6. Assessment of patient understanding.
7. An instruction that the person is free to withdraw his consent and to discontinue participation in the project of activity at any time without prejudice to the subject.

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### **3. The English Law Position**

Under the common law a doctor may only administer treatment when a patient gives consent. A competent person is entitled to reject a treatment or select an alternative treatment, even if the decision entails serious risk of death. The patients' reasons for withholding consent can be rational, irrational, unknown or even non-existent<sup>1</sup> this respect for patient autonomy is one of the guiding principles of medical law. The principles of self-determination will in most cases prevail above the competing principles of sanctity of life and will protect the rights of a patient to decide what is to happen even should the decision be contrary to medical advice and even should it bring about death.<sup>2</sup> This has been confirmed by the House of Lords in the case of *Bland* (the Hillsborough victim in persistent vegetative state), the Lord laid down that the principle of life is not absolutely one: 'it does not compel a medical practitioner on pain of criminal sanctions to treat a patient who will die if he does not, contrary to the express wishes of the patient' the House of Lords has also endorsed the view that a doctor who proceeds without the consent will be liable for trespass, assault or battery, and regardless of whether the doctor had any hostility.<sup>3</sup> Patients do not even need to have suffered any harm from the doctor's actions to bring a successful action for damages.

#### **Valid 'Informed Consent'**

For consents to be legally valid a patient must know in broad terms what is involved in the suggested procedure or treatment<sup>4</sup> and must have been told of the side effects. The doctor also has a duty to answer truthfully any question about the treatment<sup>5</sup>

#### **Indicating consent:**

A conscious person can signal consent by words or gesture. In most of medicine, that is what happens: the fact that a patient voluntarily walks into the doctor's office or holds out their arm for an injection is taken as consent to treatment, and often no more than this is requested or supplied. It would be good practice in hospitals to use a consent form, but signatures on consent form do not in themselves prove valid, binding consent. Some forms are signed by relative, and thus have no value at all. And even if patient sign a consent form he or she can refuse and withdraw his or her consent at any time in the future and override his or her earlier consent. If a patient do refuse consent a doctor can try to persuade him to change his mind, but they can't put undue pressure on him. If they do, and they obtain his consent under duress, it would be completely invalid. In order to be in a position to validly give consent or refuse treatment, a patient must first of course be competent to make the decision. It is very telling that it is not usually until somebody refuses treatment that competence becomes an issue.<sup>5</sup>

#### **Capacity**

We do not intend to go into full discussion of these tests because of lack of certainty and unanimity in academic and judicial opinions on the point. However, attention must be drawn to few cases on this issue where attempts have been made to provide a guide in determining capacity to give consent. If a patient has capacity, then the patient has full autonomy and the right to decide any way he wants, even irrationally. If patients don't have capacity, if he is incompetent, then doctors can proceed on his best interests. Although capacity and consent are legal concepts, decisions are made on these by practitioners without any knowledge of the tests they should be applying or the legal principles involved. First of all, it is important to remember that capacity is presumed in all adults<sup>6</sup>. Therefore, if anyone wants to say a patient is incapable, it is their job to rebut that presumption<sup>7</sup>. A patient doesn't have to prove that he is capable; they have to prove he is incapable

#### **Legal Tests of Capacity**

The legal test for capacity was formulated in law in 1994 in the case of *In Re C*<sup>8</sup> Mr. C had bad gangrene in his leg, and the doctor said he had an 85% chance of death if his leg wasn't amputated. And Mr. C said, 'You are not chopping my leg off. The thing about Mr. C was that he had paranoid schizophrenia and was detained mental patient in a maximum security hospital, so to paraphrase, the doctors said, 'you're mad, so we can chop your leg off if we think it will help' Mr. C was sensible enough to announce that he was going to get an order to stop them chopping his leg off, then and in future, because he said, 'I am capable of making this decision. I may have paranoid schizophrenia but I know whether I want my leg off, and you can't do it under the Mental Health Act.'<sup>9</sup> So it went to court. The judge and lawyers and a forensic psychiatrist came to Mr. C's bedside, and in the course

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<sup>1</sup> *Airedale NHS Trust v Bland* (1993) AC 789 at 859

<sup>2</sup> *Re T (Adult Refusal of Treatment)* (1992) 4 All ER 649

<sup>3</sup> *Re F (A mental patient sterilization)* (1990) 2 AC 1

<sup>4</sup> *Chatterton v Gerson* (1981) 1 All ER 257

<sup>5</sup> *Sideway v Board of Governors of Bethlem and Maudsley Royal Hospital* (1985) 1 All ER 643

<sup>6</sup> *Re T (adult: refusal of treatment)* (1992) 4 All ER 649

<sup>7</sup> BMA and the Law Society (1995) Assessment of mental capacity guidance of doctor and lawyers London, BMA

<sup>8</sup> *Re C (An Adult Refusal of Treatment)* (1994) 1 FLR 31

<sup>9</sup> Mental Health Act (1983)

of these discussion, they formulated the test for capacity, which the court approved. The test is a patient will be considered to lack the relevant mental competence to make treatment decision if he or she is incapable of:

1. Comprehending and retaining treatment information.
2. Believing such information, and
3. Weighing such information in the balance and arriving at a choice.

If a patient is capable of all these three stages then consent is valid and must be respected. The mere fact that a patient's value system is unusual or his choice is at odds with the doctor does not make his refusal invalid. Being irrational doesn't actually matter. It is this kind of principle that upholds the right of Jehovah's witnesses' to refuse blood transfusions.

### **Practical Aspects of the Assessment of Capacity**

Even with this 'three stage capacity test', we still need to know how to apply it in practice. So we will look at some of the test in more detail.

#### **Stage 1:- comprehending and retaining treatment information**

There is a very functional approach to understanding in English Law<sup>10</sup> a patient don't have to have a general ability to understand the current situation. The need to retain information will incapacitate those with short-term memory defects and anyone who is unconscious. The comprehending is related to a particular capacity to make decisions in some circumstances but not others. For example, someone with a mild learning disability might have no problem understanding a tooth extraction, but if you try to explain a bone marrow transplant, that might be more difficult to understand. So it does matter what treatment the patient is talking about. It is not necessary that he understand every simple detail (indeed most people would be deemed incompetent if we were talking about high-level neurosurgery), just that a patient have enough understanding of the nature, purpose and effects of the treatment required. The easiest way of checking if someone has that is to ask them if they understand:-

1. The nature of their diagnosis
2. The nature of the recommended treatment
3. The probable benefits of the treatment
4. The probable risks and discomforts'
5. Any alternative treatment and its benefits and risks.
6. The consequences of not accepting treatment;

This list is not definitive, but is a guide to the kind of things that can be markers of understanding. It is also important for someone assessing capacity to get the doctor to repeat in their presence what has actually been said to the patient. Sometimes doctors can present material in a way in which a patient wouldn't understand it, and it's their fault, if the patient do not understand and not patient's fault. Remember that this ability to understand is completely independent of the subsequent choices. The weight the patient puts on the information is irrelevant. All that is important is that he comprehends and retains it.

#### **Stage 2:- Believing the Information**

This state of the capacity test has caused quite a lot of academic debate, mainly because Mr. C himself was a little bizarre in his beliefs. He believed he was ill and required treatment. He had said he would accept antibiotics, he just wouldn't have amputation. He believes that he would die at some time in his life and he believed that the doctors were trying to help him. He also believed (falsely) that he was a famous doctor who had never lost a patient. And he did not believe that he would die because of his diseased foot, even though the surgeon told him that there was an 85% chance of death. The court found out that 'in his own way' he believed enough. Perhaps the best way to frame the concept is 'having the ability to believe' not necessary the doctors. It is not clear how much he has to believe. It would be very worrying if one were deprived of the right to self determination because one does not believe his doctor. The judge in Re C looked at the reason for disbelief, and said that Mr. C's areas of disbelief did not arise out of his mental illness. They came from his ordinary convictions and therefore he had capacity.

#### **Stage 3:- Weighing Information in the Balance and Arriving At a Choice.**

A person can arrive at a decision that other perceive as irrational or unconventional, <sup>1</sup>but as long as you got there by rational means, demonstrating that you can manipulate the information rationally and show reasoning and logic, then you have capacity. In order to assess whether a patient is rational decision making, you can look at whether the patient is

- a) Expressing personal values,

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<sup>10</sup> Berg .J.W., Appelbaum PS., Griss O.T. 1996 'Constructive Competence: Formulating standards of Legal competence to make medical decision'. *Rutgers Law Review* Vol 48 (2)345-396 @ 353

- b) Considering the consequences of a treatment option.
- c) Comparing the benefits and risks of different treatment options or no treatment
- d) Giving weight to these possible factors.
- e) Comparing these options in a way which gives them some weight.
- f) Identifying personal preferences.
- g) Applying them consistently.

Although in real life, few people reach decisions by completely logical processes, as long as you can show kind of rational factor, this should be enough to show his capacity. In Mr. C's case, he said to the judge 'I would rather leave this world with two feet than live with one' – a very rational reason for not wanting his leg amputated. This was quite a powerful influence in making the judge decide for him. But a patient could have a problem which stops him from having rational balancing. This has come up in law in the cases of enforced caesarean sections, where women have refused caesarean because of needle phobias, which led them to refused anesthetic. Their decisions have been overridden on the basis that their needle phobias interfere with the rationality of their decision making process. They were irrationally refusing the anesthetic even though they wanted to have a caesarean. There is another caveat to the principle of self-determination, in that sometimes the court can override a patient's decision. Because capacity is not an on-or-nothing thing, people will have varying degrees of capacity. The courts have said that when looking at weight of decision to be made, it is a very different decision whether to have a tooth out or not, than it is whether to die or not, the degree of capacity should be considered, and the decision should be reached on a scale the preservation of life against the autonomy of the patient. If the capacity to decide is Unimpaired, autonomy weighs heavier. But the more one's capacity is reduced, the lighter autonomy weighs. That unfortunately, may be used by courts to make decisions contrary to the wishes of the patients.

#### **4. The Position of Law in Nigeria**

Under Nigerian legal system, the framework for the regulation, development and management of a national health system and the setting of standards for rendering health services is the National Health Act<sup>11</sup>. Under the Act, there is no provision on how capacity is to be determined in relations to competent and incompetent patients. However, part 111 of the Act provides for the rights and obligations of users and health care personnel. Section 23 provides for the user to have full knowledge pertaining to his state of health and necessary treatment relating thereto.<sup>12</sup> The information should contain:

- (a) The users health status except in circumstances where there is substantial evidence that the disclosure of the users health status would be contrary to the best interest of the user;
- (b) The range of diagnostic procedures and treatment options generally available to the user
- (c) The benefits ,risks, cost, and consequences generally associated with each option; and
- (d) The users' rights to refuse health services and explain the implications, risks, obligations of such refusal.<sup>13</sup>

This provision is in line with the protection and preservation of the autonomy of the patient over medical paternalism. More so, the combined effect of sections, 35, 37, and 38 of the constitution of the Federal Republic of Nigeria<sup>14</sup> accord the Nigerian patient the right to autonomy. Thus the Nigerian patient is therefore empowered to decide whether or not to submit to the line of treatment prescribe by the doctor for reasons which are rational or irrational or for no reason at all<sup>15</sup>. Consequently, in the case of *Medical and Dental Practitioners Disciplinary Tribunal v Dr John E.N. Okonkwo*, the Supreme Court of Nigeria held that patient may validly refuse medical treatment or procedures recommended by the doctor and thus upheld the decision of the Court of Appeal that a doctor who observed the autonomy of the patient is not liable.<sup>16</sup> However, where a medical professional fails to honour the patients' rights to refuse treatment, an action for assault and invasion of privacy may be validly instituted against the healthcare provider.<sup>17</sup>

#### **5. Conclusion**

The question of capacity is answered by looking at the decision reached rather than the decision itself. Patients are entitled to make decisions, to value factors which other people wouldn't value, to disregard factors which other would regard, and to disagree with their doctors, even in life threatening situations. Particular care is needed by doctors in situations where the patient's decision is against that of the doctor. It is ethically and legally wrong for the practitioner to underestimate the patients' capacity in other to bring about what they as the practitioner

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<sup>11</sup> National Health Bill 2014, S.B.215.

<sup>12</sup> Ibid

<sup>13</sup> Ibid

<sup>14</sup> CFRN 1999 (as amended)

<sup>15</sup> A. Toki, 'Patient's Rights to Refuse Treatment in Nigeria', *World Association for Medical Lawyers Newsletter*, issue 27, 2015 pp4-5.

<sup>16</sup> Ibid, p4

<sup>17</sup> Ibid, p5.

perceive as the correct outcome. Even if the doctor truly believes that treatment is in patient's best interest it must be accepted that patients do have the right to go against these interests. Where a competent patient refuses treatment in the full knowledge of what the treatment entails and the potentially fatal risks of non-acceptance, they cannot legally be treated even if the patients become unconscious afterwards. In practice very few patients whose lives are saved by doctors do go to take legal action against them there was a big case in Canada when Jehovah's Witness who sued her doctor for giving her a blood transfusion against her wishes won massive damages.<sup>18</sup> In Nigeria one is compelled to admit that elaborate legal and institutional framework for determining capacity appears to be at its emerging stage still and thus plagued with inconsistencies. In other words, for whatever its shortcoming might be the British system still presents a compelling model for a case study for Nigeria as she searches for her own domestic structure

In the light of the above, there is need for Nigeria to enact an Act that would be of general application to provide for the determination of capacity. The English Legal System, where appropriate should be adopted to develop our laws in Nigeria as most of our laws were adopted from Britain- our colonial masters. Patients right to autonomy (self- determination) .should stand supreme and must be observed in any doctor/patient relationship in Nigeria except where it is impracticable, medical professionals should be enlightened on the position of law in regards to informed consent in order to engender good practices in the doctor/patient relationship. Different medical association bodies in Nigeria should provide medical practitioners with an up to date code of conduct further more good medical standards should be adopted by every medical practitioner and a monitoring task force should be established to ensure compliance.

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<sup>18</sup> *Mallet v Schulman* (1992) 12 MED L.R 162.