

CONSENT OVER CHILD'S HEALTH: RELIGION, MEDICINE AND LAW IN COLLISION*

Abstract

But for consent, many actions, if not all, would have occasioned liabilities upon the doers of these actions. Consent excuses what ordinarily would have amounted to legal wrongs. Thus, in English jurisprudence, the notion of consent is a crucial one. In the absence of consent, any contact with the body of a person would constitute trespass, for which an action will lie, and damages accrue. When a person's health is impaired, the need for medical practitioner to 'invade' the body of the patient becomes inevitable. Consenting to this 'invasion' by an adult with full capacity is no problem, as the patient simply agrees to be treated. An adult may refuse medical treatment and the law would do nothing about this. But with a child the narrative changes, as the child lacks the competence to make decisions for himself or herself. The objective of this paper is to examine the position of the law in cases where a child is needed to be medically treated, and the issue of want of informed consent comes into the equation. Whose consent or what considerations would the law defer to? This is the fulcrum of this article. The paper adopts a doctrinal methodology, and that is, an examination of what the law will do in a situation where a prescribed medical procedure, for instance, blood transfusion, is in conflict with the parents' religious inclination. This paper found out that where the medically prescribed method of healing of a child conflicts with his parents' religious view or right, the court, on the basis of what is the best interest of the child, give heed to the prescribed method. It is recommended that whenever the health of a child is in issue, it is what is in the best interest of the child that should determine the treatment or medication that should be deployed.

Keywords: Child, consent, best interest of the child, blood transfusion.

1. Introduction

The essence of law is to regulate the activities of humans within society. The essence of law is to preserve life and property and, to create enabling environment for human beings to live a contented dignified life. It is again this backdrop that we shall examine where the pendulum of the law will swing, and what will determine where the pendulum swings to, in the event that a child is in need of medical treatment, and the kind of treatment recommended by medical experts run contrary to the child's parents' religions inclination. To really determine the position of law on the issue, of what the law is, when a child is to be treated, say, surgery, the need to examine the pronouncement of the court in cases where such facts arose becomes imperative.

2. The Notion of Consent

In the context of this discourse, consent simply means agreement, approval or permission as to some act or purpose, especially given voluntarily by a competent person.¹ Thus, when a person of full capacity voluntarily and consciously consents to, or objects to medical treatment, he or she is actually accessing his or her fundamental rights as enshrined in the constitution.² The liberty which the law permits a competent adult to determine what would be done with or to his own body, when exercised by the competent adult, cannot be regarded as an unjust and immoral course. The Nigerian Supreme Court, enumerating on the right of a patient to decline treatment said:

I am completely satisfied that under normal circumstances no medical doctor can forcibly proceed to apply treatment to a patient of full and sane faculty without the patient's consent, particularly if that treatment is of a radical nature such as surgery or blood transfusion. So, the doctor must ensure that there is a

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¹ Black's Law Dictionary, (9th edn, USA: Thomson West Group, 2009) p.346.

² Constitution of the Federal Republic of Nigeria (CFRN), 1999, section 37 provides persons in Nigeria with the right to private and family life.

valid consent and that he does nothing that will amount to a trespass to the patient. Secondly, he must exercise a duty of care to advise and inform the patient of the risks involved in the contemplated treatment and the consequences of his refusal to give consent.³

The dictum of Uwaifo, JSC above is to the effect that all adult persons have the inalienable right to make any choice they may decide to make and to assume the consequences. Accordingly, an adult person who is conscious and in full control of his mind has the right to either accept or refuse medical treatment including blood transfusion. In such case, the hospital has no choice but to respect the person's wishes.

3. When a Child Health is in Jeopardy

Given the tenor of the title of this paper, the question that must be resolved, is how does a medical doctor, in cases where a child needs medical treatment, obtain consent to treat the child? A child by virtue of age cannot give a legally valid consent on account of incapacity; a child is a minor. Under the Nigerian Child's Rights Act,⁴ a child is a person under the age of eighteen years. The Act⁵ provides robustly on issues concerning the right to health and health services of the child.⁶ In particular, section 13(2) provides that every government, parent, guardian, institution, service, agency, organization, or body responsible for the care of a child shall endeavour to provide for the child, the best attainable state of health. What happens when the parents or someone in *loco parentis* refuses consent, in the event that the child needs medical attention, for instance, due to parents' religion inclination, they could refuse their child blood transfusion in spite of the fact that it is the only way out, according to medical experts. If this narrative plays out, what is the position of the law? What is the attitude of the court in resolving the issue of parental refusal to the prescribed medication for a child?

4. Scope of Power of Court in Respect to Welfare of Children

The law envisages instances where the welfare of children would be in question. Alongside the provision of the right of children to health and health facilities,⁷ the Child's Rights Act provides that where it appears to the court in proceedings in which a question arises as to the welfare of a child, that it may be appropriate for a care supervision order to be made with respect to that child, the court may direct the appropriate authority to undertake an investigation of the child's circumstances.⁸ On power of court to intervene where parent or person in *loco parentis* objects to particular form of medical treatment for a child on religious ground became an issue, and it was hotly contested, in the case of *Tega Esabunor v Dr. Tunde Faweya*.⁹ Given the objective and question that this paper is poised to tackle, we consider it imperative that the case of *Tega v Faweya* should be examined in *extenso*. Facts of the case are as follows: Tega Esabunor was given birth to by Rita Esabunor on 19th April, 1997 at a clinic, in Lagos, Nigeria. On 11th May, 1997, within a month of his birth, Tega fell gravely ill. His mother, Rita Esabunor took him back that day to the clinic where he was born for urgent treatment. Doctor Faweya examined little Tega and found that he was suffering from severe infection and anaemia (lack of blood). Doctor Faweya began treatment. He administered antibiotics on the child. In the morning of 12th May, 1997, the doctor observed that the child's health had not improved – had poor colour, was convulsing, and was not breathing well. From observations, the doctor concluded that Tega urgently needed blood transfusion to stay alive. But Rita Esabunor, Tega's mother and her husband, Tega's father clearly told doctor Faweya that on no account should their child be transfused with blood. Their reasons were that blood transfusion would expose their child to several health hazards such as AIDs, hepatitis, etc; and as members of the Jehovah's Witnesses Christian sect, their religious belief required them to abstain from blood transfusion.

³Per Uwaifor, JSC, *Medical and Dental Practitioners Disciplinary Tribunal v Dr. John Emewulu Nicholas Okonkwo*, (2001) 7 NWLR (pt.711).

⁴ Child's Rights Act, Laws of the Federation of Nigeria, 2004

⁵ *Ibid.*

⁶ *Ibid.*, section 13.

⁷ *Ibid.*

⁸ *Ibid.*, section 59(1).

⁹ (2019) 7 NWLR (Part 1671) p. 316 – 347.

The doctor did not agree with the child's parents on their rejection to blood transfusion for their child, Tega Esabunor. Doctor Faweya reported the matter to the Commissioner of Police of Lagos State, who filed an originating motion *ex parte* before a magistrate on 12th May, 1997. The motion was filed under sections 27 (1) and 30 of the Children and Young Persons Law.¹⁰ The relief sought was that the medical authorities of the clinic where little *Tega* was delivered and now hospitalized be allowed and permitted to do all and anything necessary for the protection of the life and health of the child. The court heard and delivered its ruling on the motion that same 12th May 1997. The Magistrate held that he had the inherent jurisdiction to prevent the commission of offences. He reasoned that if Rita Esabunor, Tega's mother was allowed to prevent Tega from being transfused with blood, an offence would have been committed under section 339 of the Criminal Code and that if the child died, the offence of murder under section 316 would have been committed as a result. So, the learned Magistrate granted the relief sought. He authorized the medical authorities of the clinic to do all and anything necessary for the protection of the life and health of the child, Tega. Under the receipt of the order of the Magistrate, doctor Faweya administered blood transfusion on *Tega* who got well, was discharged and was taken home by the mother, Rita Esabunor.

Later, on 15th May, 1997, Tega's mother, Rita Esabunor filed an application on notice at the Magistrate Court. She sought setting aside the order by which the blood transfusion was done. The Magistrate heard and dismissed the application; dissatisfied with the dismissal, Rita Esabunor on behalf of her child, Tega filed an application at the High Court, asking for certiorari and damages of fifteen million naira – for unlawfully infecting or transfusing blood into the body of her son; and for unlawfully preventing her from having access to her son from 12th May, 1997 to 15th May, 1997; and also for preventing her from exercising parental rights of care over her son. The High Court dismissed the application on the ground that the action complained against, blood transfusion had taken place, and there was no way this can be undone. The appellants appealed to the court of Appeal, which found that there was no basis upon which the High Court could have granted the relief of certiorari sought by the applicants. Consequently, the court of Appeal affirmed the ruling of the High Court and dismissed the appeal. The appellants appeal to the Supreme Court.

5. In the Best Interest of the Child

In the Supreme Court, in *Esabunor v Faweya*,¹¹ one of the issues submitted for determination, is whether it is correct to hold, as the Court of Appeal held, that the refusal of the child's mother to give consent to blood transfusion amounted to an attempt to committing crime or to allow the child to die. In our view, this issue is germane, in that it pitches two rights against each other. On the one hand, the parents of the child have constitutional right to freedom of thought conscience and religion.¹² And by extension, they can decide what manner of medical treatment can be carried on their child. From the facts of the case, their ground of objection to blood transfusion was chiefly religion. On the other hand, the life of the child is at stake. In this case, the medical doctor made it abundantly clear, that given the child's state of health, without blood transfusion death will result. Thus, what should the disposition of the court be where religion, law and medicine collide? One of the arguments put forward in favour of the appellant, the child's mother, is that refusal to blood transfusion, which is one method of treatment, cannot amount to commission of crime or an attempt to commit one. It was argued that the right to give or refuse consent to medical treatment has been recognized worldwide as an inalienable right.¹³ Thus, it was submitted that consent of the patient is mandatory before treatment can be embarked upon. Replying to this submission, the respondent submitted that where the court is confronted with having to balance the right of a child to life against the right of his parent to veto such right in vindication of their religious conscience, the overriding consideration should be what is the best interest of the child. To strengthen this argument, it was further submitted that the right of the parents to freedom of thought, conscience and religion,¹⁴ like almost every other right, is not unrestricted; and that that right is reasonably restricted by the Nigerian Constitution in section 45(1) (h) – where it is provided that nothing

¹⁰ Chapter 25, Laws of Lagos State, 1994.

¹¹ *Supra*.

¹² Constitution of the Federal Republic of Nigeria (CFRN) 1999, section 38.

¹³ *Esabunor v Faweya, supra*, p.339.

¹⁴ CFRN, *supra*, section 38.

in section 37 shall invalidate any law that is reasonably justifiable in a democratic society for the purpose of protecting the rights and freedom of other persons.¹⁵ Thus, it was further submitted that a child is incapable of exercising this right to life and privacy personally, hence the state intervenes through section 339¹⁶ and section 341¹⁷ of the Criminal Code to protect the venerable person from the abuse of its rights by those in *loco parentis* over him.

6. The Supreme Court's Decision

Having heard arguments on the issue from both sides, the Supreme Court agreed with the respondents, Dr. Faweya and others, that though, an adult can elect to refuse blood transfusion, but it is a different ball game when it involves a child, as in the instant case. With Rhodes – Vivour, JSC, delivering the lead judgment, the court reasoned:

It is long settled that an adult who is conscious and in full control of his mental capacity, and of sound mind has the right to either accept or refuse blood (medical treatment). The hospital has no choice but to respect their patients' wishes. All adults have that liberty of choice. This freedom has been exercised in accordance with the rule of law (see section 45(1)(b) of the constitution). All adults have the inalienable right to make any choice they may decide to make and to assume the consequences.¹⁸

Having stated the principle of law with respect to adult patients as to their liberty to make choice of medical treatment, the Court, in respect of children, reasoned:

When it involves a child, different considerations apply and this is so because a child is incapable of making decisions for himself and the law is duty bound to protect such a person from abuse of his rights as he may grow up and disregard those religious beliefs. It makes no difference if the decision to deny him blood transfusion is made by his parents.¹⁹

The Court, having reasoned thus, held that the interest of the child should be the factor to be considered where the child's life is at stake, not the religious belief of its parents or anyone in *loco parentis*:

When a competent parent or one in *loco parentis* refused blood transfusion or medical treatment for her child on religious grounds, the court should step in, consider the baby's welfare, i.e saving the life and the best interest of the child, before a decision is taken. These considerations outweigh religious beliefs of the Jehovah Witnesses Sect. The decision should be to allow the administration of blood transfusion especially in life threatening situations.²⁰

7. Recommendation

This paper has examined what the position of the law is, in situation where the health of children is gravely at stake, and the recommended medical treatment is at variance with the religious inclination of the parents or someone in *loco parentis*. The law is settled that the factor to be considered is the child's welfare; what will save the life and the best interest of the child, regardless of the religious belief of the parents or anyone in *loco parentis*. It is recommended that parents and persons in *loco parentis* should adhere to what is in the best interest of a child with regard to medical treatment, as this is in line with the law and logic.

¹⁵ *Esabunor v Faweya, supra*, p339.

¹⁶ Section 339 of the Criminal Code creates the offence of failure to supply necessities of life for another over whom he has a charge to do so.

¹⁷Section 341, Criminal Code criminalizes abandoning or exposing a child under the age of seven years, in such a manner that any grievous harm is likely to be caused to the child.

¹⁸ *Esabunor v Faweya, supra*, p.340.

¹⁹ *Ibid.*

²⁰ *Ibid.*, italics for emphasis.