

**THE LAW ON INFORMED CONSENT IN MEDICAL PROCEDURES IN NIGERIA: ORGAN AND TISSUE TRANSPLANT IN FOCUS\***

**Abstract**

*During medical procedures, the law, generally, mandate medical personnel to seek and get the consent of patients before proceeding with any medical treatment. The rule on informed consent, simply put, entails health professionals properly informing patients, to their understanding, about any medical treatment to be administered to such patient and getting approval before proceeding with such treatment. This basically aligns with the medical and legal positions that recognize the autonomy of a patient and recognizes such patient's right to either accept or reject any medical treatment and also the right to participate in every decision regarding the patient's medical treatment. The informed consent rule allows some exceptions which include emergency cases where it would be fatal to insist on seeking and getting a patient's consent to a lifesaving medical intervention. The present research is focused reviewing the current state of the law with respect to informed consent in transplant procedures in Nigeria to determine its adequacy. It is recommended inter alia that the National Health Act be amended to specifically mandate health personnel to seek and get the informed consent of parties to transplant procedures – where possible – to prevent the legal implications of doing otherwise. Also, medical personnel should be trained continually to practice informed consent when handling patients that come to them for any form of medical treatment.*

**Keywords:** Medical Procedures, Informed Consent, Organ and Tissue Transplant, Nigeria

**1. Introduction**

The whole concept behind obtaining informed consent in medical procedures generally, when reviewed, reveals the pertinence of respecting the patient's autonomy as a human being who has rights as a human being. The right of a patient to voluntarily and legally consent to any medical treatment from any healthcare worker has been recognized globally.<sup>1</sup> The principle of the right of the patient to choose and determine the circumstances of such patient's health is based on the right to consent to medical treatment. Makes consent pertinently necessary.<sup>2</sup> In the Canadian case of *Ciarlariello v Schacter*, the Supreme Court held that bodily integrity embodies a patient's right to decide the types of medical procedures that the individual will accept and the extent to which they will be accepted.<sup>3</sup> As basic as informed consent sounds, several medical personnel in Nigeria are still in the habit of administering medical treatment on patients without getting their informed consent. Possibly, they are not aware that there are attendant criminal and civil implications for ignoring and not practicing the informed consent rule. The present research dwelt on the position of the law in Nigeria pertaining to informed consent in transplant procedures, the legal implications of not complying with the law, barriers to effective practice of the informed consent doctrine by healthcare personnel during transplant and recommendations on improving informed consent in transplants in Nigeria.

**2. The Conceptual Clarification**

**Informed Consent**

Merriam Webster dictionary defined informed consent as consent to surgery by a patient or to participation in a medical experiment by a subject after achieving an understanding of what is involved.<sup>4</sup> Informed consent is a process in which patients are given important information, including possible risks and benefits, about a medical procedure or treatment, genetic testing, or a clinical trial.<sup>5</sup> This is to help them decide if they want to be treated, tested, or take part in the trial. Patients are also given any new information that might affect their decision to continue. Additionally, informed consent is said to occur when communication between a patient and physician results in the patient's authorization or agreement to undergo a specific medical intervention.<sup>6</sup> As has been rightly noted, consent is the ethical cornerstone of all medical

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<sup>1</sup> S D Pattison, *Medical Law and Ethics*. (Sweets & Maxwell, 2006) p.97.

<sup>2</sup> J Cutan, 'Informed Consent: An Ethical Obligation or Legal Compulsion' (2008) 1 *Journal of Cutaneous and Aesthetic Surgery*, 35. <sup>3</sup> [1993] 2 SCR 119

<sup>4</sup> Merriam Webster Dictionary, 'Informed Consent.' <https://www.merriam-webster.com/dictionary/informed%20consent> retrieved on March 29, 2024.

<sup>5</sup> National Cancer Institute, 'Informed Consent.' <https://www.cancer.gov/publications/dictionaries/cancer-terms/def/informed-consent> retrieved on March 29, 2024.

<sup>6</sup> American Medical Association, 'Informed Consent.' <https://code-medical-ethics.ama-assn.org/ethics-opinions/informed-consent> retrieved on March 29, 2024.

interventions.<sup>7</sup> Dworkin noted that generally, a surgical operation will be lawful if the following conditions are complied with –<sup>8</sup>

- a. The patient shall give full, free and informed consent.
- b. The surgery shall be therapeutic and the patient's well being.
- c. There is lawful justification for the surgery.
- d. The operation is to be done by appropriately skilled personnel.

Legally speaking, consent is the agreement, approval, or permission as to some act or purpose, especially give voluntarily by a competent person; legally effective assent.<sup>9</sup> Consent is a valid and indispensable condition for any valid doctor<sup>10</sup>-patient relationship. It has been aptly noted that a patient that approaches any health facility for any form of medical treatment has both a common law and constitutional right to object to any form of treatment.<sup>11</sup> Hence, that patient's consent must be sought before any kind of treatment is administered on him or her. In the American case of *Barber v. Supreme Court*,<sup>12</sup> the Court clearly ruled that a patient has the right to refuse any medical treatment, even such that may save or prolong life. In the case of *Bouvia v. Supreme Court of California*,<sup>13</sup> the right of a cerebral palsy patient to withdraw consent was respected when she refused artificial feeding, preferring to end her life. The court clearly asserted that a competent adult has the right to refuse treatment even when the exercise of that right is likely to cause death. This same position was adopted in the Canadian case of *Malette v. Shulman*.<sup>14</sup> In the Nigerian case of *MDPDT v. Okonkwo*,<sup>15</sup> Uwaifo JSC clearly opined as follows: '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....'

Based on the foregoing, it is obvious that consent to medical treatment or procedure is of great pertinence and a right that the courts, domestically and internationally, are ready to preserve and uphold. There are various forms of consent which include express consent, implied consent and presumed consent. Express consent is that which is clearly and unmistakably stated.<sup>16</sup> A clear instance is where a patient goes to a health facility, makes some complaints, agrees to be examined, the health condition diagnosed with drugs administered and that patient settles the bill for the drugs – leaving the health facility with the drugs paid for. Implied consent is consent imputed as a result of circumstances that arise as when a surgeon removing gall bladder discovers and removes colon cancer.<sup>17</sup>

### **Organ**

The word 'organ' is coined from the Latin word – *organum* which means an instrument or tool.<sup>18</sup> Biologically, an organ can be defined as a collection of tissues that structurally form a functional unit specialized to perform a particular function.<sup>19</sup> 'Organ has also been defined as a differentiated structure – such as the heart or kidney, consisting of cells and tissues and performing some specific function in an organism bodily parts performing a function or cooperating in an activity.'<sup>20</sup> Furthermore, it is a relatively independent part of the body that carries out one or more special functions. Examples of organs include the eyes, ears, heart, lungs, and liver.<sup>21</sup>

### **Tissue**

Physiologically speaking, 'tissue' means a level of organization in multi-cellular organisms; it consists of a group of structurally and functionally similar cells and their intercellular material.<sup>22</sup> By definition, tissues are absent from unicellular organisms. Even among the simplest multi-cellular species, such as sponges, tissues are lacking or are

<sup>7</sup> See the Commentary to Guideline 1 of the World Health Organisation Guiding Principles on Human Cell, Tissue and Organ Transplantation of 2010 made pursuant to Resolution WHA63.22.

<sup>8</sup> J Devereux, *Medical Law: Text, Cases and Materials*. (1997, Cavendish Publishing, London) p.

<sup>9</sup> B A Garner, *Black's Law Dictionary*. (8<sup>th</sup> Edition, Minnesota: Thomson West, 2004) p. 323.

<sup>10</sup> The word 'doctor' is used in a general sense here to accommodate all health personnel that administer one form of medical treatment or the other on patients in any kind of health institution. In other words, it applies to nurses, pharmacists, physiotherapists, and the like.

<sup>11</sup> N Tijani, 'Physicians, Patients and Blood: Informed Consent to Medical Treatment and Fundamental Rights.' (2007) *Ikeja Bar Review*, 96.

<sup>12</sup> (1983) 147 Cal App 3d 1006.

<sup>13</sup> (1986) 275 Cal Rptr 297.

<sup>14</sup> (1988) 63 OR (2d) 243 (Ontario High Court).

<sup>15</sup> (2001) 7 NWLR (Part 711) 206.

<sup>16</sup> B A Garner, *op. cit.* p. 323.

<sup>17</sup> *Ibid.*

<sup>18</sup> National Human Genome Research Institute, 'Organ.' [https://www.genome.gov/genetics-glossary/Organ#:~:text=In%20biology%2C%20an%20organ%20\(from,lungs%20are%20examples%20of%20organs.](https://www.genome.gov/genetics-glossary/Organ#:~:text=In%20biology%2C%20an%20organ%20(from,lungs%20are%20examples%20of%20organs.) retrieved on June 21, 2023.

<sup>19</sup> *Ibid.*

<sup>20</sup> Merriam-Webster, 'Definition of Organ.' <https://www.merriam-webster.com/dictionary/organ> retrieved on December 28, 2023.

<sup>21</sup> Medicine.net, 'Definition of Organ.' <https://www.medicine.net.com/script/main/art/asp?articlekey=21288> retrieved on December 29, 2023.

<sup>22</sup> Encyclopedia Britannica, 'Tissue.' <https://www.britannica.com/science/tissue> retrieved on June 21, 2023.

poorly differentiated. But multi-cellular animals and plants that are more advanced have specialized tissues that can organize and regulate an organism's response to its environment. 'Tissue' can also be said to be a group of similar cells united to perform a specific function.<sup>23</sup>

### **Transplant, Transplantation**

Transplant, also called graft or organ transplant, in medicine, is a procedure whereby a section of tissue or a complete organ is removed from its original natural site and transferred to a new position in the same person or in a separate individual.<sup>24</sup> The term, like the synonym *graft*, was borrowed from horticulture. Both words imply that success will result in a healthy and flourishing graft or transplant, which will gain its nourishment from its new environment.<sup>25</sup> According to Jadesola Lokulo-Sodiye, transplantation involves transferring an organ, tissue or cells from one person (donor) to another (recipient).<sup>26</sup> Transplant could be from a dead person (for major organs like the heart and liver) or from a living person (for other organs like the kidney and tissues which the recipient is not depending on to live).

### **3. Conditions for Valid Consent to Medical Procedures**

Having looked at consent and the significance attached to its expression or withdrawal; it is necessary to look at the vital conditions for a valid consent in medical procedures. Legally, the following are the basic conditions for a valid consent by a patient to any medical procedure:

- a. Disclosure, by the health personnel, of information on the treatment, test or procedure to be carried out on the patient. Such information should include the expected benefits and risks involved, available alternatives (if any) and the likelihood that the benefits and risks would occur.
- b. The patient's clear understanding of the relevant information disclosed by the health personnel in a language the patient understands. The health personnel has a duty of care to disclose the said health procedure in a manner the patient understands in order to decide whether to give or withdraw consent. It is insufficient that the information is lucidly contained in written. The health personnel is duty bound to ensure that whatever is written is understood by the patient.
- c. Capacity of the patient to make the decision. The capacity of a patient to decide whether to give or withdraw consent to any medical treatment or procedure is in two contexts. The first context is the patient's capacity age wise and the second context is intellectual capacity.
- d. The patient's voluntary consent to the medical treatment, test or procedure without any form of coercion or duress.

It has been rightly asserted that ordinarily, every form consent to any medical procedure, treatment or test should be informed.<sup>27</sup> All the same, there are instances where consent cannot possibly be informed especially where the consent is implied. A surgeon who is aiding a pregnant woman deliver her baby through Cesarean section and sees fibroid and safely removed same cannot successfully be sued for removing the fibroid for lack of informed consent. This is so because, if informed consent to the Cesarean section surgery had been expressly given by the pregnant woman, consent can be implied for the removal of the fibroid if not harmful to the woman.

The rationale behind informed consent has been outlined to include the following:<sup>28</sup>

1. The inherent right of every competent individual to decide what happens to his or her body.
2. The need for health personnel to avoid civil and criminal liability that may arise as a result of the patient's lack of consent.
3. The assurance of unhindered cooperation of the patient.
4. The understanding and promotion of the moral, legal and symbolic importance of a cordial relationship between health personnel and patients.

### **Consent During Organ and Tissue Transplants**

Consent with respect to organ and tissue transplants has two aspects – the consent of the donor on the one hand and the consent of the recipient on the other hand. As a general rule, there is no consent as to donation of an organ or tissue if the decision is not that of the donor.<sup>29</sup> Also, donor consent to any transplant cannot be given by proxy.<sup>30</sup> With respect to consent of the donor, there are two types of consent – express consent and presumed consent. Express consent is where the donor expressly gives consent to donate his or body organ(s) or tissue(s) in his or her life time. The donation could take effect during the donor's life time for organs and tissues that are dispensable like blood and one of the donor's kidneys. The donation can also take effect at the death of the donor for indispensable organs and tissues like the heart.

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<sup>23</sup> Medical-Dictionary.com, 'Tissue' <http://medical-dictionary-.com/m/results-m.php> retrieved on December 29, 2023.

<sup>24</sup> R Y Calne, 'Transplant.' <https://www.britannica.com/science/transplant-surgery> retrieved on June 21, 2023.

<sup>25</sup> *Ibid.*

<sup>26</sup> J Lokulo-Sodiye, 'Organ Transplantation Tourism: Upholding the Donee's Right to Qualitative Health Care.' (2022) Open Access Library Journal, p. 1.

<sup>27</sup> N Tijani, *op. cit. p.*

<sup>28</sup> O Okpara, *Medical Jurisprudence in Nigeria: Volume 1.* (Abakaliki, Publicom International Nigeria Ltd: 2007). P. 421.

<sup>29</sup> F O Emiri, *Medical Law and Ethics in Nigeria.* (2012: Lagos, Malthouse Press Ltd) p. 200.

<sup>30</sup> This was the position of the court in *McFall v. Shimp*

Countries that utilize the express consent system for organ donation include the USA, Denmark, Brazil, the UK and Canada.<sup>31</sup> Presumed consent, alternatively known as an ‘opt out system’ is a form of consent where, unless a dead person expressed a wish – while alive – not to be an organ, consent will be assumed.<sup>32</sup> What this simply means is that when a person, while alive, did not object to donating the body organs and tissues, it will be presumed that while alive, the person consent to being a donor. The rationale behind presumed consent is to increase organs and tissues to meet the long waiting lists of persons in need of them for transplant purposes. This is codified and implemented by countries that recognize this presumed consent for donors in transplants. Countries that practice the presumed consent system with respect to organ donation include Spain, Belgium, Denmark, France, Italy and Singapore.<sup>33</sup> Different countries of the world have made several laws regulating donor consent for transplant purpose. Countries that practice the express consent system view the presumed consent system of procuring organs for transplant as an invasion of the bodily autonomy of the donor and a further incursion by the government<sup>34</sup> into the personal affairs of the people.<sup>35</sup> Nigeria currently practices the express consent system with respect to donor consent in transplant procedures. This contained in sections 55 and 56 of the National Health Act as follows –

55. (a) A person who is competent to make a will may:-  
(i) in the will; or  
(ii) in a document signed by him and at least two competent witnesses; or  
(iii) in a written statement made in the presence of at least two competent witnesses,  
donate his or her body or any specified tissue thereof to be used after his or her death, or give consent to the post mortem examination of his or her body, for any purpose provided for in this Act.  
(b) A person who makes a donation as stated in paragraph (a) above may nominate an institution or a person as donee.
56. (1) A donation under section 55 may only be made for the purposes of:-  
(a) training of students in health sciences;  
(b) health research;  
(c) advancement of health sciences;  
(d) therapy including the use of tissue in any living person; or  
(e) production of a therapeutic, diagnostic or prophylactic substance.
57. A donor may, prior to the removal for transplantation of the relevant organ into the donee, revoke a donation in the same way in which it was made or, in the case of a donation by way of a will or other document, also by the intentional revocation of that will or codicil or document.

From the above provisions of the law above, the following are noteworthy –

1. A potential donor in any transplant, to give valid consent, must be competent enough to make a will;
2. The consent of the donor must be expressly given to be valid; and
3. Such consent can be revoked in writing.

The above provisions of the National Health Act have not been tested in court. Hence, it is unknown, for now if a donor’s consent is expressed orally, whether such oral consent would be accepted as valid if the donor is competent to make a will and has witnesses to prove such oral consent.

#### **4. The Legal Framework for Informed Consent in Nigeria**

It has been argued that argued that Nigeria’s law on informed consent is grossly inadequate.<sup>36</sup> This position cannot be completely be true currently as the learned scholar that took this position made the asserting in 2006 when his book was published. Presently in Nigeria, there are two major legal instruments that basically provided for informed consent to medical procedures – the Code of Medical Ethics and National Health Act. The Criminal Code Act does not expressly stipulate what informed consent is but impliedly provided the implication of failure to get informed consent in the definition of battery and assault. The provisions of the Code of Medical Ethics and National Health Act are appraised hereunder.

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<sup>31</sup>S Zink, R Zeehandelaar and S Wertlieb, ‘Presumed vs. Expressed Consent in the US and Internationally.’ <https://journalofethics.ama-assn.org/article/presumed-vs-expressed-consent-us-and-internationally/2005-09> retrieved on March 7, 2023.

<sup>32</sup>S Bramhall, ‘Presumed Consent for Organ Donation: A Case Against.’ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3363073/> retrieved on March 7, 2023.

<sup>33</sup> S. Zink, *op. cit.*

<sup>34</sup> Through legislation.

<sup>35</sup> S Zink, *op. cit.*

<sup>36</sup> F O Emiri, ‘Medical Law and Ethics in Nigeria’ (Malt house Press Limited. Lagos 2006) p.71.

### **Code of Medical Ethics**

The Code of Medical Ethics,<sup>37</sup> in Nigeria, is a subsidiary legislation made pursuant to the Medical and Dental Practitioners' Act and the official document that regulates the professional conduct of medical practitioners in Nigeria. Rule 19 of the CME elaborately makes provision for informed consent by medical practitioners in the course of carrying out their professional duties as follows –

Practitioners involved in procedures requiring the consent of the patient, his relation or appropriate public authority must ensure that the appropriate consent is obtained before such procedures, either for surgery or diagnostic purposes, are done, be they invasive or noninvasive. Consent forms should be in printed or in written form either as a part of case notes or in separate sheets with the institution's name boldly indicated.

From the foregoing, informed consent can be gotten orally or from a written form from a patient. It has been argued that the language of the Code of Medical Ethics above suggests that some medical procedures do not require 'consent' while others require 'informed consent'.<sup>38</sup> Furthermore, 'consent' and 'informed consent' may seem alike but have varying implications. While 'consent' operates to validate what may otherwise be battery, it actually requires particularly general disclosure of the nature of the intervention that is to be carried out. In contradistinction, 'informed consent' has analytical components that include competence, disclosure, understanding, voluntariness, and consent. It is quite ludicrous that medical practitioners in Nigeria dispense with the above provisions on consent in medical procedures that is glaring in the CME that regulates them professionally. It is common knowledge that medical personnel mostly seek informed consent from patient before surgical procedures which is contained in forms given to patients to sign most times immediately before surgery. This is a common practice in federal and state government health facilities across the country.

### **National Health Act 2014**

The National Health Act<sup>39</sup> was enacted in 2014 to provide a framework for the regulation, development and management of a national health system and set standards for rendering health services in the federation, and other matters connected therewith.<sup>40</sup> Incidentally, the National Health Act is the second legislation made in Nigeria to regulate transplant procedures. In section 23, the NHA provided for informed consent as follows –

Every health care provider shall give a user relevant information pertaining to his state of health and necessary treatment relating thereto including: -

- (a) the user's health status except in circumstances where there is substantial evidence that the disclosure of the user's health status would be contrary to the best interests of the user;
  - (b) the range of diagnostic procedures and treatment options generally available to the user;
  - (c) the benefits, risks, costs and consequences generally associated with each option; and
  - (d) the user's right to refuse health services and explain the implications, risks, obligations of such refusal.
- (2) The health care provider concerned shall, where possible, inform the user in a language that the user understands and in a manner which takes into account the user's level of literacy.

It has been asserted that the NHA, with clarity, reflects the pertinence of the extraction of informed consent from a patient before medical treatment.<sup>41</sup> The provisions of the NHA is an improvement on informed consent in the CME. As has been rightly observed, earlier, the CME creates the impression that in certain circumstance, informed consent might be waived. Section 48 of the NHA further makes provisions for the extraction of consent from a transplant donor before any organ or tissue is harvested from a potential donor as follows –

48. (1) Subject to the provision of section 53, a person shall not remove tissue, blood or blood product from the body of another living person for any purpose except;
- (a) with the informed consent of the person from whom the tissue, blood or blood product is removed granted in prescribed manner;
  - (b) that the consent clause may be waived for medical investigations and treatment in emergency cases; and
  - (c) In accordance with prescribed protocols by the appropriate authority

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<sup>37</sup> Medical and Dental Council of Nigeria, 'Code of Medical Ethics.' <https://www.mdcnigeria.org/downloads/code-of-conducts.pdf> retrieved on March 29, 2024. Hereinafter referred to as CME.

<sup>38</sup> I O Iyioha and O Aniaka, 'Informed Consent, in I O Iyioha and R N Nwabueze (ed.), *Comparative Health Law and Policy: Critical Perspectives on Nigerian and Global Health Law* (Routledge, 2015) p. 1.

<sup>39</sup> Hereinafter referred to as the NHA.

<sup>40</sup> See the long title to the NHA.

<sup>41</sup> Q Ukpo, 'Nigeria: Observance of the Patient Safety Measures in the National Health Act: The Panacea for Medical Negligence in Nigeria.' (2024) <https://www.mondaq.com/nigeria/healthcare/1444234/observance-of-the-patient-safety-measures-in-the-national-health-act-the-panacea-for-medical-negligence-in-nigeria> retrieved on March 29, 2024.

## **ORAEGBUNAM & IFEDIORA: *The Law on Informed Consent in Medical Procedures in Nigeria: Organ and Tissue Transplant in Focus***

A careful and combined reading of sections 23 and 48 (1) of the NHA reveals that before any organ or tissue can be harvested from a transplant donor for onward transplant to a recipient in need of same, the healthcare giver involved must give the donor information in a language he or she understands on –

1. the donor's health status except in circumstances where there is substantial evidence that the disclosure of the user's health status would be contrary to the best interests of the user; the range of diagnostic procedures and treatment options generally available to the donor
2. the benefits, risks, costs and consequences generally associated with each option; and
3. the donor's right to refuse health services; the implications, risks, obligations of such refusal.

It is pertinent to point out the provisions of section 48 (1) (a) of the NHA which authorizes healthcare workers to waive informed consent for medical investigations and emergencies. This provision of the Act indeed created a lacuna as that section can be exploited for nefarious activities and organised crime. The National Health Act did not limit the type of medical investigations contemplated. No effort was made to define and streamline what would be seen as an emergency case that will warrant the harvest of the organ or tissue of a Nigerian citizen, without obtaining his or her informed consent. Section 48(1) (b) of the National Health Act 2014 states that a person shall remove the tissue, blood or blood product from another living person without his informed consent 'for medical investigations' and 'treatment in emergency cases'.<sup>42</sup> Unimpressively, Section 62, the interpretation section of the Act, did not provide the definition of the phrases 'medical investigations' and 'treatment in emergency cases.' The import of this omission is that anybody under the pretext of carrying out 'medical investigations' or 'treatment in emergency cases' could waylay any non-consenting living person and forcefully remove his or her tissue or blood or blood product. Section 48 (2)(a) of the Act states that 'a person shall not remove 'tissue' which is not replaceable by natural processes from a person younger than 18-years.' The implication of this is that a person can remove tissue replaceable by natural processes from persons who are 19 years and above. Section 49 is ambiguously couched and could be greatly abused. It states that a person shall use 'tissue' removed or blood or a blood product withdrawn from a living person only for such medical or dental purposes as may be prescribed. Again, the definitions of the word 'tissue' and the phrase 'medical or dental purposes' are not provided in the interpretation section of the Act.

The provisions of the National Health Act mentioned above make it very easy for medical personnel to run an organ harvesting cartel or market with the full protection of the law. With the aid of smart lawyers, the said medical personnel would easily walk away without conviction. It is the state of ambiguous laws in Nigeria that gave Ike Ekweremadu, his wife and the personal physician the confidence to travel to the U K to harvest the kidney of a young man from Nigeria for onward transplant to Ike Ekweremadu's daughter.<sup>43</sup> Fortunately, the three parties to organ harvesting were rightly convicted and sentenced accordingly by the UK government under the UK Modern Slavery Act. It is humbly submitted that allowing a waiver of informed consent for medical investigation amounts to an invasion of the personal autonomy of the patient which is the foundation upon which the principle of informed consent rests. Sometime in September, 2023, one Noah Kekere and his accomplices were arrested and charged to court over allegations of organ harvesting by Kekere who held himself out as a medical doctor in Jos.<sup>44</sup> NAPTIP swung into action by conducting their own separate investigation to get to the root of the matter.<sup>45</sup> Investigation revealed that the said Kekere had been illegally running a hospital as a medical doctor but was disowned by the Nigerian Medical Association in Plateau State as being a quack and impostor. NAPTIP pledged their commitment to get to the root of the matter and get justice for the victim whose kidney was harvested during a surgery conducted by Kekere on the victim.

### **5. Practice of Informed Consent among Medical Personnel**

Research reveals that it is mostly during surgeries that informed consent is sought and got from patients by healthcare workers.<sup>46</sup> The provisions of the CME and the NHA clearly require getting the informed consent of patients before administering medical care and not just surgeries. Hence the practice of requiring informed consent is wrong professionally and legally with legal implications which include civil and criminal action for assault and battery. All the same, medical personnel are excused from any form of liability in emergency situations when they act in the best interest of the patient. Where this happens, medical practitioner or health worker will be justified and would not have any criminal or civil liability imposed upon him if the value which he seeks to protect outweighs the wrongful act he performs, which

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<sup>42</sup> S Ekwowusi, 'Legal Aspects of Organ Harvesting.' <https://guardian.ng/opinion/legal-aspects-of-organ-trafficking/> retrieved on November 24, 2023.

<sup>43</sup> C Okafor, 'Nigerian Politician Ike Ekweremadu, Wife Jailed in UK for Organ Trafficking.' (2023) <https://www.premiumtimesng.com/news/top-news/596884-nigerian-politician-ike-ekweremadu-wife-jailed-in-uk-for-organ-trafficking.html> retrieved on March 30, 2024.

<sup>44</sup> Punchng, 'Two more Doctors Nabbed in Plateau over Organ Harvesting.' <https://punchng.com/two-more-doctors-nabbed-in-plateau-over-organ-harvesting/> retrieved on November 24, 2023.

<sup>45</sup> The Guardian, 'Illegal Human Organ Harvesting: NAPTIP Promises Justice for Victim in Plateau.' <https://guardian.ng/news/illegal-human-organ-harvesting-naptip-promises-justice-for-victim-in-plateau/> retrieved on November 24, 2023.

<sup>46</sup> E R Ezeome and P A Marshall, 'Informed Consent Practices in Nigeria.' (2009) <https://pubmed.ncbi.nlm.nih.gov/18452553/#:~:text=Empirical%20studies%20show%20that%2070,Western%20model%20of%20informed%20consent.> Retrieved on March 30, 2024.

is treating without consent.<sup>47</sup> Several reasons have been given to explain why informed consent is not effectively practiced for all medical treatments. They include the following:

**Non-enforcement of the existing laws on informed consent:** It has been established above that the CME and the NHA exist and have laid down the informed consent rule that ought to be complied with by medical personnel. The cases on medical negligence in Nigeria are somewhat few, hence, the nonchalance of medical personnel in giving patients proper information on their health situation to enable them give or withdraw consent to any medical intervention. Most times, it is allegations of medical negligence that end up court and the courts are then faced with first deciphering if the principle of informed consent was implied consent.

**Patients' ignorance on their right to informed consent.** Many people in Nigeria are unaware of their right to informed consent in line with respect for their autonomy as human beings. Where patients are aware that they have a right to understand whatever medical treatment that is being administered to them, they are better guided in giving informed consent or withdrawing same.

**Lack of constant training of medical personnel on the recognition and the rights of patients generally and specifically the right to informed consent:** Most medical personnel keep writing professional exams as a form of continuing education and updating their knowledge on healthcare delivery. It is doubtful if medical law and ethics is part of their curriculum in continuing education programs.

**Most medical personnel in government owned hospitals are overwhelmed with the number patients that through their health facilities:** A visit to any federal or state health centre reveals the large crowds awaiting their turns to receive treatment with few medical personnel on ground to handle the crowd. Hence most times the practice of informed consent is dispensed with except surgery is to be performed on patients.

There are various implications of health personnel's failure to effectively practice informed consent civilly and criminally. There are discussed hereunder:

### **Criminal Liability**

Failure of a health worker to obtain informed consent from a patient before any medical treatment can amount to assault under sections 252 and 253 of the Criminal Code Act in Nigeria. section 252 describes assault as follows:

A person who strikes, touches, or moves, or otherwise applies force of any kind 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 of thing whatever, if applied in such a degree as to cause injury or personal discomfort. (Emphasis is added.)

Section 253 of the Criminal Code Act makes assault offence and where medical personnel is found guilty such person can be guilty of a misdemeanor, being liable, if no greater punishment is provided, to imprisonment for one year.<sup>48</sup> Under the National Health Act, removal of a donor's tissue without informed consent is a crime punishable by payment of fine, a fine of #1,000,000 (one million Naira) or imprisonment of not less than two years or both fine and imprisonment. On the other hand, removal of blood or blood product from a donor without informed consent is a crime punishable by the payment of fine of #100,000 (One hundred thousand Naira) or imprisonment for a term not exceeding one year or both fine and imprisonment.

### **Civil Liability**

Generally, any medical personnel that performs a medical procedure on a patient without consent, he will be liable for an offence of assault and monetary compensation will be awarded in favour of the patient. The only circumstance where failure to obtain informed consent would not attract civil action and damages where proved is where there is an emergency situation and the medical intervention is carried out in the best interest of the patient. This played out in the case *Esabunor v Faweya*,<sup>49</sup> where a baby was given blood transfusion to save its life without getting the informed consent of the mother who was the appropriate person to give consent. The transfusion saved and revived the child. The mother's reason for refusal was that she was of the Jehovah Witness religious denomination and they religiously frowned at blood transfusions. After the transfusion, the child's mother sued the hospital. After several appeals that reached the apex court, the Supreme Court held that the blood transfusion was rightly given and in the best interest of the child. In any given

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<sup>47</sup>U Abugu, *Principles and Practice of Medical Law and Ethics* (Pagelink Nigeria Limited, Abuja 2018), p.200.

<sup>48</sup> Section 355 of the Criminal Code Act.

<sup>49</sup> 1(2019) LPELR-46961 (SC).

circumstance that a patient suffers harm in connection with any medical treatment or procedure without the patient's consent can attract a medical malpractice claim either with the Medical and Dental Practitioners Disciplinary Tribunal.<sup>50</sup>

## **6. Conclusion and Recommendations**

The state of the laws as regards informed consent in transplants is found in the provisions of sections 23 and 48 of National Health Act and Rule 19 of the Code of Medical Ethics. The provisions of the NHA are not exhaustive as there are gaps in it. The NHA is silent on the legal implications of harvesting a donor's organ without his informed consent. Also, medical investigation which is an exception to the requirement for informed consent before removal of tissue, blood and blood products from a donor is not explained. This can lead to the provisions of the NHA being relied on by organ harvesting cartels to carry out their nefarious acts. The present study undertaken has shown that healthcare personnel mainly practice informed consent when faced with life threatening situations or health interventions requiring surgery. This practice is wrong as same is unethical professionally and has grave legal implications civilly and criminally. With respect to transplant, unarguably, informed consent must be practiced to avoid the attendant legal repercussions. For healthcare workers to better practice informed consent in dispensing healthcare delivery the following are recommended:

1. Constant training should be organized for healthcare workers for proper orientation on informed consent. Just like medical personnel undertake refresher courses and trainings to get better professionally, it is pertinent that they should also be constantly trained on the practice of informed consent and on the legal implications of not practicing same. This would help medical personnel get better in the practice of informed consent generally.
2. The language of the Code of Medical Ethics needs to be injected with more clarity to emphasize informed consent and importance medical personnel practicing same. The provisions of rule 19, when read carefully impliedly emphasizes 'consent' when it should actually be informed consent. This needs to be looked into and addressed.
3. Members of the public need to be enlightened on their health rights generally with the right to informed consent dwelt on. Many hospitals have educative materials on their walls on various health conditions, how they can be identified and handled. Same can be done for the right to informed consent. Also, the government at various levels need to go on enlightenment campaigns on the various media channels - social media, mass media and print media. This will increase patients' awareness of their right to informed consent to giving or withdrawing consent to medical procedures.
4. The government at all levels should put in place measures to manage the crowds that throng their health facilities. It is common knowledge that government owned health centres are overwhelmed with crowds that visit them to access healthcare products and services. Measures need to be put in place to manage the crowds such as employing more medical personnel and health assistants who will be trained to recognize and observe the health rights of patients – especially the right to informed consent. This would go a long way in ensuring that patients are given enough information to accept or refuse consent to any medical treatment and not just life threatening situations and surgeries.
5. The Medical and Dental Council and other professional bodies of the various medical personnel have a role in emphasizing the pertinence of seeking and getting informed consent before medical treatments and also the legal implications of non-compliance.

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<sup>50</sup> Medical and Dental Council of Nigeria, 'Disciplinary Tribunal.' <https://www.mdcnigeria.org/mdcn-disciplinary-tribunal/> retrieved on March 30, 2024.