

THE PRACTICABILITY OF PATIENT'S RIGHT TO INFORMATION AND INFORMED CONSENT IN THE NIGERIA MEDICAL SECTOR

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Abstract

Patient's Right to be fully informed on the state of their health condition and the latest developments on health has not been obtainable of late in Nigeria, as most medical practitioners rarely disclose necessary information to their patients. Patients have the right to know their past and present medical status and to be free of any mistaken beliefs concerning their conditions. Medical practitioners are duty-bound to disclose every information about their patient's state of health. Thus, where the right to information is lacking or where proper information is not given, the patient cannot be seen to be giving informed consent to the treatment. This paper aims to examine the right of the patient to information about his health condition, the practicability in Nigerian hospitals, and the observation of the patient's right to give informed consent on treatment and procedures available. The doctrinal method of research is applied in the course of this work. This paper shows that though doctors obtain consent from their patients before surgical operations, the method of obtaining such information is not satisfactory as most of the time, patients end up giving consent to a procedure that they are not well informed about. Aside from surgical operations, one cannot validly say that patients' consents are gotten before ordinary treatment is given as doctors do not bother themselves with certain explanations and information since what they intend to do is mere treatment and not surgery. Hence, the right to informed consent remains continually breached and the patients or their family members rarely take these cases to court, this has made doctors not realize the need to abide by the principles of informed consent. This paper recommends that physicians disclose every medical detail to the patient so that when the patient is making any consent with regards to the treatment procedure to be given to him, his decision can now qualify as informed consent. It is also recommended that patients begin to utilize our courts in enforcing any breach of their right to informed consent.

Keywords: Patient, Informed Consent, Competence, Capacity, medical sector, practicability.

1.0 Introduction

The principle of informed consent stems from the fact that before any medical procedure is carried out on a patient, the patient must consent to the procedure. In making an informed medical decision every necessary information needs to be at the disposal of the patient. A well-detailed explanation of the medical problem, causes, treatment and side effects from the treatments must be given to that patient before we can rightly infer informed consent of the patient to such treatment procedures. Informed consent is a basic requirement in the patient-physician relationship.¹ Its object is to respect the autonomous person and act in his best interest.

In Nigeria, medical and legal researchers have noted that informed consent in medical practice is poorly implemented. This could be as a result that Nigeria's law on informed consent is grossly

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¹ER Ezeome and PA Marshall 'Informed Consent Practices in Nigeria', The Authors Journal Compilation 2008 16:59:28

inadequate due to low level of literacy, poor health care delivery system, ineffective prosecutorial powers for medical infractions, and lack of viable right enforcement mechanisms.²

It has been noticed that physicians are only after the patient consents to treatment without making them fully understand the nitty-gritty of the medical condition. Medical practitioners are encouraged to disclose necessary information to their patients, and to take that very seriously, since without the informed consent of the patient, every medical intervention intended to be carried out by the health practitioner will not be achieved if the patient refuses to consent to it

2.0 Nigerian Laws on Informed Consent

2.1 Constitution of the Federal Republic of Nigeria, 1999 (As Amended)

The Constitution is the supreme law of the land which has its binding force on all authorities, institutions, and persons³. The Nigerian Constitution, although, has no specific provisions on Health and informed consent however can be rightly argued to contain some sections which have indirectly made allusions to the recognition of the health of its citizens. Chapter II of the Constitution provides for fundamental objectives and directive principles of state policy, which are ideals towards which a nation or country is expected to attain, it is a reflection of the goals of a liberal democratic polity and a guidance to action on major policy goals⁴. It is worthy to state that Chapter 11 was made to buttress the preamble of the constitution which promises to provide good government and welfare of all persons in the country. These rights require institutional support from the state before they can be enforced, unfortunately, these social economic rights are not recognized as having any force of Law. Section 14(2) (b) provides that the security and welfare of the people shall be the primary purpose of the government. Section 17 (3), (g), and (h)⁵ deals with the social objective of the Nigerian State. (d) The State shall direct its policy towards ensuring that there are adequate medical and health facilities for all persons.

(g) Provision is made for public assistance in deserving cases or other conditions of need.

(h) The evolution and promotion of family life are encouraged.

This section assures citizens that it is the duty and responsibility of the government to provide for the welfare of the people, ensure the provision of suitable and adequate sick benefits, ensure adequate medical and health facilities for all, provide state (public assistance to deserving cases as well as ensuring the evolution and promotion of family life

2.2 The National Health Act 2014

Section 23 of the National Health Act⁶ provides that every health care provider shall give a user relevant information about his state of health and necessary treatment relating to:

- 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, cost, and consequences generally associated with each option; and
- d. The user's right to refuse health services and explain the implications, risks, or obligations of such refusal.

² FO Emiri, *Medical Law and Ethics in Nigeria*, (Malt house Press Limited, Lagos 2006) p. 71

³ Constitution of the Federal Republic of Nigeria, 1999 (as amended)

⁴ S Ibe 'Implementing Economic, Social and Cultural Rights in Nigeria: Challenges and Opportunities, *African Human Rights Law Journal* (2010) p 197-211 <<https://www.ahrlj.up.ac.za/ibe-s-1-2010#>>

⁵ Constitution of the Federal Republic of Nigeria 1999 (as amended)

⁶National Health Act 2014

The health care provider concerned shall, where possible, inform the user in a language that the user understands, and in a manner that takes into account the user's level of literacy.

2.3 Code of Medical Ethics 2004.

Section 19 of the Code of Medical Ethics⁷, 2004, provides that 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 non-invasive. 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.

Explanations to patients from when consent is being sought should be simple, concise, and unambiguous about expectations. Proper counseling should precede the signing of the consent form where the patient is under age (below eighteen years (18) by Nigerian Law) is unconscious or is in a state of mind constituting a mental impairment, a next of kin should stand in. In the absence of a next of kin, the most senior doctor in the institution can give appropriate directives to preserve life. In special situations, a court order may need to be procured to enable life-saving procedures to be carried out.

In some cases which may involve surgical procedures that are difficult to reverse or involve removal of organs e.g sterilization, amputation of a limb, etc counseling sessions should be undertaken at a minimum of three (3) sittings to give the patient ample time to take an informed decision before a consent form is signed.

2,4 The Medical and Dental Practitioner Act

The Act was enacted in 1963, to regulate the practice of the medical and dental professions and for purposes connected therewith. The Medical and Dental Practitioners Act⁸ established the Medical and Dental Council of Nigeria (MDCN) for the registration of medical practitioners and dental surgeons and also provided for a Disciplinary Tribunal for the discipline of members. The council is saddled with the responsibility for determining the standards of knowledge and skill to be attained by persons seeking to become members of the medical or dental profession and reviewing those standards from time to time as circumstances may permit. The MDCN Act⁹ provides for the establishment of an investigating panel called "the panel". The panel after its investigation will determine whether or not a prima face case has been established against the practitioner and if it has been established, the panel will frame a charge against the erring practitioner before the Medical and Dental Practitioners Disciplinary Tribunal referred to as " the tribunal, the tribunal is charged with the duty of considering and determining any case referred to it by the investigating panel.¹⁰ In *Medical and Dental Practitioner Disciplinary Tribunal v Okonkwo*,¹¹ the court emphasized the importance of the patient's consent, when it stated that the patient's consent is paramount in a doctor/patient relationship and the choice of a competent adult with a sound mind should be respected. The physician must give a detailed explanation of the procedure as a patient has the right to know what treatment procedures he intends to go through.

⁷Code of Medical Ethics, 2004

⁸ The Medical and Dental Practitioners Act, CAP M8 Laws of the Federation 2004.

⁹ Section 15 (3) MDCN Act, CAP M8 Laws of the Federation 2004.

¹⁰ Section 52 MDCN Act, CAP M8 Laws of the Federation 2004.

¹¹ 2001 7 NWLR pt. 711 206.

3.0 Concept of Informed Consent

Informed consent is predicated on the patient's or surrogate's capacity to make decisions, not only should the decision-maker understand the relevant information, but he or she should also be able to appreciate the importance of the information and use it to weigh treatment options in the light of their values.¹² Legally, simple consent protects the patient against assault and battery in the form of unwanted medical interventions. The higher standard of informed consent further safeguards patients' right to autonomy, self-determination, and inviolability.¹³ Informed consent requires extensive disclosures. Ailments and treatments are innumerable, and doctors must give patients all the information a reasonable person would want in making a decision¹⁴.

In *D.A.B. V. Brown*¹⁵, the court held that a physician who is seeking a patient's consent for a medical procedure must disclose personal interests unrelated to the patient's health, whether research or economic, that may affect his medical judgment. The court in *Johnson V. Kokemoor* observed that doctors may be obliged to tell patients about their competence to perform procedures and the superior competence of other doctors. The court in *Planned Parenthood V. Casey* affirmed the constitutionality of statutory provisions that require doctors to tell women, the nature of the procedure, the health risks of abortion and childbirth, and the probable gestational age of the unborn child. The physician must also inform the woman of the availability of printed materials published, describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies that provide adoption and other services as alternatives to abortion.

Globally, the recognition of the patient's right to consent to any medical treatment proposed by medical personnel is paramount in the medical profession.¹⁶ In every medical treatment, it is the responsibility of the medical practitioner to respect the patient's right to self-determination and to avail him of the relevant information that will enable him to make informed choices about his health care. For example, elements of informed consent in surgery include;

1. Explanation of the procedures to be followed and the purposes of each; those procedures that are experimental should be identified as such.
2. Description of any attendant discomfort and risk that can reasonably be expected.
3. Description of any benefit that can reasonably be expected.
4. Disclosure of any appropriate alternative procedures that might be advantageous to the patient.
5. Instruction that the person is free to withdraw his consent or to discontinue treatment or participation in the project or activity at any time without prejudice to the subject.¹⁷

A patient must be competent to make a medical decision based on the information received from his Doctor. It is illegal for a medical practitioner to carry out treatment on a patient against his will except for legally authorized involuntary treatment, patients who are legally competent to make medical decisions and who are judged by their healthcare providers to have decision-making

¹² T. Grisso and PS Appebaum, *Abilities Related to Competence in Assessing Competence to Consent to Treatment: A Guide for Physicians and other Health Professionals* (New York: Oxford University Press 1998) 31-60.

¹³ Hall DE and others, 'Informed Consent for Clinical Treatment' 2012 *Canadian Medical Journal*, 533.

¹⁴ OB Shaha et al, 'The failure of Pennsylvania Laws Review' (2011) Vol. 159:647

¹⁵ 1997 57 N.W. 2d 168 Minn. ct. App.

¹⁶ SD Pattison, *Medical Law and Ethics* (Sweet & Maxwell, 2006) 97.

¹⁷ YZ Lawal et al 'The Doctrine of Informed Consent in Surgical Practice' (2011), 10 1-5 *Annals of African*

Medicine <<http://www.annalsafmed.org/text.asp/2011/10/1/1/76558>> assessed on September 19, 2019.

capacity, have the legal and moral right to refuse any or all treatment procedures suggested by their physician. Generally, every adult patient is competent to consent to medical treatment except that competence is challenged by insanity or the patient involved is a minor, in which case, their parents or guardians will have to give their consent. For minors, their parents or guardians may give informed consent on behalf of them since they cannot give consent. Parents are assumed to act in the best interest of their children. However, where the consent of the parents is not forthcoming or appears not to be in the best interest of the child, the medical practitioner is entitled to rely on clinical judgment or to seek the order of a court to proceed with the treatment or procedure as elucidated in *Esabunor v Faweya*¹⁸.

4.0 Applicability of Patient's Right to Information and Informed Consent in Nigerian Hospitals

Research has shown that only four empirical studies exist on informed consent in clinical settings in Nigeria.¹⁹ In all four empirical studies it was revealed that though about 100% of patients' consent was obtained before the surgical procedure, however, the said consents were not obtained by the consultant surgeon but by junior doctors under them, who could not in most cases, properly explain the rudiments of the surgical procedures to the patients. Hence, the patients haphazardly gave consent to avoid the cancellation of the surgery, however, such consent in our views does not amount to informed consent as most of the patients did not understand all that were involved in the surgical procedure especially the possible complications of the surgery. It can therefore be said that informed consent is poorly implemented in Nigeria. Reasons for this poor implementation have been linked to the low level of education of the patient population; according to Osime et al²⁰, the level of information provided to Nigerian patients at the University of Benin Teaching Hospital increased with the level of education and the least educated patients were least satisfied with the information provided to them. Hence, illiteracy is one of the factors that affect the need for full disclosure of information about medical conditions however, this might not be the case with educated people because the patients who are sound, knowledgeable, and educated would have researched extensively into their health condition(s) this will help the patient understand the causes, benefit of a particular treatment, complications and alternative treatment(s) if any which will guide the patient in making an informed decision and consent for procedures or treatment to be done and more so help the patient get ready with plethora of questions for the physicians.²¹

Low level of knowledge of informed consent among doctors and senior doctors not being involved in consent discussions with patients is another reason.²²

Moreover, there is this notion that the doctor knows the best and acts in the best interest of the patients, hence, most patients do not even bother to know details about their medical conditions and the likely treatment procedure. They rely on the doctor solely such that once the consent form is presented to them, they sign it without getting to know all about the surgical procedure.

Worst cases are seen in ordinary treatments not involving surgical procedures. There is virtually little or no explanation at all to most patients after diagnosis. A practical example is what happens

¹⁸ 2008 12 NWLR Pt 1102 794.

¹⁹ ER Ezeome and PA Marshall, *op cit* note 1

²⁰ Osime et al, Current Practices and Medico-Legal Aspect of Pre-Operative Consent, *East African Medical Journal* Vol.81 No. 7, (2004).

²¹ Arinze- Umobi and Okeke, 'A Review of Socio-Cultural Factors Affecting Patients' Right To Informed Consent and Autonomy in Medical Practice in Nigeria' *AJLHR* [2020] (4) 1

²² KA Agu, *Informed Consent Policy and Surgeons in Southeast Nigeria*, (*Niger J Surg* 2003;) 9:39-41.

almost on a daily when one goes to the hospital to lay a complaint about his health symptoms to the doctor, the doctor simply writes down the diagnosis to be carried out, when the result is out, and the person takes it back to him for review. Most of the time, what they do is go ahead and make prescriptions for him without properly explaining what he is suffering from. People who do not know their rights, come out of the doctor's office and head straight to the pharmacy to get the prescribed drugs. But for a person who is exposed and who knows his/her right, the proper thing to do once you show the result to the doctor is to ask him questions regarding the result, the likely causes of the medical condition, treatment options available, any alternative treatment and finally, you make an informed decision whether you want to go ahead with the treatment or not. From all these, one can rightly say that there is indeed poor implementation of informed consent in Nigeria.

5.0 Mechanism of Enforcement of Patient's Right to Information and Informed Consent

It is notable that in Nigeria, only two laws exist on informed consent; the National Health Act 2014 and the Code of Medical Ethics 2004. How far are these available laws enforced? Do patients go to court when their right to informed consent is infringed?

Generally, there is poor enforcement of informed consent in Nigeria. Most of the time, when a surgical procedure results in complications unexplained to the patient, or where the death of the patient results from the surgical procedure, the patients and their family members hardly sue the doctors, they merely believe that it is the will of God that it ended up in that manner.

The only case that has seen the forewalls of the courtroom where a breach of informed consent could be inferred is the case of *Okonkwo v Medical and Dental Practitioners Disciplinary Tribunal*, and since then no other Nigerian case has been decided on this subject. Unlike in other developed or developing countries where patients utilize the courts in enforcing the breach of their right to informed consent as we see in a plethora of cases; *Chester v Afshar*²³, where Lord Steyn posited that a rule requiring a doctor to abstain from operating without consent of a patient serves two purposes: it tends to avoid the occurrence of the particular physical injury, the risk of which a patient is not prepared to accept. It also ensures that due respect is given to the autonomy and dignity of each patient.

In *Salgo v Leland Stanford University Board of Trustees*²⁴, it was asserted that a physician may violate his duty to his patient and subject himself to liability if he withholds any facts necessary to form the basis of intelligent consent by the patient to the proposed treatment.

In *Murray MC Murdy*²⁵, an action of battery succeeded when the surgeon sterilized a female patient by removing her uterus without her consent during a cesarean section operation. The court held that the procedure of sterilization was not detrimental to the life of the patient and could be decided later. Therefore, the physician must in the course of his duty, obtain valid consent before invasive procedures or treatment are carried out on a patient to avert criminal liability.

²³ 2004 UK HL, para 18.

²⁴ 1957 464 2d 772 (DC).

²⁵ 1949 2 DLR 442.

In *Shinal V Toms*²⁶, the court held that the duty to provide informed consent belonged to the physician alone and was non-delegable because obtaining informed consent results directly from the duty of disclosure, which lies solely on the physician.

In *Allen v Harrison*²⁷ the court emphasized the scope of informed consent and stated that the doctrine of informed consent applies to invasive as well as noninvasive medical treatments and treatment alternatives regardless of a physician's scope of practice. To effectively discharge a physician's duty to disclose, a physician must disclose the medically reasonable alternatives regardless of whether it is the physician's preferred method of treatment. The ultimate decision of what treatment a patient receives rests with the patient and not the physician.

These cases show that informed consent is more readily enforced in other developed countries than in Nigeria. Further research may be ventured into to know why Nigerians are nonchalant about enforcing their right to informed consent.

6.0 Conclusion

The fact that informed consent is very crucial in every medical treatment makes it an aspect that should not be mismanaged or mishandled by the medical professional in charge. The decision of the patient lies mainly on the information he has of his medical condition. Every patient has a right to full disclosure of all the relevant information concerning his health, the causes, diagnosis, treatments, alternatives, risks, or side effects of the proposed treatment if any. This right should not be deprived of the patient for any reason. The physician in charge is obligated to give the patient proper and accurate information about his condition in the language that he understands fluently and also inform him of his right to accept or reject the treatment. Countries like the United Kingdom, the United States, and South Africa, do not only practice the right to fully disclose every necessary information to the patient but it is seen as a ritual that must be performed before the patient can be said to have consented to the treatment.

From this research, it was realized that patients and their family members rarely sue the doctor who breaches the right to informed consent, they merely ascribe whatever happens to the will of God. This has made it impossible for doctors to realize the need to abide strictly by the principle of informed consent since they already know that these patients are not ready to pursue an action in court for any breach of the right to informed consent.

Nigerian Doctors are therefore encouraged to see this right as a material aspect of every medical treatment so that when the patient decides as regards his treatment, it will be considered as an informed consent *stricto sensu*.

7.0 Recommendations

1. There should be sensitization of the public on the right to informed consent so that people are made to be aware that they have this right available to them.
2. As much as we would recommend that more laws should be made on informed consent, it is more important that patients begin to utilize our courts in enforcing the breach of their right to informed consent as is applicable in other developed countries.
3. Doctors should be re-educated in most of their conferences on informed consent, as what most of them do, does not portray a good understanding of what informed consent means.

²⁶ 162 A. 3d 429 pa. 2017.

²⁷ OK 44, 374 P, 3d 812 2016.