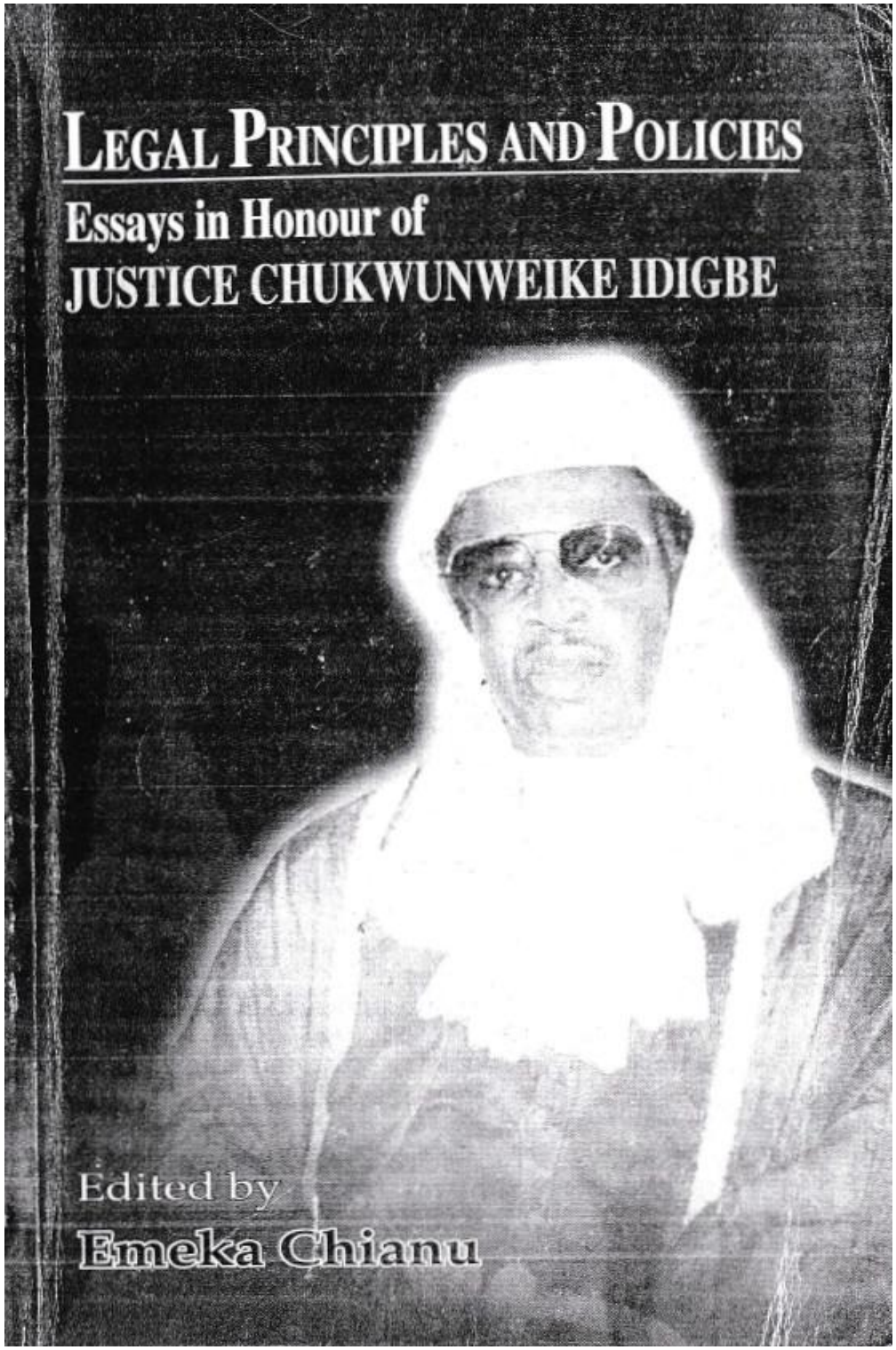

17 Physicians, Patients and Blood: Informed Consent to Medical Treatment and Fundamental Rights

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Introduction

A patient who goes to a medical practitioner for treatment has both, at Common Law and constitutionally a right to object to a form of treatment. Therefore, his consent must be sought before treatment is administered. This is referred to as obtaining the informed consent of the patient. What is the Common Law view of this concept of informed consent? Are there constitutional safeguards?

Sometimes, doctors in treating certain patients tend to override their objection to certain forms of treatment on the basis of medical ethics. This paper shows that a doctor who disregards the opinion of the patient would be liable in the tort of assault and battery and also for infringement of the fundamental right of the individual as preserved under sections 37 and 38 of the 1999 Constitution of the Federal Republic of Nigeria.

One particular area of concern is blood transfusion. Some patients on the basis of religion would refuse blood transfusion under any circumstance. This is particularly so amongst Jehovah's Witnesses. Can a doctor override the wishes of this class of patients? It will be shown in this paper that the right of Jehovah's Witnesses to refuse blood transfusion has been recognized both at Common Law and under the Nigerian Constitution. This is also true in other Common Law jurisdictions including the United States of America. A doctor does not know it all. Medical knowledge is not sufficiently advanced to enable a physician to predict with unerring certainty who will live or die upon the performance or non-performance of certain medical procedures. In fact, it would be the height of arrogance for doctors to presume that they know what is absolutely 'good' or 'best' for a

particular patient. Indeed, there is no basis for presuming that a doctor can always prescribe and enjoin what is in the overall interest of a patient. The only way to know whether an intervention is good medicine is to ask the patient. The patient may then give an informed consent.

Doctrine of Informed Consent

At Common Law, consent to medical treatment may be expressed or implied.[1] A patient's consent is express where he authorizes the medical practitioner orally or in writing that he consents to that form of treatment. In most cases, however, consent to medical treatment is implied. A patient who holds out a hand for an injection or he is on the couch for an examination impliedly consents to that procedure. This implied consent however is limited to what is agreed. In other words, there must be a consensus *ad idem* (meeting of the minds) between the doctor and the patient on the scope of treatment or examination.

Consent in whatever form must be informed. Informed consent is that by a person of sound mind seised of the entire information necessary to make up his mind as to whether he would or would not accept a form of medical treatment. Therefore, consent obtained by fraud, under the influence of drugs or anesthetics, from an insane person or without giving sufficient information about the ailment, the treatment proposed and the attendant risks to enable the patient to understand the position fully and make an intelligent decision is not informed consent.[2]

If a patient refuses to give informed consent, the law is that the medical practitioner who proceeds to administer the medical measure or treatment, surgery or blood transfusion, will be liable for assault and battery. He would be liable even where no injury is occasioned, since trespass is actionable per se.

In the case of *Sidaway v Board of Governors Bethlehem Royal Hospital*,[3] a patient brought an action against her doctor claiming that

1. Professor C.O. Okonkwo: 'Medical Negligence and the Legal Implic ations' in B.C. Umerah (ed) *Medical Practice and the Law in Nigeria*, Ibadan, Longman, pp. 131-133.
2. See *Okonkwo v. Medical & Dental Practitioners Disciplinary Tribunal* [1999] 9 NWLR (Parts 617) 1 or 26 per Nzeako JCA.
3. [1985] 2 WLR 480 at page 488 Paragraphs D-E.

he failed to warn her about some inherent hazards in a form of treatment which the doctor proposed and applied to her. The House of Lords held that since the treatment involved a substantial risk of grave consequences the doctor ought to have warned her. Lord Scarman in his judgment stated:

> A doctor who operates without the consent of his patient is, save in cases of emergency or mental disability, guilty of the civil wrong of trespass to the person; he is also guilty of the criminal offence of assault. The existence of the patient's right to make his own decision which may be seen as a basic human right protected by the common law, is the reason why a doctrine embodying a right of the patient to be informed of the risk of the surgical treatment has been developed in some jurisdictions in the U. S. A. and has found favour with the Supreme Court of Canada - known as the doctrine of informed consent...

In the Canadian case of *Malette v Shulman*,[4] a medical practitioner administered blood to a Jehovah's Witness patient, though he had been informed of a Medical Alert Card in the purse stating that she did not desire blood transfusion under any circumstance. When she recovered she sued the medical practitioner for battery. The doctor argued that it was an emergency situation which *required* an urgent life saving *need* for blood. This argument was rejected and damages for trespass was awarded against him. The court said:

> A competent adult is generally entitled to reject a specific treatment or to select an alternative form of treatment, even if the decision may entail risk as serious as death and may appear mistaken in the eyes of the medical profession or of the community. Regardless of the doctor's opinion it is the patient who has the final say on whether to undergo the treatment.[5]

The above two cases were approved and followed by the Nigerian Supreme Court in *Medical & Dental Practitioners Disciplinary Tribunal v Okonkwo*.[6] Uwaifo JSC 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,

4. [1990] 47 DLR (4th Edition) 18.
5. Ibid at p. 24.
6. [2001] 7 NWLR (Part 711) 206.

> particularly if the treatment is of a radical nature such as surgery or blood transfusion. So the doctor must ensure that there is a 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.[7]

In another recent Nigerian case, *Okekearu v Tanko,*[8] a medical doctor amputated the left centre finger of a 14-year old boy without his consent. In the boy's action for damages for battery, the doctor's defence was that he obtained the consent of the plaintiff's aunt who was the closest relative present at the material time before he amputated the finger. The trial court gave judgment for the plaintiff and awarded him the sum of ₦100,000 as general damages for permanent incapacity, negligence and battery resulting from the amputation of his finger. The defendant's appeal to the Court of Appeal failed; only the general damages was reduced from ₦100,000 to ₦50,000.

The defendant's further appeal to the Supreme Court was dismissed. In discussing the need for informed consent to medical treatment, Katsina-Alu JSC said:

> The next question to be resolved is whether the Defendant had the Plaintiff's consent or that of his guardian to amputate his finger. The law allows a man to consent to the use of a reasonable degree of force on his person in certain circum-stances recognized as lawful justification e.g. in lawful games or sports, or for a surgical operation. In all these cases consent will be a bar to an action in trespass.[9]

Tobi JSC in his concurring judgment stated:

> The main issue is whether the Appellant had the consent of Tanko Danjuma before the finger was amputated. Consent, which is the act of giving approval or acceptance of something done or purposed to be done, is an exact conduct flowing from the person giving the consent. While consent could be implied in certain situations, it is my view that consent to amputate a part of the body should be exact and unequivocal. There should be no doubt

7. Ibid at 255-256.
8. [2002] 15 NWLR (Part 791) 657.
9. Ibid on page 667 A-B.

> that Tanko Danjuma, the amputee, gave his consent that his finger be amputated.[10]

From the above exposition, it is clear that the Common Law position of informed consent is not only applicable in other jurisdictions, it has been judicially accepted in Nigeria.

Six basic elements of informed consent have been identified. They are:

1. A fair explanation of the procedure to be followed, and their purposes including identification of any procedures which are experimental.
2. A description of any attendant discomfort and risk reasonably to be expected.
3. A description of any benefits reasonably to be expected.
4. A disclosure of any appropriate alternative procedures that might be advantageous to the patient subject.
5. An offer to answer any inquiries concerning the procedures.
6. An instruction that the person is free to withdraw his consent and to discontinue participation in the project or activity at any time without prejudice to the subject[11].

Sometimes, medical doctors tend to override the informed consent of adults on the basis that they know what is 'best' for the patient. Various learned writers have criticized this 'know-all' attitude of doctors.[12]

A patient has a right to determine his own medical treatment and that right is superior to the physician's duty to provide necessary care. No medical 'ethics' can derogate from this position.

Blood Transfusion and Informed Consent

Blood transfusion is a form of medical treatment. It has been associated with transmission of HIV, hepatitis, malaria and other diseases. Therefore, under the doctrine of informed consent, a patient

10. Ibid on page 670 671.
11. See O.F. Emiri, *Medical Jurisprudence,* Lagos, Jeroiliromah Press, at pp. 191-192.
12. See 'Paris: Compulsory Medical Treatment and Religious Freedom: Whose Laws Shall Prevail'? *10 University San Francisco Law Review.* 1, at 26; also, Byre: 'Compulsory Lifesaving Treatment for the Competent Adult' (1975) 44 Fordham Law Review 1 at 29.

can refuse blood transfusion and from the authorities, the doctor is bound to respect the patient's wish. If a doctor administers blood on a patient without consent, a claim for assault and battery would lie at common law.

In Professor Okonkwo's article he states as follows:

> Members of the religious sect known as Jehovah's Witnesses, object to blood transfusion as a matter of religious belief. If after explaining the pros and cons of a transfusion to a patient of that sect and it is refused by the patient, a doctor is free to reject the patient. The doctor should not force a transfusion upon the patient otherwise the doctor may be liable for battery. On the other hand, if, despite the refusal of transfusion, a doctor decides to operate on such a patient knowing very well the probable risk of death he may be liable in negligence if the patient dies. In such a case, the doctor should obtain the patient's written undertaking acknowledging the risk and waiving any legal rights against the doctor. It should be stated however that if in an emergency a transfusion is necessary to save life and a doctor administers it despite the patient's refusal, an action against the doctor would hardly succeed. And should that ever be the case, the court would not be disposed to award more than nominal damages.[13]

Professor Okonkwo's assertion that in case of emergency an action could hardly succeed is, with respect, wrong. In *Malette*, it was an emergency yet the patient succeeded in her action and damages were awarded for trespass to person.

Informed Consent of Incompetent Adult and Minor[14]

An incompetent adult is a person who suffers from a disease of mind or natural mental infirmity which impairs his reasoning powers or ability to decide whether to take a form of medical treatment or not. He is unable to understand the nature, purpose and effects of the medical treatment proposed. Where an incompetent adult, by reason of, for example, mental illness, is unable to give consent, the court may authorize the treatment. I am of the opinion that nothing stops his family, as next of kin, from making such decision rather than the court.

13. Ibid on p. 133.
14. See generally O.F. Emiri, *Medical Jurisprudence* on pp. 196-212.

In the case of a minor, the parents or guardian are usually the ones to give the consent. A person below the age of 14 years would qualify as a minor in Nigeria.[15] But it would seem that age cannot be the overriding consideration in deciding the question of who is a minor going by the decision of the Supreme Court in *Okekearu v Tanko*. The Court held on this point that a 14 year-old whose finger was amputated ought to have been asked for his consent even before seeking the consent of the aunt. This position of the court is more realistic as a child of 14 years today can make a rational informed decision. Tobi JSC in coming to this view stated that the 14 year-old was not in coma and he even gave lucid evidence at the trial.[16]

Informed Consent and Fundamental Rights

The doctrine of informed consent has become entrenched in our Constitution as a fundamental right under sections 37 and 38 of the 1999 Constitution. Section 37 provides: 'The privacy of citizens, their home, correspondence, telephone conversations and telegraphic communication is hereby guaranteed and protected.' Section 38(1) reads:

> Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

15. In taking out an action in our Courts, for instance, actions are commenced by next friend and may be defended by Guardian *ad litem* appointed for that purpose under the Civil Procedure Rules. See: Order 11 Rules 10 & 12, High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules; Order 14 Rules 8 and 10 High Court of Lagos State (Civil Procedure) Rules. See also s.2 of the Criminal Procedure Act Cap. 80 Laws of the Federation of Nigeria, 1990 which defines a child as any person who has not attained the age of 14 years. In the USA, for instance, the doctrine of mature minor has been developed to deal with the question of informed consent of minors to medical treatment. Where it can be shown that a minor is mature enough to make an informed decision or to appreciate the nature, extent and consequences of his action, the Courts have treated such persons not as minors but mature minors with a right to determine the type of medical treatment they wish to be subjected to. See the case *of Re: Ernestine Gregory* 133 Ill 2d 98,549 NE 2d 322 (1989) noted by O.F. Emiri (Ibid), at p. 200.
16. See per Tobi JSC ibid at p. 670.

These provisions are constitutional safeguards to the right of a patient to reject a form of medical treatment based on religious beliefs. Therefore, a Jehovah's Witness can on the basis of sections 37 and 38 of the 1999 Constitution object to a blood transfusion on religious grounds.[17] A blood transfusion against the consent of a patient would be an invasion of his right to privacy. This is irrespective of the fact that the doctor is of the opinion that such blood transfusion would have the effect of prolonging life or that the refusal of blood transfusion seems unwise, foolish or ridiculous to others. The courts in the United States have recognized that the constitutionally guaranteed right to privacy of a patient encompassed his right to decline medical treatment.[18]

In *Re Yetter,* upon evidence that the patient was a mature, competent adult, had no children and had not sought medical attention and then attempted to restrict it, the court said that the constitutional right of privacy includes the right of a competent, mature adult to refuse treatment that may prolong one's life even though that refusal may seem unwise, foolish or ridiculous to others. In *Re Osborne*, the court affirmed the lower court's order refusing to appoint a guardian to give consent for the administration of a blood transfusion to a patient who had refused it on religious ground and whom the physician feared would die without blood, upon evidence that the patient had validly and knowingly chosen this course, and upon the lower court's finding that there was no compelling state interest which justified overriding the patient's decision to refuse blood transfusion.

Factors to Consider when Patient Objects to Medical Treatment on Religious Ground

In the case of *MDPDT v Okonkwo*, Ayoola JSC identified the following as the factors to be taken into consideration and stressed the need to balance those interests:

1. The constitutionally protected right of the individual.

17. See *MDPDT v Okonkwo* per Ayoola JSC at pp. 244-245.
18. See the following cases *Satz v Perlmutter; Lane v Candura; Re: Melideo; Re: Quinlan; Re Yetter, Re: Osborne,* noted in 93 A.L.R. 3d 67 at 74–80, *Re: Yetter* (1973) 62 Par. D & C 2d 619 noted in 93 ALR 3d 67 at 79 were approved by the Supreme Court in *Okonkwo's* case (Ibid) at pp. 245–246.

2. State interest in public health, safety and welfare of the society.
3. The interest of the medical profession in preserving the integrity of medical ethics and thereby its own collective reputation.

We intend to examine these conflicting interests and show that the constitutionally protected right of the individual patient should be paramount at all times and agree with his Lordship to the extent that to give undue weight to the other interests over the right of the competent adult would constitute a threat to the liberty of the individual and his right to self-determination.

We are of the opinion that no compelling state interest in the public health, safety and welfare of the society would justly override the decision of the patient to refuse a medical treatment, e.g. blood transfusion. It is a personal decision of the patient that does not affect the public. A citizen's right cannot be abridged for the purpose of protecting himself. Section 45(1) of the 1999 Constitution provides:

> Nothing in sections 37, 38, 39, 40 and 41 of the Constitution shall invalidate any law that is reasonably justifiable in a democratic society –
> '(a) in the interest of the defence, public safety, public order, public morality or public health; or
> '(b) for the purpose of protecting the rights and freedom of other persons.'

From the above constitutional provision, it is clear that:

1. Only a law duly passed can derogate from or restrict the fundamental rights protected under sections 37 and 38 of the 1999 Constitution.
2. Such a law is limited to those which are reasonably justifiable in a democratic society and must also either be:
   a. in the interest of defence, safety, public order, public morality or public health; or
   b. for the purpose of protecting the rights and freedoms of other persons.

We do not foresee the right of refusal of blood transfusion affecting the rights and freedom of other persons. It cannot also affect 'the defence, public safety, public order, public morality, or public health'

in any way. If, for instance, in case of an epidemic the state requires a form of medical treatment that involves blood transfusion, the citizen can refuse the blood transfusion as part of his fundamental right. Any law passed to derogate from this right will not be one that is 'reasonably justified in a democratic society'. Rather, it would be one justified in a totalitarian society. There is no compelling state interest which can justly override the patient's decision to refuse blood transfusion.

One of the factors stated by Ayoola, JSC to be taken into consideration is the 'interest of the medical profession in preserving the integrity of medical ethics and thereby its own collective reputation'. With respect to his Lordship, this is not a relevant factor *vis-a-vis* the constitutionally protected rights of the individual. The interest of a particular profession cannot override provisions of the Constitution.

We submit that as there is no constitutional basis for elevating the medical professional ethics above the fundamental, constitutionally guaranteed right of a patient in Nigeria, there is no basis for subjecting a patient's right to such a factor as 'preserving the medical ethics and medical reputation'. Therefore, where there is a conflict between a patient's and a doctor's values or ethics, it is the patient's values or ethics that control.

In the case of *Randolph v City of New York,*[19] it was held that: 'A patient has a right to determine his own medical treatment and that right is superior to the physician's duty to provide necessary care'.

Also in *Rivers v Katz*[20] it was stated *inter alia:*

> the state's interest . . . in maintaining the ethical integrity of the medical profession, while important cannot outweigh the fundamental individual rights here assessed. It is the need and desire of the individual, not the requirement of the institution that is important.

Apparently based on the postulation that the constitutional right of the patient needs to consider the interest of the medical ethics, profession and reputation and the helplessness of the doctor where there is no consent to a form of medical treatment including blood

19. 501 NYS 2d 837, 841 (App. Div. 1986) See also: *Superintendent of Belchertown State School v. Saikewicz* 370 N.E. 2d 417, 426-27 (Mass 1977) referred to and approved in *MDPDT v Okonkwo* (Ibid) at p. 245.
20. 495 N.E. 2nd 373, 343 n-6 (N.Y. 1986).

transfusion, Ayoola JSC in *MDPDT v Okonkwo*[21] suggested a 'judicial intervention' in such cases to override the patients decision. He stated:

> This is why, if a decision to override the decision of a competent patient not to submit to blood transfusion or medical treatment on religious grounds is to be taken on the ground of public interest or recognized interest of others, such as dependant minor children, it is to be *taken by the Courts*. (Italics mine)

He stated further (professing it to be a gratuitous opinion) that the solution to whether or not patient's decision should be overridden should be 'shifted to the Courts which are the proper forum for such decisions'.

We submit that his Lordship's *dicta* cannot stand in this present setting where the Constitution is the grundnorm. The interpretation by the Court will have to respect the informed decision of the patient in line with sections 37 and 38 of the 1999 Constitution.

Conclusion

Both under Common Law and the 1999 Constitution, the medical practitioner must respect the informed decision of a patient to a form of medical treatment even if such decision seems to him 'ridiculous' or 'irrational'. The patient has a right of self-determination and constitutional rights to privacy and freedom of thought, conscience and religion preserved by sections 37 and 38 of the Constitution. Where a Jehovah's Witness refuses blood transfusion on basis of religious belief, the doctor must respect the objection otherwise he would be liable for battery and for breach of the patient's fundamental rights.

21. Ibid at p. 245 paragraphs ACF and p. 247 paragraph A-D.