MEDICAL PATERNALISM AND PATIENT AUTONOMY: CALIBRATING THE LEGAL BALANCE.

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BEING A PROJECT SUBMITTED TO THE FACULTY OF LAW, ALEX EKWUEME FEDERAL UNIVERSITY, NDUFU ALIKE, IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF BACHELOR OF LAWS (LL. B)

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APPROVAL

The Long Essay titled "Medical Paternalism and Patient Autonomy: Calibrating the Legal Balance" has been assessed and approved by the Undergraduate Studies Community of the Faculty of Law, Alex Ekwueme Federal University, Ndufu Alike.

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CERTIFICATION

This is to certify that this long essay titled "Medical Paternalism and Patient Autonomy: Calibrating the Legal Balance" has been assessed and approved by the Undergraduate Studies Community of the Faculty of Law, Alex Ekwueme Federal University, Ndufu Alike, as an original work carried out by Ugochukwu Obioma Success, with registration number: 2020/LW/14299 in the Faculty of Law, Alex Ekwueme Federal University, Ndufu Alike, under the guidance and supervision of Dr. Kelechi Goodluck Onyegbule.

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DEDICATION

This project work is dedicated to my outstanding and spectacular mother, Mrs. Nnadi Favour for her love, care, support and guidance towards the course of my studies.

ACKNOWLEDGEMENT

I wish to register my profound gratitude to God for the guidance and grace throughout this research.

To my distinguished and prestigious mother, Mrs. Nnadi Favour, thank you so much for your love and support throughout my stay in school. I will not fail to appreciate my amiable sister, Mrs Oluebube Abigal Ojimba, to my prominent sister Ugochukwu divine favour .C, May Almighty God bless you abundantly. To my Eminent brother Barr. Ugochukwu Prince Chinaemelum, I pray for God's favour upon you, thank you for being a brother and also a father to me throughout my stay in school.

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List of Abbreviations

UN-	United Nations
Cap-	Chapter
Pt-	Part
P-	Page
LFN-	Laws of the Federation of Nigeria
NCLR-	Nigeria Constitutional Law Report
NWLR –	Nigeria Weekly Law Report
SCJN-	Supreme Court of Nigeria Judgment
All FWLR –	All Federation Weekly Law Report
All NLR-	All Nigeria Law Report
CHR-	Chancery Report
SACLR-	South Africa Constitutional Law Report
PLC-	Public Limited Company
Ltd-	Limited
SC-	Supreme Court
AC-	Appeal Cases

ABSTRACT

In the medical sphere, medical professionals and patients often have to contend with issues relating to the proper course of action to take at specific points in time as dictated by the imperatives of legal rights and duties. Medically, autonomy or respect for autonomy is about allowing patients to decide or be part of the decision-making on their health. On the other hand, paternalism refers to an action performed by a medical practitioner with the intent of promoting another's good even though such act may be against his/her will or done without his/her consent. To uphold a patient's right to autonomy in some cases may negate the doctor's duty of beneficence and non-maleficence leading to paternalistic medical practice. To this end, the main objective of this study is to critically analyze medical paternalism and patient autonomy: calibrating the legal balance. The study considered the issues surrounding autonomy and paternalism as a potential negation of patient's best interests, medical professional's discretion and the society's common interest in line with existing legal frameworks in Nigeria. In the course of carrying out this study, doctrinal research methodology was adopted and the study found that respect for autonomy rights of patients stands at the core of every doctor-patient relationship and thus, supreme and quintessential. The study further found that conceptualizing autonomy within the context of the individualism of western societies may not be fit for purpose in an African context like Nigeria. The study concluded that medical practitioners must first seek and obtain the informed consent of a patient before administering any treatment on him/her. This is in tandem with the principles of biomedical ethics to wit: autonomy, beneficence, non-maleficence and justice, and recommended among others that the Nigerian medical law has to be overhauled. Rights of Nigerians relating to health must be removed from the Fundamental Objectives and Directive Principle of State Policy under the Nigerian constitution.

CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

One of the challenges medical personnels face in the course of rendering medical services to patients is the issue of observance of a patient's right to autonomy or making decision for patients who lack decision making capacity. [1]

Typically, a patient may lack decision-making capacity by reason of physical or mental incapacity or by reason of age. Such persons include those who are in unconscious state, mentally ill persons and minors. Therefore, the fate of such persons inevitably lies in the hands of other persons who now have choices to make, taking into consideration the peculiar circumstances of the given case. Cases that could give rise to the need for such decision making on behalf of a patient include when there is need to apply a specific type of treatment (such as surgical procedure or blood transfusion) and when there is need to discontinue treatment (such as withdrawal of life support). Such treatments are usually of very sensitive nature given their grave implication for the wellbeing and even the life of the patient.[2] For instance, some persons, for reasons of religious belief, may find certain medical procedures objectionable; a recurring example is objection to blood transfusion by adherents of Jehovah's Witnesses.[3]

There is also the example of persons who may object to an abortion procedure intended to save life. Again, surgical procedures are typically invasive and certain drugs come with some serious risks to the patient that it may be inappropriate and even risky to assume that a patient would naturally have no objection to them. In *Chester v. Afshar*,[4] Lord Steyn posits that:

> "... a rule requiring a doctor to abstain from performing an operation without the informed consent of a patient serves two purposes. It tends to avoid the occurrence

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[1] C Cameron & E Gumbel, *Clinical Negligence: A Practitioner's Handbook* (Oxford University Press 2007), 38.
[2] C P Selinger, The Right to Consent: Is it Absolute?' [2009] (2) (4) *British Journal of Medical Practice*; 50.
[3] *Ibid*, (n 2) 52.
[4] [2004] UKHL 41, para 18.

> 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"

Treatment without proper consent could give rise to civil liabilities. For instance, a surgical procedure performed without the patient's due consent could amount to the tort of battery.[5] However, when the patient is incapable, a number of difficult questions arise as follows: which decision is the most appropriate to be made? Who is the most appropriate to make the decision? Is it right in the circumstance for anybody to assume the responsibility of decision-making on behalf of the patient in the first place? This last consideration is very crucial given the possibility of erroneous judgment in presuming a patient incapable of decision-making and in presuming oneself the right person to make the decision,[6] assuming the incapacity is genuinely present in the first place. The basis of the problem encountered in making decision for those who lack the capacity in clinical setting lies in the need to preserve a patient's right to personal autonomy while at the same time ensuring that his/her best interest is served by the choices made regarding his/her health situation by medical experts, relatives and other concerned interests.[7]

To understand the intricacy of this situation more clearly, the four major elements that are at play need to be specified. The first element is the patient's 'best interest'; what decision and action should be taken to ensure that the patient's wellbeing is maximally served. The second is the patient's right to personal autonomy: does the action to be taken derogate from the patient's right to non-interference in his/her individual personal space. The third is the medical expert's professional discretion to offer his/her intervention in line with his best professional judgment and applicable industry standards.

And the fourth is the interest of third parties – the patient's relatives, the community and others likely to be affected by whatever course of action followed in the circumstance.

There now stands a possible contradiction between the patient's right to personal autonomy and whatever decision taken on his/her behalf and when this autonomy can be legitimately dispensed with. Where it is

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[5] R Mulheron, 'Trumping Bolam: A Critical Legal Analysis of Bolitho's 'Gloss'' [2010] (69) *The Cambridge Law Journal*; 609.

[6] See also the earlier case of *Schloendorff v. Society of New York Hospital* [1914] 211 NY 125, 126.

[7] *Ibid,* (n 5) 610.

satisfied that the patient genuinely lacks capacity, there comes a possible contradiction between the decision made and the patient's best interest. In other words, does the decision taken on his/her behalf represent his/her best interest. Then if the patient's best interest, whatever it may be, is to be realized, there again comes a potential contradiction between it and the professional discretion and integrity of the medical expert as well as the interest of third parties either relatives or the public.[8]

The foregoing basically represents the problem associated with making decision for patients who lack the capacity in a clinical setting. Such decision making practically places the actors in a difficult legal terrain where they are obliged to negotiate through tricky and intricately connected questions of rights and duties. In this instance, it may be easy for one to default while trying to reconcile multiple interests that may at times seem contradictory and even irreconcilable. In view of the foregoing, decision-making for those lacking capacity in the clinical scenario has become an important legal issue in many countries. In countries with a vibrant culture of clinical treatment-related litigations, it has yielded many judicial decisions which, alongside legislative enactments, have led to emergence of a reasonably dynamic legal framework. However, in Nigeria, the situation appears different as the law relating to decision making in clinical setting is yet to experience such development.[9]

While the culture of clinical litigations is yet to become strong in the country, Nigeria only relatively recently passed the National Health Act with provisions relating to clinical consent in *section 23(d)* of the Act. This implies that the Nigerian legal system, as far as clinical consent is concerned, is still relatively young. But before the National Health Act was enacted, the Nigerian legal system has accommodated statutory provisions related to right to privacy, freedom of religion and conscience, right to personal dignity,

[8] A I Sulaiman, & *et al*, Knowledge, Attitude and Perception of Patients Towards Informed Consent in Obstetric Surgical Procedures at Aminu Kano Teaching Hospital [2018] (l2) (1) *Nigerian Journal of Basic and Clinical Sciences*; 45.

[9] See Rule 19 of the Code of Medical Ethics in Nigeria which provides for informed consent and how consent would be given in a situation where a patient lacks capacity.

negligence, assault and battery which are all in one way or the other relevant to clinical decision making. Nigeria is also signatory to international instruments recognizing such relevant rights.[10]

Nevertheless, experiences of other nations, such as the United Kingdom,[11] Nigeria's erstwhile colonial masters, show that such statutory provisions alone may not be enough; judicial interpretations have proved crucially useful in improving their functionality in the light of the practical dynamism of everyday clinical experience. Besides, none of the domestic legislations contain any provisions specifically and elaborately addressing the principles and procedures for deciding for those who lack capacity in clinical setting. Even the Code of Medical Ethics in Nigeria, the statute-based principal regulatory instrument for medical and dental practitioners, while containing provisions on the imperative of patient's consent, is silent on how such consent could be obtained for persons who cannot personally decide.

Consequently, one may wonder how much Nigeria's statutory provisions could go in addressing all the intricacies of deciding for those that are incapable of making decision(s) in clinical circumstances. It is against this background that this research sets out to study the Nigerian legal system with a view to assessing its strengths and weaknesses vis-a-vis the question of patient's right to autonomy, best interest, paternalistic medical practice and decision making in the context of incapacity to decide. The issues are discussed from the perspectives of how the right to autonomy tends to negate the patient's best interest, the medical professional's discretion and the common interest of society. As a result, the research brings to the fore the problems surrounding the right to autonomy and paternalistic medical practice in relation to the best interests of a patient, the application of the medical professional's discretion and the society's common interest.[12]

1.2 Statement of the Problem

[10] K E Oraegbunam 'Jurisprudence of Genetic Engineering in Nigeria: Prospects and Challenges for Human Dignity in the Light of the National Health Act, (2014) 2(1) *International Journal of Business and Law Research*: 9-25

[11] A Murgic, & *et al*, Paternalism and Autonomy: Views of Patients and Providers in a Transitional (Post-Communist) Country, [2015]16(1) *Journal of Medical Ethics*, 1.

[12] *Ibid*, A Murgic et al, (n 11) 2-3.

The balance between medical paternalism and patient autonomy in the legal framework involves a delicate negotiation. While medical paternalism, where doctors make decisions for patients' best interests, can be seen as beneficial to the patient in maintaining his or her health status. In certain cases, the legal system increasingly prioritizes patient autonomy, granting individuals the right to make informed decisions about their own healthcare.[13] This conflict arises when a patient's decision may be considered detrimental, leading to potential legal challenges if a doctor disregards the patient's autonomy, considering the fact consent remains a crucial element in medical law. The general rule is that any treatment given by a doctor to a patient is unlawful unless done with the consent of the patient. Thus, any treatment done without the patient's consent would constitute the crime of battery and the tort of trespass to the person. Knowledge of this is a vital step towards enhancing the relationship between a doctor and his patient. Another problem as regards rendering medical services to a patient also arises in the event the patient does not have the knowledge of an ailment in order to be able to make an informed decision, or would paternalism stepping in to alleviate such a situation will be seen as an exception of the need of patient's autonomy under the Nigerian medical law.

Medical practitioners are beginning to realize that conflict between medical paternalism and patient autonomy would arise if they continue to uphold this dualism as distinct in all circumstances of medical practice. Information about an intended medical procedure or clinical research involving humans needs to be comprehensively transmitted so that the client can make a rational decision to consent.[14] The rationale behind the doctrine of informed consent is primarily to uphold patient autonomy and self-determination without coercion.

1.3 Research Questions

[13]T B Ogiamien, *Medical Practice and the Law*, https://en.m.wikipedia.org/wiki/palsgraf_v_long_island_railroad_co.> accessed on 20th May, 2025.
[14] *Ibid*, (n 13).

Flowing from the background and subsequent problems revealed or disclosed in the statement of the problem, the researcher would rely on the following questions to direct the path of this study. The research work will supply cogent answers to the following research questions:

1. What does medical paternalism and patient autonomy entail?
2. Which decision is the most appropriate to be made as regards patient autonomy and paternalism in discharging medical services?
3. Who is the most appropriate person to make the decision as regards health conditions of a patient?
4. Is it right in the circumstance for anybody to assume the responsibility of decision-making on behalf of the patient in the first place?
5. What is the position Nigerian legal frameworks as regards medical paternalism and patient autonomy?

1.4 Aim and Objectives of the Study

The main aim of this study shall be to discuss medical paternalism and patient autonomy: calibrating the legal balance.

Specifically, this study intends to achieve the following objectives:

1. To determine what medical paternalism and patient autonomy truly entail.
2. To find out which decision is the most appropriate to be made as regards patient autonomy and paternalism in discharging medical services.
3. To determine who is the most appropriate person to make the decision as regards health conditions of a patient
4. To critically analyze if it is right in the circumstance for anybody to assume the responsibility of decision-making on behalf of the patient in the first place

5. To determine the position Nigerian legal frameworks as regards medical paternalism and patient autonomy

1.5 Scope and Limitations of the Study

The research work is confined to appreciating on a general note the provisions of Nigerian laws on medical paternalism and patient's autonomy, considering the fact that the basis of the problem encountered in making decision for those who lack the capacity in clinical setting lies in the need to preserve a patient's right to personal autonomy while at the same time ensuring that his/her best interest is served by the choices made regarding his/her health situation by medical experts. This study covers the provisions of Nigerian laws ranging from the Constitution being the supreme law of the land to ethics of medical profession as regards decision making in the course of rendering medical services to patients especially in the event where the patient lacks the ability to make such critical decision. The study also engages on in depth examination of the laws and makes reference to foreign and Nigerian cases in respect to discharge of medical services in general and making informed decisions.

Limitations of the Study

The task of carrying out a research work on this topic was very inspiring, educative and informative but it is not devoid of some constraints.

These constraints include:

1. Time Constraint: Due to the pandemic and the strike action that was embarked upon by both the Academic and Non-academic staff of Universities in Nigeria, the Researcher could not handle the process of getting the information needed for this study.

2 Lack of frequent power supply was also one of the challenges the researcher encountered in the course of carrying out this research.

3 Financial Constraint: The Researcher does not have the financial where withal to carry out some of the expenses in this research work.

4 Dearth of Materials: there are not many source materials in respect to the topic of this study and this hindered the quick delivery of the research.

1.6 Significance of the Study

This work tends to explore medical paternalism and patient's autonomy in line with the provisions of the Nigerian laws, considering the fact that medical law is primarily concerned with the relationship between health care provider and his patients, and as such, this study will be of great importance to law students as it will educate them on the position of law and court as regards medical paternalism and patient's autonomy.

It is also important to most especially lawyers and judges as decisions of the foreign courts cited in the work be persuasive and lay a path adjudicating over matters involving medical paternalism and patient autonomy.

In addition, this research work will be of great benefit to policy makers and will contribute to body of literature on medical law in Nigeria and so, will help students and lawyers who would be carrying out research work on this topic in future.

1.7 Research Methodology

In carrying out this research work, the doctrinal method of research was adopted by the researcher; the information used was from both primary and secondary sources with particular references to Nigeria materials. Primary data was collected from case laws and statutes while the secondary data collected for this study were obtained from books, journals, articles, and internet. The main

purpose of gathering information from the secondary sources is to augment the data from the primary sources.

1.8 Chapter Analysis

This research work is divided into five distinct chapters. Chapter one introduced the work and laid a strenuous foundation as regards medical paternalism and patients' autonomy in Nigeria and the provisions of Nigerian laws with regards to the topic. The same chapter also looked out the problem that necessitated the study and as well analyzed research questions, scope of the study among others.

Chapter two discussed some key concepts to the topic of the research, discussed some theories of law and reviewed the position of some scholars and explained in clear terms the gap in knowledge the work intends to fill.

Chapter three discussed the existing legal and institutional frameworks in relation to the topic under discourse. Such legal and institutional frameworks respectively include the Constitutional of Nigeria, National Health Act 2014, Medical and Dental Practitioners Act, Ministry of Health, Medical and Dental Council of Nigeria and the Judiciary.

Chapter four looked at some key issues in the topic of study such as Autonomy as a Potential Negation of Medical Professional's Discretion, Autonomy as a Potential Negation of the Society's Common Interest, Confidentiality and Access to Medical Information, Informed Consent to Treatment among others, while chapter five concluded the work.

CHAPTER TWO

CONCEPTUAL AND THEORETICAL FRAMEWORKS AND REVIEW OF RELATED LITERATURE

2.1 Conceptual Frameworks

2.1.1 Medical Paternalism

The concept of paternalism is simply an action performed with the intent of promoting another's good but occurring against the other's will or without the others' consent. The concept of paternalism comes from the Latin Word "Pater" which literally means 'to act like a father or to treat another person like a child'. It is to act for the good of another person without that person's consent as parents do for their children.[15] Therefore, in medicine, paternalism refers to acts of authority by the physicians in directing care and distribution of resources to patients as a result of the knowledge-based value judgments, apprenticeship and experience that have been gathered over the years by the physician with the sole aim of providing medical care that will benefit patients and prevent harm.[16]

Similarly, in the context of healthcare, paternalism constitutes any action, decision, rule or policy made by a physician or other care giver, without considering the patient's own beliefs and value

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[15] H Brody, *The Physician's Role in Determining Fertility* (New York Press, 1994) 42.

[16] Y O Ali, *Damages for Medical Practice: Nigeria as a Case Study*- http://www.yusufali.net/articles/damages_for_medical_practice_nigeria_as_a_case_study.pdf> assessed on 5th May, 2025.

systems and does not respect patient autonomy. The intentional overriding of one person's known preferences or actions by another person, where the person who overrides, justifies the action by the goal of benefiting or avoiding harm to the person whose preferences or actions are overridden in essence the overrides is the physician while the override is the patient.[17]

Paternalism in another way is any kind of caring control or action in the name of protecting people's own best interest against themselves. It is a behaviour by an organization or state that limits some persons or group's liberty or autonomy for what is presumed to be that person's or group's own good.

Medical paternalism is the assumption that certain health care decisions are best left to the professionals providing the health care, and not the patient. The traditional practice of medicine is thus a paternalistic affair. The operation involves the patient going to the doctor, the doctor tells the patient what to do and the patient does as ordered. The doctor plays the part of parent. Medical paternalism has thus been seen as a philosophy that certain health decisions (example; whether to undergo heroic surgery, appropriateness of care in terminally ill patient(s) are best left in the hands of those providing healthcare.[18]

The issue of paternalism may arise in medical contexts by the withholding of relevant information concerning a patient's condition by physicians. Paternalists advance people's interests (that is life, health or safety) at the expense of their liberty. Medical paternalism further emphasizes that staff members (physicians) must ensure the patient's best interest in everyday care and treatment, but that decisions are to be taken by the professionals only. Thus, staff should only use their knowledge

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[17] R S Edge and J L Krieger, *Legal and Ethical Perspectives in Health Care: An Integrated Approach* (Delmark Publishers, 1998) 20.

[18] P Veikko, k Engstrom, and E Ingemar, *Paternalism, Autonomy and Reciprocity: Ethical Perspective in Encounters with Patients in Psychiatric In-Patient Care'* available at http://www.biomedcentral.com/1472-6939/14/49 accessed on 14th May, 2025.

and skills for the benefit of the patient, never do harm (the principle of '*primum non nocere*') and always act only in the patient's best interest.[19] The basis of medical paternalism principle is as follows: (a) promoting and restoring the health of the patient, (b) providing good care, (c) prevention of patients from their own errors in judgment, and (d) assuming responsibility.[20]

Medical paternalism as a concept has been divided into several forms using different yardstick such as respect for autonomy among others. Its division varies from weak/soft strong/hard and paternalism, broad and narrow paternalism, pure and impure paternalism, moral and welfare paternalism, and active and passive paternalism. But this paper will only restrict itself to weak and strong paternalism only.[21]

Weak/Soft Paternalism: This refers to a situation in which the actor attempts to prevent without full or adequate knowledge or understanding of the consequences by the person acting. It is a philosophy that believes the physician or the state can help one to make the choices a patient would make for himself/herself.[22] A weak paternalist believes that it is legitimate to interfere with the means that agents choose to achieve their ends, if those means are likely to defeat those ends. E.g. giving life-saving therapy to a young child whose parents refuse such treatment.

Their interventions may involve prima face violation of the recipient's/patient's autonomy upon a justifiable ground of appeal based on the recipient's best own interest on the fact that the recipient at that time was not capable of reasonable voluntary decision making and that the recipient would without the doctor's intervention inflict relatively grave harm on himself/herself.[23]

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[19] *Ibid*

[20] P Veikko, et al (n12).

[21] A S Brett, and L B McCullough, 1986. 'When Patients Requests Specific Interventions: Defining the Units of the Physician's Obligation, (1986) 2(3) *Journal of Medical Law*. 315

[22] *Ibid*

[23] A Murgic et al, (n9)

Similarly, weak paternalism is exercised when patients have severely and permanently diminished capacity such that he/she may still be able to make decision but have no way of calculating the consequences of their decisions. The application of this kind of paternalism is often justified as appropriate. Thus, where weak paternalism persists, continuing paternalism is appropriate.[24]

This kind of paternalism seeks to prevent harm to or act for the benefit of persons by liberty-limiting measures even when their contrary choices were not capricious, were well informed and voluntary. An example of this is forcing patients who are Jehovah witnesses to be transfused.[25]

It is done ostensibly to prevent harm or to bring about what is perceived to be the good of another, it is a situation defined by the doctor or actor and not the recipient/patient. Doctors' intervention in this kind of paternalism, often involve unjustifiable violations of the recipient's autonomy. A strong or hard paternalist believes that people may be mistaken or confused about their ends and that it is legitimate to interfere to prevent them from achieving those ends. This kind of paternalism involves an individual who refuses to accept another's autonomous decision in actions or choices. Furthermore, strong paternalism occurs where the liberty of a patient who is functionally autonomous (capable of making rational decision as to his treatment) is restricted in order to prevent self-help and to secure benefit for them. This kind of paternalism is usually judged to be dying patient thereby causing displeasure for that patient is accordingly morally wrong.

2.1.2 Patient Autonomy

Autonomy or Respect for Autonomy (RFA) stands at the core of the principles of medical ethics namely autonomy, non-maleficence, beneficence and justice. Autonomy connotes an individual's freedom to exercise his/her personal choice irrespective of any other choice made by any other

[24] *Ibid*, A S Brett & L B McCullough, (n 21) 317.
[25] *Ibid*

person. Patient autonomy is a fundamental principle of medical ethics, hence, the ability to recognize and foster it, and its various dimensions, is widely considered an important clinical competence for physicians.[26] However, its conception in the medical and ethical literature, as well as its practical implementation, still raises ongoing challenges for the practice of medicine. Beauchamp and Childress in their work 'Principles of Biomedical Ethics,[27] posit that:

> Ethically, appropriate conduct is determined by reference to four key principles which must be taken into account when reflecting on one's behaviour towards others. They are: (i) the principle of respect for individual autonomy (i.e. – individuals must be respected as independent moral agents with the 'right' to choose how to live their own lives); (ii) the principle of beneficence (i.e. – one should strive to do good where possible); (iii) the principle of non-maleficence (i.e. – one should avoid doing harm to others); and (iv) the principle of justice (i.e. – people should be treated fairly, although this does not necessarily equate with treating everyone equally).

In 1948, the World Medical Association's (WMA) General Assembly in Geneva, adopted the Hippocratic Oath Declaration wherein the professional duties of physicians as well as the ethical principles of the global medical profession were outlined in concise terms. Several amendments have been made to this Declaration, the latest being the newly revised version adopted by the WMA General Assembly, Chicago, United States, on October 14, 2017, which includes several important changes and additions to the physician's pledge, among which is an oath to respect the autonomy and dignity of my patient.[28]

The most notable difference between the Declaration of Geneva and other key ethical documents such as the WMA's Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects of 196426 and the Declaration of Taipei on Ethical Considerations Regarding

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[26] A Murgic et al (n9)

[27] C A Beauchamp and F Childress, *Principles of Biomedical Ethics* (Sweet & Maxwell, 1999) 54.

[28] R W Parsa-Parsi, The Revised Declaration of Geneva: A Modern-Day Physician's Pledge, available at https://jamanetwork.com/journals/jama/fullarticle/2658261 accessed on 14th May, 2025.

Health Databases and Biobanks of 2002,[29] was determined to be the lack of overt recognition of patient autonomy, despite references to the physician's obligation to exercise respect, beneficence, and medical confidentiality toward his or her patient(s).

To address this difference, the workgroup, informed by other WMA members, ethical advisors, and other experts, recommended adding the following clause: 'I WILL RESPECT the autonomy and dignity of my patient'. In addition, to highlight the importance of patient self-determination as one of the key cornerstones of medical ethics, the workgroup also recommended shifting all new and existing paragraphs that are focused on patients' rights to the beginning of the document, followed by clauses relating to other professional obligations. Expressing respect for patients' autonomy means acknowledging that patients who have decision-making capacity have the right to make decisions regarding their care, even when their decisions contradict their clinicians' recommendations.[30] Beauchamp and Childress remind us that autonomy requires both 'liberty (independence from controlling influences) and agency (capacity for intentional action)' and that liberty is undermined by coercion, persuasion, and manipulation.[31]

Clearly, from the foregoing, a physician is charged by the Physician's Pledge to respect the autonomy and dignity of his or her patient. The implication of this is that a physician is ethically bound to adhere to and respect his or her patient's autonomy while treating such a patient. However, respect for a patient's autonomy might in turn negate or contradict the patient's best interests which is central to the duties owed by the physician to his or her patient non-maleficence

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[29] World Medical Association Declaration of Taipei on Ethical Considerations Regarding Health Databases and Biobanks. Available at <https://www.wma.net/policies-post/wma-declaration-of-taipei-on-ethical-considerations-regarding-health databases-and-biobanks> Accessed 14th May, 2025.

[30] T L Beauchamp, & J F Childress, *Principles of Biomedical Ethics*, (4th ed., Oxford University Press, 1994), 58.

[31] *Ibid*, T L Beauchamp & J F Childress, (n 30) 60.

(duty to avoid harm to others) and beneficence (duty to strive to do good where possible). Autonomy or right to autonomy here is perhaps mislabeled in the medical context as a patient does not have the right to decide which medical treatment she or he will be given. A patient has no right to demand that she or he be given cosmetic surgery. A health care professional may refuse because she or he does not want to provide the treatment or because of rationing of health care resources means it is not available. What is really being claimed here is a right of 'bodily integrity': a right not to have something done to your body without your consent.[32]

Autonomy implies a responsibility to accept the consequences of one's decision. At the heart of autonomy is the right to decide how we wish to live our lives.[33] So, to respect autonomy is to accept a person who has a right to hold views, make choices, and take actions based on personal values and beliefs. To override a person's wishes is to treat that person as a means to reach other people's ends and to fail to respect their humanity.

In other words, in the medical sphere, it must exist consequent to information being given that influenced a user to make such a decision. This voluntariness accords with the principle that an autonomous user is generally self-governing. So, to tell a user to act in a particular way or take a particular decision does not prevent a person from exercising autonomy in granting or refusing consent. However, where a user takes a decision after having been told or commanded to act in a particular way or take a particular decision, such negates the principle of informed consent as was aptly seen in the case of *Moore v Regents of the University of California*.[34] In this case, Moore, a

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[32] M D Laura Sedig, What's the Role of Autonomy in Patient-and Family-Centered Care When Patients and Family Members Don't Agree?' (2016) 18(1) *American Medical Association Journal of Ethics*: 13. Available online at https://journalofethics.ama-assn.org/article/whats-role-autonomy-patient-and-family-centered-care-when-patients and-family-members-dont-agree/2016-01> Accessed 14th May, 2025.

[33] M N Njotini, Preserving the Integrity of Medical-Related Information – How 'Informed' is Consent?' (2018) (21) PELJ: 5. Available at http://dx.doi.org/10.17159/1727- 3781/2018/v21i0a3400> Accessed 14th May, 2025.

[34] [1990] 51 Cal 3d 120

patient at the time, had his spleen taken out from his body with the aim of treating leukaemia. Samples of blood, bone marrow and other tissues were subsequently extracted from his body. He was then told by the hospital to amend his admission form to read that he consented to research being undertaken using the parts removed from his body of which he duly did as commanded. It was established later that Moore's physician and his assistant had created the Mo-cell line using the samples taken from Moore. Thereafter, they patented the line and made profit in a sum estimated at 3 billion US Dollars. It could be asked if Moore had also given his informed consent to the creation of the Mo-cell line. Is it legally justified to extend the informed consent given for the removal of a spleen to then create a profitable business? Today, the importance attached to autonomy has grown in recent years. We no longer regard ourselves as subjects of a higher authority, but as individuals with rights. To more explicitly invoke the standards of ethical and professional conduct expected of physicians by their patients and peers, the clause 'I WILL PRACTISE my profession with conscience and dignity' was augmented to include the wording 'and in accordance with good medical practice.[35]

2.1.3 Autonomy as a Potential Negation of Patient's Best Interests

Firstly, what comes to mind when autonomy is mentioned is the fact that a patient has the right to determine what is to be done on his/her body. Put differently, a patient undergoing treatment has the right or is in control of such treatment since he calls the shot. This being the case therefore, it means that any decision or act of the medical practitioner without the informed consent of the patient first sought and obtained may amount to a tort or crime being committed against such a patient since no attention was paid to the observance of the patient's best interests viewed as the

[35] P F Omonzejele, Obligation of Non-Maleficence: Moral Dilemma in Physician-Patient Relationship' [2005] (4) *Journal of Biomedical Sciences*, 23.

patient's best interest. Patient's autonomy is supposed to advance the interest of the patient; however, it becomes paradoxical that the same autonomy may be seen as potentially injurious to the very interest of the patient.[36]

In *Re T* (adult) (refusal of medical treatment),[37] a pregnant woman was involved in a car accident and, after speaking with her mother, signed a form of refusal of blood transfusion. Following a caesarian section and the delivery of a stillborn baby, her condition deteriorated and a court order was obtained legalizing blood transfusion on the ground that it was manifestly in her best interests; the declaration was upheld by the Court of Appeal. The fundamental decision was to the effect that an adult patient who suffers from no mental incapacity has an absolute right to consent to medical treatment, to refuse it or to choose an alternative treatment. – 'it exists notwithstanding that the reasons for making the choice are rational, irrational, unknown or even non-existent'. However, *Re T*'s case is not to be confused with the quite exceptional case of *NHS Trust v T* (adult patient: refusal of medical treatment),[38] where transfusion was refused because the patient thought her own blood was contaminating the transfused blood. The authority in Re T (adult) (refusal of medical treatment), was shortly applied in the case of *Re C* (adult: refusal of medical treatment).[39] The case involved a 68-year-old patient suffering from paranoid schizophrenia who had developed gangrene in a foot while serving a term of imprisonment in Broadmoor. On removal of the patient to a general hospital, a consultant prognosed that he had only 15 per cent chance of survival if the gangrenous limb was not amputated below the knee. The patient, however, refused the operation, saying that he preferred to die with two feet than to live with one. The hospital questioned C's

[36] *Ibid*
[37] [1992] 4 All ER 649
[38] (2005] 1 All ER 387
[39] (1994] 1 All ER 819

capacity to exercise his autonomy in this way and an application for an injunction restraining the hospital from carrying out the operation without his express written consent was lodged with the court on C's behalf. Thorpe J held that C was entitled to refuse treatment even if this meant his death.

2.1.4 Legal Position on Informed Consent to Medical Treatment

Legal position on informed consent to medical treatment is also an ethical-legal issue. It centers on both the common law and constitutional right of a patient to object to a form of treatment. Sometimes, doctors in treating certain patients tend to override their objection to certain forms of treatment on the basis of medical ethics. A doctor who disregards the opinion of the patient would be liable to the tort of assault and battery as well as infringement of the fundamental right of the patient as preserved under *Sections 37 and 38* of 1999 Constitution of Nigeria (as amended). Therefore, a Jehovah Witness has a right to refuse blood transfusion under any circumstances even if the decision entails risk as serious as death. In *Malette v Shulman*,[40] the Court dismissed an emergency situation which requires an urgent lifesaving need for blood. The right of the patient to be informed of the risk of the surgical treatment has been developed in some jurisdiction in the United State and has found favour in the Supreme Court of Canada in the doctrine of informed consent. The above foreign case on informed consent has been approved by the Supreme Court of Nigeria in *Medical & Dental Practitioners Disciplinary Tribunal (MDPDT) v Okonkwo*,[41] where that Court held:

[40] (1990) 47 NLR 23.
[41] (2001) 2 NWLR (Pt 23) 400

> "I am completely satisfied that under normal circumstances no medical doctor can forcibly proceed to apply treatment to a patient of full age and sane faculty without the patient's consent, particularly where the treatment is of a radical nature such as surgery or blood transfusion. So, doctor must ensure that there is a valid consent and he does nothing that will amount to a trespass to the patient. Secondly, he must exercise a duty of care, advise and inform the patient of the risk involved in the contemplated treatment and the consequence of his refusal to give consent"

Hence, a patient's objection to medical treatment is founded on fundamental rights. In *Okekearo v Tanko*,[42] a medical doctor amputated the left centre finger of a 14-year-old boy without his consent. The boy's action for exemplary damages succeeded. The doctor's appeal to the court of appeal failed and his further appeal to the Supreme court was dismissed. Consent by its own nature is an act of giving approval or acceptance of something done or proposed to be done. It could be expressed or implied. Thus, an incompetent adult who mentally ill cannot give a valid consent, rather court may authorize the treatment and nothing stops his family as next of kin from making such decision rather than court. In the case of a minor, the parents and guardian are usually the ones to give the consent.

Also, in *Rivers v Katz*,[43] The court held that the state interest in maintaining the ethical integrity of the medical profession, though important, cannot outweigh the fundamental individual rights. From the foregoing it will be apt to conclude that the issue of patient's informed consent to treatment is sacrosanct.

2.1.5 Legal Implication of Breach of Duty of Confidentiality

[42] (2000) 1 NWLR (pt 23) 71.
[43] (2002) 15 NWLR (pt 791) 10.

The law establishes that physicians owe a duty of confidentiality to their client. All information generated in the course of a medical relationship must be kept confidential. This duty is recognized at common law.

The duty of confidentiality is even constitutionally guaranteed in *Section 37* of the Constitution of the Federal Republic of Nigeria 1999. Patients must be encouraged to seek treatment without fear that their ailment, condition or treatment will be disclosed. This is in the public interest ultimately. In Canada, this privacy right is protected by legislation, so also in South Africa, particularly in relation to HIV status of an individual. A physician may disclose patient information with the informed consent of the patient or where legislation specifically requires that confidentiality can be breached to protect a third party. Partner notification is required or authorized by some Public Health Acts hence giving room to necessity.[44]

The Supreme Court of Canada in *Mclnerney v Mac Donald*,[45] The Nigerian case characterized the physician-patient relationship as fiduciary (i.e. special relationship of trust and confidence). Also, in *Hay v University of Alberta Hospital*,[46] The status of the right of confidentiality was described by Picard J as the cornerstone of the Doctor- Patient relationship and this is recognized in a number of international ethical codes such as the Hippocratic Oath and Declaration of Geneva domesticated in the Nigerian Code of Medical Ethics among others. The Hippocratic Oath states inter-alia: "all that may come to my knowledge in the exercise of my profession or outside my profession or in daily commerce with me which ought not to be spread abroad, I will keep secret and will never reveal". Also, Declaration of Geneva specificizes the following oath: "I will respect the secrets which are confided in me even after the patient had died".

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[44] *Ibid,* (n 1) 18.
[45] (1992) 2 SCJ
[46] (1990) 69 DLR 45

2.2 Theoretical Frameworks

2.2.1 Utilitarianism Ethical Theory

This is an ethical theory which suggests that an act should be judged right or wrong according to the pleasure produced and the pain avoided. According to the principle of utility, the moral end that should be sought in all that we do is the greatest possible balance of good over evil. John Stuart Mill and Jeremy Bentham were two notable philosophers who are advocates of utilitarianism. Mill J.S. formulated 'the Greatest Happiness principle', which holds that actions are right in proportion as they tend to promote happiness, and wrong as they tend to produce the reverse of happiness 'pain'.[47]

Jeremy Bentham formulated a principle, which insists that the good for man is the attainment of pleasure and the absence of pain. Bentham was a hedonist who believed that individual happiness is based on pleasure and pain: increase pleasure and decreased pain bring happiness while decreased pleasure and increased pain bring unhappiness. He believes that what is most fundamental in an individual's self-interest is to have pleasure rather than pain, and that the total happiness of the community is the sum total of individual happiness of its members. In view of the above analysis as advocated by Mill J.S., Jeremy Bentham and the likes, paternalism in medical practice would be morally acceptable, if it produces pleasure or reduces pain for the greatest number of people.[48] According to this theory, if a physician or health worker forces his or her own idea on a patient, treats or carries out a procedure on a non-consenting patient or out rightly disregards a patient's feeling, idea or wishes, it is morally acceptable so long as it is to the benefit of a greater number of people such as the patient's family or relatives, or the government at large

[47] E Barcalow, *Moral Philosophy: Theories and Issues* (4th ed, Wadsworth Publishing Company, 1994) 14.
[48] *Ibid*

irrespective of whether it is strong or weak paternalism. However, if paternalistic actions by physicians and other health workers result in pain or sadness for the patients, then it is morally wrong. For example, disregarding the wishes of a dying patient thereby causing displeasure for that patient is accordingly morally wrong.[49]

2.2.2 Deontological Ethical Theory

This is otherwise known as Kant's ethical theory, which focuses on the intrinsic nature of an action itself, rather than the consequences of the action. Kant's ethics can be subdivided into three categories, namely: the concept of Goodwill, concept of Duty and concept of categorical imperative. According to Immanuel Kant, the concept of goodwill is the only one thing that is good without qualification, other things considered as good are not good unconditionally as their goodness can be bad when misused.[50] For example, a physician can use his knowledge about the adverse effects of a drug to kill a patient. Therefore, the implication of Kant concept of goodwill in medical practice is that physicians and health workers are enjoined to always have goodwill in their dealings with their patients. It is only upon this act, that their actions can be justified in doctors-patient relationship. As regards the concept of Duty, Kant distinguishes two types of duty, namely; 'acting for the sake of duty' and 'acting according to duty'. He regards the former as perfect duty and the latter as imperfect duty. To act for the sake of duty is to perform one's duty not because of the hope to gain anything from one's actions or because of just feels like doing it or one has a natural inclination to doing such for the moral law.[51]

In other words, for an action to have moral value or to be morally praiseworthy, it must be done strictly for the sake of duty or out of respect for the moral law. Kant's ethics also distinguishes

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[49] *Ibid*

[50] John Austin, *The Province of Jurisprudence Determined*. (HLA Hart Publishers, 1832) 184.

[51] *Ibid*, John Austin (n 49) 189.

right from wrong actions by means of the principle of universalization, which is the first formulation of his categorical imperative. To know whether an intended action is morally right, the underlying principle of the action should be considered and universalized.[52]

The second formulation of Kant's categorical imperative is that we should always act to test humanity as an end and not as a means of an end. According to Kant, every rational creature possesses an autonomous self-legislative will. This, including the rationality they possess, enables them to make rules for themselves, direct their actions and consider the consequences of their actions. He strongly holds the view that one must never undermine their self-respect or humiliate them for that would violate the requirement that we treat people with respect.[53]

Paternalism according to Kant as observed from this theory must establish or show that physicians and health workers are enjoined to always have good will in their dealings with their patients, they are to perform their duty strictly for the sake of duty or out of respect for moral law and to treat humanity as an end and not as a means to an end. In view of the above theory, soft/weak paternalism is advocated while strong paternalism is discouraged or at best subjected to rigorous test.

2.3 Review of Related Literature

Many scholars have distinctly discussed some vitals things on medical paternalism and patient autonomy; calibrating the legal balance. These scholars include the following:

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[52] *Ibid*

[53] R B Maboloc*, Applied Ethics: Moral Philosophy for the Contemporary World*, (MS Lopez Printing and Publishing, 2008) 10

A.A John,[54] is of the view that health matter is a growing social concern that cuts across a wide range of actors and policy fields between healthcare stakeholders and patients. As human health and the delivery of effective healthcare is not a straight forward matter, their general recognition as public goods imposes on society an obligation to explore ways of improving health care outcomes. As a result of this, a variety of fields, practices, institutions and instruments have a role to play including the law. In view of this, the most paramount duty or obligation is that of the health care stakeholders who by their expertise and knowledge are meant to protect the life of their patients as regulated by law under the ethical values of paternalism.

M.J Barry and L.S Edgman,[55] are of the view that ethical principles are the obligations of a moral nature which governs the practice of medicine and give guidelines regulating conducts and practices of medical practice. It serves as guidelines which persons within and outside the medical profession uses as a yardstick or measurement to assess and evaluate what is considered acceptable right/honorable and wrong/unacceptable/ignorable in the profession. Ethical principles vary from communities to communities and are prone to changes with time as the morals and attitude of the society changes. There is no doubt that ethical principles are moral principles that apply values and judgment to the practice of medicine as they vary from; Autonomy, Beneficence, Non-Maleficence, Justice, paternalism etc. The increase in diagnostic and therapeutic options over the last half century has created more medical making situations yet the process of medical decision making remains nebulous as many decisions (example, ordering routine blood tests) are made unilaterally by physicians (paternalism) which others (e.g. elective surgical procedures, medication

[54] A A John, The Realities surrounding the Applicability of Medical Paternalism in Nigeria, (2015) (14) *Global Journal of Social Sciences*, 55.

[55] M J Barry and L S Edgman, Shared Decision-Making Pinnacle of Patient Centered Care, (2012) (9) *Journal of Medicine*, 366.

adherence) involve more patient choice (Autonomy). In some cases, decision may not be straight forward.

A.S Ogwuche,[56] posits that if a doctor holds himself out as possessing special skill and knowledge and he is consulted as possessing such skill and knowledge by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his discretion and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary that the service be rendered for reward.

T. Hope et al,[57] argued that by the provisions of medical and dental practitioners, a physician shall always bear in mind the obligation of preserving human life, promote the health of the patient and shall be concerned with the common good and human dignity of the individual. This Rules further permit medical and dental practitioners to determine when to give their services and the nature of the care to be given to a patient under their care. It is from the above provisions that the concept of paternalism may be deduced.

A. Umobi and G. Okeke,[58] posit that medical service is one sphere in which crucial questions of rights and duties arise from time to time. It is one area where parties – medical experts and their clients – often have to contend with issues relating to the proper course of action to take at specific points in time as dictated by the imperatives of legal rights and duties. Consequently, choices made in such instances by either of the parties could have serious legal implications.[59] One of such instances which, at times, poses a difficult challenge of choice to health care professionals is where

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[56] A S Ogwuche, Compendium of Medical Law (Espee Printing & Advertising, 2006) 21.

[57] T Hope & et al*, Medical Ethics and Law: The Core Curriculum* (2nd Ed, Church Livingstone, 2005) 18.

[58] A Umobi and G Okeke, Autonomy versus Paternalism in Medical Practice in Nigeria: A Socio Legal Discourse, (2020) 2(1) *IRLJ* 20.

[59] A Umobi & G Okeke, (n 57) 21.

it comes to the observance of a patient's right to autonomy or making decision for patients who lack decision making capacity. Typically, a patient may lack decision-making capacity by reason of physical or mental incapacity or by reason of age. Such persons include those who are in unconscious state, mentally ill persons and minors. Therefore, the fate of such persons inevitably lies in the hands of other persons who now have choices to make, taking into consideration the peculiar circumstances of the given case.

The aforementioned scholars have extensively discussed medical paternalism and patient autonomy.

However, the stated scholars failed to superfluously look at the provisions of Nigerian laws and bring its provisions line in line with the topic under discourse. This is the gap in knowledge this long essay seeks to fill by extensively discussing the provisions of the law in respect to medical paternalism and patient autonomy.

CHAPTER THREE

LEGAL AND INSTITUTIONAL FRAMEWORKS FOR MEDICAL PATERNALISM AND PATIENT AUTONOMY

3.1 Legal Framework

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

The Constitution of the Federal Republic of Nigeria 1999(as amended), is the basic law of the land in Nigeria. Every law flows from it either directly or by implication, including medical paternalism and patient autonomy. *Chapter IV* of the constitution provides for the fundamental rights of all citizens of Nigeria.

The right to health can be deduced from the right to life under chapter IV of the 1999 Constitution. *Section 33* of the 1999 Constitution of the Federal Republic of Nigeria provides for the fundamental right to life. This entails the need for consent and patient autonomy in rendering medical services. The above referenced section stipulates that "*no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which the person has been found guilty in Nigeria*." While the rights to health care exist as a socio-economic right under the Directive principles of the government.[60] *Section 17(3)(d*) of the 1999 Constitution of the Federal Republic of Nigeria as Amended) stipulates thus:

(i) The health, safety and welfare of all persons in employment are safeguarded and not endangered or abused.

(ii) There are adequate medical and health

The constitution creates a national health care policy, and the provision of health care delivery is a concurrent responsibility divided into three sectors; tertiary, secondary and primary, which remains the functions of the three tiers of government; federal, state and local. However, this does not confer any legal right on the citizen in the event of non-compliance by the Government as opposed to right to life under Chapter 4 of the constitution in which the citizens can enforce by seeking recourse in court.

Additionally, *section 34(1)(a)* of the 1999 constitution, provides that; "Every individual is entitled to respect for the dignity of his person, and accordingly no person shall be subject to torture or to inhuman or degrading treatment" and to avert this, there is need for patient's consent to treatment or where there compelling circumstance requires medical treatment being done without the

[60] Chapter 2 of the 1999 Constitution of Federal Republic of Nigeria (as amended).

patient's consent, such treatment should be done in order to preserve the patient's constitutional right to life.[61]

3.1.2 African Charter on Human and People's Right (Ratification and Enforcement) Act Cap A 9 LFN 2004

Nigeria has incorporated the African Charter on Human and Peoples' Right into its domestic law, with the result that all rights contained therein can be invoked in the court of competent jurisdiction. The African Charter on Human and Peoples' Rights expressly guarantees both civil and political rights and socio-economic rights as enforceable rights. The African Charter precisely recognizes the right to health. In *Article 14* of the African Charter on Human and Peoples' Right (Ratification and Enforcement) Act, states that:

> "Every individual shall have the right to enjoy the best attainable state of physical and psychological health; State parties to the present Charter shall take the necessary actions to safeguard the health of their people and to ensure that they receive medical care when they are sick".

The Act in *Article 14*, while promoting fundamental human rights, including the right to health, can inadvertently create tensions between medical paternalism and patient autonomy. The Act, by emphasizing the right to the "best attainable state of physical and mental health," can be interpreted to give healthcare providers a strong role in decision-making, potentially hindering patients' autonomy. However, the Act also recognizes the right to life and the integrity of the person, which can be seen as supporting patient autonomy in medical choices.

3.1.3 The National Health Act (No. 8, 2014)

[61] CFRN 1999 (as amended) s. 36.

This Act provides a legal framework for the regulation, growth, and administration of Nigeria's health system. The NHA contains vital provisions which, if efficiently applied will have a remarkable impact on health-care access, universal health coverage, healthcare cost, quality and standards, practice by healthcare providers, as well as patient care and health outcomes. The Act applies to both public and private health care providers. *Section 1 Part 3* of the National Health Act contains several Rights and Obligations of Users and Healthcare Personnel. For instance, a healthcare provider cannot refuse a patient emergency health treatment,[62] and the health establishment shall implement measures to minimize injury to person and property.[63] In addition, a healthcare provider should disclose to patient diagnostic procedures, risks, costs, and benefits.[64] Also the patient has the right to be made aware of any important information involving his/her health status except such disclosure will be contrary to the best interest of the patient.[65] Furthermore, all information pertaining to a patient relating to his/her health status and treatment is confidential and shall not be revealed to anyone except in circumstances allowed by the Act. The act also provides that a patient can lay a complaint to the proper authority with regards to how he/she has been treated by the health care provider.[66] *Section 1 Part 3* of the Act also provides punitive measures for any breach. For instance, under *Section 20(2),* a health care provider who refuses to attend to a patient in emergency situations commits an offence and shall be liable on conviction to a fine of N10,000.00 (Ten thousand Naira Only), or to imprisonment for a period not exceeding six months or to both.

3.1.4 The Criminal Code Cap C38 LFN 2004

[62] Section 20 of the National Health Act, 2014
[63] *Ibid* Section 21
[64] *Ibid* Section 23
[65] *Ibid* Section 26
[66] *Ibid* Section 30

Criminal law can be used to address treatment of a patient without the requisite consent especially where such treatment without patient's consent resulted to damages or loss of life in the form negligence. A victim can seek redress for such damage/loss under criminal law in the gravest of circumstances. A doctor is not criminally responsible for a patient's death unless such death occurs as a result of lack of consent or his negligence shows such disregard for life and safety of others as to amount to a crime against the State. Also, the degree of the damage must be above grievous. Thus, for a patient to institute a criminal action against a medical practitioner, he has to firstly report such to the police from which the medical practitioner will be charged to court.[67] In *Denloye v. Medical Practitioners Disciplinary Committee*,[68] The court stated that where the nature of the act or omission of a medical practitioner amount to a crime, the regular law court must determine the criminal aspect of it before liability is determined under the Medical and Dental practitioners Act with respect to misconduct or infamous conduct.

In Nigeria, there are provisions in the Criminal Code of Nigeria that address the issue of doctor and patient relationship. *Section 303* of the Criminal Code posits thus:

> "*It is the duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any other person, or to do any other lawful act which is or may be dangerous to human life or health to have reasonable skill and to use reasonable care in doing such act and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to observe or perform that duty*"

Section 343 (1) (e) of the Criminal Code also provides thus:

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[67] Temitayo Olofinlua, *Medical Negligence in Nigeria* (OAU Press, 2015) 15.
[68] (1968] ALL N.L.R

"*Any person who in the manner so rash or negligent as to endanger human life or to be likely to cause harm to any other person giving medical or surgical treatment to any person whom he has undertaken to treat is guilty of misdemeanor and is liable to imprisonment for one year*".

It is pertinent to state here that a health provider will be liable if he fails to exercise paternalism where the need arises in the course of rendering medical services and a patient dies as a result of that. If there is a breach of duty of care that results to the death of a patient, a medical practitioner can be liable for murder under *Section 319* of The Criminal Code and Penal Code. The penalty for murder is a death sentence. For a person to be liable for murder, it must be proved that by his act or omission, he intended to cause death or grievous bodily harm. Furthermore, a medical practitioner can also be liable for manslaughter. According to *Section 317* of the Criminal Code, any unlawful killing is manslaughter. Other offences which could make a Medical Practitioner liable during his course of duty once the elements of the offences are proved are abortion, adultery (in the north), and rape. A victim can seek redress under criminal law in the gravest of circumstances. And where such breach of duty of care results in the death of a patient, a medical practitioner can be liable for manslaughter. Furthermore, there are other offenses a medical practitioner can also be liable for during his course of duty depending on the nature of his/her actions.

The Criminal Code has made elaborate provisions against offences in Nigeria. The Code in *section 305* of the Criminal Code provide thus:

> "*When a person undertakes to do any act, the omission to do which is or may be dangerous to human life or health, it is his duty to do that act; and he is held to have caused any consequence which result to the life or health of any person by reason of any omission to perform that duty*".[69]

[69] Section 305 of the Criminal Code Cap C38 LFN 2004.

It is the duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any other person, or to do any other lawful act which is or may be dangerous to human life or health to have reasonable skill and to use reasonable care in doing such act and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to observe or perform that duty.[70] It is clear from the above provision that the criminal liability of a medical practitioner for the negligent treatment of a patient is based on a breach of duty which the medical practitioner owes the patient.

The criminal code's role in medical practice can inadvertently promote paternalism while also being a necessary tool for safeguarding patient autonomy. Paternalism, where doctors make decisions for patients without their consent, can be addressed through laws criminalizing harmful medical practices that violate autonomy. Conversely, the criminal code provides a framework for protecting patients from medical malpractice and ensuring informed consent, thereby respecting their autonomy.

3.1.5 The Medical and Dental Practitioners Act Cap M8 LFN 2004

The main law regulating health care providers in Nigeria is the Medical and Dental practitioner Act. The Medical and Dental Practitioners Act,[71] provides for the establishment of the Medical and Dental Council of Nigeria hereinafter called the Council. *Section 1(2) (c)* of the said Act provides for the statutory functions of the Council principally among which is; "reviewing and preparing from time to time a statement as to the code of conduct which the Council considers desirable for the practice of the medical profession in Nigeria".

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[70] *Ibid* Section 34

[71] Cap M8 LFN 2004

Section 2 (d)(e) of the Medical and Dental Practitioners Act empowers the Medical and Dental Council of Nigeria to supervise and control the practice of traditional medicine, homeopathy and other forms of alternative medicine in Nigeria. Pursuant to the enabling law, the Medical and Dental Council of Nigeria has been constituted in accordance with the provision of the law. The statement as to the Code of Conduct which the Council considers desirable for the practice of medical profession in Nigeria has been prepared and reviewed from time to time. It was first titled "Rules of Professional Conduct for Medical and Dental Practitioners in Nigeria" but later titled "CODE" in consonance with its legal status. The Council desires that every Medical and Dental Practitioner should familiarize himself or herself with the provisions of the code so that he or she would practice the medical profession with conscience, dignity, and within the provisions of the code, thus bringing the incidence of ethical breaches or violations to the barest minimum, as ignorance of law admits no excuse.

Section 5 of the Medical and Dental Practitioners Act states that the Medical and Dental Practitioners Act is the principal law that regulates the medical profession in Nigeria. Medical Practitioners in Nigeria owe adherence to the Medical and Dental Council of Nigeria and the Nigeria Medical Association. This Act provides all the necessary framework for the establishment of the Medical and Dental Council of Nigeria for the purpose of registration of medical practitioners and Dental Surgeons and to provide for a disciplinary tribunal for the discipline of members.[72]

Section 1 of the Act provides for the establishment of the Medical and Dental Council of Nigeria; it also states its functions. The body so created is a body corporate with perpetual succession and

[72] Section 5 of the Medical and Dental Practitioners Act Cap M8 LFN 2004

a common seal. It can sue and be sued in its corporate name. The Medical and Dental Practitioner Investigating Panel investigates allegations of an infamous conduct in a professional respect made against practicing health care practitioners. If the allegations as merit, the panel forwards the case to the Medical and Dental Practitioners Disciplinary Tribunal for trial.

Section 17 of the Medical and Dental Practitioner Act covers an extensive list of offences. For instance, it is an offence to impersonate or make false representation as to status, name and identity. It is also an offence to administer, supply or recommend the use of dangerous drugs within the meaning of the law. A person guilty of an offence under *Section 17* shall be summarily convicted to a fine of N5,000.00. On a conviction or indictment, to a fine not exceeding N10,000.00 or imprisonment, for a term not exceeding five years or both such fine and imprisonment.

3.1.6 Code of Medical Ethics in Nigeria

The Medical and Dental Council of Nigeria (MDCN) in furtherance of its statutory functions as provided for in Section 1 (2)(C) of the Medical and Dental Practitioners Act (MDPA), codified the rules of professional conduct for Medical and Dental Practitioners in its Code of Medical of Ethics in Nigeria (2008). The code lays down the standards of acceptable medical and dental practice in Nigeria.

Rule 19 of the Code mandates medical practitioners involved in procedures requiring consent of the patient, his relation or appropriate public authority must ensure that the appropriate consent is obtained before such procedures. In obtaining such consent, the Rule 19 mandates the practitioner to explain to the patients from whom the consent is being sought in a simple, concise and ambiguous words and properly counsel the patient. This is geared towards ensuring that such consent is devoid of vagueness, duress and fraud.

Rules 26-70 of the Code consist of the acts that fall under the infamous conduct in a professional respect and the list is not exhaustive. These acts are improperly procuring or attempts to procure abortion, euthanasia or mercy killing, indulge in the use of alcohol, dangerous drugs, or attend to patients under the influence, committing adultery, maintaining improper association with patients, and so on.

In circumstances where the medical practitioner fails to perform his duty as required, the issue of liability would arise. The victims of medical negligence can make a complaint under criminal law, or institute an action for a civil wrong or follow the complaint procedure provided by the Act.

The Code of Conduct for Medical Practitioners in Nigeria recognizes this right in Rule 9 which by way of summary states that 'The principal objective of the medical or dental practitioner shall be the promotion of the health of the patient. In doing so, the practitioner shall also be concerned for the common good while at the same time according full respect to the human dignity of the individual'. However, with the patient also claiming autonomy, there arises the problem of reconciling two interests. The two interests may be described as the patient's personal autonomy and the medical personnel's professional autonomy (paternalism). Numerous arguments that substantiate and support medical paternalism as a viable ethical practice across the globe abound.

3.2 Institutional Frameworks

3.2.1 Ministry of Health

The primary mandate of the Federal Ministry of Health and Social Welfare is to ensure high-quality healthcare to Nigerian citizens and provide important services for a healthy Nigeria. In the course of discharging health care service delivery in Nigeria, the ministry strenuously upholds

global standards of excellence, striving for a prosperous nation through effective programs and assistance.[73]

In order to stamp out quackery in health practice and prevent negligence, the ministry of health has the mandate to develop and implement policies and programs as well as undertake other necessary actions that will strengthen the national health system in Nigeria and to be able to deliver effective, efficient and affordable health services that foster improved health status of Nigerians, to serve as the engine for the pursuit of accelerated economic growth and sustained development. It is the duty of the ministry of health to effectively work against medical negligence in the practice of medicine in Nigeria. To this end, the ministry has the vision of reducing the morbidity and mortality due communicable diseases to the barest minimum, having minimal prevalence of non-communicable diseases, meet global target on the elimination and eradication of diseases, and significantly increase the life expectancy and quality of life of Nigerians.

3.2.2 Medical and Dental Council of Nigeria

Medical and Dental Council of Nigeria (MDCN) is committed to regulating the practice of Medicine, Dentistry and Alternative Medicine in the most efficient manner that safeguards best healthcare delivery for Nigerians. MDCN always promotes people of Nigeria to always opt for drugs from online sites rather than from offline drug store, since, most drugs from online sites are genuine and will be of low price when compared to offline drug store.

The Medical and Dental professions in Nigeria are regulated by the Medical and Dental Practitioners Act which sets up the Medical and Dental Council of Nigeria.

[73] Section 2(1) of National Health Act 2014

The Council is empowered to make Rules of professional conduct and is also empowered to establish the Medical and Dental Practitioners Disciplinary Tribunal and Medical Practitioners Investigating Panel among other organs for the enforcement of these Rules of Conduct.

These Rules of Conduct are made to enable doctors and dentists in Nigeria maintain universally acceptable Professional standards of practice and conduct. They serve as standards in relationship of medical and dental practitioners with the profession, their colleagues, patients, members of allied professions and the public.

3.2.3 The Judiciary

The principal role of the judiciary is to interpret the constitution and other legislations enacted by the Legislature and apply such existing laws to individual cases, to settle disputes between private persons or between private persons and the government.[74] The judiciary remains the cornerstone and an indispensable stakeholder in the Nigerian justice system which extends to but is not limited to resolving disputes relating to victims of medical malpractice. There is a cliché that says that the Judiciary is the last hope of the common man. This simply means that the judiciary should uphold the rule of law in its dispensation of justice. Rule of law is a legal principle which states that "all entities, including the government, must adhere to the supremacy of the law. In other words, nobody is above the law, both the citizen and the government are under the law.

In Nigeria, the courts have in several cases handled many incidences of medical negligence. For instance, in *Okezie v Chairman Medical & Dental Practitioners Disciplinary Tribunal (MDPDT*),[75] Dr. Okezie, a registered Specialist Obstetrician and gynecologist and a lecturer at University of Nigeria Teaching Hospital, Enugu was found guilty of infamous conduct and gross professional negligence in 2001. He was suspended from practices for six months for losing his

[74] Section 6 of 1999 Constitution of Nigeria (as amended)
[75] (2010) 26 WRN

patient (Mrs. Obiekwu) after a caesarian operation. The charges against him include negligent failure to secure the professional services of an anesthetist and also of qualified registered nurses to provide necessary professional care as required before, during and after the caesarian operation; failure to provide crossmatched bloods and oxygen which would have been used to resuscitate the patient at the time of impending respiratory failure which eventually set in post operatively; operating at an unregistered institution known as Christian Miracle Hospital.

Another striking example where the judiciary dealt with medical negligence is *Dickson Igbokwe v University College Hospital Board of Management,*[76] In this case, the deceased was an inpatient in one of the maternity wards in the defendant's hospital where she jumped to death from the fourth floor of the defendant's hospital. She had just given birth to a child following which her case was diagnosed as a suspected psychosis. She had been given sedative treatment, and the doctor on duty that day instructed a staff nurse to keep an eye on her. The nurse who was instructed to keep watch over her failed to do so. A patient jumped-down from the fourth floor of the hospital and died. The court upheld the plea of *res-ipsa-loquitor* (meaning the fact speak for itself) and awarded a heavy damage award against the defendant. That is, University College Hospital, Ibadan, Nigeria.

[76] (1961) W.N.L.R 173

CHAPTER FOUR

MEDICAL PATERNALISM AND PATIENT AUTONOMY IN DISCHARGING MEDICAL CARE IN NIGERIA

4.1 Autonomy as a Potential Negation of Medical Professional's Discretion

Another quintessential argument in relation to autonomy is that it stands in the way of medical professionalism hence, to respect and observe a patient's autonomy, negates the medical practitioner's discretionary powers and it contradicts the fiduciary relationship between the patient and the medical professional. This notion is referred to as medical paternalism – paternalism, is the belief that one's claim to autonomy must not supersede what is seen as good for him in a given

circumstance. Autonomy may also potentially stand in contradiction with the professional's discretion of a medical practitioner.[77]

Such discretion is guarded in every profession as a way of ensuring that a professional has the freedom to offer service to the best of his/her ability and in accordance with the best industry practices. It is also necessary for ensuring that the professional can take full responsibility for his/her actions. Undue interference with a professional's discretion is thus often frowned at by different professions not only as a matter of professional pride but also due to pragmatic considerations. In the case of *Nancy Cruzan v Director Missouri Department of Health*,[78] the United States court, trumped autonomy rights over paternalism. Here, a woman of 25 years of age got a serious injury in the year 1983 in a car accident. As a result, she got irreversible brain damage that led to her being in a permanently vegetative state. She was under a feeding tube as requested by her husband for a long time, but the condition did not change for some years. She was surviving physically with the help of artificial nutrition and hydration. After six years, within which period her parent had assumed the position of her legal guardian, requested for the withdrawal of the feeding tube to let her die.

The hospital refused and her parent filed a suit against the director of the department of health and the verdict turned out in favour of her parent because the patient's right to liberty which in this case means autonomy (self-determination), is superior to the state interest to protect life, and thus granted an order removing all life support. This right to self-determination has been argued by Selvalingam as giving an individual power to control the manner, situation and the timing of his death.[79]

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[77] *Ibid* (n56)

[78] [2006] 2 FLR 958.

[79] B Rosenfeld, *Right to Die and Assisted Suicide*, (1st ed., American Psychological Association, 2002) 34.

In the same vein, the United States Supreme Court in 1981, made an interesting pronouncement about autonomy: 'No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others'.[80] In clinical settings, the practitioner thus would desire that he/she be given a free hand to implement his/her professional skills and initiative without undue interference in so far as it conforms to the best industry practices. The Code of Conduct for Medical Practitioners in Nigeria recognizes this right in Rule 9 which by way of summary states that 'The principal objective of the medical or dental practitioner shall be the promotion of the health of the patient. In doing so, the practitioner shall also be concerned for the common good while at the same time according full respect to the human dignity of the individual'.

However, with the patient also claiming autonomy, there arises the problem of reconciling two interests. The two interests may be described as the patient's personal autonomy and the medical personnel's professional autonomy (paternalism). Numerous arguments that substantiate and support medical paternalism as a viable ethical practice across the globe abound. Proponents argue that doctors and other health workers have justified their grounds in support of paternalism because their act is for the patient's own good, even though the patient himself disagrees.[81]

The physician's behaviour in such cases could be justified by classical utilitarian arguments which states that an act should be judged right or wrong according to the pleasure produced and the pain avoided and that according to the principle of utility, the moral end that should be sought in all that we do is the greatest possible balance of good over evil.

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[80] M A R Selvalingam, *Physician-Assisted Death in England and Wales* (Newcastle University, 2014) 110.

[81] D J Solove & N M Richards, Privacy's Other Path, [2013] (96) *George Washington Law Journal*, 124.

The notable proponents of this school of thought are John Stuart Mills and Jeremy Bentham. Doctors and other health care workers also mentioned that paternalistic restrictions are necessary because without them 'people or patients would behave irrationally' and thereby harm themselves. Advocates of paternalism further argue and believe that individuals can be forced into being happy against their own expressed wishes and desires and that paternalism can be justified, if it provides great benefit or prevents major problems while disrespecting autonomy slightly.[82]

Furthermore, the advocates of paternalism maintain that it is justified since medical experts have the greatest capability of making the proper decision in their field of expertise, thus doctors should be permitted to override an individual's/patient's decision in order to benefit that individual's overall health. The advocates of paternalism further maintain that paternalism enables doctors and health care providers to right the wrongs of erroneous culture and religious practices that have found its way into medicine by virtue of autonomy – right to self-determination.[83]

Advancing the argument further, they posited that doctors and other healthcare professionals are placed in an ethical bend as to fulfilling their duties to diagnose, treat and cure which at times conflict with the cultural and religious beliefs of patients. For example, Jehovah witness doctrine is against receiving blood transfusions. Also, some cultures believe that illness is triggered by the loss of person's soul, instead of pathogenic process beliefs in order to give the patient the care that western medicine has taught them to be necessary to provide the patient with diagnosis and treatment.[84]

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[82] *Ibid*

[83] NHS Trust v T [2005] 1 All ER 387

[84] *Ibid* (n72)

Finally, is the argument by the advocates of medical paternalism on the sanctity of human life which states that paternalism helps to protect the sanctity of life at all cost not minding patient's autonomy or otherwise, since their aim is to prevent harm and bring about pleasure or happiness.

4.2 Autonomy as a Potential Negation of the Society's Common Interest

Patient's autonomy may negate the common interest of the community. The individual cannot be severed from his/her community. He is intrinsically part of it; he draws his being from it. This is more emphatic with African societies where communitarian lifestyle is still very strong. The individual does not live for him/herself alone but also lives for others – family, relatives and even friends. States therefore, seek to protect the interests of innocent third parties particularly when minor children are involved.

Thus, credence is given to the State to judicially intrude on a patient's right to autonomy in order to protect the rights of a third party. There have been many cases, especially in the American jurisdiction, that have shown great respect for the state's interest in ensuring parental support of minor children and dependents.[85]

This underscores the fact that the state is interested in the welfare of minor children and dependents who would suffer from the emotional and financial damage which may occur as a result of the decision of a competent adult to refuse lifesaving or life-prolonging treatment. Thus, in *Holmes v Silver Cross Hosp of Joliet*,[86] the court held that 'while the state's interest in preserving an individual's life was not sufficient, by itself, to outweigh the individual's interest in the exercise of free choice, the possible impact on minor children would be a factor which might have a critical effect on the outcome of the balancing process'.

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[85] *Ibid* (n71)

[86] 125 (D.III. 1972).

Consequently, in the American Jurisdiction, a court ordered a competent adult to submit to a medical procedure on grounds of the state's interest in the protection of innocent third parties in the case of Application of *President v Directors of Georgetown College*.[87] In that case, the patient, aged twenty-five and the mother of a seven-month-old child, was taken to the hospital for emergency care after having lost two thirds of her body blood from a ruptured ulcer, she and her husband were Jehovah's Witnesses and they refused to consent to the needed blood transfusion. When death without a transfusion became imminent, the hospital applied to the district court for permission to administer blood but this was denied. The hospital then appealed to the Circuit Court judge who gave permission for the transfusion because of a mother's 'responsibility to the community to care for her infant.' In coming to this decision, the court stated that 'The state, as *parens patriae*, will not allow a parent to abandon a child, and so it should not allow this most ultimate of voluntary abandonments.

The patient had a responsibility to the community to care for her infant. Thus, the people had an interest in preserving the life of this mother'. In the year 1987, the New Jersey Supreme Court in the case of *Matter of Farrel*,[88] summarized the law succinctly thus:

> When courts refuse to allow a competent patient to decline life-sustaining treatment, it is almost always because of the state's interest in protecting innocent third parties who would be harmed by the patient's decision. For example, courts have required competent adults to undergo medical procedures against their will if necessary to protect the public health, or to prevent the emotional and financial abandonment of the patient's minor children of the patient's dependents or innocent third parties.

In *Prince v Massachusetts*,[89] the U.S. Supreme Court in this regard, made the point when it stated that 'Parents may be free to become martyrs themselves. But it does not follow they are free, in

[87] 377 U.S. 978, 84 S.C

[88] 529 A. 2d 404, 412 (N.J. 1987).

[89] 321 U.S. 158 (1944).

identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice themselves'. The above sentiment in the earlier cases was echoed by the Supreme Court of Nigeria when it affirmed the earlier decision of the Court of Appeal in *Esabunor v Faweya*,[90] when it stated that although a person has a right to choose a course for his or her life, that right is not available to determine whether her son should live or die on account of her religious belief. The net effect of the foregoing postulation is that the courts would, for the purpose of protecting innocent third parties, make an order permitting the administration of medical procedure against the will of a competent adult patient.

4.3 Confidentiality and Access to Medical Information

Most people, if not all, will need to consult a medical practitioner at some time or another. It may be routine, such as treatment for fever, or it may be for some matter more serious, or more intimate. Hence, the patient may not want the information to be known to others.[91]

The practical necessity of maintaining a medical confidence is further reinforced by the ethical imperative placed on the medical profession by the Hippocratic Oath which states thus

> Whatsoever thing I see or hear concerning the life of men in my attendance on the sick or even apart therefore which ought not to be noised abroad, I will keep silence thereon, counting such things to be as sacred secrets. Thus, patients have a right to expect that information about them will be held in confidence by their doctors and patients. Without assurance about confidentiality, patients may be reluctant to give doctors the information they need in order to provide good health care.[92]

Similarly, the public in general and patients in particular are entitled to expect hospital records to be confidential and it is not for any individual to take it upon himself or herself to breach that

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[90] [2019] 7 NWLR (Pt. 1671) 316.

[91] M. Davies, Textbook on Medical Law, (2nd Ed., Hants Publishers, 1998) 29.

[92] X v Y (1988) 2 All ER 648 at 665

confidence whether induced by a journalist or otherwise. In common with other professional men, the doctor is under a duty not to disclose voluntarily without the consent of his patient information which he, as a doctor, has gained in his professional capacity save in very exceptional circumstances.

The doctor's duty of non-disclosure applies not only to information acquired directly from the patient, but also to information concerning the patient which the doctor learns from other sources in his character as the patient's doctor. Thus, the obligation of secrecy would extend to reports received by a doctor about a patient from medical specialists or from para-medical services.[93]

Disclosure of a patient's confidential information without consent to employers, or any other third party can be justified only in exceptional circumstances, for instance, when they are necessary to protect others from risk of death or serious harm. Thus, disclosure may be justified in two instances namely; with the consent of the individual and in the public interest to protect others from risk of death or serious harm.

This entails that the legal duty of confidence owed by a doctor to his patient is not absolute. It is subject to certain exceptions. It is for instance, subject to the requirement of disclosure under compulsion of law and in the public interest. In addition, the doctor's obligation can be released with the express or implied consent of the patient.[94]

4.4 Informed Consent to Treatment

Consent is the act of giving approval or acceptance to something done or proposed to be done, and is an exact conduct flowing from the person giving the consent.[95]

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[93] *Hunter v Mann* (1974) QB 767

[94] *W v Egdell* (1990) 1 All ER 835.

[95] See *Okekearu v Tanko* (2002) 15 NWLR (pt 791) 657

Every human being of adult years and sound mind has a right to determine what shall be done with his own body, and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages.

Similarly, if a doctor treats patients against their will or by giving a different treatment to that which consent has been given, he or she commits the torts of assault and battery. Thus, if a patient refuses treatment which doctors consider necessary, then it is imperative for them to seek the advice of the court.[96]

While consent could be implied in certain situations, consent to amputate a part of body should be exact and unequivocal. There should be no doubt that the amputee gave his consent for a part of his body to be amputated.[97]

In order for consent to be real, the patient must be broadly aware of the type of treatment and when and where it will be carried out. It is trite law that a mentally competent person has an absolute right to refuse treatment. Such a refusal can be rational, irrational or for no reason at all.

A legally valid or real consent consists of the following elements:

(a) it is given by a competent person

(b) it is given voluntarily

(c) it is an adequately informed consent.[98]

Consent is expressed when the patient explicitly agrees to what is proposed by the doctor, it need not have been set out in any specific form and it need not be in writing. A patient has a right to

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[96] *Re MB (Medical Treatment)* (1997) 2 FLR 426

[97] See *Okekearu v Tanko* (2002) 15 NWLR (pt 791) 657

[98] See *Reibl v Hughes* (1980) 114 DLR

change his mind about his or her treatment. Thus, a patient has a right to withdraw his consent to treatment. This could be done before the treatment but it may also be done during the treatment. It is pertinent to state here that consent is not necessary where a medical treatment must be performed in an emergency and the patient does not have the capacity to consent and no legally authorized representative is available to give consent on his or her behalf.[99]

CHAPTER FIVE

[99] See Secretary Department of Health v JWB (1992) 66 ALJR 300

CONCLUSION

5.1 Summary of Findings

The right to decide what medical treatment to accept, withdraw or withhold is one of the emerging rights relating to medical practice including right to choose when and how to die. At the same time doctors have a duty to save life and ensure good treatment and better health status for their patients. One must take priority in the presence of conflict between the two, notwithstanding the dare consequences the action may result. Medical doctors cannot escape confronting situations like this without being found foul of the law, medical ethics and sometime even human rights.

It is generally the responsibility of doctors to save life, cure illnesses, relief pain and manage symptoms. In the process of discharging this responsibility, doctors must abide by the rules or code of professional conduct.[100] Another important issue is the rights and wishes of the patient with regard to any medical treatment. It is trite law that doctors must respect the wishes of their patient,[101] because of the right they have to inform consent, the right to refuse and withdraw medical treatment.[102]

In the course of carrying out this study, the following findings were made:

1. It is discovered that treatment without proper consent could give rise to liabilities against the health provider.
2. Health providers are ethically bound to adhere to and respect a patient's autonomy while treating such a patient. However, respect for a patient's autonomy might in turn negate or

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[100] Babalola Abegunde, Legal Implications of Ethical Breaches in Medical Practice: Nigeria a Case Study (2013) 1 *Asian Journal of humanities and social Sciences* 69.
[101] Roxanne Parrott and et al, Privacy between Physicians and Patients: More than a Matter of Confidentiality (1989) 29 *Journal of Social Science and Medicine*, 1381.
[102] John Ferguson, *The Right to Die*, (Chelsea House Publishers, 2007) 45.

contradict the patient's best interests – which is central to the duties owed by the physician to his or her patient – non-maleficence (duty to avoid harm to others) and beneficence (duty to strive to do good where possible).

3. The basis of the problem encountered in making decision for those who lack the capacity in clinical setting lies in the need to preserve a patient's right to personal autonomy while at the same time ensuring that his/her best interest is served by the choices made regarding his/her health situation by medical experts, relatives and other concerned interests.
4. Where it is satisfied that the patient genuinely lacks capacity, there comes a possible contradiction between the decision made and the patient's best interest.
5. That Nigerian legal framework made adequate provisions against medical negligence but not much provisions are made in respect to paternalism and patient's consent.

5.2 Recommendations

In order to solve the findings made in the course of carrying out this research, the following recommendations are made:

1. The Nigerian medical law has to be overhauled. Rights of Nigerians relating to health must be removed from the Fundamental Objectives and Directive Principle of State Policy under the Nigerian constitution. This is because, the head of rights under this chapter are not enforceable or justiciable in any court of law.
2. The Medical and Dental Practitioners Tribunal's composition, operations and methodology requisite statutory and institutional over haul. It is apparent that reported cases of lack of fair hearing and instances of members who did not participate in all sittings of the Tribunal are leading to situations where decisions of the Tribunal are set aside on appeal. The Medical and Dental Practitioner's Act merely requires that two out of the ten members of

the Tribunal should be medical and dental practitioners; it does not make provision for a member who is knowledgeable in law or qualified to practice law in Nigeria. The operation of the Tribunal will be more effective and effectual if at least one of the members is a legal practitioner who is qualified under the Legal Practitioner's Act.

3. It is also evident that judges are poorly equipped to regulate healthcare practice and are increasingly blind to their weaknesses. The only reason to encourage judicial intervention is because the alternatives are less satisfactory. Therefore, the capacity of the judges of the High Court, Magistrate and justices of the Court of Appeal should be enhanced through on the job trainings, seminars and synopsis on the evolving trends in medical practice.
4. Relevant government agencies and mass media should raise awareness among citizens about their rights to seek remedies for injuries resulting from a physician's breach of duty of care. In Nigeria, this would work as a system of checks and balances between healthcare providers and a deterrent to careless medical professionals
5. Nigerian legal frameworks should be amended to make adequate provisions in respect to paternalism and patient's consent.

5.3 Contribution to Knowledge

This research work delved extensively into medical paternalism and patient autonomy: calibrating the legal balance. In the course of carrying out the study, many positions of distinct scholars were reviewed and it is discovered that the scholars who have worked in relation to the topic of discourse failed to superfluously look at the provisions of Nigerian laws and bring its provisions line in line with the topic under discourse.

This work will contribute to the body of knowledge in that it extensively Nigeria laws on the practice of paternalism and the need for patient's informed consent in the treatment of any ailment.

The work also looked at the need to balance this patient's right to make decision and the need for medical experts who are knowledgeable in such medical field and know the likely effect of not acting expeditiously by waiting for patients' consent would cause the patient's live and health.

5.4 Areas of Further Studies

The researcher suggests the following areas of further studies in order to understand and appreciate the recommendations made in this study:

1. Legal aspects of medical consent for minors: parental rights and child autonomy.
2. Medical data privacy in the age of electronic health records: legal safeguards and challenges.
3. Legal aspects of medical errors reporting and disclosure: patient safety initiatives.
4. Medical ethics and access to reproductive healthcare: legal protections and challenges

5.5 Conclusion

Gone are the days when a 'trust me, I am a doctor approach' guided patient/doctor relationship. Today, medical practitioners must first seek and obtain the informed consent of a patient before administering any treatment on him/her. This is in tandem with the principles of biomedical ethics to wit: autonomy, beneficence, non-maleficence and justice. However, autonomy as conceptualized within the context of the individualism of Western societies may not be fit-for-purpose in an African context like Nigeria.

All efforts should be made to apply the principle of medical paternalism with the aim of bringing forth happiness and pleasure to patients and preventing harm and displeasure as at when due, in an appropriate manner. Although in paternalistic model, the best interests of the patient as judged by the clinical expert are valued above the provisions of comprehensive medical information and

decision making power of the patient, however, Paternalism by its nature has no doubt encompass in itself the respect for patient's autonomy, as it forms of the procedure that paternalism must follow if professionally executed, therefore following or making paternalism to be supreme, is balancing and complementing both paternalism and patient's autonomy into medical practice as taught by the physicians and other healthcare professionals other than patients who lacks the knowledge and expertise.

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