AN EXAMINATION OF THE EXCEPTIONS TO CONSENT AS A REQUIREMENT TO MEDICAL TREATMENTS AND PROCEDURES***

Abstract

It is a fundamental principle of medical law and ethics that before treatment commences on a patient, such medical practitioner should obtain the consent of the patient**.** The consent must be free, prior and informed and where it is involuntarily obtained, it may result in an action for battery. However, in practice, circumstances exist where physicians or healthcare givers are exculpated from liability even when he/she failed to obtain the informed consent of a patient before commencing medical treatment or procedure. This paper seeks an examination of the exceptions to consent as essential requirement to medical treatments. The paper adopts doctrinal methodology in achieving this examination. The paper finds that barring the general requirement of consent before medical treatments, exceptions are rife where medical practitioners treat without first obtaining informed consent of the patient and he is exempted from liability in torts of battery, assault and false imprisonment. It is recommended that a robust legal framework for the protection of physicians or health care providers treating cases of emergency, mental incapacitated patients, children or minors or other cases of exceptions to consent be enacted to ensure and encourage the best treatment of the patient in the overriding interest of the public.

Keyword: Examination, Exceptions, Consent, Medical, Treatment, Procedure.

1. Introduction

The necessity of obtaining a valid consent before medical treatments cannot be over-emphasized because it is both a precondition of autonomous decision-making and a requirement of lawful treatment.[1] In fact, it is a fundamental principle of medical law and ethics that before treatment commences on a patient, such medical practitioner should obtain the consent of the patient.[2]This is so, as the law forbids the unlawful or unjustifiable interference with the body of another man and the unlawful detainment of a person.[3]Where such unlawful and unjustifiable interference occur, the tort of battery, assault or false imprisonment would have been committed.[4] For consent to be valid and proper before the law, it must be an informed one, which possesses all the essential elements required by law.[5] However, in practice, circumstances exist where the informed consent of patient may not be obtainable and healthcare giver administers medical treatment or procedure on the patients. This is to say, in express terms, that there are limitations and inhibitions to obtaining medical treatment or procedure by physicians from the patients. For instance, medical treatment or procedure involving emergency or unconscious patients, mentally incapacitated patients, medical cases of necessity, children or minor, therapeutic privilege public policy or legislative powers etc. In these situations, obtaining an informed consent of a patient is increasingly difficult or near impossible and where medical personnel embarks on medical treatment or procedure on a patient having any of the above exceptional circumstances without obtaining an informed consent, he is excused in law. These

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[1]Shaun D Pattinson, *Medical Law and Ethics* (3rd ed, Sweet & Maxwell U K 2011) 97

[2]Jonathan Herring, *Medical Law and Ethics* (Oxford University Press 2006) 83

[3] Folashade Rose Adegbite, 'An Examination of the Principle of Consent in Medical Treatment: Matters Arising,' *Danfodiyo University Journal of Private and Business Law (UDUJPBL)* (2022) (2) (3) 1

[4] Ibid

[5] Ibid

exceptional circumstances constitute the backbone of this paper as it tends to examine in details the exceptions to consent as a desideratum to medical treatments or procedures.

2. Exceptions or Limitations to Consent as a Requirement to Medical Treatments and Procedures.

The idea that an individual has right to autonomy and self-determination or unfettered right to determine what happens to his/her life or body is limited by a good number of exceptions which are discussed hereunder.

2.1. Emergency Treatment/ Unconscious medical cases.

An emergency exists when there is sudden marked change in the patient's condition so the action is immediately necessary for the preservation of life or the prevention of serious bodily harm to the patient or others, and is impractical to first obtain consent.[6]It has been submitted that in cases of emergencies, consideration regarding consent will be set aside and the doctor will have to do the necessary to save from death or permanent disabilities.[7] As a general principle under the common law doctrine of emergency, it is lawful for the doctor to treat without consent if the doctor is of the opinion that irreparable harm or death might ensue by delaying treatment.[8]In *Sidaway v Bethlen Royal Hospital*,[9]the House of Lords held that a doctor operating without consent, save in emergency or case of mental incapacity, commits trespass and criminal assault. In *Malette v Shulman*,[10]a doctor administered blood on a Jehovah's witness patient, though he had been informed that a card in her purse stated she will not consent to blood transfusion under any circumstance. When she recovered, she sued the doctor for disregarding her wish. The doctor's argued that the emergency situation resulting from her serious car injury was one that required urgent lifesaving blood transfusion that ought to override her medical alert instruction. He further argued that society has an interest in the preservation of life and that the particular emergency justified his disregard of the card and that he had a medical duty to save life. He reasoned that since the doctor in such emergency could not communicate the serious life-threatening nature of the situation to the patient, the patient could not make an informed refusal to the treatment deemed necessary.[11]Where there is an adverse refusal, emergency situation will not invalidate this refusal of consent, or if there is sufficient time to obtain consent from next of kin or relative, the doctrine of emergency will not suffice.[12]

An unconscious patient has no capacity to give consent but it is presumed that if he were capable of giving such consent, he will do so to save his/ her life. In this circumstance, the doctrine of necessity will apply. In criminal and civil law, the doctrine of necessity give legitimacy to an otherwise wrong act but the intention is of paramount importance, which is- to save or preserve a human life.[13] Therefore, a physician who carries out a procedure or treatment on an unconscious

[6]J W Berge and others, *Informed Consent: Legal Theory and Clinical Practice* (Oxford University Press 2001) 76. Cited in Folashade Rose Adegbite, 'An Examination of the Principle of Consent in Medical Treatment: Matters Arising, *Usman Danfodiyo University Journal of Private and Business Law* (2022) (2) (3)11

[7]S R Speller, *Speller Law Relating to Hospital and Kindred Institutions* (6th ed., London: Lewis1978)772

[8]Shaun D Pattinson, *Medical Law and Ethics* (3rd ed, Sweet & Maxwell UK 2011) 97

[9](1985) AC 871 at 87, 904

[10](1990) 47 DLR 18

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

[12]Ibid at 68-69

[13] J.K Mason & Mc Call Smith, *Law & Medical Ethics* (7th Edn Oxford University Press 2006) 350-411. [6] Ibid 351.

patient to safe his/ her life should not incur criminal liability; hence necessity is a defence for non-consensual treatment especially in an unconscious patient.[6]

Pointedly, a physician should not take undue advantage of unconscious state of a patient to carry out a procedure more extensive than what is immediately required to save the life of the patient.[14]

This position was established in two renowned Canadian cases where a distinction was made between procedures justified by necessity and that of mere convenience. In *Marshall v Curry,*[15] the plaintiff sought for damage for battery against a surgeon who removed a testicle in an operation of hernia. The surgeon claimed that the testicle was diseased and would affect the life of the patient if not removed immediately. The court held that the action of the surgeon was necessary at the point.

However, in the case of *Murray v Mc Murdy*,[16] the action of battery succeeded where the surgeon sterilized a female patient by removing her uterus without her consent during a caesarian section operation. The court held that the procedure of sterilization is not detrimental to the life of the patient and could be decided later. Therefore, a physician in the course of duty must obtain a valid consent before invasive procedures or treatments are carried out on a patient to avert criminal liability.

2.2. Consent of a Child / Minor

A minor is a person yet to attain maturity. Treatment of minor raises several ethical problems.[17] Parents are minors' primary care givers, concerned with their welfare, including medical.[18]Parents, in furtherance of parental duties or rights may make decisions on treatment that others (the community/state, may be hospital authorities) consider unreasonable.[19] It is not uncommon to hear parents tell hospital authorities that as a result of their customary and or religious belief, they may not accept certain medical procedures such as blood transfusion for their children. Such situations are capable of creating ethical dilemma for hospital, especially if the health condition of the minor patient makes it imperative to apply blood therapy.[20] Hospitals faced with such challenges are required to make balanced decisions considering the concern of the parents, its duty to save life, the law and the general position of ethics in this area.[21]. It is believed that parents have the capacity and wisdom to make accurate and informed decisions that affect the lives of their children.[22]This may be premised on the fact that parents bear the long time effect or consequences of choice of treatment on behalf of their children.[23]

The ability to give consent is not limited to the statutory age of majority.[24] In medical examination or treatment, a competent minor of less than the statutory age of majority can give a valid consent in as much as he/ she is fully informed and totally understands the implication of such treatment or procedure. In spite of the rights of parents to take decision on behalf of incapable minors, they do not have the legal right to solely make decisions regarding some medical procedures

[14]Patricia Imade Gbobo and Mercy Oke-Chinda, 'An Analysis of the Doctrine of Informed Consent in Nigeria's Health Care Services', *Journal of Law, Policy and Globalisation* (2018) (69) 17

[15] {1933} 3 DLR 260.

[16] {1949} 2 DLR 442.

[17] F O Emiri, *Medical Law and Ethics in Nigeria* (Malthouse Press Ltd. 2012} 304.

[18]Ibid

[19]Ibid

[20]Ibid

[21]Ibid

[22] F O Emiri (ibid) 304.

[23] D W Brock 'Children for Health Care Decision Making' in JA Dada 'Legal Aspect of Medical Practice in Nigeria'

[24] The Constitution of the Federal Republic of Nigeria prescribes 18 years as age of majority where a citizen can exercise his/her franchise.

such as sterilization and removal of vital organs of a living child for donation, as well as choosing for the minor the right to die-martyr.[25]

Under the English Law, a child of 16 or 17 can consent to treatment and such a treatment will be treated as a consent given by an adult.[26] It means that parents' rights to make decisions on behalf of their children are not sacrosanct. However, in the case of a mature minor who has the capacity to understand the choice of treatment and its consequences, then he/she can give a valid consent to care as though he were an adult This principle of a mature minor was determined in the supreme court case of *Re Ernestine Gregory*[27]

In that case, Ernestine, a 17year old Jehovah Witness was on admission for Leukemia[28]. The age of maturity in Illinois was 18years. He refused blood transfusion as it was against his faith; his mother was in support of his decision. Because he was a minor, the Child Welfare Officials in Chicago sued his mother for medical negligence. The trial court ordered blood transfusion in spite of the evidence that the patient had sufficient maturity to make such decision. The patient appealed against this decision. The Court of Appeal affirmed the decision of the mature minor. The Supreme Court also re affirmed the position of the appellate court overruled the decision of the trial court on the ground that the patient has shown enough competence to make such decision and hence cannot be forced to submit to blood transfusion, right of self determination must be respected.

Similarly, in *Gillick v West Norfolk and Wisbech Area Health Authority*,[29]the issue was whether a young girl of 16 can consent to the prescription of contraceptive without recourse to the consent of her parents. Mrs. Gillick sought to challenge the legality of a Department of Health circular which permitted doctors to provide contraceptive advice and treatment to less than 16 years old without parental permission. Initially she was successful in arguing her case in the Court of Appeal where Fox LJ held that parents or guardians has parcel of rights in relation to children in their custody, and that such rights cannot be abandoned. He held further that there is no authority of any kind to suggest that to anyone other than by resort to courts, or pursuant to statutory exceptions. Also, that as far as girls are concerned, the provision of the criminal law shows that Parliament has taken the view that consent of a girl under the matter of sexual intercourse is a nullity.[30] Fox LJ's decision was based on the criminal law provision of under aged in sexual intercourse issues, ignoring the functional test for capacity.[31]

However, the House of Lords held a contrary opinion, it held that it was lawful for a doctor to do so, provided the child is sufficiently mature to understand the medical, social and family issues involved and the child can provide an effective consent. Therefore, maturity and the ability to understand the issues determined whether a person was competent, rather than age.[32] Lord Fraser

[25]*Re T* (1992) WLR 782, 4 ALL ER 649

[26] Section 8 of the Family Law Reform Act 1969

[27] Re Ernestine Gregory 133 IU 2d 98549 NE 2d 322(1989)

[28] A medical condition: cancer of the blood resulting in frequent breakdown of the blood cells in the body.

[29][1986] AC 112

[30] I Kennedy & A Grubb, *Medical Law: Text with Materials* (1994, London: Butterworth) 109

[31]*Gillick's* case (ibid)

[32]Jonathan Herring, Medical Law and Ethics (Oxford University Press 2006) 208. Herring outlined the position of the court in *Gillick's case* as follows: the child must understand the medical issues; the child must understand the moral and family issues involved; the child need only have the majority needed to consent to the particular issue in question; if the child is fluctuating between competence and incompetence, she or he should be treated as incompetence; the court will need to be persuaded that the child is sufficiently mature to reach his or her own decision and not merely be repeating the views of her or his parents; and finally, in assessing whether a child is competent or not the court should not reason that because the decision is wrong the child must be incompetent.

held that if the girl who though is under 16 years of age will understand his advice, the doctor cannot persuade her to inform her parents or to allow him (the doctor) to inform her parents.[33]

The courts in Nigeria seem to have endorsed the principle in *Gillick's case* by allowing matured children to exercise their rights and make their own autonomous decision in medical treatment.[34]This is exemplified in *Okekearo v Tanko*[35] where the court criticized the defendant for his failure to obtain consent from a 14-year-old boy whose finger was to be amputated.[36]
In addition, it is established under Common Law that parents in the absence of neglect or incapacity make all the necessary choices as it pertains to the wellbeing of their children.[9] Furthermore, there are essentials that must be taken into consideration in implementing the best interest principle, they include:

a) Is the decision likely to improve the condition of the child?
b) Can the treatment prevent further deterioration of the child's condition?
c) If the benefit involved in the treatment outweighs the risks on the child?
d) Whether there is an option of a less invasive treatment?[10]

2.2. Mentally Incapacitated Persons

Generally speaking, a person with a sound body and mind is competent to give informed consent. However, patients with mental diseases or impairment may be incapable of giving informed consent to treatment or medical procedures. Mental impairment could also be due to dementia arising from degenerative processes in the brain as a result of aging process. Whether such persons can legally choose alternative treatment or refuse treatment depends on whether the illness is of such a nature as to seriously impair reasoning to the extent that the patient cannot sufficiently understand the nature, purpose and effects of the medical treatment proposed. That was the point made by Thorpe J in *Re C (adult refusal of medical treatment)*.[37] The court granted an injunction preventing Heather word Hospital from amputating C's leg without his express consent. C, a 68-year-old man, was diagnosed with gangrene in the right foot and the hospital considered amputation. C refused and sought an injunction to restrain the amputation. The hospital argued that by virtue of C's chronic mental illness, he had no capacity to make an informed choice. The court held that in considering capacity the important question to be decided is whether it has been established that C's illness prevented him from understanding the nature, purpose and effect of the proposed amputation. To arrive at this His Lordship used as decision-making analysis, the three-stage enquiry, namely: (I) the patient's ability to comprehend and retain treatment information; (ii) believe in the treatment; and (iii) balance of risks and benefit ratio. Applying these three decisions -making analyses, the court found that C's mental illness had not displaced his right of self-determination and his treatment choice. An injunction was ordered in his favor. The conclusion is supportable because even though C's general capacity was impaired by his mental illness-schizophrenia, he still could understand the nature, purpose and effect of the treatment method he refused. Thus, the right of C did not evaporate by his illness. It remained intact and there was no jurisdiction whatsoever for the hospital substituting its judgment to his under wardship or *paren pattrae* jurisdiction. [38]

The court may authorize medical treatment for an incompetent adult who cannot appreciate the nature, effect and purpose of medical treatment. The authorization of medical treatment or

[33]*Gillick's case* (ibid)
[34] Adegbite (n 3) 12
[35] (2002) 15 NWLR (Pt 791) 657 SC
[36] Ibid
[37]*Re C adult: refusal of treatment* (1994) 1 ALL ER 819, (1993) 15 BMLR 77
[38] F O Emiri (n 18)304

overriding refusal to treatment by the court would usually be based on its *paren patriae* or wardship jurisdiction, even though such a jurisdiction is now legally doubtful.[39]

Davis[40] classified lack of competence as temporary (in children); transient (as in unconscious patients); or permanent (in some mentally handicapped patients, except the patient is in the lucid stage where he is capable of understanding the information given to him). The issue therefore is to determine when a patient is competent to give informed consent to treatment or surgical procedure.[41]

2.3. Best Interest of the Patient

Where the patient is unable to make a choice and the surrogate decision maker does not know what such patient would have chosen under those circumstances, then, the obligation of both parties (doctor and the surrogate decision maker) is to act in the best interest of the patient.[42]In *Medical and Dental Practitioner Disciplinary Tribunal v Dr. John Emewulu Nichola Okonkwo,*[43]the patient (Mrs. Martha Okorie) was a Jehovah witness who refused blood transfusion together with her husband and had even put pen on paper to instruct that on no account should blood be transfused on her even if she goes into coma, as a result of this refusal, the patient died. The complainer's argument therefore is that the 'best interest of the patient' which is an exception to the rule of consent ought to have been observed so as to save the life of the patient. The best interest principle will operate when the patient is unable to give consent or direction which should be followed in treatment, at the same time, the surrogate decision maker for the patient appears not to know the decision the patient would have taken had he not been incapacitated. Then the healthcare giver would invoke the best interest principle. Contrary to this principle, in the case of Mrs. Okorie, she was aware of the implications that may follow if blood was not transfused into her, and had even signed an undertaking to that effect before she eventually went into coma. Therefore, the best interest principle which is an exception to the doctrine of consent could not have been operated.[44]

2.4. Therapeutic Privilege

This is an exception to the principle of consent to treatment. Where a doctor in his opinion, believes that the disclosure of information is likely to cause harm to a patient, it is deemed appropriate to withhold information.[45] It must seek to protect the patient from harm other than likely to be caused by the patient's decision to refuse the treatment in question.[46]*Battersby v Tottman and South Australia,*[47] a patient suffered serious damage to her vision as a result of high dose of melleril, prescribed by an ophthalmologist on the basis that the patient was depressed and potentially suicidal. Other modes of treatment had apparently failed. Although aware of the potential damage to the plaintiff, the doctor did not warn her because the patient was suffering from mental illness, and the doctor was concerned the knowledge of the risks would have an adverse effect on her.[48] It has been suggested that Therapeutic Privilege is properly relied on only in those exceptional circumstances

[39]E D Freedman, *Medicine, Ethics and The Law,* (London: Stevens & Sons 1988)
[40] M. Davies *Textbook on Medical law* (1998 Blackstone Press Ltd. London) 131-139. [2] S D Pattinson (n 1)131.
[41]Ibid (n 11) 18
[42]*Isaac Mesiha v South Eastern Health* (2004) NSWSC 1061
[43] (2001) 3 SC 76
[44]Adegbite (n 3)14
[45]W Ronald Scott, Promoting Legal and Ethical Awareness: A Primer for Health Professionals and Patients (1st ed, Mosby 2098)
[46] Ibid
[47](1985) 37 524
[48] Ibid

where a patient is so fragile that full disclosure would overwhelm him at that time, such as where a road accident victim in a critical condition asked about family members or where a patient asked about the extent of burns or internal injuries at a critical time.[49]

2.5. Necessity

Under the common law, there was no jurisdiction in the court to approve or disapprove medical treatment for those who were incapable of making the choice themselves, but acting as an agent of necessity may render lawful an action that would otherwise be tortious. The basis of this doctrine is that acting unlawfully is justified if the resulting good effect materially outweighs the consequences of adhering strictly to the law.[50] In this context, the doctor is justified, and would not have any criminal or civil liability imposed upon him if the value which he seeks to protect is of greater weight than the wrongful act he performs, which is treating without consent.[51]The Canadian case of *Marshall v Curry*,[52]appears to capture the essence of necessity as an exception to the doctrine of consent. In this case the doctor having opened up the patient in a hernia surgery discovered that the left testicle is diseased and becoming festering, he removed it. The court held that the exception of necessity will avail the doctor, because it would have been unreasonable to postpone the removal to a later date.[53] This was also the court's position in *Murray v McMurchy*.[54]Thus where there is neither evidence of the patient's wishes nor that of his surrogate on the additional treatment or procedure, and it is immediately necessary for it to be performed so as to save the life and health of the patient, this exception will avail the practitioner who defies consent and continues with the treatment.[55]

2.6. Public Policy or Legislative Powers

The issue of consent, at times, may be discarded when there is an overriding public interest and legislative incursion.[56] For instance, if there is a breakout of communicable disease such as cholera, tuberculosis etc., the law will not allow refusal of consent when the procedure or treatment is designed to enforce public peace, health and safety. The National Child Immunization Policy in Nigeria is a good example, where eradication of poliomyelitis and other childhood diseases is being aimed at. Also, there are existing legislations which can be evoked whenever the need arises, for example where there is an accident; the driver's blood sample will be obtained to determine level of alcohol.[57]

3. Judicial Attitude to Parent Refusal of Consent for an Underaged Child in Nigeria

Under the law, an underage child is regarded as a minor who is incapable of entering into legal relationships. An under aged child lacks the capacity or is incapable of giving informed consent to medical treatments and procedures. This is because they lack the ability to appreciate and understand the medical information and lack the capacity in law to take decisions whether for themselves or others. Hence, the parents or guardians of a sick child, has the burden or responsibility to give informed consent on behalf of the child. Under the Child's Rights Act,[58]

[49]Emma Cave, ' The ill-informed: Consent to Medical Treatment and the Therapeutic Exception (2017)(46) (2) *Common Law World Review*140-168. Available online at https://doi.org/10.1177/1473779517709452.
[50]Mason and McCall Smith's *Law and Medical Ethics* (London, Butterworths 1999) 56
[51]Uwakwe Abugu, *Principles and Practice of Medical Law and* Ethics (Pagelink Nigeria Limited, Abuja 2018)200
[52](1933) 3 D.L.R. 260
[53] Ibid pp 275-276
[54] (1949) 2D.L.R. 442.
[55]Adegbite (n 3) 14
[56]Ibid at 13
[57] Adegbite (n 3) 14
[58] Child's Rights Act 2003.

The pertinent question to ask at this juncture, is whether a parent or guardian can refuse consent for an underage child or minor? The key consideration here is capacity; hence children are incapable of giving informed consent. First, they lack the ability to appreciate and understand the medical information; secondly, minors lack the capacity in law to take decisions whether for themselves or others. The parents or guardians (where applicable) of a sick child, therefore, has the onus to give informed consent on behalf of the child.[59]

Issues typically arise where such parents or guardians make a choice which the physician considers medically detrimental to the child. Such instances occur, where the parent or guardian refuses informed consent. Refusal to grant informed consent puts the deep rooted but personal convictions of the parents, which the law also protects, against the medical interest of the child.[60] It is noteworthy that personal interest and convictions of a parent should always rank lower than the rights and interest of the child. Under the Child Rights Act ("the Act"), the best interest of the child must be of paramount consideration in all actions taken in relation to any child. The Act provides for the rights of every child in line with the fundamental rights enshrined in the Constitution. These include right to life, right to personal liberty, etc. Furthermore, Section 4 of the Act also provides that ' every child has a right to survival and development.' In the case of *Esabunor v Faweya*,[61]the parents refused to consent to blood transfusion being administered on the child even when it was explained by the physician that the blood transfusion will greatly improve the child's chances of survival. The parents argued that their religious belief forbade blood transfusion. An important question was whether it could it be said that the parents were acting in the best interest of the child?

The Supreme Court observed that whilst an adult has the right to either accept or refuse medical treatment for himself, a different consideration arises where a child is involved because a child is incapable of making decision for himself and the law is duty bound to protect such a person from abuse of his rights as he may grow up and disregard such religious beliefs.

The overriding interest of the child or minor is the ultimate consideration in a matter as above and the court of law will always intervene in the overwhelming interest of the public to save or protect the right and welfare of a child. That is why the apex Court[62] in *Esabunor's case,* while examining the power of the court to intervene where parent or person in *loco parentis* objects to particular form of medical treatment for child on religious grounds, held magisterially, thus:

> All adult persons have the inalienable right to make any choice they may decide to make and to assume the consequences. Accordingly, an adult person who is conscious and in full control of his mental capacity, and is of sound mind has the right to either accept or refuse medical treatment, including blood transfusion. In such case, the hospital has no choice but to respect the

[59]Okey Nnebedum and Oloruntobi Opawoye, 'A Doctor's Dilemma – Parent 's Right to Refuse Consent' (2021) *JEE Sector Thought Leadership Series* 4

[60]Ibid

[61](2019) LPELR-46961 (SC). The facts of this case is simple and straight. In this case, a one-month-old baby was brought into the Chevron Clinic in Lagos by his mother. It was discovered that the child was suffering from sepsis (severe infection) as well as anaemia and needed urgent blood transfusion. The next morning, the child started convulsing and developed difficulty in breathing. He was subsequently placed on oxygen therapy. Dr Feweya observed that the child desperately needed blood transfusion to increase his chances of survival and recovery from the illness. The mother refused to grant consent for the child to be transfused with blood, stating that it was against her religious beliefs to receive blood. The police obtained an order from the Lagos State Magistrate Court overruling the mother. Pursuant to the order of court, Dr. Faweya administered blood transfusion on the child and the child survived and recovered fully from his illness. The mother subsequently filed an action at the High court for certiorari and damages. The action was an utter fiasco up to the apex court.

[62] Per Justice Rhodes Vivour JSC (Now retired)

> person wishes. However, different considerations apply to a child because a child is incapable of making decisions for himself and the law is duty-bound to protect such a person from abuse of his rights even by the child's parents. So, when a competent parent or one in *loco parentis* refuses medical treatment or blood transfusion for a child on religious grounds, the court should step in. The court should take a decision after considering the child's welfare i.e. saving the life and the best interest of the child. These considerations outweigh whatever religious belief the parent of the child may have about any form of medical treatment because the child may grow up to reject his parents' religious beliefs. And the decision should be to allow the administration of blood transfusion especially in life threatening situations. In this case, the 1st appellant was then only one-month old, was incapable of deciding for himself. On the other hand, the 2nd appellant, his mother acted on her religious belief. In the circumstance, the 5th respondent was right in granting the said 4th respondent's application, which allowed the 1st respondent to save the life of the 1st appellant.[63]

Interestingly, the question, who then can override the parents' refusal to give consent, is answered by the Supreme Court in *Esabunor* v *Faweya*.[64]The court per Justice Rhodes Vivour made the following enchanting and illuminating pronouncement, to wit:

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

The palpable corollary deducible from the pronouncement of the Supreme Court in the *Esabunor's case* above is that the court of law can override the decision of the parents of a child refusing to grant consent for the treatment or clinical procedure or blood transfusion on a child. Where the parents, next of kin or guardian of a minor or child refuse consent to treatment or medical procedure to save the life of a child or minor, the court of law, in the overriding interest of the public can intervene to ensure the survival of the minor or child.

Some grounds upon which the courts can make such decision, as held in *Esabunor's* have crystallized. They include: (i) to save the life of the child (ii) the need to ensure the best interest of the child remains paramount (ii) to prevent the commission of crime. It was observed in *Esabunor's* case that the refusal by the parents to grant consent would have amounted to crime if the child had died, hence in its inherent jurisdiction to prevent crime, the court could override the decision of the parents.[65]

However, another important question that appears yet unanswered is whether a physician can override parental consent in any situation without a court order, especially in emergencies? Where, therefore the physician is faced with a situation like *Esabunor's* case, what legal course of action is available for that physician considering the delicate situation such physician may have

[63] (Pp. 340, paras. C-G; 344, para. C; 347, paras D-E). See also M *D P D T* v *Okonkwo* (2001) 7 NWLR (Pt. 711) 206
[64] Ibid
[65]Okey Nnebedum and Oloruntobi Opawoye (ibid)

found himself/herself. If he/she override's the parent without recourse to the court, would he/she be protected, more so where the treatment leads to a negative outcome such as death of the child?[66]

Although *Esabunor's* case offers no clarity on the authority of the physician or any other person to override the parent, it does however offer a hint of likely options available for the physician in such precarious position, these includes:

i. Report to the Police: In *Esabunor's case*, Dr. Faweya reported the matter to the police who approached the court for an order to sanction the treatment. This is in line with the power of the police to prevent crime and secure life.
ii. Proceed with treatment if such is the last option for the child's survival and approach the court timeously for an order to continue treatment: This can be deduced from the decision of the Supreme Court that the paramount decision should always be the best interest of the child. However, this option should only be exercised when the physician is able to show that such treatment could not be delayed.

The second safeguard is akin to an analogy given by an enlightened scholar,[67] Prof. Festus O. Emiri, when he posits that if parents, however, make adequate arrangement for the treatment for their children, but refuse a particular management method suggested by the hospital authority, questions may be raised whether in the circumstance it would be proper for hospital to override parents' refusal? And importantly, should it be treated as abandonment of parental responsibility? If the answer is no, would the parents be liable for any consequences that result from their refusal of medical treatment? If we answer 'yes', then one can imagine manslaughter or murder prosecution against parent where death results. If the answer is the affirmation, then is the law implicated in a process that allows parents to make martyrs of their children? How far can parents ride the horse of self-determination as proxies or surrogates of their minor? Should not the state, as *parens patriae* have a say in this issue?[68]

Given the above postulate by the learned author, it is submitted that the limits are cases of emergency and state intervention for the safety of the child. That is to say, in extreme cases of emergency, where the survival of a minor is in question, the physician can proceed with the treatment or procedure in the overriding interest of the public to save the life of the minor and timeously obtain the order of the court to continue the treatment. The interest of the child or minor must be of utmost consideration. However, where there is no emergency, hospital authorities should respect the treatment choice by the parents.[69]

Another curious but ethical question that can arise in this respect is whether or not parents can prevent their wishes from being frustrated in an emergency situation by executing in advance a directive prohibiting some form of medical treatment.[70]In *Mallet* v *Shulman*[71] it was decided that unsigned but witnessed, dated medical alert card prohibiting blood transfusion carried by the patient was binding on all hospital authorities even in life threatening emergency. Though in a case, dealing with the effect of an alert card on adult choice, there is good reason why it should apply to a minor.[72]

[66]Ibid
[67]F O Emiri (n 17) 306
[68] Ibid at 306
[69]*Jehovah's Witness v King Country Hospital* 278 F. Supp. 488 (ND Wash. 1967)
[70]F O Emiri (n 17) 307
[71](1990) 67 DLR (4th 321, (1991) 2 Med LR 162
[72]F O Emiri (ibid)

We submit that this consideration should apply to a minor. A different consideration, which is overriding interest of the child, his welfare and ultimately saving the life of a minor should be a primary consideration, whether there exist an alert card prohibiting blood transfusion or not.

4. The Legality *Vel Non* of Lack of Consent in Cases under Exception to Consent.

Generally, medical treatment and procedure without physician obtaining the consent of the patient is, in law, unlawful. That is to say that before medical practitioner embarks on medical treatment or procedure on a competent patient, the latter's consent must be obtained. However, there is legal justification on the part of physician who undertakes medical treatment or procedure on patients in extreme cases of emergency without consent had and obtained. Where this happens, medical practitioner or health worker will be justified and would not have any criminal or civil liability imposed upon him if the value which he seeks to protect outweighs the wrongful act he performs, which is treating without consent.[73]In cases of emergency or unconscious situations, a doctor may proceed without express consent provided: it is not known that the patient would not consent to the treatment, if the patient were liable to do; it is in the best interest of the patient; the urgency is such that the lawfulness of the proposed procedure cannot be declared by the time available.[74]

This presumption is encapsulated in the Latin maxim: *negotiorum gestio,* which is essentially that a person expects another to do his best for him. Thus, a medical practitioner in this situation can administer treatment without seeking consent in order to save life.[75]

Therefore, a physician may be exempted from liability in emergency cases where a patient is unconscious and there is urgency to preserve life, consent may be expended with.[76] Conversely, the right to self-determinism may be dispensed with in cases of overriding public *interest* and health worker will be exempted from liability. In *Esabunor v Faweya,*[77] the appellant withhold consent to transfuse her child with blood based on her religion (Jehovah Witnesses). The Commissioner of Police got an order from the Magistrate Court to transfuse the child with blood. The court held that the child being an infant would prefer to live rather than to die and that the appellant has no right to determine the fate of the child.[78]

In spite of right of autonomy and self-determination, the choice of an individual can be overruled by the overriding interest of the state.[79] In the case of *Fosmire v Nicoleau,*[80]the plaintiff a Jehovah Witness delivered through caesarian section and had complications which resulted in profuse loss of blood which crashed the haemoglobin level to 4gms/dl.[81] The plaintiff with the consent of her husband refused blood transfusion based on religious grounds. The hospital made an application to the New York Supreme Court to make an order for blood to be administered on the patient. The application was granted. The patient sued the hospital for the violation of their fundamental rights and autonomy to make a choice about what happens to her body. The court held that though the patient had a right to self-determination, but such rights affect an innocent 3rd party, and the state which has the

[73]Uwakwe Abugu (n 51) 200
[74] Ibid
[75]Uwakwe Abugu (n 51) 200
[76]Patricia Imade Gbobo and Mercy Oke-Chinda (n 14) 21
[77]Ibid
[78]Ibid
[79] Ibid
[80]551 NY.S. 2d 876 N. Y 1990 (Court of Appeal of New York)
[81]The hemoglobin level indicates the level of the available red blood cells in the body. The normal level is 12-14gms/dl

overriding interest to protect the lives of its citizens. The court held in favour of the state.[82] Also, in *Re S (Adult Refusal of Medical Treatment),*[83] a pregnant Nigerian living in England was admitted in labour, there was poor progress in labour as a result of the abnormal lie of the baby and therefore caesarian section is the only option to save the life of the baby as well as that of the mother. The defendant and husband refused to give their consent claiming to be 'Born Again Christians.' The hospital made an application to the president of Family Court Division for an order to carry out caesarian section on the patient, the court obliged them. The interest of the unborn child and that of the public overrides the decision of the defendant and her husband.[84]

5. Conclusion / Recommendation

Medical treatment and procedure without physician obtaining the consent of the patient is, in law, generally, unlawful. That is to say that before a medical practitioner embarks on medical treatment or procedure on a competent patient, the latter's consent must be obtained, otherwise the physician's action would amount to an assault or battery or false imprisonment. However, there is legal justification on the part of physician who undertakes medical treatment or procedure on patient in extreme cases of emergency or unconsciousness, mental incapacity, treatment of minor or children, cases of therapeutic privilege, overwhelming interest of the public, without consent had and obtained. Where no consent is obtained in these cases, medical practitioner or healthcare giver will be justified and would not have any criminal or civil liability imposed upon him if the value which he seeks to protect outweighs the wrongful act he performs, which is treating without consent.

It is our recommendation that a robust legal framework for the protection of physicians treating emergency medical cases, mentally incapacitated patients, children/minor and cases involving overriding public interest should be enacted and encourage best treatment of the patient in the overriding interest of the public and preservation of life at the expense of religious beliefs or personal conviction of the patient or his/her next of kin or guardians.

[82] The above case is on all fours with the Nigerian case of *Esabunor v Faweya* (ibi)

[83] [1992] 4 All ER 671, [1992] 9 BMLR 69.

[84]Patricia Imade Gbobo and Mercy Oke-Chinda (n 14) 22