

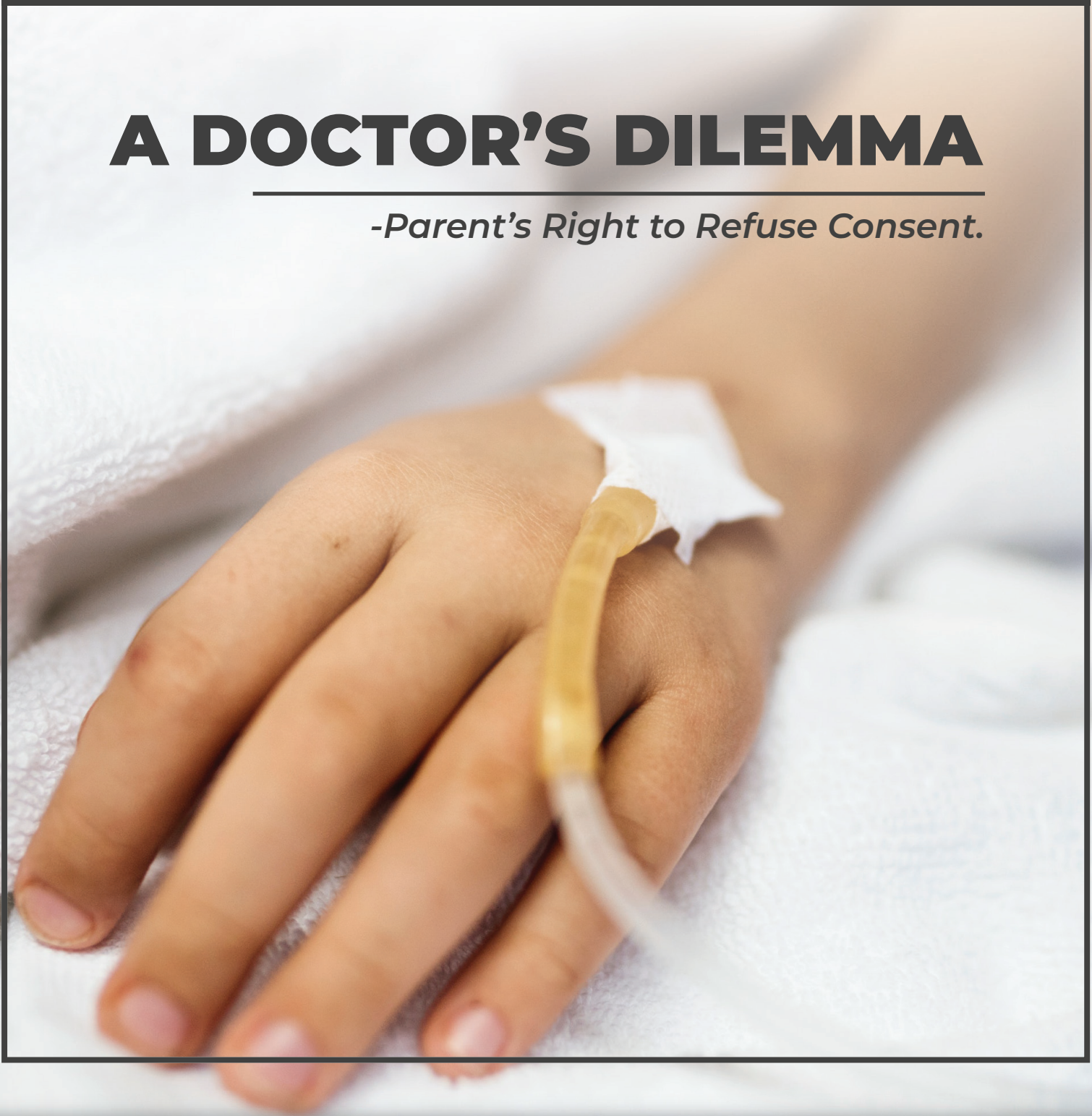


Jackson, Etti & Edu

JEE Sector Thought Leadership Series

A DOCTOR'S DILEMMA

-Parent's Right to Refuse Consent.



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Introduction

“It is instructive to note that the law exists primarily to protect life and preserve the fundamental rights of its citizens inclusive of infants. The law would not override the decision of a competent mature adult who refuses medical treatment that may prolong his life but would readily intervene in the case of a child who lacks the competence to make decision for himself... I hold the view that it could have amounted to a great injustice to the child if the court had stood by and watched the child being denied of basic treatment to save his life on the basis of religious conviction of his parents”¹

In the recent case of ***Esabunor v. Faweya***, Justice John Inyang Okoro of the Nigerian Supreme Court, painted an emotional picture of the implication of

inaction by the courts in an event of refusal by a parent to grant consent to administer medical procedure to a child in dire need. By its decision in this case, the Supreme Court has laid to rest the age long controversy over the right of parents to refuse treatment on their underage children.

Informed consent is a well-established medical law concept that has until recently, been subject of controversy and confusion due to lack of clarity within the Nigerian law context. The ramifications of this principle, particularly where the medical treatment of underage children is concerned had not, until now been fully tested by the Nigerian courts. The case of *Esabunor v. Faweya* on the one hand, answers some of the raging questions asked over the years, whilst on the other hand it brings new perspectives to the question of informed consent.

¹Tega Esabunor & Another V. Dr. Tunde Faweya & Others (2019) LPELR-46961(SC); Judgement delivered on the 8th of March 2019

Facts of Esabunor v. Faweya

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, child started convulsing and developed difficulty in breathing. He was subsequently placed on oxygen therapy. Dr. Faweya 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 the 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 failed up to the Supreme court.

The concept of Informed Consent under Nigerian Law

Informed consent has been defined as *‘legal rules that prescribe behaviours for physicians and other healthcare professionals in their interactions with patients and provide for penalties, under given*

*circumstances, if physicians deviate from those expectations. It is an ethical doctrine rooted in our society's cherished value of autonomy that promotes patients' right of self-determination regarding medical treatment. It is an interpersonal process whereby the healthcare provider and the patient interact with each other to select an appropriate course of medical care.*²

Informed consent is rooted in three fundamental ideas: (i) Voluntariness (Willingness of the patient to make a decision), (ii) Capacity (patient is able to understand the nature of a decision) and (iii) Knowledge (Sufficient information disclosed to the patient by the healthcare provider enabling the patient to make an informed choice). It is important to tick all these boxes in the process of obtaining informed consent as failure to ensure any one of these principles can render the consent null and void.

The legal background to informed consent can be traced to the Universal Declaration of Human Rights which is embedded in Chapter IV of the Nigerian Constitution. Section 34 of the Constitution provides that *“every individual is entitled to respect for the dignity of his person, and accordingly - (a) no person shall be subject to torture or to inhuman or degrading treatment”*.

²Berg, Jessica W.; Appelbaum, Paul S.; Lidz, Charles W.; and Parker, Lisa S., "Informed Consent: Legal Theory and Clinical Practice" (2001). Implemen-

The protection of dignity of every patient as a human being as well as the legal and moral obligation of the physician to treat the patient with respect is one of the cardinal principles of informed consent. Similarly, this includes right to privacy and right to freedom of thought, conscience and religion. The Supreme Court had held in the earlier case of *Medical and Dental Practitioners Disciplinary Tribunal v. Okonkwo*³, that the right of a patient to consent to medical treatment must be respected.

This essence of implied consent is comprehensively captured by Section 23 of the National Health Act which provides as follows:

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

- a. The user's health status except in circumstances where there is substantial evidence that the disclosure of the user's health status would be contrary to the best interest of the user;*
- b. The range of diagnostic procedures and treatment options generally available to the user;*
- c. The benefits, risks, costs and consequences generally associated with each option; and*

d. The user's right to refuse health services and explain the implications, risks or obligations of such refusal

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

Earlier this year, the Consumer Protection Council (now Federal Competition and Consumer Protection Commission) introduced a patient's bill of rights for the health sector which outlines certain fundamental rights of patients including the rights that amplify patient's rights to decline care, subject to prevailing law and upon full disclosure of the consequences of such a decision as well as right to relevant information in a language and manner the patient understands, including diagnosis, treatment, other procedures and possible outcomes.

Can a Parent Refuse Consent for an underage Child?

Under the law, an underage child is regarded as a minor who is incapable of entering into legal relationships. The key consideration here is capacity, hence children are incapable of giving informed consent.

³ (2001) 7 NWLR (Pt.711) 206

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.



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 pits the deep rooted but personal convictions of the parents, which the law also protects, against the medical interest of the child. 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*, 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 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.*

Who can Override the Parents' Refusal to Grant Consent?

The court per Justice Rhodes Vivour made the following pronouncement in *Esabunor v. Faweya*:

“when a competent parent or one in loco parantis 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 courts can override a parent’s refusal to grant consent to the treatment of the child.

Some grounds upon which the courts can make such decision, as held in *Esabunor’s* case 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.

Therefore, the court did not give medical personnel carte blanche to override the authority of a parent or guardian in the

treatment of minors.

However, an 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 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?



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 include as follows:

- 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.



Conclusion

Since the decision of the Supreme court in *Medical and Dental Practitioners Disciplinary Tribunal v. Okonkwo*, affirming the rights of patients to reject medical treatment, especially on religious grounds, there has been a gap and general lack of clarity on the position of the law when such consent is required in respect of a sick child. It took about 18 years for the Nigerian courts to bring closure to Esabunor's case. During the long intervening period, physicians were left in quandary as to the proper course of action to take when faced between the moral duty to protect life and the uncharted legal terrain occasioned by refusal of parents or guardian to grant consent to treatment. Although this appears to have now been settled, however, more questions remain unanswered as regards the entire ramifications of the supreme court judgement in Esabunor's case. As pointed out above, has this decision created a blanket authority for the physicians to override the decisions of parents as regards matters of consent, or such authority is only within the purview of the courts?

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