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Respect for Patients' Right to Autonomy

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Abstract: In this review article we examine the laws and rulings regarding informed consent. It is well known that the patient must give valid consent to medical treatment; and it is his or her prerogative to refuse treatment even if the said treatment will save his or her life. No doubt this raises many ethical debates and falls at the heart of medical law today. There is widespread refusal of or withdrawal from medical treatment by patients suffering from illnesses, including communicable and non-communicable diseases. In Papua New Guinea (PNG) while a patient has a right to refuse treatment, there is no legal right to demand treatment. The paper seeks to clarify the nature, extent and importance of a patient's right to respect for autonomy from the practitioner. We will attempt to conceptualise the patient's autonomy by exploring the legal framework of consent or more specifically informed consent. Where the law of PNG differs from the laws of other parts of the world we have focused on the laws of the former. The legal aspects and guidance by the regulatory authorities apply only to PNG.

Key words: Consent, legal right, ethics, respect for autonomy.

1. Introduction

Informed consent is required for all medical investigations and procedures and is considered a corner stone of medicine. The earliest expression of this fundamental principle, based on autonomy, is found in the Nuremberg Code of 1947 [1]. The code makes it mandatory to obtain voluntary and informed consent of human subjects. Similarly the Declaration of Helsinki adopted by the World Medical Association in 1964 emphasizes the importance of obtaining freely given informed consent for medical research by adequately informing the subjects of the aims, methods, anticipated benefits, potential hazards, and discomforts that the study may entail [2]. Several international conventions and declarations have similarly ratified the importance of obtaining consent from patients before testing and treatment [3]. The present paper examines the entire gamut of issues pertaining to consent from the point of view of the legal environment as it exists in PNG today. The cycle of legal development in the area of consent appears to be at its infancy stage, there is not much happening in PNG. This places medical professionals in a tremendous dilemma. Hence it is time to visit the area of "consent and medical treatment" from the generalized law perspective to understand the sensitive and underpinning elements.

2. Ethical Principles

In the past various international and national ethical guidelines have proliferated which enshrined the concept of informed consent. It is the code to be adhered to so as to protect the individual patient or healthy research volunteer subject from possible exploitation and harm. Such regulations are linked to the discourse of human rights and autonomy.

There are four main principles of medical ethics and these are justice, non-maleficence, autonomy and beneficence [4]. Autonomy is the main ethical consideration underlying informed consent. The patients' right to determine what investigations and treatment to undergo must be respected by doctors [5]. Patients and research subjects will refuse to take relevant procedures for treatment or decide not to participate in a research because of conflicting interests, that is, they would like their interests in culture,

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language, customs, belief and opinions to be considered. In most instances the healthcare professionals and researchers do not understand the participants and do not disclose adequate information. Most importantly, healthcare workers fail to ask whether they communicated the information well to the patients. For the consent to be informed patients rely on the information provided by their doctors. Honesty and truthfulness is the key to make the process of consent valid. Principle of justice must be applied when deciding what treatments are offered to or withdrawn from patients. It sets the process of informed consent to flow and further allows for the right to demand certain treatments that are discussed by the doctor and patient.

It is for this important aspect that I turn to the philosophical discourse on informed consent.

3. Philosophical Discourse

The question on whether a right or a principle is absolute not only involves ethical and legal aspects; it touches as well the philosophical argument of absoluteness. Let us look at "freedom", Selinger [6] said it cannot exist as an absolute principle because granting one individual absolute freedom will infringe the freedom of the other individual considerably, that is, the person A's freedom to take any good will influence the freedom of the person B to have the property. When applying these principles to autonomy the same problem arises, that is, total autonomy of one individual has a negative effect on autonomy of the other individuals [6]. Nowadays many modern democratic societies have rules and laws to live fairly together and harmoniously. On the one hand this restricts autonomy while on the other hand this same restricted autonomy guarantees the same amount of it to all members of the society. Therefore Selinger [6] says that on a philosophical basis the principle of total autonomy contradicts itself when applied to society.

4. The Right to Autonomy

The patient's right to autonomy should always be respected and steps taken to make consent truly informed [6, 7]. We say that a valid, true or real consent to medical treatment may be described as a voluntary and autonomous authorization by an individual who understands his condition and any proposed treatment, including other treatment options available, and the benefits, risks and possible complications of the recommended treatment, and in the absence of any coercion or undue influence, makes a decision. The healthcare professional and the patient agree and consent is valid and truly obtained giving the care professional the permission to perform the procedure. Similarly, a person with parental responsibility may give consent for a minor or underage child but the minor's assent is necessary to be considered as well. However, when there is a dispute on the children's consent or refusal, a court's opinion must be sought. This was demonstrated in an American case Strunk v Strunk [8] where a mentally incompetent organ donor who was nominated to donate to a sibling was granted permission to consent, through the parents, by the court to allow transplant of one kidney to 26 years old healthy sibling. In this case consent was granted by the court based on humanitarian ground.

5. Capacity, Understanding and Information while Seeking Consent

The element of consent is one of the critical issues in the area of medical treatment today. The basic difference between consent and informed consent is the patients' knowledge behind the consent decision; informed consent requires the patient to understand the diagnosis and uncertainties about it as well as the different treatment options including doing nothing and their disadvantages and achievable outcomes [5].

There are two important aspects to be borne in mind, first, valid consent can be obtained only from a patient who is competent and secondly, such consent must also be informed consent. When a patient is competent he or she must give a legally effective consent. In other words the patient is endowed with the ability to weigh

the risks and benefits of the treatment that is being processed. The law presumes that such ability is generally acquired with the attainment of the age of maturity. In PNG persons who attain the age of 16 are generally considered to have attained the age of maturity. If for unknown reason(s) the patient is incompetent to give consent, then the consent may be obtained from the attendant of the patient. There are ethical issues regarding the proxy consent on behalf of such persons. Regarding proxy consent, when the patient is unable to give consent himself, there are no clear regulations or principles developed in PNG. Irrespective of the age, for a person who is incompetent due to unsoundness of mind, consent will be obtained from the guardian of the patient. In PNG courts have not come across a case of an adult refusing treatment leading to emergency and leaving the doctor in a dilemma, unlike in the UK [9]. The law also presumes that the medical professional is in a dominating position vis-à-vis the patient; hence it is his or her duty to obtain proper consent by providing all the necessary information. Consent without necessary information is no consent at all. The amount of information needed to make the consent informed may vary depending on the complexity and risks of treatment as well as the patient's wishes [5, 7]. Obtaining informed consent is more than receiving his or her signature on the informed consent form but a procedure that requires excellent communication skills to transfer sufficient and customized information. However clinical experiences and literature demonstrate that there are several parameters that adversely influence the informed consent process, such as long working hours, excessive number of patients, lack of awareness of physicians and or hospital administrations, absence of quality assurance systems, inadequate training of medical professionals, and insufficient regulations [10].

We have studied patients in PNG regarding how informed consent is obtained and expressed the view that it would be helpful if patients would always inform their doctors of any cultural or religious considerations that the care provider should be aware of but this may always not occur [11]. When patients inform the doctor about their concerns in regards to medical procedure or treatment, their wishes should be met if the doctor is able to assist them. Furthermore an autonomous person is described as having the capacity for and often demonstrating autonomous action which encompasses refusal to align with desirable social norms that operationalize compulsion, and downplay reflective thinking, comprehension and insight [12]. Individual patients have different capacities and understanding of their illness, for instance, people have their own definition of the common illnesses that affects them. It is therefore important to tailor the information provided to the individual patient, family and the current situation [11]. We say that it is difficult to assess if the patient has truly understood the information provided and often little of the information is retained. This leaves doctors in doubt whether their patients' consent is truly informed [11]. In an unreported case in PNG, a patient was initially spoken to by a female theatre nurse, then was trolleyed into the operating theatre, underwent a surgery without consent but got well after the operation [11]. The consent based on partial information may be invalid but this may go unnoticed by the patient, surgeon and the anesthetist [7]. The principle of an absolute right to consent could be easily undermined by partial information. This is highly dependent on the care professional's willingness to provide full information and the patient's capability to comprehend the information and weigh up the options.

Considering the adverse impact of those factors on the informed consent procedure, written informed consent becomes more critical for ensuring that physicians disclose the core information to the patient and thus providing substantial evidence in case of a legal dispute. Physicians and healthcare facility administrations are subject to lawsuits due to lack of a proper informed consent procedure. We say that

medical intervention without valid informed consent is a wrong and the doctor can be charged with battery. Examples of such situations include treatment against the patient's will, different treatment than the one consented to and treatment after consenting deliberately with wrong information. It is argued that guidance by the regulatory body is required in healthcare facilities to help the patients who are not able to understand. While no one can consent for a competent adult in PNG, many healthcare facilities have policies for regulating consent for minors, patients with acute or permanent incapacity, and patients suffering from severe mental illness. In PNG, to protect the public from contagious infectious diseases the Department of Health through the Public Health policy of the government regulates notification of diseases and mandatory treatment of conditions like tuberculosis (TB) and a wide range of other diseases including food poisoning [13]. The individual's right to consent is restricted, at least in two areas, namely the patient's diagnosis that must be given to the authorities, and the disclosure of information.

It is mandatory that the medical practitioner must disclose personal details of the patient and the diagnosis to the authorities even if the patient does not agree to this [6, 13]. Patients suffering from communicable diseases can be forced to take their medication supervised by the healthcare administration or involuntary inpatient treatment. The regulations are set out by law; a physician might encounter situations in which no clear guidance is given [5]. If patient confesses a crime or a planned crime, it is left to the doctor to decide whether to report on this information to the police [6]. This decision requires careful weighing up of whether the right to consent on passing on information is more important than the right of the public to be protected. However, there is no reported case on a person being detained for violation but it is discussed elsewhere in the National Health Plans. The aim is to prevent the spread of TB and other infectious diseases to the wider community by forcing the treatment on an individual who was not compliant [13]. Further we say that based on the above the laws and national health policies clearly state when a right to consent does not apply to a patient. Incompetent minors, adults lacking capacity and some mentally ill patients do not have an absolute right to consent. Similarly patients having certain infectious diseases have limited right to consent and can be detained and treated against their will. PNG does not have a law to prevent infectious diseases including TB. Nevertheless using the principles of capacity and justice combined in cases of other individuals, the right to autonomy has been curtailed in a few well-defined circumstances. Moreover, the act establishes the binding power of attorney concept [6]. This enables the patient to grant rights of consent and refusal to an attorney-in-fact (AIF) while still incompetent. The AIF then takes over these powers when the patient loses capacity [6]. Legally important to an understanding of the legal right to privacy is an understanding of other interests that may override it. Whenever an invasion of privacy is claimed, there are usually competing values at stake. Privacy may seem paramount to a person who has lost it, but that right often clashes with other rights and responsibilities that we as a society deem important. For example, our right to be secure in our homes often collides with a police officers' need to investigate a crime. A woman's right to terminate a pregnancy or refuse medical treatment often conflicts with the state interest in protecting life and potential life. A wife's right [14] to receive healthcare needs conflicts with her spouse interest. Our right to keep facts about ourselves secret often clashes with a free press, an employer's right to run a business, and the free flow of information of us all. We acknowledge that the trade-offs between privacy and competing social values or legal rights are different in each area [15].

Consent should always be obtained for including patients in clinical research. There are conditions which do not allow a delay: unconscious patients, patients in shock and studies with short therapeutic

windows. Including a patient without consent infringes their right to autonomy. The European Union (EU) allows such studies to recruit patients without their consent under strict regulations [16]. There are laws in other countries for example, British Law, that clearly give competent patients the right to refuse any treatment. In contrast however no patient has a right to demand certain treatments. General Medical Council (UK) regulation 2008 [5] states that if a patient wishes treatment that in the doctor's view is clinically not indicated there is no ethical or legal obligation to provide such treatment.

We maintain that whatever might be the difference of approach it is evident that a medical professional is obligated to provide the necessary information before obtaining consent from a patient. To account for the PNG position, although we do not have much litigation unlike in the developed countries, it may be concluded that the courts have assigned immense significance to the requirement of informed consent. A healthcare worker has a duty to provide all the necessary information to the patient in a language that is understandable to him or her. Therefore it is reasonable information which a doctor deems fit considering best practices. Considering the knowledge gap in this regard, the professional regulatory body for healthcare can play an important role in establishing standards.

6. PNG Law on Informed Consent

In this segment we discuss the laws that are applicable to the development of informed consent as an idea. In PNG a right to informed consent to medical procedures is not expressly declared in any health legislation [7]. The right is certainly necessary since consent of any quality to medical, especially surgical procedures incurs some risk of diminishing an individual's personal integrity. Such procedures further imply some level of invasion of a person's privacy at his or her most vulnerable time when a healthcare professional could relatively easily manipulate the decision-making process to achieve consent to the procedure. The principal limitations of this right are elaborated in the following paragraphs.

7. Constitution

Background: The Constitution in PNG is the set of rules and principles, which determines the composition and functions of the organs of the National, Provincial and Local-level governments in PNG and regulates the relationship between the individual and the Independent State of PNG. The Constitution as in many countries is the most important document which regulates how the PNG government operates. The Constitution ensures also that the rights of all citizens are protected. It is a social contract between the government and the people it governs. This relationship is affirmed in the Preamble to the Constitution, in particular the duties under the Social Obligations between the State and people. The Constitution also vests in certain bodies or offices the responsibility to ensure that, when carrying out constitutional duties, the people are treated equally irrespective of their physical appearance, religion, creed, sex or caste. There are many more obligations that the Constitution provides for the benefit of the citizens in this country. It is the supreme law (Section 11, Constitution) that ensures that the government does not abuse the power of the people. The life of each and every citizen is important and protected by the constitution. The constitution covers every aspect of governance in PNG and is a complete code of law, comprehensive and exhaustive in every aspect of good governance. It provides for the principles and aids of interpretation. The political aims are detailed, some of which are to some extent made enforceable. Ergo, this is reflected in the constitutional provisions that give the National Parliament the power to make laws.

Unique: The Constitution is uniquely suited to PNG needs. Although the Constitution is autochthonous or home-grown, in the sense that it does not derive its authority from an external or foreign source, the laws that it declares or makes provision for, are to a large

extent not indigenous laws. They are a replica, based on, or copied, derived, imported, borrowed, adopted, inherited or introduced (to use some of the expressions commonly encountered in PNG legal discourse) from England and Australia. This is the result of the colonial process and part of the colonial legacy. During the colonial period, the administration by and large adopted principles of the English common law and equity, English and Australian statutes as the applicable laws. These were what the colonial administration was familiar and comfortable with. It is little wonder then that the bulk of PNG law is based on, or derived from, Anglo-Australian law. However, this is not to say that in all respects PNG law is similar to the law in England and Australia. First, even during the colonial period, custom or customary law continued to apply amongst the indigenous people. It still applies, though in limited circumstances such as marriage, divorce, inheritance and land ownership and use. Second, now, as in the colonial period, there are laws which are peculiarly Papua New Guinean. They were, and continue to be, made in response to purely local forces, needs and demands. They have no parallels in England or Australia. Third, changes in the law in England and Australia are occurring at a much faster pace than in PNG. As these changes are not necessarily replicated in PNG, the differences between PNG law and the law in England and Australia are bound to get more prominent with the passage of time. What one can say with confidence is that the bulk of the law in PNG has its origin in Anglo-Australian law. PNG adopted a base structure of the Westminster system of government. This Constitution gives the country a vital process of government and the fundamental aspirational principles that are in the National Goals and Directive Principles found in its preamble.

The rights of persons are outlined in Part III Division 3 sub division C (Qualified Rights) of the Constitution. The principle of autonomy is enshrined within Sections 32 and 49 of the PNG Constitution, which deal with the right to freedom and right to privacy.

The expression right to freedom under Section 32 is of the widest amplitude and covers a wide range of right, including the right to life with human dignity and all that goes along with it, and any act which damages, injures, or interferes with the use of any limb or faculty of a person, whether permanently or temporarily.

"Section 32, Right to Freedom, Freedom based on law consists in the least amount of restriction on the activities of individuals that is consistent with the maintenance and development of Papua New Guinea and of society in accordance with this Constitution and, in particular, with the National Goals and Directive Principles and the Basic Socials Obligations…"

And the expression "right to privacy" Section 49 of the Constitution, on a somewhat liberal interpretation, imposes some measure of control on the diminution of the person's integrity or invasion of his or her privacy. In a list of various rights, the right "to informed consent to the extent provided by a law, (Constitution Section 49) is noted.

"Section 49, Right to Privacy, Every person has the right to reasonable privacy in respect of his private and family life, his communications with other persons, and his personal papers and effects, except to the extent that the exercise of that right is regulated or restricted by a law that complies with Section 38 (general qualifications on qualified rights)."

This provision declares that every person has the right to reasonable privacy in respect of his or her private or family life as well as his or her communication with other persons and his or her personal papers and effects, except to the extent that the exercise of that right is regulated or restricted by a law which complies with Section 38 (general qualifications on qualified rights). We say that while the law seems to acknowledge the existence of informed consent in PNG, it does not often seem to clearly define it. In other words, within the law the concept of informed consent is not mentioned or even defined. On the other hand, this same provision seems to define various different parts of informed consent without rightly naming it. I

discuss this below.

Section 49 "Right to Privacy" of the Constitution on a somewhat liberal interpretation, imposes some measure of control on the diminution of the person's integrity or invasion of his or her privacy. For example, the consent obtained after giving the relevant information has its own parameters of operation to render protection to the medical practitioner. If the doctor goes beyond those parameters, he or she would be treating the patient at his or her own risk, as it is considered that there is no consent for such treatment at all. There is no reported case in PNG but in other jurisdictions a doctor was liable when he operated on a patient without consent [17]. The patient was suspected to have appendicitis. After obtaining the due consent, she was subjected to an operation. Upon incision, it was found that she has normal appendix and not inflamed. To protect the interest of the patient the doctor removed her gangrenous gall bladder. Later it was discovered that the kidney of the patient was affected. The doctor was held liable as he was operating without consent. Under Section 49 of the Constitution the same or familiar case would amount to diminishing a patient's personal integrity [11]. The principal limitations of this right are:

(1) It is "reasonable", not absolute;

(2) Its scope of exercise can be regulated or restricted by a law, in which legislative restriction is characteristic of qualified rights and the right to privacy is a qualified right, not absolute;

(3) It covers a person's private or family life, his communications with other persons, and his personal papers and effects, the first and second of which are of immediate relevance here.

A right to informed consent to medical procedures is not expressly declared in any health legislation in PNG. Nevertheless this right is certainly necessary since consent of any quality to medical, especially surgical procedures incurs some risk of diminishing an individual's personal integrity. Such procedures further imply some level of invasion of a person's privacy at his or her most vulnerable time when a healthcare professional could relatively easily manipulate the decision-making process to achieve consent to the procedure.

Courts would be criticized for not taking into consideration in their decisions the current state of the legislation regarding healthcare and informed consent as envisioned. There has not been a judicial proceeding on informed consent brought to PNG courts. We are of the view that the Court's judgement would be consistent with the constitutional provisions and thus would expand the common law by reference to judgements from foreign legal jurisdictions and would in turn promote the values of human dignity, equality and freedom when interpreting the bill of rights as contained in the Constitution or any other relevant PNG legislation. Informed consent before medical procedures is a constitutionally protected right in other jurisdictions but it is not clear in PNG. However the common law application of consent is not fully developed in PNG.

The constitutionally protected right to personal autonomy has been tested in fewer countries [18]. Accordingly patient consent is a requirement for all lawful medical interventions, for example, it is a well-established principle in South African common law [18]. The enactment of the National Health Act 61 of 2003 (NHA) in South Africa codified the requirements for informed consent and specified the nature and aspects of information to be disclosed before informed consent. We assert that patients who intend to rely on lack of informed consent bear the onus to prove on a balance of probabilities that,

(1) the medical practitioner was negligent in so far as he failed to warn his patient of the particular risk or complications; and

(2) the medical practitioner's negligent omission as such caused the damages suffered by them.

Perhaps the courts in PNG are reluctant to apply the regulations laid down in the South African NHA with regard to the legal application of the informed consent

doctrine in medical practice.

8. National Health Administration Act

The National Health Administration Act (NHAA) of PNG came into effect in 1997. No legal matters relating to informed consent have gone through courts in PNG under the NHAA since its implementation, maybe for the same reason as in South Africa. There are no cases that have been brought to the courts since the NHAA was implemented. Whilst NHAA is clear in its objectives in section 3(a), it seems unclear as to whether section 3(a) actually is the provision which endeavors to develop the common law on informed consent as envisaged by the Constitution. Perhaps this may also be one explanation why the courts are reluctant to apply the provision enacted in NHAA with regards to informed consent doctrine in medical practice. Another explanation is that there are no cases that have been subject to judicial proceedings in PNG, or maybe there could be other reasons.

According to the South African law (NHA) there is a duty on a medical practitioner to disclose the material risks of a planned procedure to the patient [18]. It has been determined that in order for consent to be used as a defense, the patient must have knowledge of the risks, understood the risks, and assumed the attendant risks and all its consequences. In Broude v McIntosh and another [19], a claimant brought an action against a surgeon for negligence following facial paralysis occurring secondarily to an operation that the claimant alleged had been wrongfully performed. The claimant also alleged that the defendant had failed to obtain appropriate informed consent, and had also failed to warn of the risk of facial paralysis prior to surgery. The case was appealed to the Supreme Court of Appeal and the court held that failure to obtain a real consent can be considered an assault on the plaintiff. We assert that the South African National Health Administration law [20] codified the principles of informed consent, particularly the aspects of information to be disclosed before informed consent is obtained.

In light of the above comments, it is apparent that PNG should take into consideration the experience of other countries on informed consent, consistent with the declared rights and exceptions in Sections 49 (Right to Privacy) and 51 (Right to Freedom of Information) of the Constitution of PNG [21, 22]. One may conclude these observations by noting what has been suggested by others, namely that "the ease with which any jurisdiction is capable of upholding individuals and patients' rights depends on its history and jurisprudence as it does on its willingness to make appropriate modifications or enthusiasm for change [23].

While the above laws are clearly set out, a doctor might encounter situations in which no clear guidance is given. If the patient confesses his or her wrong to the doctor, it is left to him or her to decide whether to pass on this information to the police authorities. This decision requires careful weighing up whether the right to consent on passing on information is more important than the right of the public to be protected. The legislature has given clear laws stating when the right to privacy does not apply to a patient. Incompetent minors, adults lacking capacity and some mentally ill patients do not have an absolute right to consent. The patients suffering from infectious diseases have limited right to consent and can be detained and treated against their will. When an adult becomes incompetent he loses the right to decide on his medical care. Furthermore an adult patient might set up an advance directive to not receive mechanical ventilation without discussing the merits of this intervention with a health care professional. This generally prohibits the doctor from administering such treatment in any situation.

The Department of Health (PNG) through its agencies is increasingly engaged in research. This is justified by the need to improve the quality of assistance provided to those settings in PNG and to collect evidence of the standard to inform advocacy and policy change, the instability of the patient-doctor relationship in the context of informed consent, and the

heightened vulnerability of population who value their culture and traditional customs but nevertheless calls for careful consideration of the funding into research in this area, and the ethical requirements. The fact that informed consent is not processed by many medical professionals, and the situation is widespread, continues to affect the lives of patients and many patients are refusing or withdrawing from medical treatment. The increasing numbers of infected patients returning to their local settings could increase the spread of infections and healthy population is placed at risk. We note that there is a relative dearth of published information on the plight, health status and challenges facing such populations. This is largely due to the fact that local medical facilities are often compromised by limited infrastructure, lack of medical doctors (both in terms of numbers and capacity) and insecurity. Medical and health policy research is limited. When it is done, it is often conducted by international non-governmental and humanitarian aid organizations who are the main actors on the scene. There is a clear justification and necessity to conduct research into the processing of informed consent in the context of law and its protection of the autonomy for both the patients and health care professionals.

9. Discussion and Conclusion

In PNG although the medical practice seems to acknowledge the requirement for patients' autonomy prior to medical treatment, the healthcare laws do not often seem to clearly define it. The patients on the other hand, generally demand to know their medical conditions. We found that many patients tend to speak their minds about their medical conditions, the subsequent treatment or medical procedure plans, and request to see their medical records and thus clearly demonstrated their understanding of the medical, ethical and legal aspects of informed consent process and knowledge of the type of medical treatment. The patients were mostly educated to college and a few who had postgraduate education would like to know about their medical conditions. The rationale for this reflects a strong cultural privileging of autonomy, liberty and the right to self-determination, and choice patients must make based on their own personal values and preferences. For example, when a patient refuses to consent for medical treatment, s/he would stand firm on that decision made whether its custom or customs related or for any other reason(s) only known to them and their spouses, or family members or a close friend. However we argue that informed consent is needed for any investigations or treatment proposed to a patient.

In the medical context, consent has been conceptualized as either "the coming together of minds" whereby parties make agreements following discussions on possible treatments and procedures the patient will undergo and benefits and risks which may occur as a result of his or her decision(s). The parties, patient and the doctor, must reach a mutual understanding in order to strike an agreement to proceed to a mutual conclusion and thus consent actually takes place. Consent may be a waiver of the patient's right to have a care professional to interfere with his or her body or if the patient does not authorize the undertaking of the proffered treatment or procedure any physical interference is deemed wrongful. Regardless of which action is taken, a patient's consent to a proposed intervention requires a deliberate act, that is, there must be an intention. Nevertheless this is not the end of the story, for a patient's consent to be truly given, is legal and ethically valid, a number of standard elements need to have been met, namely that the patient has the capacity to consent, that the patient has made the decision voluntarily, and that the patient has been provided with adequate information about the facts and risks associated with the treatment or procedure. This is known as "informed consent". These requirements demand an action from both parties involved, that the patient authorized the proposed intervention and the care provider must meet considerable responsibilities. This model of consent is well understood in terms of various regulations and court decisions which are

supported by codes and theories of ethics enshrined in many healthcare laws, and are the core of health policy and clinical governance. We argue that this can be integrated into clinical practice and in particular how it could capture or describe the decision making in situations where patients live also in other settings where traditional customs, beliefs and opinions are widespread, patients adhere to them, and the communities of people practice them.

The consent obtained after getting the relevant information will have its own parameters of operation to render protection to the medical practitioner. If the doctor goes beyond these parameters, he or she would be treating the patient at his or her risk, as it is clear that there is no consent for such treatment at all. A medical professional who treated a patient to protect the patient's interest was held liable as he failed to obtain consent [17]. This case law also signifies the traditional notion of paternalism prevalent among the members of the medical fraternity. It is the notion where the doctor takes up the role of a parent of the patient and begins deciding on behalf of the patient. The law in other jurisdictions does not allow for this notion. The first priority is the right of autonomy of the patient provided he is endowed with the necessary capacity. The doctor had not stopped after realizing that the patient's actual condition was normal, he would have been protected as he was working under valid consent. The patient's autonomy was sacrificed in the doctor's honest belief and confidence of his knowledge in the surgical procedure. Mill advocated for minimal level of paternalism in the interest of the medical profession and the overall inability of humans in taking rational decisions during the time of emergency [24]. Regarding proxy consent when the patient is unable to give consent himself, there are no clear regulations or principles developed in PNG. If a situation such as this occurs, the doctor may proceed with treatment by taking the consent of the patient or even an attendant. However, there are no objections or complaints that have been reported to the healthcare facilities or even the law authorities. When a doctor is acting reasonably under normal circumstances he or she is always protected, the doctor is never expected to play the role of an investigative agency.

The present work has examined the legal aspects of consent and explored the medical professionals and patients' perspectives of gaining informed consent for medical treatment from amongst a population of indigenous people who live in their local settings in PNG [7]. The belief of the data was based on the previous work in PNG on how the respondents related to the elements of consent, whether they understood the legal and ethical aspects of consent such as what the patients felt was important to their decision-making [7, 25]. The participants in those studies were asked to talk principally about their experience of decision-making in the context of medical treatment. However those interviewed spoke about the accepted elements of valid consent and how the elements of informed consent were challenged in circumstances where the decisions had to be made about undergoing medical treatment [11]. In PNG, the people are stuck with adhering to their traditional customs, beliefs and opinions. Looking at the practical aspects of consent shows that the information provided is often poorly understood and retained. Patients giving consent are doing so without being truly informed. In other words they cannot give informed consent due to their lack of understanding. It seems difficult to conceive an absolute right to consent in practice when efforts to provide information required for informed consent fail so often. This review examines the issue whether the right to consent is an absolute right by exploring the legal framework of consent or specifically informed consent, where the law differs between PNG and other parts of the world. We focused on the laws in PNG and the legal aspects and guidance by the regulatory authorities also apply only to PNG.

We contend that the medical professional has a duty to treat a patient and the State has a duty to safeguard the right to life of every person. The preservation of

human life is thus of paramount importance. The public hospitals run by the State are duty bound to extend medical assistance for preserving the lives of the people. Failure by the state hospitals to provide timely treatment to a person in need of such treatment results in the violation of the right to life guaranteed under the PNG Constitution, Section 35. No law or state action can intervene to avoid or delay the discharge of the paramount obligation cast upon members of the medical profession. Nevertheless, there is no case law in PNG to affirm this position. In other jurisdictions, for example in India, the higher court laid down some important guidelines such as (i) the doctor when approached by an injured person shall render all such help which is possible for him at that time including referring him to the proper experts, (ii) the doctor treating such persons shall be protected by law, as they are not contravening any procedural laws, (iii) all legal bars (real or perceived by the doctors) are deemed to have been eliminated by the verdict. This is in consonance with the hypocratic oath which a doctor takes when entering the profession. Hence a doctor is duty-bound to treat a patient in the case of emergency without waiting for any formalities. This is irrespective of complying with any of the formalities including consent. Hypothetically, what shall be the position if a patient in an emergency resists taking treatment? PNG courts are not clear on that. A case [26] in India shall bring light onto this situation, a case of perforated appendix with peritonitis requiring a surgery. But no surgery was done until the patient's death. The contention of the doctor was that the patient did not consent for surgery. The patient was willing to go for surgery but his condition did not permit it. The plaintiff's wife argued that the doctor demanded money to perform the surgery. Furthermore, the doctor was attending to some chores in an outside private nursing home to conduct operations on the other patients and the appellant doctor came back only after the death of the patient. The court finally delivered a verdict in favor of the plaintiff's wife stating that consent under such an emergent situation was not mandatory [3]. In the United States, the doctrine of informed consent was developed on the grounds that patient's right to self-decision shapes the boundary of the duty to reveal [27]. The important legal precedent in England was the case of Bolam v Friern Barnet Hospital Management Committee [28]. According to the Bolam principle, as formulated by Lord Scarman in the case of Sidaway [29], "A doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different approach". According to the Bolam principle, the medical profession and not the legal profession was recognized as the authoritative source of guidelines and criteria relating to medical information and related patient decisions rather than specific legal principle and agendas. The Australia court rejected the Bolam principle but favored the position more consistent with the American "reasonable patient standard" of determination. This standard means that a doctor is legally obliged to give their patient enough information and to do so in such a way that a "reasonable" or prudent person, in the particular patient's position would be able to understand any material risks and benefits of a proposed treatment enabling them to give their informed consent to proceed. Although the American "doctrine" of informed consent was not totally embraced in Australia, the High Court also did not accept the English precedent on the Bolam principle. The Australian High Court [30] held in Rogers v Whitaker, "except in the case of an emergency or where disclosure would prove damaging to the patient, a Medical Practitioner has a duty to warn the patient of a material risk inherent in a proposed treatment". The requirement in Australia that the reasonable care is provided is to ensure that patients understand the information, advice or warnings. This places the onus squarely on the treating healthcare professionals and further the practitioner must also assess the patient's comprehension of the information

[30]. Similarly in another case in the High Court of Australia, a dental surgeon was sued by his patient for failing to advise her beforehand of the risks inherent in the surgery. The patient suffered pain and injuries to her temporomandibular joint (jaw) [31]. His Honour Kirby J commented further on the sufficiency of the provision of written information about the risks to the patient. His Honour views that a personal one-to-one communication between the doctor and the patient would have been understood and appreciated by the patient and was necessary for the legal obligation of the practitioner to be discharged.

In summary understanding of the nature of the procedure, benefits and risks are important to informed consent. The patient's right to autonomy should always be respected and steps should be taken to make consent truly informed. We hold the view that there is no absolute right to autonomy or consent. In light of all these developments, it is concluded that there are many grey areas in this field of consent law in PNG which can be eliminated by pro-active intervention by the concerned professional regulatory body.

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Conflict of Interest

None.

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