

MATRIMONIAL UNITY AND MEDICAL CONFIDENTIALITY

Examining Spousal Notification Of Infectious Diseases In The Context Of Nigerian Marriage Laws

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This paper examines the application of medical confidentiality, and by the same token the right to privacy, in the context of husband and wife relations. The analysis is undertaken in the framework of Nigerian laws relating to marriage, vis-à-vis the concept of legal unity. Where necessary, references are made to relevant legal principles drawn from other jurisdictions. Among the fundamental issues addressed is whether the need to protect a spouse from being infected with a sexually transmitted communicable disease is a justification for a doctor to breach medical confidence.

1. Introduction

1.1 Husband and Wife: Special Relationship

From the perspectives of law, religion, social norms, culture and others, matrimony is accorded certain special treatment that makes it distinctive from all other interpersonal relationships.¹ By virtue of marriage, spouses enjoy some

¹ E.I Nwogugu, *Family Law in Nigeria* (Ibadan: Heineman Educational Books (Nigeria) Ltd, 1974) xxviii.

advantages at law, which are unavailable to unmarried persons. The basis of some of the special treatments enjoyed by married couples is the legal categorization of the spouses, though two separate individuals, as one person. This legal transmutation of spouses into one entity is described as legal unity,² rephrased as 'matrimonial unity' in the title of this paper. It is a creation of common law.³

It seems that the principle of legal unity had been recognized long before the comparatively modern era common law evolution. There appears to be an indication of the existence of the principle in biblical Old Testament times. According to an injunction in the book of Genesis⁴:

"Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh."⁵

In various ways, statutes have implicitly consolidated the principle of legal unity. One of such ways can be found in the Nigeria *Criminal Code*, which provides that a spouse shall not be criminally culpable for damage to the property of the other spouse.⁶ While there is no explicit reference to legal unity in the *Criminal Code* provision, it is manifest that the provision revolves round legal unity; seemingly, what one spouse does to the property amount to doing it to his or her own property.

One area in which the unity of spouses may appear contentious, concerns the duty of a doctor to keep the medical confidentiality of patients. While it is discussed in detail in later section of this paper, it is necessary to briefly preview the subject. Simply, medical confidentiality imposes an

² *Ibid* at 83.

³ *Ibid*.

⁴ *Genesis* II, 24.

⁵ Emphasis added.

⁶ Section 36 *Criminal Code Act*, Cap. C38 Laws of the Federation of Nigeria (LFN) 2004 ['Criminal Code Act'].

ethical duty on a doctor not to disclose to a third party what he discovers about his patient in professional capacity, without the consent of the patient or legally sustainable grounds.⁷ Medical confidentiality, essentially, is one mechanism for safeguarding the right of the patient to privacy, which is guaranteed under the Nigerian Constitution.⁸

As will be shown subsequently, it is debatable whether a doctor, without his patient's consent, can legally disclose to the spouse of the patient that the patient suffers from a sexually transmittable infection. Using HIV/AIDS to represent sexually transmittable disease, we can assume the following scenario to illustrate: a doctor discovers that his patient who is married is HIV positive. Notwithstanding the doctor's advice, the patient insists he would not inform his wife nor strive to engage in safe sex. In the absence, or uncertainty of any legal backing, what would be the legal situation of the doctor if he overreaches the patient to inform the spouse?⁹

This paper addresses this question with reference to the principle of legal unity and special relations existing between husband and wife. It will essentially examine whether matrimony is a basis for the doctor to overreach the patient in the scenario assumed above.

2. Spouses as Sexual Partners: Examining Different Levels of Sexual Partnership

It needs to be emphasized that this paper does not seek to argue the merits or desirability of partner notification as a measure of controlling HIV/AIDS or any other sexually

⁷ See J.K Mason, R.A McCall Smith and G.T Laurie *Law and Medical Ethics* (5th ed.), (London: Butterworths, 1999) at 191-193.

⁸ See section 37 of the Constitution of the Federal Republic of Nigeria, 1999 [hereinafter 'Nigerian Constitution'].

⁹ This illustration is extracted substantially from D.G. Casswell, 'Disclosure by a Physician of AIDS-Related Patient Information: an Ethical and Legal Dilemma', (1989) 68 Can. Bar Rev., 225.

transmitted disease. It has earlier been argued in some other areas that partner notification, due to various challenges, may not be an effective public health measure.¹⁰

Partner notification or contact tracing, as it may also be called, is the process of locating and informing, or warning, the sexual partners or other persons who may be at risk of contracting a disease through the sexual or other behaviours of infected persons.¹¹ Generally, partner notification is a means of preventing spread of disease, especially sexually transmittable diseases. Partner notification has featured significantly in the discussion of curtailing the spread of HIV/AIDS.¹²

In discussions of the desirability of partner notification as disease control measure, it seems that the special relationship of husband and wife does not attract any distinctive attention. Spouses tend to be summarily subsumed into the indistinctive classification of 'sex partners'.¹³ The argument that human right protection is a better option in the drive to control HIV/AIDS, necessarily leads to the conclusion that patients' rights to privacy should not be transgressed by notification of "sexual partners". In such situation, there is the tendency to foreclose the analysis whether the special relationship of married couples warrant that an exception be made in the case of spouses.

In discussing the right of a sexual partner to know about the health or other condition of the other, it would seem unrealistic to simply loop spouses and non-spouses in the same category of sexual partners. "Doing so", it is argued, "would be

¹⁰ See generally S.B. Odunsi 'HIV/AIDS: Should Doctors be bound to inform Sexual Partners of Infected Patients? Right to Privacy versus Public Health' Paper delivered at IUSSP on Seminar on Ethical Issues in Reproductive Health, held at Wassenaar, Netherlands on 23/09/2006.

¹¹ *Ibid.*

¹² See e.g. D.G. Casswell *supra* note 9.

¹³ See generally *ibid.*

an affront on the institution, which is held sacred in various cultures and legal systems".¹⁴

Any discourse of partner notification should take cognizance of levels of sexual partnership. True, a spouse, through marriage, becomes a sexual partner. It is, however, arguable that the situation of the spouse as a sexual partner cannot be equated with those of *mere* sexual partners who may range from temporary girlfriends, casual acquaintances to commercial sex workers.

Mutually, as foundation of marriage, spouses solemnly undertake and bear the onerous moral burden to stand by each other "for better for worse, for richer for poorer, in sickness, and in health, to love and to cherish, till death do us part".¹⁵ Manifestly, in that light, sexual intercourse is a slight portion of the yoke of marriage. Spouses, essentially, are life partners whose individual fates have become intricately interwoven. Simply, the situation of one fundamentally affects the other.

Putting spouses in a special class of sexual partners is the starting point in the examination of the justifiability of doctors' breach of patients' confidence in notifying spouses of the risk of communicable diseases.

3. Nigerian Law and Types of Marriage: Focus on Statutory Marriage

Statutorily regulated monogamy and customary law polygamy are the two types of marriage in Nigeria. The *Marriage Act*¹⁶ and the *Matrimonial Causes Act*¹⁷ govern monogamy, which is also commonly referred to as 'statutory

¹⁴ See E.I. Nwogugu *supra* note 1 at xxxviii.

¹⁵ See e.g. Foreverwed.com, online at http://www.foreverwed2.com/Religious_Ceremonies/ceremony%20sample%20nine.htm accessed on 29/11/2006.

¹⁶ Cap. M6 Laws of the Federation of Nigeria (LFN) 2004.

¹⁷ Cap. M7 Laws of the Federation of Nigeria (LFN) 2004.

marriage' 'Christian marriage', or 'marriage under the Act', because it is regulated by statutory provisions.

Monogamous marriage has been defined in the case of *Hyde v Hyde*¹⁸ as a marital union of one man and one woman to the exclusion of all others. Thus, when a man and a woman undergo a statutory marriage, none of the parties can contract another marriage while the statutory marriage subsists.¹⁹ A marriage contracted in violation of this rule would be void. Apart from that, such act amounts to a crime of bigamy.²⁰

Blacks Law Dictionary defines polygamy as, "[t]he state or practice of having more than one *spouse* simultaneously,"²¹ and a polygamist as, "[a] person who has several spouses simultaneously."²² With its connotation of plural or multiple marriages, polygamy encompasses a situation where a man simultaneously has more than one wife (polygyny) and where a woman simultaneously has more than one husband (polyandry).

However, in Nigeria, polygamy is largely restricted to the practice of a man having more than one wife. The practice of a woman simultaneously having more than one husband, apart from being a social aberration, is illegal in Nigeria.²³

¹⁸ (1886) LR 1 P&D 130 particularly at 133, per Lord Penzance.

¹⁹ See sections 47 and 48, *Marriage Act*.

²⁰ Section 370, *Criminal Code Act*. See generally, C.O.Okonkwo and Naish: *Criminal Law in Nigeria* (London: Sweet & Maxwell, 1980), 284-287. See also sections 47 and 48 of the *Marriage Act*. See also C.O.Okonkwo *supra* note 19, 285-287.

²¹ B. A. Garner *et.al* (eds.) *Black's Law Dictionary* (8th edn.) (St. Paul, Mn: Thomson West, 2004), 1197. [Emphasis added] See, W.J. Stewart *Collins Dictionary Law* (2nd edn.), (Glasgow: Harper Collins Publishers, 1996), Sheila Bone (ed.) *Osborn's Concise Law Dictionary* (9th edn.) (London: Sweet & Maxwell, 2001), 291. See also The Law Commission, *Family Law Report on Polygamous Marriages* (London: Her Majesty's Stationary Office, 1971), 1.

²² B. A. Garner *et.al* (eds.) *ibid.*

²³ See S.N.Chinwuba, *Modern Family Law in Southern Nigeria*, (London: Sweet & Maxwell, 1966), 167.

Therefore, in the context of this paper, discourse of polygamy is largely restricted to the polygyny.

Polygamy is governed by Nigerian customary law, which varies from place to place, according to the cultures and ways of life of each community. This is why customary law has been described as "a mirror of accepted usage."²⁴

Polygamy is an inherent customary practice of the indigenous people of Nigeria. As a Nigerian sociologist puts it, "[w]e were born into polygyny. It is part and parcel of our society."²⁵

This paper will however focus on statutory or monogamous marriage. The reason for this restriction is that the statutorily provided benefits of legal unity, which form the bedrock of the argument for expanding to medical confidentiality, are largely limited to monogamous marriages.²⁶ Secondly, the doctrine of legal unity is a creation of common law;²⁷ while common law applies in many respects to monogamous marriage in Nigeria,²⁸ it does not apply to polygamous marriages, which are strictly governed by customary law.²⁹

Legal unity manifests in various aspects of marriage. These will be examined in light of legal effects of marriage and some legal exemptions, which husband and wife enjoy by virtue of their marriage.

²⁴ *Owonyin v Omotosho* [1961] 1All N.L.R. 304 at 309.

²⁵ S. F. Petasalis, *The Silent Power, A Portrait of Nigerian Women* (Quebec: Meridian Press, 1990) 47.

²⁶ See e.g. C.O. Okonkwo, *supra* note 20, 123. See also section 161(3) together with section 2(1) *Evidence Act* Cap. E14 Laws of the Federation of Nigeria (LFN), 2004.

²⁷ E.I. Nwogugu *supra* note 1 at 83.

²⁸ See S.A. Adesanya *Laws of Matrimonial Causes* (Ibadan: Ibadan University Press, 1973) 2.

²⁹ E.I. Nwogugu, *supra* note xxxii.

4. Legal Consequences of Marriage

Statutory marriage is a contract out of which flow some rights, duties and obligations for the parties to the marriage contract. The rights and duties can be summed as 'consortium'. Lord Reid, in the case of *Best v Samuel Fox & Co.*³⁰ explained consortium as "a name for what a spouse enjoys by virtue of "a bundle of rights, some hardly capable of precise definition."

More simply, consortium can be described as the right of one spouse to the company, assistance and affection of the other. While the interpretation of 'consortium' may be open wide-looping, some consequences of marriage tend to indicate what consortium in effect is. Some of these are examined subsequently.

One is that marriage entitles a woman to use the husband's surname. The woman can even retain the name after termination of the marriage by divorce or death of the husband.³¹ The husband and wife mutually owe duties to cohabit in a place designated as the matrimonial home. Cohabitation does not rigidly connote that they both stay under the same roof at all times. They would still be deemed to be cohabiting, if some factors such as nature of their jobs, keep them apart, and the staying apart is based on mutual understanding.³² Husband and wife also have duties to engage in sexual intercourse with each other, subject to the condition that the right to sex of one must not be exercised in such a way that would be harmful to the other.³³

From another perspective, one legal consequence of marriage is that some legal rules are made to apply to spouses which do not apply to unmarried persons. While this has been

³⁰ (1952) AC 716 at 736.

³¹ See *Fendal v Goldsmith* (1877) 2 PD 263; see also *Cowley v Cowley* (1901) AC 450.

³² *R v Creamer* (1919) 1 KB 564 (CA).

³³ See *R v Miller* (1954) 2 All E.R 52.

touched briefly earlier, it would now be examined in some detail by considering some other legal rules.

Generally, under common law, spouses cannot contract with each; doing so would amount to one person contracting with himself or herself. Husband and wife are also entitled to defend each other. Similarly, husband and wife, generally, can be liable in tort for acts committed against each other and against each other's property. This rule also manifests in criminal law; as mentioned in the early part of this paper, by virtue of which husband and wife cannot be criminally liable for offences committed against each other's property.³⁴ Furthermore, husband and wife cannot be held criminally liable for conspiring between themselves, because doing so would amount to one person conspiring with himself or herself.³⁵

5. Medical Confidentiality in the context of marriage

The basis of the special provisions made to regulate the relationship between spouses is to strengthen the bond between husband and wife. "These rules recognize the particular relationship of married people and the need to foster and preserve marital harmony and unity."³⁶

The rationale for special legal rules for spouses is quite commendable. It would now be whether the special rules extend to the realm of medical confidentiality, so that a doctor can summarily notify one spouse of the HIV positive status of the other in case of refusal or reluctance. As a prelude to this, medical confidentiality would be examined in some detail.

³⁴ See also E.I. *supra* note 1 Nwogugu at 97-99.

³⁵ See *Keshiro v I.G.P* (1955-56) WRNLR 84.

³⁶ E.I. Nwogugu *supra* note 1 at 97.

6. Right to Privacy and Medical Confidentiality

In the simplest sense, 'right to privacy' connotes the right to control information about oneself.³⁷ The right to privacy is the epicenter of all human freedoms and rights.³⁸ Based on its importance, it recurs in various international human rights treaties and constitutions of different countries.³⁹

In the realm of medical law and practice, the right to privacy translates to medical confidentiality. Medical confidentiality dictates that a doctor, save in exceptional cases, must not disclose confidential information he obtains in the course of doctor-patient relationship. In the case of *Hunter v Mann*,⁴⁰ Boreham J summed up the kernel of medical confidentiality in the following words: "...the doctor is under a duty not to disclose, without the consent of the patient, information which he, the doctor, has gained in his professional capacity."

Flowing from the foregoing is that the doctor should not disclose such information; similarly, any information obtained by the doctor in breach of medical confidentiality will be inadmissible and, where wrongfully admitted, would be excluded from the records in the case of court proceedings.⁴¹

Generally, medical confidentiality is rationalized on the ground that it would enable patients to give, freely and confidently, information to their doctors. According to the British Medical Association,⁴²

³⁷ J. H.F. Shattuck, *Rights of Privacy* (Skokie, Illinois: National Textbook Company, 1977), xii.i

³⁸ *Ibid.*; see the Canadian case of *R v Dymont* 55 D.L.R. (4th) 503 at 513, per La Forest J, referring to Alan F. Westin, *Privacy and Freedom* at 349-350.

³⁹ For example, see section 37 of the Constitution of the Federal Republic of Nigeria, 1999 [hereinafter 'Nigerian Constitution'].

⁴⁰ [1974] QB 767 at 772.

⁴¹ See *R v Dymont supra*.

⁴² British Medical Association (BMA) guidance *Confidentiality: Protecting and Providing Information* June 2000, obtained at www.gmc-uk.org accessed on 17/4/2005; see also BMA guidance, *Confidentiality &*

[P]atients have a right to expect that information about them will be held in confidence by their doctors. Confidentiality is central to trust between doctors and patients. *Without assurances about confidentiality, patients may be reluctant to give doctors the information they need in order to provide good care.*⁴³

The normative sources of medical confidentiality include professional self-regulation, common law and statutory provisions.⁴⁴ Among other measures, an aggrieved patient may seek to recover from a doctor for breach of confidence.⁴⁵

At different points, the doctor has to balance the right of his patient to confidentiality against overall public interest. In that light, the patient's right to privacy is not absolute and the doctor's duty to keep patient's confidence is not rigid. Consequently, common law, statutes and ethical guidelines permit doctors to disclose patients' information without consequences in some situations.⁴⁶ The first situation where a doctor can legitimately break confidentiality without the patient's consent is when it is in the patient's interests to do so and it is medically undesirable to seek the patient's consent.⁴⁷ The doctor's duty to safeguard public interest in some situations can justify the breach of confidence in some situations; control of crime and the need to safeguard members of the public from harm are included in public interest exceptions. This aspect of the doctor breaching confidence in overriding public interest

disclosure of health information, October 1999 obtained at www.bma.org.uk accessed on 17/4/2005.

⁴³ *Ibid.* [emphasis added].

⁴⁴ S.B Odunsi *supra* note 10 at 6-8.

⁴⁵ See M. A. Jones *Medical Negligence*, (London: Sweet and Maxwell, 2003), 170-172.

⁴⁶ See M. A. Jones *supra* note 32 at 173-184. See also J.K. Mason et al *supra* note 22 at 193-198.

⁴⁷ J.K Mason, R.A McCall Smith and G.T Laurie *supra* note 7 at 194.

is open to debates, and “is arguably the most controversial permissible exception to the rule of confidentiality.”⁴⁸

7. Exceptions to Medical Confidentiality: the situation of Spouses and Infectious Diseases

Generally, under common law there is no duty of care in the absence of special legal relationship. Thus, except in the accepted cases of public interest, a doctor is not legally bound to warn or inform a third party about the danger constituted by his/her patient to a third party. Conversely, the doctor has a legal and ethical duty to keep the confidence of the patient.

In the absence of an express legal duty to intervene or *rescue*⁴⁹ under common law, it becomes arguable whether a doctor could legitimately breach the confidence of his patient in order to protect a spouse from being exposed to an infectious disease by the other spouse.⁵⁰ Related to the above situation is the question of possible consequences to the doctor where he/she chooses to keep the confidence of his/her patient and the third party is injured.

This question can be addressed by an analysis of the rules relating to notification of transmissible diseases in Nigeria. A legislation that relates to notification of transmissible diseases is the *Venereal Diseases [Ordinance]*.⁵¹ The kernel of the legislation, as presently contained in the *Venereal Diseases Laws* of Oyo State of Nigeria,⁵² is contained in section 3(1), which states:

⁴⁸ *Ibid* at 195.

⁴⁹ *Ibid* at 201.

⁵⁰ In the context of this paper, is assumed that the spouse at risk is not the patient of the doctor.

⁵¹ Laws of the Federation of Nigeria 1958; the legislation made during the colonial era now forms part of state legislations applicable in various states. I will adopt the legislation of Oyo state, one of the states constituting the Federation of Nigeria, in this paper.

⁵² Cap. 167, Laws of Oyo State of Nigeria, 2000.

Any person suffering from any venereal disease or suspecting that he is so suffering shall, on becoming aware of his condition, immediately consult-

- (a) the medical officer of health for the area in which he is residing; or
- (b) a qualified medical practitioner,

and shall place himself under treatment by that medical officer of health or qualified medical practitioner, who may direct that such person shall attend for treatment at an approved medical institution.

There is no provision in the legislation empowering or compelling a doctor to notify a spouse about the other spouse's infection.

The common law applicable in England is one of the sources of Nigerian law.⁵³ Therefore, as in England, there is no duty to *rescue* in the absence of legal duty in Nigeria. Furthermore, there does not seem to be any practice directive by the Nigerian Medical Association (NMA)⁵⁴ compelling or empowering doctors to disclose patients' infectious diseases to a spouse. In any case, it is doubtful whether the NMA's position can be radically different from the global situation which largely enjoins the keeping of patient's confidence. Based on the above analysis, the Nigerian position, ostensibly, is that there is no legal basis for the doctor to notify a spouse about the partner's infectious disease. Such decision is at the discretion and peril of the doctor.

Using HIV/AIDS as a reference, government policies in Nigeria tend to align with keeping the confidence of infected

⁵³ See A.O. Obilade, *The Nigerian Legal System* (London: Sweet & Maxwell, 1979) 55-56.

⁵⁴ The NMA is the regulatory body of medical practice in Nigeria, the equivalent of the BMA or CMA.

persons. For example, the *Armed Forces HIV/AIDS Control Policy Guidelines*⁵⁵ provides:

Medical records and other aspects of care of service Personnel with HIV/AIDS must be protected by full confidentiality, with release of information strictly on a "need to know" basis. All persons who "need to know" shall also be bound by the principle of confidentiality.⁵⁶

While the HIV/AIDS policies are not legally binding, as products of the Federal Government, they stand to enjoy significant deference as the national standard for dealing with HIV/AIDS as a communicable disease. Thus there is a strong indication that the prevailing policy in Nigeria leans in favour of keeping the confidence of HIV infected persons, than breaching it.

8. Legal Unity as Justification to Breach of Confidence in Nigeria

Inferably, the prevailing rules relating to medical confidentiality in Nigeria do not legitimize doctors' breach of patients' confidence in the interest of spouses, notwithstanding the principle of legal unity. Essentially, while it may seem harsh, the situation is that a doctor is not empowered or obliged to notify a spouse about the HIV status of the other spouse. This also appears to be the prevailing norms beyond Nigeria too.

Some have argued that unauthorized disclosure of medical information to family members does not amount to

⁵⁵ *Armed Forces HIV/AIDS Control Policy Guidelines* Issued under the authority of Hon. Minister of Defence, October 2003.

⁵⁶ *Ibid* at 16-17.

unjustified breach of confidence.⁵⁷ However, it seems that the argument does not enjoy popular support.⁵⁸ In the specific context of spouses, the generally acceptable position appears to be that legal unity does not apply in the realm of medical confidentiality. Some writers have strongly alluded to this situation in the following words:

The longest established family relationship is that of the spouse- what are his or her rights in both the positive and negative aspects of confidentiality? *If the treatment is for medical condition, a married person has the same rights to confidentiality in respect of the spouse as in respect of anyone else...*⁵⁹

9. Conclusion

Seemingly, legal unity is a tool of convenience created to regulate matrimonial relationship in some respects. However, it falls far short of expectation in its not enabling doctors to disclose medical information about spouse to the other spouse, without consent; a situation where people who are to share each other's joy and sorrow are permitted to conceal issues such as HIV/AIDS infection or any other medical condition from each other is open to some moral criticisms. Unfortunately, moral arguments are of little significance in the face of established legal principles. There is an urgent need for review in this aspect of matrimonial and other laws in Nigeria.

True, it is important to protect the right to privacy to avoid exposing infected persons to stigma and other disadvantages. At the same time, such reasoning has to take appropriate attention to the special relationship of husband and wife.

⁵⁷ A. Samuels 'The Duty of the Doctor to Respect the Confidence of the Patient' (1980) 20 Med Sci. & Law 58.

⁵⁸ J.K Mason, R.A McCall Smith and G.T Laurie *supra* note 7 at 202.

⁵⁹ *Ibid* at 204 [emphasis added]

In the case of married persons, it would seem that such disclosure would even be in the interest of HIV/AIDS control. For example, if one spouse is promptly aware of the status of the other, he or she may take measures for safe sex, or ensure that the infected one receives treatment. Along this line, it is important that legal unity and special legal rules which are facilitated for married persons be extended to the realm of medical confidentiality.