

Consent - Its Medico Legal Aspects

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Abstract

One of the duties of a doctor towards his patients is to obtain consent before any medical examination. Any such examination without prior consent amounts to an assault on the patient. Consent is defined under Indian Contract Act (because Doctor Patient relationship is a contract) as “two or more persons are said to consent when they agree to the same thing in the same sense.” Consent may be implied, expressed or informed depending upon the circumstances. But the consent of the patient is not required in situations like medical emergency, for vaccination etc. If the patient is not medically or legally competent to give consent, the consent of the parents or guardians or any person present at the time with the patient can be taken. Any research on a potential subject, removal of organs for transplantation, publication of information obtained during medical examination also require consent of the concerned person. ©

INTRODUCTION

Every individual has the right to do what he likes with his body, in order to protect and preserve his health and personal privacy. This is the Constitutional protection provided by Article 20 (3).¹ Therefore, any examination or treatment done by a doctor to a patient which involves any interference with the physical integrity of the patient is unlawful unless done with the consent of the patient: it constitutes the crime of assault and the tort of trespass to the person.²

Consent is defined under Section 13 of Indian Contract Act, 1872 (because whenever a patient comes to a doctor for treatment, there is a contract established between the doctor and the patient) as “Two or more persons are said to consent when they agree to the same thing in the same sense”.³

In most of the cases filed against the doctor, it is alleged that consent was not obtained. Obtaining consent will thus be a cornerstone of protection against litigation. Depending upon the circumstances, in each case, consent may be implied, expressed or informed.

Implied consent

An implied consent is not written, that is, its existence is not expressly asserted but nonetheless, it is legally effective. It is provided by the demeanor of the patient. It implies consent to medical examination in a general sense i.e. when a patient approaches the doctor for treatment, it is presumed that there is a consent for

routine physical examination e.g. examination of pulse, B.P., temperature, rate of respiration etc. This is the most common variety of consent in both general and hospital practice.

Expressed consent (Tacit consent)

Expressed consent is one, the terms of which are stated in distinct and explicit language. It is a must in any examination beyond routine physical examination. E.g. giving injection; examination of private parts; examination for determining age, potency and virginity; giving anaesthesia or any surgery etc.

When the patient expresses his consent verbally it is termed as ‘oral or verbal expressed consent’ and when expressed in writing is known as ‘written expressed consent.’ Expressed consent is obtained preferably in the presence of a disinterested party. Oral expressed consent, when properly witnessed, is as valid as written expressed consent, but latter has the advantage of easy proof and permanent record.

INFORMED CONSENT

The concept of informed consent has come to the fore in recent years and patients who allege that they did not understand the nature of the medical procedure to which they gave consent have brought many actions. Therefore all information should be explained in comprehensive, non-medical terms preferably in patient’s own language about the,

- i. Nature of the illness.
- ii. Nature of the proposed treatment or procedure.
- iii. Alternative procedure.
- iv. Risks and benefits involved in both the proposed and alternative procedure.

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- v. Potential risks of not receiving the treatment.
- vi. Relative chances of success or failure of both procedures.⁴

Yet, in practice this is not always so simple. Because in certain situations the patient may be in dire need of treatment, but revealing the risks involved (the law of full disclosure) may frighten him to refusal. The doctor may not reveal the risks involved, if-

- i. Patient prefers not to be informed.
- ii. When complications are trivial.
- iii. When revealing complications is likely to have a gross impact on psychology of the patient (a close relative of the patient can be informed of the complications and a colleague should be consulted preferably patient's family physician for the treatment of the patient). This is known as "Therapeutic privilege".¹ But the doctor should note his decision and reasons for the same in patient's case record.

The informed consent when expressed by the patient in writing is termed as, "informed expressed written consent." This is a must in all surgeries, administration of anaesthesia and all complicated therapeutic and diagnostic procedures.

Physician's failure to provide the patient with information necessary to make an informed and intelligent choice, is a breach in standard of disclosure, which, if found to be the cause of alleged injury, makes a prima facie case for negligence on part of the physician.

Role of hospital

A question that may creep, particularly for those practicing in a hospital setting, is, "Does the hospital have a responsibility to ensure that the patient received adequate disclosure?" Under the theory of "Respondent Superior", an employer (hospital) could be held jointly liable with an employee (doctor) whose failure to obtain informed consent could be shown to have caused injury and damage to a patient. A hospital policy must govern the procedure by which consents are obtained.

A patient can withdraw consent after signing a consent form. Though this is the rule, but there are practical limitations. In such cases, if patient is admitted in a hospital, it is the obligation of the hospital to make sure that no member of the hospital staff performs the refused procedure.

Legally valid consent¹

Legally valid consent for medical examination, interventional procedure and treatment is one that is –

- i. Given by the person himself, if above 12 years of age (Sec.88 IPC), conscious and mentally sound or given by the parent, guardian or close relative, if the patient is less than 12 years of age or is insane or is unconscious. In such circumstances consent given by parent, guardian or close relative is known as

"substitute or proxy consent."

- ii. Informed expressed written consent.
- iii. Given before actually doing the procedure.
- iv. Given in the presence of two witnesses.
- v. Given freely, voluntarily and directly.
- vi. Given without fear, fraud or force.
- vii. Signed by the doctor, patient (or guardian) and witnesses."

Blanket consent

It is a consent taken on a printed form that covers (like a blanket) almost everything a doctor or a hospital might do to a patient, without mentioning anything specifically. Blanket consent is legally inadequate for any procedure that has risks or alternatives.

COMPULSORY MEDICAL EXAMINATION¹

In the following situations, medical examination and treatment can be done even without consent-

- i. In emergency i.e. when patient is not in a condition to give consent and there is nobody with the patient to give consent, but his condition warrants immediate treatment to save his life. In such situation, treatment to save life can be given without consent (Emergency doctrine – Sec. 92 IPC).
- ii. Examination of a person, who is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of such a person will afford evidence as to the commission of an offence, can be done without his consent at the request of the Police Officer not below the rank of Sub-Inspector (Sec. 53 (i) Cr. PC). This is because medical examination forms a part and parcel of the process of investigation. If the person is not willing for examination "reasonable force" can be applied (though what is reasonable force and who applies it, is unclear).
- iii. If there is chance of spread of infection to others.
- iv. Examination of immigrants.
- v. Members of armed forces, handlers of food and dairy products.
- vi. Prisoners and criminals can be examined forcibly in the interest of the society.
- vii. When the court orders for psychiatric examination and treatment.
- viii. For vaccination- as vaccination is authorized by the law.
- ix. Child offenders – when the Magistrate makes the request.
- x. Attempted suicide.

Role of consent in special circumstances

- i. In emergencies involving children, when their

parents or guardians are not available, consent is taken from the person who is in charge of the child (Loco parentis) e.g.: a school teacher can give consent for treating a child who becomes sick during a picnic away from home town.⁵

- ii. Patient is unable to give consent and no parent or guardian is available then consent can be given by friends or any one present with the patient.
- iii. Consent given for an illegal act is not valid e.g. Criminal abortion. Doctor is punishable if he performs such an act even with consent from the patient.
- iv. Examination of a person in the state of drunkenness should not be done without his consent and blood, urine or breath should not be collected. If the person becomes unconscious and is incapable of giving consent, the consent of the guardian or relatives, if available, should be taken. If none is present with the patient the examination and treatment should be carried out. Similarly a doctor can examine and treat an intoxicated person without his consent if he cannot comprehend the consent. If the person is arrested on a charge of committing an offence, it is advisable to wait till he becomes sober and gives consent for divulging the examination finding to the Police.⁵
- v. Consent of Spouse for operation and treatment in the routine course is not necessary. But consent is required if an operation or treatment involves danger to the life or destruction of an unborn child or impairment of sexual function. Consent of both husband and wife is a must for an operation involving the reproducing or sexual organs of a married partner. E.g. sterilization, artificial insemination etc. For artificial insemination, in addition to the consent from recipient partners, the consent of donor partner must also be obtained. But consent of wife alone is sufficient for gynecological operation to be done to safeguard her health.⁵
- vi. For medical treatment of pregnancy the consent of the pregnant woman alone is sufficient provided she has attained the age of 18 years, conscious and not insane.
- vii. In medicolegal cases though the law requests the examination, consent must be obtained, whether it be the victim or assailant who has to be examined.

ROLE OF CONSENT IN CIRCUMSTANCES OTHER THAN MEDICAL EXAMINATION AND TREATMENT

- i. A female of more than 16 years can give valid consent for sexual intercourse (Sec. 375 IPC). Therefore sexual intercourse by a man with a woman of less than 16 years even with her consent amounts to rape.⁴

- ii. A person below 18 years can not give valid consent to suffer any harm which can result from an act not known or intended to cause grievous hurt or death (Sec. 87 IPC). A person above 18 years can participate in rough sports like rugby, boxing, wrestling etc.³
- iii. The nature of illness of a patient should not be disclosed to a third party without his consent. But a doctor can disclose a secret without consent (even if patient refuses consent) if it is "Privileged communication."⁵
- iv. It is improper and illegal to perform an autopsy without proper consent or concerned authorization. No consent is required for Medicolegal autopsy, as it is done as per the requirements of law. For clinical autopsy consent of the surviving spouse or next of kin or two close relatives of the deceased is a must.
- v. Removal of organ for transplantation:

- a) From a living person:¹

Section 3 of "The Transplantation of Human organs Act, 1994" defines "donor" as any person, not less than 18 years of age, who voluntarily authorizes the removal of any of his/her organs for therapeutic purposes. Therefore, it is illegal to remove organs from the body of a person of less than 18 years even with his/her consent. If the person is above 18 years, conscious and of sound mental health his/her own consent is required for removal of organs from his/her body.

- b) From a dead body:⁵

1. No organ can be removed, if inquest is to be carried out on the dead body.

2. To remove organs from the body, there must exist an oral or written consent of the deceased that should have been obtained at any time in the presence of two or more witnesses, during his last illness. Even if the consent was given by the deceased during life, permission must be obtained from the person in possession of the body.

- vii. For video and audio recording: doctor should inform the patient before recording (except in situations in which consent may be understood from patient's co-operation with a procedure e.g.: radiographic investigation) and obtain his consent. But doctor may make recording without consent in exceptional circumstances, such as when it is believed that child has been the victim of abuse.

If a recording has been made in the course of investigation or treatment of a patient but the doctor now wishes to use it for another purpose eg. Publication in textbook, journals etc., the patient's consent must be obtained.²

- viii. For research:⁶ Before obtaining consent from the

potential subject the doctor must inform about-

- a. Purpose of the study.
- b. How the research relates to the subject's underlying condition and the impact on his well being.
- c. Procedure of the study.
- d. What risks and benefits the person can expect.
- e. Alternative treatments available.

CONCLUSION

Examination of a patient to diagnose, to treat or to operate on a patient without his consent amounts to an assault in law, even if it is beneficial and done in good faith. The doctor may be charged for negligence, if he fails to give the required information to the patient before

obtaining his consent to a particular interventional procedure. This explains the role of a valid consent in medical practice.

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