

Consent-Why? How?

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Consent is a subject of great practical importance to the Gynaecologists and Obstetricians. It certainly has legal implications but more than that it presents a dilemma for the physicians. The physician needs to be fair & frank in informing the patient about the proposed treatment. At the same time he does not like to scare the patient by detailing all the remotely possible complications. Especially because all the patients are female and many doctors are male it assumes special importance in case of gynaecologists.

The concept of consent comes from the ethical issue of respect for individual integrity as well as self determination. In law, the tort of battery is defined as 'Application of force to a person without lawful justification & therein lies the essence of requirement of consent for any medical treatment.

Clearly Doctors may do nothing to or for a patient without valid consent. This principle is applicable not only to surgical operations but also to all forms of medical treatment & to diagnostic procedures that involve intentional interference with person.

Types of Consent:

Implied Consent:

Consent to treatment may be implied or it may be specifically expressed either orally or in writing.

Much of physicians work is done on the basis of consent, which is implied either by the words or behaviour of the patient or by the circumstances under which treatment is given. It is common for a patient to arrange an appointment with a doctor, to keep the appointment, to volunteer the history, to answer questions relating to the history & to submit without objection to physical examination. In these circumstances consent for the examination is clearly implied.

However, the foregoing notwithstanding in many

situations, the extent to which consent was implied may later become a matter of disagreement. For this reason, the physicians must be sure, the actions of the patient do, in fact, unequivocally imply and would be interpreted by others to have implied permission to whatever the Doctor proposed. When there is doubt it is preferable that the consent be expressed.

Expressed Consent:

Expressed consent may be in oral or written form. It should be obtained when the treatment is likely to be more than mildly painful, when it carries appreciable risk, or when it will result in diminishing of a bodily function. Although orally expressed consent may be acceptable in many circumstances, frequently there is need for written confirmation. As physicians have often observed patients can change their minds or may not recall what they authorized, after the procedure or treatment has been carried out. they may attempt to take position that it had not been agreed to or was not acceptable or justified. Consent may be confirmed and validated adequately by means of a suitable contemporaneous notation by the treating physician in the patients record.

Expressed consent in written should be obtained for surgical operations & invasive investigations. It is prudent to obtain written consent, also whenever analgesic, narcotic or anaesthetic agents will significantly affect the patients level of consciousness during the treatment. This is where significance of consent form lies. The consent form is not to be equated with consent itself but it is evidence of consent.

Valid consent:

Consent consists of three related aspects:

1. Voluntariness
2. Capacity
3. Knowledge

1. Voluntariness:

Patients should give consent completely voluntarily

without any duress either from the doctor or any third party (e.g., relatives). Consent obtained with compulsion either by the action or words of the doctor or others is no consent at all. Especially in our country we need to keep in mind that initiative to the treatment may not be of patient herself & she may be coerced by relatives into giving consent. This is especially true in cases of medical termination of pregnancy. Here the doctors have to ensure voluntariness of the consent. Also any consent by the patient for examination is negated by improper motive of the doctor since such consent is falsely obtained.

2. Capacity to consent:

The patient should be in a position to understand the nature and implication of the proposed treatment including its consequences. In this regard the law requires following special considerations.

Age of consent:

In our country only a person who is major by law i.e., above the age of 18 can give valid consent for the treatment. Hence, any person who is a minor, cannot legally give consent.

The concept of a "mature minor" i.e. a minor who is mature enough to understand the implications of his or her treatment though well established in some western countries is not routinely recognised in our country. In one case, Chennai High Court had allowed a girl of 16 to refuse termination of her pregnancy which was insisted upon by her parents. It is also important for a Doctor to remember that even though a minor may represent himself/herself as a major even then the onus of finding out whether the patient is minor or not is on the physician. That means it is not a defense just to state that 'the patient told me she is above the age of 18'. The important point to be remembered here is that the consent given by the guardians should be in best interest of the minor.

Mental capacity:

It is well accepted that a person should be mentally capable to give consent for his or her own treatment. This implies that patients who are mentally retarded or mentally incapable due to any disease process may not be capable of giving their own consent. In such cases

consent from the legal guardian is essential. Courts also may intervene in such cases in granting or refusing consent.

Patients under the influence of alcohol or drugs as well as patients suffering from extreme pain form a separate category, Validity of consent in such situations is liable to be questioned.

3. Knowledge:

Knowledge forms the crux of the matter regarding the consent.

It includes:

- a. nature of diagnosis
- b. nature of treatment planned
- c. foreseeable risk involved in the treatment.
- d. Prognosis if treatment is not carried out.
- e. Any alternative therapy available

It is the duty of a doctor to disclose all these points to the patient so that patient may exercise his right to self determination about the proposed course of treatment.

When questioned specifically by a patient about the risk involved in a particular treatment proposed, the doctor's duty is to answer both truthfully and as the questioner requires. This doctrine of informed consent is developed by American and Canadian case law. British case law which is generally followed in our country takes slightly different view. While, American law insists on informing all possible risks, the British law expects the doctor to be reasonably prudent in explaining the same.

Consent in Emergency

Generally, it is essential to obtain consent before any treatment is administered. However, there is an important exception to the rule. In cases of emergency a patient may be unable to give consent, in such cases a substitute decision maker, if readily available, should be approached. If however, such a person is not on the scene, then it is the duty of the doctor to do what is immediately necessary without consent.

One may go a step further to point out that Supreme Court

has specifically laid down a duty on all doctors to take life saving measures in any given case without worrying about consent.

For the doctor to declare any clinical situation an emergency, for which consent is not required, there should be demonstrable imminent threat to the life or health of the patient.

There must be an undoubted necessity to proceed at that time under such emergency situations, the treatment should be limited to those steps which are necessary to deal with, imminent threat to life, limb or health.

When in emergency, it is imperative to proceed without valid consent from the patient it is correct to keep contemporaneous record explaining such circumstances, which forced the doctor to act likewise.

If the circumstances are such that the urgency might be questioned later, arranging a second medical opinion would be prudent, if possible to do so.

Consent for extended treatment

Sometimes during an operation, it becomes essential to extend the surgery in the interest of the patient's health. For example, proceeding for hysterectomy in cases of atonic PPH.

If this is important to carry out at that particular moment then at least a substitute decision maker should be informed & validity of urgency of such a step should be well documented.

Entirely, unrelated surgery should not be undertaken unless it is essential to save the life of the patient.

In Ram Biharilal's case - The surgeon did not explain the hazards of chloroform anaesthesia before taking consent of the patient for operation of appendicitis.

On finding the appendix to be normal, he proceeded to remove the gall bladder without consent & risking the ill effects of the patient under chloroform.

In this case the surgeon was held negligent.

Refusal of Treatment:

The patient has a right to control his or her body. Hence any treatment without consent of the patient is actionable. A pertinent case in this respect is Jehovah's witness, who was allowed to refuse blood transfusion though doing so was life threatening.

Any competent adult is entitled to reject any specific treatment offered to him, even if the decision may entail risk, as serious as death, and may be wrong in the eyes of the medical profession. This concept has been rigorously followed by the western law courts in recent times. However, in our country the interest of the state in protecting and preserving the lives and health of its citizens has also been given importance in some rare situations.

Such problem may arise for an obstetrician when the patient or the relatives refuse consent for L.S.C.S. In such situation if possible their refusal should be taken in writing or atleast it should be noted on paper, preferably with a witness who will corroborate the same.

Case Law:

The issue of consent was decided in following two cases by the consumer fora.

- i. Tamil Nadu State consumer forum in Lakshmi Rajan Vs Malar hospitals Ltd has said merely because patient has consented it cannot be said that there was necessity of operation.
- ii. Maharashtra State consumer disputes redressal forum in Nirmala Parab Vs K. Desai has observed that 'Patient signed the consent form knowing risks involved in the anaesthesia and operation. Hence later cannot claim damages', this contention is not right. Merely signing of consent form by the patient does not exclude doctor's responsibility if he is negligent in carrying out his duties.