



ROLE OF CONSENT IN MEDICAL PRACTICE IN INDIA

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ABSTRACT

Consent of the patient has a great practical importance to the clinicians. The element of consent is one of the vital issues in medical treatment. The patient has a legal right to decide as enshrined within Article 21 of the Indian Constitution. As the doctor is in a dominant position, he should not obtain the consent by undue influence and should provide all the necessary information otherwise the doctor will be liable under the tort and criminal laws.

The present paper has made an attempt to analyze the concept of consent from the point of view of the legal environment as it exists in India today. The circle of legal development in this area appears to be almost complete when the apex court in India recently ruled that, it is not just the 'consent' or 'informed consent' but it shall also be 'prior informed consent' generally barring some specific cases of emergency. This places a medical professional in a tremendous dilemma. Hence, it is time to discuss the role of consent in medical profession.

KEYWORDS : Autonomy, prior informed consent, valid consent.

INTRODUCTION:

The word consent derived from the Latin word *consensus-ad-idem* Identity of mind. S.13 of the Contract Act speaks that two or more persons are said to be Consent with each other, when they agree upon the same thing in the same sense and at the same time.

In consent there are three separate but correlated elements such as:

- Voluntariness ie, willingness of patient to undergo treatment.
- Capacity ie, a degree of ability of the patient to understand the nature and consequence of treatment offered.
- Knowledge ie, sufficient amount of information about the nature & consequence of treatment has been disclosed to patient.

If these 3 things are present then only consent may be called as a legally valid consent.

Consent of the patient has a great practical importance to the clinicians. Doctors may do nothing to a patient or for a patient without valid consent. Consent is not only necessary for surgical operation but it is necessary to all forms of medical treatment, diagnostics etc. Consent is fundamental & established principle in the Indian laws. Every person has the right to determine what shall be done to his body. Self defense of body¹ provides right to the protection of bodily integrity against invasion of other. Treatment & diagnosis cannot be forced upon anyone who does not wish to receive them except in statutory sanction. In India, at present legal cases concerning absence of consent are rare because:

1. Medical techniques become more advanced and complicated.
2. Medical care becomes more widespread.
3. Level of awareness and education of population increases.

INDIAN LAWS ON CONSENT:

The principle of autonomy is enshrined within Art.21 of the Indian Constitution, which deals with the right to life and personal liberty. The expression personal liberty under Art. 21 is of the widest amplitude and covers a wide variety of rights, including the right to live 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, either permanently or temporarily.² However, the Common law application of consent is not fully developed in India, although the Indian courts have often referred to these principles. In such situations, obviously one has to refer to the principles of the Indian Contract Act and the Indian Penal Code. The relationship between a medical professional and his patient is a contract by parties competent to contract giving rise to contractual obligations.

Sec. 87 to 91 IPC deals with consent. **Under section 88** an act is not an offence if it is not intended or not known to be likely to cause death. After a valid consent if surgeon operates a patient & patient dies on the operation table, then the surgeon cannot be held guilty

of murder. But persons who are not allowed to take the plea of this section as they are not said to do the act in good-faith.³

Section 91 of IPC serves as corollary to Sec. 87 to 89. **Sec. 91** states the exceptions contained in sec. 87 to 89 do not extend to acts, which are offences independently of any harm, which they may cause to any person giving consent. Thus causing miscarriage (unless caused in good faith for the purpose of saving the life of the woman) is an offence independently of any harm which it may cause or be intended to cause to the woman & the consent of the woman or her guardian for causing such miscarriage does not justify the act.

Prisoners & persons released on bail can be treated without their consent in the interest of justice of society. A registered medical practitioner can examine an accused by using reasonable force if the examination is requested by the investigating police officer not below the rank of sub-inspector.⁴

Under Section 53 (2) CrPC in case of examination of a female, the examination shall be made only by or under the supervision of a female registered medical practitioner. Consent of the patient cannot be a defense to medical practitioner in negligence. Principle of consent is not applicable when the act was not done with reasonable care and attention.

If a person is found under the influence of alcohol, then consent of such person will not be valid. So it is always better obtain consent from guardian or parents

To standardize the practice, the **Medical Council of India (MCI)** has laid down guidelines that are issued as regulations in which consent is required to be taken in writing before performing an operation.⁵ The MCI guidelines are applicable to operations and do not cover other treatments. For other treatments, the following may be noted as general guidelines:

1. For routine types of treatment, implied consent would suffice
2. For detailed types of treatment, ideally express oral consent may be needed

For complex types of treatment, written express consent is required

Who can give consent:

The age of consent is not officially laid down for medical treatment. Adulthood is achieved at the age of 18 years in India, but a person who is above the age of 12 years can give consent for medical treatment.

If a person is under 12 years of age or of unsound mind then his guardian or the person in whose lawful custody he is can give consent ie, provided u/s. 89 IPC (Act done in good faith for benefit of child are insane person by consent of guardian) Sec.87 and 88 IPC

refers to validity of consent, which may occur from any act done in good faith & for individual benefit⁶. So combination of Sec. 87 & 88 IPC shows that "Parental consent is necessary for medical treatment or surgical procedure on the minor". But if there is any emergency situation involving a child, when his parents or guardian are not available then consent is taken from the person in charge of the child, called as locoparentis.

Sec.90 IPC defines consent in negative term ie, any consent given under five circumstances will not be true consent such as:

1. By a person under fear of injury
2. By a person who is under misconception of the facts and the person who obtain consent knows or has reason to believe that consent was given in consequence of such fear or misconception.
3. By intoxicated person
4. By a person who is of unsound mind or unable to understand the nature & consequence of that to which he gives consent.
5. By a person who is below the age of 12 years.

Types of Consent:

Medical profession in India Practices different types of consent:

1. Implied consent
2. Express or Specific Consent
3. Informed Consent

1. Implied Consent:

It is not written, but legally effective. When patient comes to doctor/hospital waits for the doctor, implied consent is presumed. Such implied consent only goes to history taking & ordinary medical examination like inspection etc. It does not cover the consent for examination of private parts of the patient or injection or any major intervention. If any material risk is involved the specific or expressed consent must be obtained.

2. Express/Specific Consent:

It may be oral or written. An oral consent is legally valid, but it is preferred to obtain written consent for major procedures because there is risk involved that, the patient, in the case of oral consent, may at later stage deny that any oral consent was given by him.

3. Informed Consent:

It is an ongoing process, that includes the exchange of information & development of choices. This does not say that the same should be in writing.

JUDICIAL TRENDS:

In Rajaram S.Paras Vs. dr. Kalpana Desai⁷ a consent form was obtained from the patient by virtue of whom she had consented to be responsible for the consequences of anesthesia being administered. Thus the argument was that the Complainant was stopped from claiming damages. In these circumstances Maharashtra State Commission observed that the signing of the Consent Form does not exclude doctor's responsibility if he is negligent in carrying on his duties.

In Dr.T.T.Thomas Vs. Smt. Elisa⁸ the court held that, a surgeon who failed to perform an emergency operation must prove with satisfactory and convincing evidence that the person had refused to undergo the operation, not only at the initial state but even after the patient was informed about the dangerous consequences of not undergoing the operation.

In Majulaben Vinodbhai Patel v. Dr. Harshida K. Patel⁹ it was held that the eminent gynecologist had participated in order to save life of the patient. As there was continuous bleeding and patient condition was deteriorating they removed the uterus. Thus no negligence, regarding removal of uterus was found on the part of doctors.

Recently, the apex court gave an impacting judgment. The court observed that "where a surgeon is consulted by a patient and consent of the patient is taken for diagnostic procedure/surgery, such consent can't be considered as authorization or permission to perform therapeutic surgery either conservative or radical except in a life-threaten-

ing emergent situation¹⁰".

In Chandra Shukla v Union of India¹¹, the court held that if there are no circumstances for a doctor to sense foul play or doubt about the capacity of the patient, he is protected.

Regarding proxy consent, when the patient is unable to give consent himself, there are no clear regulations or principles developed in India. If such a situation exists, the medical practitioner may proceed with treatment by taking the consent of any relative of the patient or even an attendant¹².

CONCLUSION:

Consent is necessary for every medical examination. Any medical procedure requires written consent. Written consent should refer to one specific procedure and not blanket permission on admission to hospital. Consultation, consent and clinical confidence will never put the doctor in any tortfeasors cases.

END NOTES:

- 1 sec. 96-102, 104,106 IPC
- 2 Maneka Gandhi v Union of India. AIR 1978 SC 597.
- 3 Sec.52 IPC: An act is only done in good faith if it is done with due care & attention
- 4 53 of Cr.P.C.(ie, force should be applied by police).
- 5 Regulation 7.16, of Medical Council of India (Professional Conduct, Etiquette and Ethics) Regulations. 2002
- 6 Sec. 87of IPC: Act not intended & not known to be likely to cause death or grievous hurt, done by consent.Sect.88 of IPC: Act not intended to cause death, done by consent in good-faith for person's benefit .
- 7 (1998)3 CPR 398 (Maharashtra State Commission)
- 8 AIR 1987 Ker 52
- 9 1997 CPR,264 Gujurat State law Commission.
- 10 Samera Kohli v Dr. Prabha Manchanda and Another. 2008 ;(1) SCALE 442.
- 11 10. AIR 1987 ACJ 628.
- 12 C A Muthu Krishnan v M. Rajyalakshmi. AIR 1999 AP 311.

REFERENCE:

1. IJU : Journal of the Urological Society of India are provided here courtesy of **Medknow Publications**
2. 947 Neurenberg Code.
3. 1964. Declaration of Helsinki.
4. Regulation 7.16, of Medical Council of India (Professional Conduct, Etiquette and Ethics) Regulations. 2002