

## **CONSENT TO SURGERY**

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Our law recognises the general principle that every mentally competent adult has a right to determine what is done to his or her own body. But this general rule may come to be modified in certain special situations (e.g. where a person is unconscious). Again, the application of this principle in certain cases may present complicated issues of fact and law. Some of these knotty problems are proposed to be examined at this place.

### **Basic human right**

It is now regarded as a basic right of a person-at least of a mentally competent adult-to decide for himself or herself whether to agree to a particular medical or surgical treatment. Apart from constitutional aspects, interference by A with the body of B without B's consent, and without specific legal authority would amount to a civil wrong and an offence. The civil wrong that comes to be constituted is known under the genus of the tort of "trespass to the person", of which "assault" and "battery" are its usually known species. Again, from the point of view of the criminal law, such non-consensual interference with the body without legal authority constitutes the offence of using criminal force, which may be aggravated in the light of the person on whom force is used (e. g. public servant or woman) or other circumstances. If the use of force results in a wound, then "hurt" or "grievous hurt" may come to be committed. If death results, the various categories of homicide become relevant.

A doctor who is examining a patient or operates upon a patient must necessarily touch the patient. The case where he merely notes what the patient says and prescribes oral medicine without touching the patient's body is very rare one. In most cases, bodily contact is involved, and therefore consent of the patient is legally required. If the doctor forces the patient to undergo an "invasive" procedure, he acts illegally and may have to pay damages to the patient for the civil wrong so committed. It is further to be noted that the doctor can perform only that procedure to which the patient has consented. In a Canadian case, a woman who expressed her wish to be injected in her right arm was injected in her left arm. She successfully sued the doctor for compensation. *Allan v. New Mount Sinai Hospital*, (1980) 109 D. L. R. (3rd), page 536. An analogous case is an English one-*Cull v. Butler*, (1932) 1 B. M. J. 1195-in which a woman who merely agreed to curettage was subjected to hysterectomy. She could get damages. A woman consulted a doctor for an ailment which required minor gynaecological surgery. The surgeon, while performing that surgery, discovered that the woman's womb was ruptured. He sterilised her there and then. She had not agreed to sterilisation. The doctor was held liable to pay damages. *Devi v. West Midlands AHA*, (1980) 7 C. L. 44.

### **Burden of proof**

A practical question that may arise is whether (a) it is for the patient to prove that he did not agree to the medical or surgical procedure in question, or (b) whether it is for the doctor to prove that the patient gave his consent. A High Court judge in England has taken the former view. *Freeman v. Home Office*, (1984) 2 W. L. R. 130.

Indian courts may not necessarily take the same view in every case. No doubt, consent may be implied (see below) and therefore a court may presume that upto a certain limit, implied consent was given. But beyond that, specific proof may be required in which case, at least in India, the court may hold that under sections 101 to 105, Evidence Act, the burden of proof lies upon the defendant (I. e. the doctor) to justify an action which would be illegal in the absence of consent.

### **Form of consent**

As to the form of consent, two propositions are fairly well established:

(a) Consent need not always be express. It may be implied from conduct.

(b) Consent can be given orally. It need not be in writing. However, in practice, surgical intervention is not resorted to, without obtaining a written consent from the patient or his or her guardian. Generally, .c standard forms are used in various hospitals.

Injections of drugs which are likely to produce serious side effects should not be given without specific consent. This is illustrated by the controversy that arose in England in 1983 in connection with the drug Depo-prevera. [Times, Guardian, (23 July, 1983), page 24; Brazier, Medicine, Patients and the Law (1983), pages 79, 381]. Depo prevera is a synthetic hormone which (i) prevents a human egg from developing, and (ii) also makes the uterus hostile to any fertilised embryo which happens to reach it. One injection lasts for at least 3 months.

The drug is particularly useful for women for whom pregnancy is harmful or for whom pregnancy should be completely ruled out. e.g., women who have been vaccinated against German measles should not become pregnant. But the drug has several side effects of which the most notable are (i) severe and irregular bleeding and (ii) adverse effect on long term fertility. In the English case of 1983 Mrs. Potts, a woman from Salford, obtained \$3,000 as damages after the doctor injected her with Depo prevera concurrently with a vaccination against German measles. She later suffered severe bleeding. The injection was given days after the delivery of her third child, her impression being that it was a routine post-natal procedure. The object of the doctor was to protect the woman against pregnancy, while the vaccine might harm any unborn child. But the woman must be told that she is being given a contraceptive drug. In addition, the advantages and disadvantages of the drug should be made known. The judge said, "she (Mrs. Potts) should be given the choice and she was entitled to know beforehand what the decision entailed.

### ***Sterilisation***

The same principle applies to sterilisation. An adult mentally competent person cannot be sterilised without her consent. In the case of Devi, (1980) 7 Current Law 84 mentioned above, a married woman of 33, who already had four children, was admitted into a hospital for minor gynaecological operation. Her religion outlawed contraception or sterilisation. In the course of the operation, the surgeon discovered that her womb was ruptured. Further pregnancy would (according to the surgeon) be harmful. He sterilised her there and then. As the woman's consent had not been obtained, she recovered as damages.

(a) Pound 4,000 for the loss of her ability to conceive in future, and

(b) Pound 2,750 for the neurosis caused to her by knowledge of what had been done to her.

### **Blood test and transplantation**

A person cannot, In the absence of statutory authority, be Subjected to blood tests. In Gautam Kundu's case, A.I.A. 1993 S.C. 295, It was held that no one can be Subjected to blood test against his wishes for determining paternity and the court has no such Power to order blood test where no statute exists to give such authority. (In the case of persons accused of offences, physical examination of the body ncluding pathological tests, have been authorised by section 53, Code of Criminal Procedure, J 973, Subject to the observance of certain requirements).

In an American case, the court refused to order a person to donate his bone marrow, though the circumstances were such that he was the only Possible donor, being the only close relative of the Patient needing bone marrow transplantation. *Mc Fall v. shimp*, (1978), noted by Brazier, *Medicine, Patients and the Law* (1992), Page 397. In India, section 3 (1) of the Transplantation of Organs Act (42 of 1994) expressly requires that a live donor of human organ must have given his voluntary consent to transplantation of an organ from his body.

### ***Experimentation and research***

In the Course of medical practice a new drug may have to be used. It may not be totally safe and the doctor may be faced with the question whether he should take specific consent. The question has been particularly discussed with reference to random clinical trials and the view taken in England is that a patient who does not agree to such a trial, or who cannot understand Its full Implications, should not be entered in it Phillips and Dawson, *The Doctor's Dilemmas* (Harvester Press, London, (1984), pages 61- 71. Consent on the strength of a proper explanation of the trial an free acceptance by the patient of its random nature are necessary and sufficient .Brazier, *Medicine, Patients and the Law* (1992), page 425. The Helsinki Declaration (On international ethical code for the -medical profession) provides that 'every subject must be adequately Informed of the aims, methods, anticipated benefits and potential hazard of the study and (of) the discomfort it may entail..... The doctor should obtain the subject's freely given informed consent, preferably in writing".

### **Children and mentally Incompetent persons**

The position regarding children and mentally incompetent persons requires separate discussion. However, It may be mentioned that according to recent trends, the wishes of a child who is below 18 years of age but who is mature enough to understand such matters have to be taken into consideration. *Gillick v. West Norfolk and Wisbeeli AHA.* (1985) 3 All E.R. 402; *V. Krlshnan v. I.G.Rajan*, (1994) Law weekly (Crim.) 16.

Gillick's case upheld the validity of a circular issued by the Health Department instructing doctors in the National Health Service make available contraceptive advice to girls below 16. The Instruction said that every effort should be made to involve the girl's parents. But if the girl was adamant that her parents should not know of her request for contraception, then the rents must not be told. In *V. Krishnan's* case, the Madras High Court held that a father cannot compel his daughter of 16 years to undergo abortion.

### **Criminal law**

In India, so far as criminal liability goes, sections 87 to 92 of the Indian Penal Code would be important for determining the question how far consent is necessary and sufficient to legalise invasive medical treatment.

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