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CONSENT IN MEDICAL TREATMENT

~ *Kunika Karwade*

Earliest theory of consent was found in US courts in 1905 where in case of *f Schoendorff v. New York Hospital* it was stated that ‘Every human being of adult years and sound mind has a right to determine what shall be done with his own body: and a surgeon who performs an operation without his patient’s consent commits an assault...’

Two or more people consent to a thing when they agree upon same thing. Consent in case of doctor-patient relation means permission granted by patient to carry certain act by doctor such as diagnostic, surgical or therapeutic procedure. Consent in medical realm can be expressed or implied. If a patient walks in the clinic of a dentist and sits in operating chair it is implied that he wants to be treated. The demeanor, behavior and actions of the patient indicate his consent. Though implied consent cannot taken in consideration for surgery and transplant. These medical procedures are complicated and have a great impact on sufferer’s physical as well as mental health, sometimes they could even have an adverse effect. Express consent can be oral or written, it is preferred to be in writing to avoid further complication. If a medical practitioner treats a patient without valid consent can be held liable under tort as well as criminal wrong, consequence for same would be payment of compensation or imprisonment.

Doctrine of necessity has its basis in exceptional circumstances. Section 92 of the IPC offers legal immunity to a registered medical practitioner to proceed with appropriate treatment even without the consent of the patient in an emergency when the victim is incapable of understanding the nature of the treatment or when there are no legal heirs to sign the consent. This provision is provided for circumstances arising in life threatening or emergency situation. In some unavoidable circumstances an exception is provided where there would not be necessary to have consent by medical practitioner.

Consent is legal requirement of medical practice and not mere procedural formality. Just getting signature of patient on papers is no form of consent, despite getting signature consent can be invalid. While obtaining consent from the person it is material that doctor shall provide with the risk and consequences of the treatment and any alternative treatment available for the same. It is doctor's duty to disclose consequence and risk of medical treatment even when the treatment would be carried out without any negligence. This regards to the concept of informed consent. Sufficient information shall be provided to understand the nature and procedure of treatment so that proper decision can be taken by infirm.

There is a major difference in real consent in UK and informed consent in America. Consent shall be secured by the doctor from the patient before any medical treatment, that consent shall be valid and real. Real consent is that which is given when person has capacity and competence for consent, there is no undue influence, full disclosure of information to the patient regarding procedure. Informed consent just discloses that required information that is necessary for patient to agree. Consent shall be taken from patient himself/ herself and addition to that in exceptional circumstances consent of spouse can be taken. For a minor consent shall be obtained from person with parental responsibility. At times it may not be possible to explain everything to the patient. Accordingly under such circumstances doctor can reveal the details to any one of the close relatives of the patient. This is called doctrine of therapeutic privilege.

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. Though there is certain ambiguity in legal age for consent, Indian penal code does not provide with any specific age that is capable to consent for medical treatment. Section 87 of the IPC says that a person above 18 years of age can give valid consent and Section 89 of the IPC says that a child under 12 years of age cannot give a valid consent. These statutory provisions do not provide clarity on the matter whether a person between 12 and 18 years of age can give consent to undergo an invasive therapeutic procedure or not. It is important to explicitly state whether a person of this age group can give consent independently to undergo medical treatment or his/ her consent should be accompanied by parental/guardian consent. However, section 11 of the Indian Contract Act states that every person who is of the age of majority is competent to contract. Section 3(1) of the Indian Majority Act states that every person attains the age of majority on his completing the age of 18 years.

Suppose while performing a surgical operation a doctor notices an additional procedure that is needed, and further a step is taken in addition to which consent was granted. If the patient would have been conscious and even would have agreed to the same. It would be in interest of patient and it would be the postponement of the additional process. Any reason or argument is not relevant as it is the patient's right on his/her body. Finality of his/her decision would prevail. Consent for diagnosis does not mean consent for treatment, doctors guided by their good sense when given consent for a formal procedure carries a more critical procedure. Though their actions are done in good faith but they lack prior consent of operated person. As in samira kohli's case, a 44 year old women consulted doctor complaining of prolonged menstrual bleeding. She was admitted and the consent form for hospital admission, medical treatment and also, surgery, were signed. The consent form for surgery said diagnostic and operative laparoscopy. She was subjected to a laparoscopic examination under general anaesthesia. While Samira was unconscious and was being examined, the consent of the patient's mother for a hysterectomy. After her mother's consent was obtained, Doctor removed the patient's uterus, ovaries and fallopian tubes. Samira Kohli filed a complaint before the National Consumer Disputes Redressal Commission, claiming compensation of Rs 25 lakh. She complained that the doctor had been negligent and that the radical surgery, by which her uterus, ovaries and fallopian tubes had been removed, had been performed without her consent. The National Commission dismissed the complaint, declaring that the hysterectomy had been performed with adequate care and also, that the patient had voluntarily sought treatment at the clinic. A plea was filed at the apex court. Overruling the order passed by the National Consumer Dispute Redressal Commission, the Supreme Court held the doctor liable for malpractice.

Consent shall be taken at appropriate timing, not on the day of surgery or during surgery. Under such circumstances a person is under immense pressure or can be nervous. During procedure there could be influence of drugs or anesthesia that could prevent from making rational decision. Fresh consent for same procedure need to be taken. Consented once for a procedure does not mean consent is given for same again. Consent to undergo certain act once does not amount willingness to do the same again. Same legalities shall be fulfilled. Consent given in various circumstances such as when intoxicated or unconscious is not valid.

In case of medical examination in criminal cases of a person who is arrested under such circumstances that there are reasonable ground for believing that examination of that person would bring evidence to the light then consent is not needed, provided examination shall be done in presence of a disinterested witness and by registered medical practitioner. Person who

is to be examined does not cooperate then use of mild force can be used. For examination of a rape victim prior consent shall be obtain by doctor of the victim if she is above eighteen years of age and if she is a minor consent shall be obtained from guardian. Provided it shall be made known to them that findings of examination would be presented in court of law. Medical termination of pregnancy would be performed only if consent is obtained in writing. It is mandatory for same to obtain consent in writing for which there are elaborate procedure laid down in statutory provision. Only consent of a mother is sufficient if she is of the age eighteen and above can only consent for medical termination of pregnancy. For a minor a relative or guardian shall provide for consent. Consent of both husband and wife would be needed if it for artificial insemination.

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