



Policy

CONSENT TO OPERATIVE TREATMENT

THE MEDICAL DEFENCE UNION
Tavistock House South
Tavistock Square, W.C.1
Telephone: EUSton 4244

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ADVICE TO MEMBERS

1. In your own interests make sure that your subscription is paid on the due date, preferably by banker's order.
2. The Union will not accept responsibility for any legal or other expense incurred by a member unless he has first obtained the authority of the Secretary or the Council.
3. Members are asked not to reply to any letters of complaint or to any letters threatening proceedings or claiming compensation or to attend any conference to discuss their treatment of a patient without first seeking the advice of the Secretary.
4. Successful defence is often rendered impossible by action taken by members before seeking the advice of the Union.
5. Good clinical notes written at the time and dated are of inestimable value in preparing a defence to an allegation of negligence or incompetence.
6. Members should avoid adverse criticism of the conduct or work of other practitioners unless they are specially commissioned to examine and report on written statements or clinical records.
7. Members should encourage their colleagues, partners and assistants to join the Union, since the larger its membership the greater its usefulness to individual practitioners and the profession.
8. It is most important that members should notify the Registrar of the General Medical Council, 44 Hallam Street, London, W.1, or the Registrar of the General Dental Council, 37 Wimpole Street, London, W.1, of any change in their address. Failure to do this may result in the erasure of their names from the Medical or the Dentists Register. The Medical Register should **not** be confused with the Medical Directory.
9. To avoid disappointment personal interviews with the Secretariat should be arranged previously by letter or telephone.

Consent to Operative Treatment

A person suffering from disease or injury is not normally bound to submit himself to medical treatment or even to consult a doctor if he does not wish to do so. It follows, therefore, that an operation carried out without the consent of the person concerned, subject to certain exceptions to which reference will be made in due course, amounts to an actionable assault. Such an assault may lead to an action for damages under the civil law and it follows, therefore, that if a surgeon performs an unauthorised operation he or his employing authority, or both, may be confronted with an action for assault for which damages may be recoverable.

CONSENT MAY BE EXPRESS OR IMPLIED

The patient's consent to an operation may be either express or implied and, if express, it may be given either in writing or by word of mouth. All these forms of consent are equally efficacious as a means of defeating an action for assault, but an express consent is in every respect more desirable than an implied one and a written consent is preferable to an oral consent. An implied consent generally arises by silence taken with other circumstances so as to warrant the presumption that consent has been given, e.g. when a patient holds out his arm for the administration of an injection. It is the common and should be the invariable practice to obtain the patient's written consent before any operation involving a general anaesthetic is undertaken. The form of consent should include a specific consent to the administration of an anaesthetic.

To be an effective answer to a claim for assault the consent must be fully and freely given. The patient should be given a fair and reasonable explanation, in non-technical language, of the effect and nature of the operation. This should be given only by a person who is competent and qualified to give it, preferably by a medical practitioner. If an inadequate or misleading explanation is given there is the danger that the apparent consent obtained will be held to be ineffective. If the operation contemplated carries special risks, which are probably unknown to the patient, he should, as a general rule, be informed of these risks. The surgeon may, of course, on occasion be justified in not revealing or in minimising the risk involved if he thinks it necessary to do so in the interests of the patient. In the case of *Hatcher v. Black* a surgeon advising a woman to undergo a thyroidectomy was held to have been justified in telling her that there was no risk to her voice although he knew that there was some slight risk.

A surgeon should not contravene the express instructions of a patient and if he goes outside the scope of the authority which has been conferred upon him he may be liable to the patient for an assault. The fact that he was acting as he thought in the best interest of the patient, that the operation was carefully and skilfully performed and that it was successful will not afford him any defence if he is sued for assault. In the case of *Bennan v. Parsonnet* the trial Judge said: "No amount of professional skill can justify the substitution of the will of the surgeon for that of his patient." The full extent of the operation frequently cannot be determined beforehand and the form of consent should be so drawn as to enable the surgeon to adopt any further procedure that may be found to be necessary in the course of the operation.

OMNIBUS CONSENT FORM

It seems that it is still the practice in some hospitals to ask a patient on admission to sign a consent form in the nature of a blank cheque. A little while ago the Union's attention was drawn to a consent form which had been signed by a patient and which included the following sentence: "I, Mrs. X, of hereby consent to undergo the operation of whatever necessary, the effect and nature of which has been explained to me." This practice is to be deprecated, and the nature of the operation should be inserted on the consent form. An omnibus form of consent couched in general terms is open to strong objection and it is extremely doubtful if such a consent form would afford any protection to the surgeon or his employing authority in the event of a claim for damages for assault. From the legal point of view it is essential that the person consenting must understand to what he is giving consent. Unless the nature and the effect of the operation are explained to the patient he may afterwards repudiate the consent form on the ground that he did not fully appreciate the implications of the document that he was asked to sign. The wording of the consent form recommended by the Council of the Medical Defence Union (see form I in the appendix to this memorandum) makes it clear that the patient has been told and understands the nature and the effect of the contemplated operation. A separate form of consent is recommended for patients who are to undergo E.C.T. (see form IV in the appendix to this memorandum).

MARRIED PATIENTS

Any sane person of full age is competent to give a valid consent to any lawful surgical procedure. The consent of the spouse to

the performance of an operation on the other partner is not necessary in law but where the generative organs of the patient are to be interfered with or removed it is desirable that the spouse should be told of what is proposed to be done and should be asked to sign an acknowledgment to that effect. The form recommended by the Medical Defence Union for this purpose is set out in form II in the appendix to this memorandum.

UNCONSCIOUS PATIENTS

In the case of an unconscious patient the consent of a near relative should be sought, but if no near relative is readily available and the patient is in need of an urgent or life-saving operation, the surgeon should render any treatment that is immediately necessary in the best interests of the patient.

EMERGENCY SITUATIONS

A surgeon may be called upon to deal with a patient requiring immediate treatment associated with serious risks which must be undertaken if his life is to be saved. In such a case he must advise the patient to the best of his ability and endeavour to secure his consent and render all such treatment as is immediately reasonable and necessary. If the condition of the patient does not permit of this the surgeon should, if possible, consult a near relative, but if no near relative is immediately available the patient should be given any treatment that is immediately necessary in his best interests.

MINORS

There is no rigid rule of English law that renders a minor incapable of giving his consent to the performance of an operation. Except in an emergency the consent of a parent should in practice be obtained before any operation is performed on a minor under the age of 16. The form recommended by the Medical Defence Union for this purpose is set out in form III in the appendix to this memorandum. The life or health of a minor must not, however, be jeopardised by waiting for formal parental consent. If, in an emergency, it is impossible to obtain the consent of a relative, the surgeon should not hesitate to render all such treatment as is reasonable and necessary. There is no direct authority on whether the consent of a minor who is aged between 16 and 21 is valid. The Council of the Medical Defence Union believes, however, that it would be safe to follow the legislature on the age of consent in sexual conduct and mental illness and the inference which may be

drawn from the National Health Service Regulations. The Council is of the opinion that in the case of a minor who is aged between 16 and 21, and able to appreciate the nature and effect of the operation, his own consent to an operation is all that is necessary in law. A surgeon would, however, be wise to discuss the operation with the parents if any major surgery is to be undertaken.

JEHOVAH'S WITNESSES

Many practitioners have sought advice on their legal position when confronted by parents who refuse to allow their child to be given a blood transfusion.

It is generally believed that the administration of a blood transfusion to a child in opposition to the parents' wishes constitutes an assault in law. It may be that common law will protect a doctor who acts competently and in good faith in such a situation. Despite the fact that the administration of a blood transfusion to a child in opposition to the parents' wishes may constitute a technical assault, it is unlikely that any injury or damage to the child could be proved. The worst that can happen in such a case would be an action for assault but, where the alternative to a blood transfusion is death or serious impairment of health, it is highly improbable that any such action would succeed. In such cases the Council of the Medical Defence Union is of the opinion that the practitioner should decide his course of action by the dictates of his professional conscience. Members of the Union may rest assured that if they find themselves in any sort of legal difficulty arising out of their decision to give a blood transfusion to a minor, despite the expressed opposition of the parents, they can count on the full support of the Union.

If an adult patient agrees to undergo an operation but indicates that in no circumstances is he to be given a blood transfusion the following procedure should be adopted—

- (1) The patient should be interviewed by the surgeon in the presence of a witness. The patient should be given an unequivocal warning of the dangers that might arise as the result of his refusal to have a blood transfusion and an attempt should be made to persuade him to change his mind.
- (2) If the patient remains adamant he should be asked to sign a statement acknowledging the fact that, although he has been warned that either during the course of, or after the operation he might require a blood transfusion, he is nevertheless unwilling to give his consent to the administration of a blood transfusion. The form recommended by the Medical

Defence Union for use in these circumstances is set out in form V in the appendix to this memorandum. Whether the surgeon would be willing to operate subject to this restriction is a matter for him to decide.

- (3) His signature should be witnessed by the surgeon and the witness who was present at the interview.
- (4) If the patient's signature cannot be obtained a note to that effect should be entered in the medical records and signed by the surgeon and the person who was present at the interview.
- (5) The patient should be informed by the surgeon that in the circumstances he cannot accept complete responsibility for the results of his treatment.
- (6) The surgeon should submit a report to the Hospital Authority indicating that in view of the restriction that has been imposed upon him by the patient he is not prepared to accept complete responsibility for the case.

In the opinion of the Council of the Medical Defence Union a blood transfusion should not be given to an adult patient who has stated that in no circumstances is he to be given a blood transfusion.

November 1962

[P.T.O.]

APPENDIX

SUGGESTED FORMS OF CONSENT FOR
OPERATIVE TREATMENT

FORM I. CONSENT BY PATIENT

To: The Medical Staff and Committee of Management
of the _____ Hospital.

I _____ of _____

hereby consent to undergo the operation of _____,
the effect and nature of which have been explained to me.

I also consent to such further or alternative operative
measures as may be found to be necessary during the course of
such operation and to the administration of a local or other
anaesthetic for any of the foregoing purposes.

I understand that an assurance has *not* been given that
the operation will be performed by a particular surgeon.

Dated this _____ day of _____

(Signed) _____

FORM II. AGREEMENT BY SPOUSE

In certain cases, e.g., sterilisation, it is eminently desirable to obtain
the consent of the spouse in addition to that of the patient.

To: The Medical Staff and Committee of Management
of the _____ Hospital.

I _____ of _____

the Husband/Wife of _____ hereby

agree to the operation of _____
being carried out on my Wife/Husband, the effect and nature
of which have been explained to me.

Dated this _____ day of _____

(Signed) _____

FORM III. CONSENT BY PARENT OR GUARDIAN

To: The Medical Staff and Committee of Management
of the _____ Hospital.

I _____ of _____

hereby consent to the submission of my child _____

to the operation of _____, the effect
and nature of which have been explained to me.

I also consent to such further or alternative operative
measures as may be found to be necessary during the course of
such operation and to the administration of a local or other
anaesthetic for the purpose of the same.

I understand that an assurance has *not* been given that
the operation will be performed by a particular surgeon.

Dated this _____ day of _____

(Signed) _____

FORM IV. CONSENT BY PATIENT TO E.C.T.

To: The Medical Staff and Committee of Management
of the _____ Hospital.

I _____ of _____

hereby consent to undergo the administration of electroplexy,
the effect and nature of which have been explained to me.

I also consent to the administration of an anaesthetic
and/or a relaxant or sedative for this purpose.

I understand that an assurance has *not* been given that
the treatment will be administered by a specific practitioner.

Dated this _____ day of _____

(Signed) _____

FORM V. CONSENT TO OPERATIVE TREATMENT BY
PATIENT WHO REFUSES TO HAVE A BLOOD
TRANSFUSION

To: The Medical Staff and Committee of Management
of the Hospital.

I hereby give my consent to the performance upon me of
the operation of,
the effect and nature of which have been explained to me.
I also give my consent to the performance upon me of any
other operative procedure which in the opinion of the surgeon
it may be necessary to perform upon me, without having
obtained my express consent, during or by reason of the said
operation or anything connected with it; except that, although
it has been explained to me that in the course of or by reason of
the said operation it may be necessary to give me a blood
transfusion so as to render the operation successful, or to prevent
injury to my health, or even to preserve my life, I hereby
expressly withhold my consent to and forbid the administration
to me of a blood transfusion in any circumstances or for any
reason whatsoever and I accordingly absolve the surgeon, the
hospital and every member of the medical staff concerned
from all responsibility, and from any liability to me, or to
my estate, or to my dependants, for any damage or injury
which may be caused to me, or to my estate, or to my
dependants, in any way arising out of or connected with this
my refusal to consent to any such blood transfusion.

Dated (Signed)

Witnesses to patient's signature :

(Surgeon)