



CONSENT TO TREATMENT

THE MEDICAL DEFENCE UNION
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"No amount of professional skill can justify the substitution of the will of the surgeon for that of his patient".

Bennan v. Parsonnet (1912), 83 A. 948.

Consent to 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 that treatment carried out without the consent of the person concerned, subject to certain exceptions to which reference will be made, can amount to an assault which may lead to an action for damages. Thus, if a surgeon performs an unauthorized operation he or his employing authority, or both, may be confronted with an action for assault for which damages may be recoverable. This memorandum considers principally the position of the surgeon but the advice given applies to all forms of treatment which involve physical contact with the patient's body.

CONSENT MAY BE EXPRESS OR IMPLIED

The patient's consent to an operation may be either express or implied; if express, it may be in writing or by word of mouth. All these types of consent are equally effective as means of defeating actions 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, because it can more easily be proved to have been given. An implied consent generally arises by silence in circumstances which warrant the presumption that consent has been given, e.g., when a patient holds out his arm for an injection. It should be the invariable practice to obtain the patient's written consent to any operation which requires a general anaesthetic or to any procedure which may involve a special risk. The consent form should include specific consent to the administration of an anaesthetic.

To be an effective answer to a claim for assault the consent must have been fully and freely given. The patient should therefore be told, in non-technical language, of the nature and effect of the operation. **This should be done 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 on occasion be justified in not revealing or in minimizing 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 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 would not afford him any defence if he was 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. On several occasions the Union's attention has been drawn to consent forms signed by patients which have included the following sentence: "I,, of..... hereby consent to undergo the operation of whatever necessary, the nature and effect of which have 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 patient is told of the nature and the effect of the operation 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 consent forms recommended by the Council of the Medical Defence Union are set out in the appendix to this memorandum.

EXPLANATION OF NATURE AND EFFECT OF OPERATION

To ensure that the patient—or in appropriate cases his relative or guardian—is told the nature and effect of the operation the Council of the Medical Defence Union is of the opinion that the name of the member of the medical staff who gives the explanation should be inserted on the consent form; furthermore, he should be required to sign the consent form confirming that he has done so.

EMERGENCY SITUATIONS

A surgeon may be faced with a patient requiring immediate treatment associated with serious risks which must be undertaken if his life is to be saved. He must advise the patient to the best of his ability and endeavour to secure his consent and render such treatment as is immediately 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 readily available the patient should be given any treatment that is immediately necessary in his best interests.

UNCONSCIOUS PATIENTS

If the patient is unconscious 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.

MENTAL ILLNESS

Special problems arise in connection with consent to the treatment of patients suffering from mental illness, and the Medical Defence Union has obtained counsel's opinion thereon. Any member who requires advice on these problems should consult the Union.

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 person under the age of sixteen. The relevant form is Form II in the appendix to this memorandum. The life or health of a minor must not, however, be jeopardized 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 judicial authority establishing that the consent of a minor aged between sixteen and twenty-one 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 such matters as sexual conduct, on informal admission to hospital under the Mental Health Act 1959 (section 5 (2) of which provides that the wishes of a child of sixteen override the wishes of his parent or guardian in this matter), and on the choice of a doctor or dentist in the National Health Service—under the regulations once a child is sixteen he has the right to choose his own doctor or dentist. The Council is of the opinion that in the case of a minor who is aged between sixteen and twenty-one, 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 (or, if appropriate, with the spouse of the patient) if any major surgery were to be undertaken, provided that the minor did not forbid the surgeon to do so.

MARRIED PATIENTS

Any sane person of full age can 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 seriously interfered with, e.g. in hysterectomy or oophorectomy (primary sterilization is considered below), it is desirable that the spouse should be informed of the nature and effect of the operation, and should be asked to sign an acknowledgment that he or she agrees to it. The form that should be used in such cases is Form IV in the Appendix.

Primary sterilization

The Union's legal advisers do not consider that an operation for sterilization is unlawful, whether it is performed on therapeutic, eugenic or any other grounds, provided there is full and valid consent by the patient concerned. Such an operation should not be carried out without the written consent of the patient and his or her spouse if they are living together. The relevant form is Form V in the Appendix. The legal advisers are of the opinion that a man may have a legal right to the opportunity of having children by his wife and that if his wife has undergone primary sterilization without his consent he might successfully claim damages against the surgeon. If the patient is unmarried or not living with his or her spouse only the first part of Form V is required.

An operation for primary sterilization should not be carried out on a person suffering from mental disorder (whether detained or not) unless the surgeon is satisfied that the patient can really understand the nature and consequences of the operation to which he is consenting.

In the rare case in which primary sterilization of a minor is under consideration the surgeon would be well advised to consult his defence organization before carrying out the operation.

Contraception

A doctor should not insert an intra-uterine device unless he has reason to believe that the husband has consented, or unless he is satisfied that the insertion of the device is reasonably necessary for the proper treatment of the wife.

UNUSUAL SITUATIONS

Unusual situations can arise in medicine and any member who,

having read this booklet, requires advice should consult the Secretary.

JEHOVAH'S WITNESSES

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

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 could 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 follow the dictates of his professional conscience. Any member of the Union may rest assured that if he finds himself in any sort of difficulty arising out of his decision to give a blood transfusion to a child, despite the expressed opposition of the parents, he may count on the full support of the Union.

In some cases a procedure has been used which involves the removal of the child from the custody of its parents under the Children and Young Persons Acts. The Union does not favour this procedure for children in hospital.

So far as adult patients are concerned (and in this context "adult" means over the age of sixteen) the physician or surgeon must realise that the adamant refusal of the patient to permit a blood transfusion under any circumstances places a restriction on him. It must remain for him to decide, in the exercise of his own professional conscience, whether or not he will treat the patient or operate under the limiting conditions propounded by the patient. If, and only if, the physician or surgeon decides to accept these limiting conditions, he should protect himself by adopting the procedure set out below. He should not agree to treat or operate on a patient who may require but will not accept a blood transfusion and who at the same time refuses to sign a conditional consent in the appropriate form referred to in paragraph (2) below. In this event he should make a full record of the facts in the clinical notes and this should be signed by him and by the witness who was present; he should also report the facts in writing to the hospital authority

and make a full and immediate report to the patient's general practitioner.

The procedure referred to above is as follows :

- (1) the patient should be interviewed by the physician or 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 form acknowledging the fact that, although he has been warned that during the course of his treatment or operation he may require a blood transfusion, he is nevertheless unwilling to give his consent. The relevant form is Form VI or Form VII, as the case may be, in the appendix to this memorandum;
- (3) the patient's signature to the form should be witnessed by the physician or surgeon and the witness who was present at the interview.

APPENDIX

CONSENT FORMS RECOMMENDED BY
THE MEDICAL DEFENCE UNION

FORM I. CONSENT BY PATIENT

..... Hospital.

I..... of.....
hereby consent to undergo the operation of.....
the nature and effect of which have been explained to me by
Dr/Mr

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

No assurance has been given to me that the operation will
be performed by a particular surgeon.

Date..... (Signed).....

I confirm that I have explained to the patient the nature
and effect of this operation.

Date..... (Signed).....

FORM II. CONSENT BY PARENT OR GUARDIAN

..... Hospital.

I of
hereby consent to the submission of
to the operation of, the nature
and effect of which have been explained to me by Dr/Mr

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

No assurance has been given to me that the operation
will be performed by a particular surgeon.

Date (Signed)

I confirm that I have explained the nature and effect of
this operation to the child's parent/guardian.

Date (Signed)

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

..... Hospital.

I of
hereby consent to undergo the administration of electroplexy,
the nature and effect of which have been explained to me by
Dr/Mr

I also consent to the administration of an anaesthetic
for this purpose.

No assurance has been given to me that the treatment
will be administered by a particular practitioner.

Date (Signed)

I confirm that I have explained to the patient the nature
and effect of this treatment.

Date (Signed)

FORM IV. THIS FORM SHOULD BE USED IN CERTAIN
MAJOR GYNAECOLOGICAL OPERATIONS,
e.g. HYSTERECTOMY AND OOPHORECTOMY
IF THE PATIENT IS MARRIED.

CONSENT BY PATIENT

.....Hospital.

I..... of.....

hereby consent to undergo the operation of.....
the nature and effect of which have been explained to me by
Dr/Mr.....

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

No assurance has been given to me that the operation
will be performed by a particular surgeon.

Date..... (Signed).....

I confirm that I have explained to the patient the nature
and effect of this operation.

Date..... (Signed).....

AGREEMENT BY SPOUSE

I..... of.....

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

Date..... (Signed).....

I confirm that I have explained the nature and effect of
this operation to the patient's Husband.

Date..... (Signed).....

N.B. This form should be signed by the husband and the wife
at the same time.

FORM V. THIS FORM SHOULD BE USED IN CASES OF
PRIMARY STERILIZATION IF THE PATIENT
IS MARRIED AND LIVING WITH HIS OR
HER SPOUSE.

CONSENT BY PATIENT

I..... of.....
being over the age of twenty-one years hereby consent to
undergo the operation of..... the nature
and effect of which have been explained to me by Dr/Mr.....

I have been told that the intention of the operation is to
render me sterile and incapable of parenthood. I also under-
stand that it may not be possible later to reverse the effect of
the operation.

I also consent to the administration of a general or local
anaesthetic.

No assurance has been given to me that the operation will
be performed by a particular surgeon.

Date..... (Signed).....

I confirm that I have explained to the patient the nature
and effect of this operation.

Date..... (Signed).....

AGREEMENT BY SPOUSE

I..... of.....
the Husband/Wife of..... being over the
age of twenty-one years hereby agree to the operation of
..... being carried out on my Wife/
Husband, the nature and effect of which have been explained
to me by Dr/Mr.....

I have read and understand the whole of this form and it
has been signed by my Wife/Husband in my presence.

Date..... (Signed).....

I confirm that I have explained the nature and effect of
this operation to the patient's spouse.

Date..... (Signed).....

N.B. This form should be signed by the husband and the wife
at the same time.

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

.....Hospital.

I..... of.....

hereby give my consent to the performance upon me of
the operation of,

the nature and effect of which have been explained to me by
Dr/Mr and to the administration of a
general, local or other anaesthetic. 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 con-
sent, 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 depend-
ants, 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.

Date..... (Signed).....

Witnesses to patient's signature :.....

(Surgeon)

.....
(Witness present at interview)

I confirm that I have explained to the patient the nature
and effect of this operation and the possible risks attendant
upon his refusal to accept a blood transfusion.

Date..... (Signed).....

FORM VII. CONSENT TO **MEDICAL** TREATMENT BY
PATIENT WHO REFUSES TO HAVE A
BLOOD TRANSFUSION

..... Hospital

I of

..... acknowledge that I have been

informed that I am or may be suffering from
and that I require or may require treatment, the nature and
effect of which have been explained to me by Dr/Mr
I hereby give my consent to the administration of such medical
treatment as the physician considers necessary; except that,
although it has been explained to me that in the course of the
said treatment it may be necessary to give me a blood trans-
fusion so as to enhance the effectiveness of any treatment, 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 physician, 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 de-
pendants, 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.

Date (Signed)

Witnesses to patient's signature :

(Physician)

.....
(Witness present at interview)

I confirm that I have explained to the patient the nature
and effect of this treatment and the possible risks attendant
upon his refusal to accept a blood transfusion.

Date (Signed)

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