

Consent

Why the integration with law?

1. For when the doctor interacts with patient and problems with the application of the therapies applies.
 2. Government to pass laws as to how the medical profession operates. What courts can award in specific scenarios etc.
 3. Common law – the previous decisions that are binding on the medical profession.
- Doctor is no different from an ordinary citizen. For a doctor to touch a patient and in order to diagnose the doctor has to touch their patients so in order to be able to do this, they need to gain their consent.
 - The doctor has a contractual relationship with the patient. The Patient must give an express or implied consent for touching to perform his diagnosis. Without consent, the doctor could be liable for a trespass, battery and assault. Hence, doctors would be very aware of this.
 - The consent given must be a valid consent. This means the patient must have the capacity. For example; of age, not under the influence of drugs / alcohol, not in an extreme state of illness such as 'dementia' that would affect your decision making abilities.
 - The legal principle of 'necessity' would apply in situations where you are unconscious etc. and the doctor needs to operate etc. There is a greater calling to save your life, it is a ground of justification for acting in the way that the doctor does.
 - In early times, consent was not always required. **Paternalism to personal autonomy.** In other words, 'paternity' the doctor is always right and made a diagnosis and applied it. The doctor did not debate the issue, it was accepted that the doctor knew what was best and would act on the knowledge. Doctors have now been 'de-throned' and now have to negotiate and consult with their patients. Hence, **Patients now have the right to be wrong.** Hence if the doctor recommends a treatment, the patient has the right to refuse and suggest another remedy. If the patient makes this choice, they cannot later sue the doctor because they haven't treated them. This is an important development in the latter half of the 20th century.
 - **General Consent**
 1. **Consent:** Consent to be examined. Present at the doctor's office and you give a general consent. This consent avoids any future claims of battery.
 2. **Diagnosis:** The doctor is now able to touch the patient and make a general diagnosis.

3. **Treatment:** The doctor can now offer the treatment they feel appropriate.
4. **Patient Accept/Reject the treatment:** At this point, the doctor needs to inform of the possible complications associated with the treatments. With all operations, there is a danger that is involved; hence the additional information must be provided. By providing this information sufficiently, the doctor avoids a claim in negligence.

Refer to the example case of the lady who was not informed of the risks when getting a growth removed from her larynx. Her voice was her livelihood, which unfortunately was destroyed in this operation. Students could no longer understand her and could not appear on radio. The Doctor was found to be guilty of negligence.

Mohr v Williams

Patient underwent examination and diagnosis. Here, she had cancerous growths on her left ear. She gave consent to the surgeon to cut off part of her ear to remove the growths. She was placed under aesthetic and while so, he examines her right ear as well and discovers that the right is worse than the left ear. He could not bring her back up from aesthetic so he decides to contact her GP about the condition of her right ear. Her GP agreed to this and the surgeon removed most of the right also. Here, the doctor's intentions were good, without intention of harm, but the fact remains that she had not consented to the procedure being done on her right ear. She subsequently sued the surgeon and he was found guilty of battery (GBH, assault) as he did not have the necessary consent.

Hart v Herron

The doctor had diagnosed patient and he was in a highly agitated state. He had a suspected mental impediment and when in hospital he was given a calming medication. He consented to this. Once he was unconscious, doctors proceeded to treat him by way of a therapy (electro therapy), which was controversial, but widely applied during that time. Here, the issue was as to the patient had given consent to this. Because of the circumstances here, the courts found that someone that is under a strong sedative is not fit to give appropriate consent, hence this therapy constitutes a battery.

Re T

Blood transfusions for JHW cases are common. Lady here was 34 weeks pregnant when she was involved in an accident. As a result, it was diagnosed that the doctors would have to deliver child by way of immediate C-section because of certain ruptures in the area. Normally, doctors will require consent to blood transfusions before this procedures. Often do not need the transfusions, but in a small percentage of cases they do. Here the lady's mother was a Fanatical JHW. The mother was at the hospital and spoke to her daughter to insist that she not have a transfusion, hence the daughter did not consent to the transfusion (not in strong terms). The operation was performed, it was successful without the transfusion, however after, she started to emerged slowly and got to the point where she needed a transfusion to survive (was on a ventilator). Husband and Father sought urgently in chambers to allow the hospital to provide the transfusion contrary to the decision she had given. Doctors were able to persuade the judge and provided an order to counteract the refusal. They looked at the different procedures. **This was a situation where the law could override the patient's consent.**

O'Brien v Cunard

There was a Ship of Irish immigrants that was heading towards USA. USA had a policy at this time that they had to be inoculated against small pox before going onto the mainland. Cunard was a shipping line and had taken to provide a service to the passengers to offer to perform these vaccinations. On a particular day, they made an announcement for all who wish to have the inoculation in order to be free once off the boat. O'Brien was standing in the line, she stuck out her arm. She was not asked for consent nor did she give it. When she sued the company for battery, the issue was whether she gave an implied consent – she held out her arm and did not resist. Her behaviour was such that it was reasonable for the doctor to believe that she did in fact give consent.

A broad general consent removes the liability for battery. More detailed information must be given about the risks associated in order to provide an informed consent.

Elements of Consent

1. Voluntary (Not coerced, misrepresentation as to treatment, obtaining consent on a fraudulent basis – consent obtained in these matters is invalid consent and hence, the doctor would not be protected from a claim of battery)
2. Specific
3. Competency (the actual individual giving the consent to the actual treatment involved)

Appelton v Garrett

Dentist made representation to a patient that they require a series of root canal treatments and caps on their teeth. Patient consented to this because the dentist had done examination and recommended this. Subsequently transpired that the teeth the dentist performed these procedures were perfectly sound teeth, hence the patient did not require the proposed treatment. Therefore, this amounted to an example of obtaining consent through a misrepresentation as to the nature of the treatment.

R v Mobilio

Doctor (radiographer) was exploiting patient by carrying out ultrasound examinations. Patients approached regularly for pregnant ultrasounds for the health of the baby they are carrying. Based on these tests, if the baby is severely deficient, the woman may have an abortion. Mobilio told his patients that the transponder (equipment) which was usually used on the abdomen, had to be instead inserted into their vaginas, to which a number had agreed. Was this consent a voluntary consent? Here it was found that this was a breach of all ethical and professional standards done for his personal sexual gratification meant that although he told them what he was going to do, he was punished.

R v Williams

Singing teacher and pupil (16 year old girl who had lived a sheltered life). Pupil was enrolled for singing lessons with Williams to improve her voice to become a singer. Williams after some weeks of coaching the girl told her that in order to improve the voice projection that she needed to have a particular form of therapy. He proposed sexual intercourse. The girl

gave her consent to this and Williams performed the act. When she told her mother, the singing teacher was arrested and charged with rape. He claimed that she consented and hence not guilty of rape. Is this a valid consent? No, this is fraudulent, there has been fraudulent misrepresentations made as to the purpose of the act and hence the consent was invalid as it was given for the wrong reasons.

R v Flattery

Flattery professed he was not a doctor but presented himself as himself to the public as being a doctor and accepted money for supposed medical advice. Here, his patient was a 19 year old girl who had complained of an illness and his therapy was that she should have a surgical operation (intercourse). She consented to this on the belief that this reached a cure for her illness. He was charged with rape and defended with consent, however the consent was fraudulently obtained (consented for the wrong reasons) it was just to satisfy his own lust.

R v Bolduc & Bird

Here, a Genuine Medical practitioner who is consulting a female. He wishes to perform an internal examination on her. It was necessary to do this and she has consented to this. Bolduc has a lay friend of his who invited to be present during this time and claims that he is a medical intern who will give a second opinion on this problem (when really pervert). This only discovered later. Was her consent vitiated (wiped out) by the fact that there is an interloper present at this consultation? Bolduc was found guilty. Bolduc appealed and the consent was upheld however, given that this is a highly invasive procedure, his license was revoked as bringing such person into the procedure breaches ethical and moral standards and confidentiality (doctor patient).

De May v Roberts

Doctor De May was called out to a rural area (8 miles away) to a confinement, as one of his patients was about to deliver a child. It was a dark and stormy night and the road was so muddy and dangerous that he could not ride his horse and instead had to walk. Understandably, the doctor required a lot of equipment and requested his friend assist him to help carry the bags. The two of them arrived at the farmhouse where the patient lay and he introduces his companion but does not introduce him as a doctor however the couple believe he is. They proceed with the delivery and during the course of doing so, the companion clasps her hand to squeeze for comfort. The child is delivered with the baby and wife being safe. The couple then discover that Roberts was not a medical officer/intern, but a mere layman and bring an action. Here there is an infringement of privacy if the consent is deemed not to be valid. Here, the court found in favour of the woman as the right to privacy had been infringed

R v Maurantinon

Perna v Pirozzi

Patient presents to a group of doctors who work in a group practice. The patient was diagnosed as requiring an operation to have kidney stones removed. He was booked in for an operation and asked if the doctor will be the one performing the operation. He was admitted, given anaesthetic and the operation was performed and successful but requires a follow up appointment. Here he discovered that it was not the doctor that did the surgery, but another causing Perna to have extreme mental anxiety. Question here it is ethical to

mislead a patient to get consent. Here, his consent was deemed to have been obtained through misrepresentation and hence, he was successful in his action.

Risks & Consequences

These cases involve Women consenting to intercourse with man. As result she is infected with a disease and brings an action against the man. In other words, had she known of the condition, she would not have given consent. The court found that this does not invalidate consent but may give rise to an action in negligence.

Additional Procedures

When during a procedure, the doctor performs an additional step that is necessary but the patient has not specifically consented. Does this additional procedure go beyond the scope of consent?

Brushett v Cowan

Patient sees doctor complaining she had experienced severe pain in her thigh of right leg and over a period of time the doctor does certain x-rays which are not sufficiently clear to indicate what the problem might be so he suggests that he needs to do some exploratory surgery. This surgery involves a muscular biopsy. She signs a specific consent to this but there is another paragraph that empowers the doctor to do any other procedure they deem to be necessary. The perform the surgery and biopsy and they find some diseased muscle in the leg but the doctor is now concerned with what id causing the infection in the leg deciding to probe deeper to the bone to which he finds discolouration in the thigh bone. In addition he takes a bone biopsy of the discoloured portion of the thighbone. The surgery is then complete and she is discharged and awaiting the outcomes of the test. She then claims that she claimed that she was not told by the doctor that she should walk with crutches and not carry any weight on the leg. Days later, she has a fall and she breaks her leg at the point where the bone biopsy was taken. She needed to have an operation to repair the broken leg. At this point, the surgeon is not the original doctor and discovers that she has had a bone biopsy and brings a charge of batter against doctor Cowan. Here it was found that the additional clause covered the additional procedure as it was a procedure deemed necessary, therefore he was not guilty of a battery. The court also took into account that it was an exploratory surgery and that it was within reason to in fact explore.

Pridham v Nash

He was a gynaecologist who had previously worked with Nash and she presented years later complaining of severe abdominal pain. He said the only way to diagnose was to make a small incision in the all of the abdomen and insert a small scope to look around. She signed a consent form to this including an additional procedures clause. He discovers that she has severe adhesions in her uterus and hence while doing so, he cuts the adhesions. Here the question rises, has doctor Nash exceed his consent? She had provided a general consent for an exploratory operation. Was it reasonable for the doctor to have performed so? Court found that he had performed within the scope of the consent given.

ESTABLISHING CAPACITY

Capacity to provide consent

If you are lacking in capacity, you are unable to give valid consent. We know status does affect certain consents that you can give. If you are under the age of majority, you need someone to sign a valid contract for you. But the question is that minors are not without consent, there are things to which they can consent.

Gillick v West Norfolk & Wisbech (MUST READ CASE)

Mrs Gillick had two daughters. She was clearly an over protective mother and intensively community spirited person as she bought an action against the local health authority because the health authority had concerns with local legislation. They issued regulations which stated that girls in ages of 16 can, in exceptional circumstances, be issued with contraception pills without parental consent. This was offensive to Mrs Gillick and launched an action to have this action set aside as she did not like the thought of her daughters doing such without her consent. Two issues that arise here:

1. Capacity of a 16 year old to consent without parental assistance
2. Parental authority is being infringed by this legislation

The House of Lords drew on a number of analogies. They said that it wrong to say that a 16 year old has no capacity at all. **The looked at the 'test of understanding'. A minor child is capable of giving consent if they have the intellectual understanding and judgement in that situation to make an informed decision. This will be a personal decision based on each situation and hence, each case is to be taken on its own merits.**

Drew on the example of a rugby player who breaks their arm away from home.

They also looked at what the greater evil may be? What is in the best interest of the child test.

Yes parents do have authority over their children, commencing at birth. However, the closer that child gets to 18, the less of that parental authority remains. Their capacity is gradually increasing as they approach the age of 18 and hence at this age they will reach full capacity, hence the question now is that at the age of 16, what authority does the parents have? The court decided on the idea of a diminishing authority and hence decided that a 16 year old who has the capacity to make this decision.

When can a person refuse Medical treatment?

To refuse treatment you need to have made a decision to refuse treatment. This decision to refuse consent to treatment is also subject to scrutiny. In other words when will a court

accept a decision to refuse treatment where on the face of it, is contrary to the best interest of the patient. There are circumstances in which a refusal of consent will be overturned.

Re C

Serving a 6-year prison sentence for stabbing girlfriend. Doctors in the jail diagnosed him with having chronic schizophrenia. Despite mental condition, he developed a physical condition that threatened his life (tissue in leg was dying). The blood supply to this tissue of course died which leads to consequences. The obvious diagnosis was that his leg should be amputated below the knee. This was put to Mr. C (diagnosis and treatment). Mr. C refused to allow the amputation of his leg and hence would die within a week if the procedure were not to take place.

Do they doctors take this consent as being valid consent, given his mental condition? It is a question of capacity. Does this patient have the capacity to make an informed consent? If he does, the courts accept his decision. If they decide that the decision was made without logic applied, then they will decide to overrule the consent.

Mr. C did not exhibit inappropriate emotional expression. He may lack capacity in the broader sense, but as far as the particular situation, he had sufficient capacity to see what was at stake and hence, his decision was to be respected. He was autonomous. Mr. C duly paid the penalty and died as a result of refusing to undergo this treatment.

"I would prefer to die with 2 legs than to live with one"

Re B

Patient was female. She suffered a hemerage of her spinal column and they patched this up and mentioned there may be further complications. Hemerage means that the fluid was leaking out of the spinal column into the blood stream. 10 years later after gradual decline in health, she had become paralysed from head down and was on a ventilator to keep breather. Mrs. B made a request for the hospital authorities to switch of the ventilator so she could die.

Did she have the capacity to make this decision? In examining the evidence, the judge in this case had to look at her mental capacity to make a decision. They found that she had demonstrated the reasoning and the decision-making competence based on intelligence. Judge found that her decision to be disconnected from the ventilator to be upheld.

Marshal v Curry

Patient consented to have a hernia repair operation. In the course of the operation, the surgeon discovered that Mr. Marshall had a disease gangrenous testicle, which would lead to disastrous consequences and hence during the course of the operation, he removed the diseased testicle also. Marshal later objected to the removal of his testical! Because of the serious nature, the doctor was not guilty of a battery as he presented the defence of necessity. Had he not done this, he would have been dead in a couple of days and hence, Marshal was unsuccessful in his claim.

Murray v

Female patient had consented to the delivery of her child by way of C-section. In performing this, the surgeon discovered that she had numerous thyroid tumours in her uterus and hence, he removed her uterus also. She brought a claim for battery. In this case, removing the uterus is drastic and it was not a life-threatening tumour (compare this to the case of Marshall) and hence, the court decided that consent did not extend to this. Hence doctor was guilty of battery.

Voluntariness

As a general principle, persons who haven't declared to be mentally insane do not as a result of such a finding automatically lose their capacity to make decisions. In other words: if a situation arises in which a decision is made by someone who is declared to be insane, the courts can look to whether they have experience or are experiencing a lucid interval (period of time where the individual was capable of providing consent/worth).

Kainowitz v Department of Mental Health

In a mental hospital where they were conducting a medical trial involving a form of shock treatment. The question here was whether K gave consent to this treatment. He later claimed that he had not given proper consent. When he gave that consent, was that consent competent or not? What does a reasonable patient need to know to give a valid consent. Factors taken into account:

Institutionalisation: incarcerated people's consent is diminished by their circumstances and will often consent to treatments in order to please the prison services (get parole etc.)

They found in this case that the consent that was given was suspect and could not uphold it and hence overturned the consent and found in favour of K.

Refusal of Treatment

Hopp v Lepp

The court held that a patient has a right to be wrong and make their own decisions regarding treatment as long as the decision is rational. A rational process of thinking in order to arrive at the decision they are making, in this case – to refuse treatment.

Also distinguished that decisions made on beliefs and values, not commonly in society, the court must accept them – referring particularly to the Jehovah's witnesses and their refusal to have blood transfusions.

The Patient has the right to be wrong.