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# Consent to treatment: practice vis-à-vis principle

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***Abstract***

*It is a principle recognised not only by our own but by other legal systems that ignorance of the law is no excuse for violating it. This is also expressed in the form of a legal presumption that everyone knows the law. So it is the duty of every person to be acquainted with that part of it which concerns him or her. In recent years there have been a number of malpractice suits based on lack of consent or inadequate consent from the patient for procedures used in treatment. The common meaning of consent is permission, whereas the law perceives it as a contract, that is, an agreement enforceable by law. Keeping this view, the present article aims at highlighting certain misconceptions prevailing regarding consent.*

## Introduction

Sections 87 to 92 of the Indian Penal Code try to shield a doctor from litigation suits arising out of any adverse outcome, including death of the patient, in the course of medical practice (1). In all the relevant sections of the law, the essential ingredients are "consent" and "good faith". Consent is the key defence to most negligence suits because it establishes that the patient had agreed to the conduct of the doctor. Unfortunately, it has become a potential minefield of liability in the emergency care era. If the basis of a lawsuit is absence of consent or inadequate consent, the facts and circumstances of communication between doctor and patient will receive close scrutiny. Consent is not mere submission of the patient to a particular treatment, but a process of communication requiring the fulfilment of certain established elements like competence, sufficient disclosure, understanding and volunteering. With increasing awareness among patients regarding their rights, the ethics of trust between patient and doctor is gradually disappearing. So in view of the rapidly increasing number of malpractice suits concerning consent, the following practices need to be addressed from a legal point of view.

## Practice: Consent is permission for treatment

**Principle:** Although there is no legal definition of consent in Indian law, Section 13 of the Indian Contract Act says that "two or more persons are said to consent when they agree upon the same thing in the same sense" (2). Therefore, the law presumes it something more that a simple permission or submission, which is passive. Consent to treatment or any procedure is an agreement that creates an obligation or right between the parties to it. In medical practice the agreement is always bilateral because the patient consents for the procedure anticipating the best treatment in return (3). Therefore, in the Consumer Protection Act, a patient is considered a consumer and the doctor has to render service.

## Practice: Consent once obtained covers all procedures

**Principle:** By definition, consent is an agreement on the same thing in the same sense. Therefore, a consent is explicit, that is, both person- and procedure-specific (4). Consent to treatment is an agreement between a patient and his treating physician. It is not valid if an assistant treats (even in presence of the doctor) when the patient has consented to be treated by a particular doctor. Similarly, when the consent is for a particular procedure, a doctor cannot perform another without a fresh consent. Even a surgeon is legally prohibited to extend an operation, except in an emergency.

## Practice: A resident doctor or a nurse can take consent

**Principle:** Since consent is an agreement between a patient and his doctor, it has to be taken by the treating doctor only. In teaching hospitals and in surgical units the essence of this agreement does not cease and it cannot be held to be between the patient and the hospital or the unit. Thus, in every set-up it is the treating physician who is the other party to the contract.

## Practice: There is no need to explain the details of technical procedures to the patient

**Principle:** A physician violates his duty to his patient and subjects himself to liability if he withholds any facts necessary to form the basis of an intelligent consent by the patient to the proposed treatment. The law pays scant attention to the "consent" element of informed consent. It is, however, extremely concerned about the "informed" element (5). It, thus, becomes elementary that there must be understandable communication between the physician seeking authorisation or consent and the person entitled by law to grant that permission.

Therefore, all relevant information of the disease and the proposed treatment needs to be given to the patient. All the significant and material risks are to be disclosed. The patient should also be informed about other treatments available. The person giving the consent must understand the vocabulary used by the physician. Technical terms should be simplified to communicate with the untutored and laypersons. The doctor must ensure that the patient has comprehended the

information without any distortion, as any consent obtained by misrepresentation, no matter how minute, is invalid (1).

### Practice: Consent can be taken immediately before the procedure

**Principle:** Consent can be taken just before a specific procedure in emergencies. But in case of elective procedures the patient needs to be informed about the details of the procedure sufficiently beforehand so that he can decide freely and judiciously. The consent should be taken well in advance because on the day of the operation a patient may not be considered mentally sound to sign a contract.

### Practice: Presence of a third party is optional

**Principle:** Like all legal documents, consent duly witnessed and signed by disinterested third parties is legally more reliable, as the parties concerned cannot subsequently deny execution. If the patient is illiterate, and it is necessary to take his thumb impression, then the presence of a third party is still more significant.

### Practice: The consent form has to be signed by the patient only to document permission

**Principle:** As already discussed, consent for treatment is always a bilateral agreement. A unilaterally executed consent is void. Therefore, by principle, the documentation of consent to treatment should be signed by all the parties concerned, including the witness. Consent signed only by the patient and not by the doctor is null and void, and does not have any significance in the law.

### Practice: The whole procedure of consent has to be recorded in a specific format

**Principle:** Even an oral consent has got adequate standing in a court of law. Nevertheless, in litigation the question is not whether the right thing was done, but whether that can be proven. Hence, consent needs to be properly documented. The law does not prescribe any consent form, although it is a legal document. There is also no standard format for taking consent in all situations. The format can be modified according to need. The consent form should be translated into the local language so that the patient can comprehend the nature of consent to the proposed treatment. It is still better if the patient himself writes down the consent in the presence of the doctor and an uninterested third party.

**References**

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