

Consent: statutory Provisions in Eritrea

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Abstract

Consent means voluntary agreement, compliance, or permission. It implies a reasoned response to a proposal and is necessary to any type of agreement. To consent means to give assent or approval. Two or more persons are said to consent when having the same understanding they agreed upon the same thing as a result of meeting of the minds.

Different philosophical traditions define the basis for and nature of consent of patients differently. However, common to all is that under normal circumstances the patient should consent to the proposed medical intervention on his body.

The right of self determination, patient autonomy, respect to human rights, and many other important legal and ethical principles of the century are in favor of consent. The following famous phrase of Justice Cardozo in the US case of *Schloendorff v Society of New York Hospital* (1914) 105 NE 92 may suffice to appreciate the legal significance of consent.

"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."

One can realize two facts from the above phrase; individual's body is inviolate and such violation without consent amounts to assault.

CONSENT IN THE ERITREAN CIVIL CODE

Consent is a requirement or prerequisite for many civil transactions, mainly in law of contracts. For the purpose of medicine the following article is relevant. Article 20- Medical examination and treatment.

1. Principle

- (1) A person may at any time refuse to submit himself to a medical or surgical examination or treatment
- (2) Nothing in this article shall affect the provisions of laws or regulations providing for a physical examination of persons or their compulsory vaccination or other similar measures in the public interest
- (3) Nothing in this article shall affect the power of a guardian of a minor or interdicted person to submit the incapacitated person of whom he is in charge to an examination or treatment beneficial to that person's health.

Does sub-article 1 of this article imply consent?

If the law gives a person/patient the right to refuse treatment, then such right is a duty to the care provider to first obtain permission from the patient before conducting any medical or surgical intervention. This permission is what we meant by consent; A permission to do something on the other's body.

Note that the refusal may be at any time, for medical and surgical interventions, and for both examination and treatment. The message intended by this sub article is *"Do not examine or treat a person before obtaining consent from the same."*

Sub-article 1 being the general principle, sub-article 2 provides a room for some exceptions. If the purpose of the treatment or examination in question is of public interest then sub-article 1 is of no effect, meaning the person can not refuse examination or treatment. This sub-article is illustrative because after mentioning compulsory vaccination as one example it adds "other similar measures" in the public interest.

Which vaccinations are considered as compulsory vaccinations? What measures are considered as measures in the public interest? The test may be "Does the refusal indicated in sub-article 1 affect the public?" if yes, then the individual has no right to refuse. In short, whether public interest outweighs individual right is the test.

This sub- article also refers to existing provisions of laws or regulations which will be mentioned later. In interventions allowed by these provisions consent of the patient is not legal requirement. Sub-article 2 will also serve as a basis for future similar laws or regulations.

Sub-article 3 has two messages. The power to consent on behalf of incapacitated persons is vested on guardians; hence these incapacitated people can not refuse treatment.

**Exceptions stipulated by Sub-Article 2 of Article 20
 Art.34 Physical examination (Criminal Procedure Code)**

1 Notwithstanding the provisions of Art.20 Civil Code where an investigating police officer considers it necessary, having regard to the offence with which the accused is charged, that a physical examination of the accused should be made, he may require a registered medical practitioner to make such examination and require him to record in writing the results of such examination. Examination under this Article shall include the taking of a blood test.

2 An investigating police officer may, with the agreement of the victim of an offence or, where he is incapable with the consent of the parent or guardian, require a registered medical practitioner to make such physical examination as the offence being inquired into would appear to require. He shall require the registered medical practitioner to record in writing the results of such examination.

Art.40- Order for Medical Examination by Court (Criminal procedure draft)

(1 A court may, at any stage of a case, order that the accused be medically examined for the purpose of ascertaining any matter which is, or may be, in the opinion of the court, material to the proceedings before the court, provided that such examination can be conducted in a reasonable and safe manner. Without the consent of the accused, the court

may not order any procedure that is reasonably likely to endanger the health or safety of the accused or cause him undue pain.

COMPETENCE AND CONSENT

There are individuals who are incapable, for whatever reason, of making decisions affecting their lives, and that includes medical treatment.

This lack of competence can be

- A. Temporary (as in the case of the young child) or
- B. Transient (as in the case of the unconscious emergency patient) or
- C. Permanent (as in the case of some mentally handicapped patients).

A. A minor, before attaining maturity age has no capacity to consent. The following three Articles reveal this fact.

Art.198 Definition

A minor is a person of either sex who has not attained the full age of eighteen years.

Art.199 Disability of minors

- 1 A minor, as regards the proper care of his person, shall be placed under the authority of a guardian, whom he shall obey
- 2 The minor may not perform juridical acts except in the cases provided by law

Art.266 Health of Minor

- 1 The Guardian shall watch over the health of the minor.
- 2 In case of sickness of the latter, the guardian shall take the necessary measures for his recovery.

B. An unconscious patient can not consent due to his temporary state of health. The rationale behind this exception is the concept of necessity. Accordingly, the care provider is treating the unconscious patient as a matter of necessity. As long as the treatment is for the best interests of the unconscious patient consent may not be required. However, the doctor should do no more than is immediately necessary for the patient. The following paragraphs would be a good guide and illustration as regards to consent in unconscious patients .

Ordinarily, when a patient calls on the doctor with his complaints, his consent for necessary medical examination is implied. However, if the patient is unconscious and any delay in obtaining the consent would be dangerous, the doctor may examine and treat without consent such a gravely ill person who needs immediate treatment or surgery. Save this exception, a doctor should not examine or treat any patient without his consent. Even in such cases, care should be taken that the surgical procedures do not go beyond the minimum required to save life, and whenever possible, amputation of limbs, etc, is postponed till such time that proper informed consent can be obtained."

A minor was taken to a surgeon by his two adult sisters for tonsillectomy. The child died under anesthesia. The court ruled that there was no emergency to justify the surgeon to operate without parental consent, and the father could recover damages.

A minor's leg was crushed under a truck. The leg was amputated immediately. The court ruled that parental consent was implied by the prevailing emergency.

C. This exception is for people who for different reasons permanently lack capacity to consent. Sub-article 3

of Article 20 stipulates that guardians are responsible to consent on behalf of the interdicted person. The next natural question would be who legally insane and interdicted person is? The following articles from the Civil Code of Eritrea may generally answer the question.

Art. 317 Insane persons

- 1 An insane person is one who, as a consequence of his being insufficiently developed or as a consequence of a mental disease or of his senility, is not capable of understanding the significance or effect of his actions
- 2 Persons who are feeble-minded, drunkard or habitually intoxicated, and persons who are prodigals shall in appropriate cases be assimilated to insane persons

Art.341- Notorious insanity- 1. An insane person who is an inmate of an institution

A person shall be deemed by law to be notoriously insane where by reason of his mental condition, he is an inmate of a hospital or of an institution for insane persons or of a nursing home, for the time for which he remains an inmate

Art. 342.- 2. Rural communes

In communes of less than two thousand inhabitants, the insanity of a person shall be deemed to be notorious, where the family of that person, or those with whom he lives, keep over him a watch required by his mental condition, and where his liberty of moving about is, for that reason, restricted by those who are around him

Art.343 Juridical acts of notoriously insane person 1-principle

- 1 Juridical acts performed by a person at the time and in a place in which its state of insanity was notorious, may be impugned by that person, by his representatives or by his heirs.
- 2 The same shall apply to juridical acts performed by a person where the infirmity which renders such person unfit to take care of himself and to administer his property is apparent.

Art.344-- 2. Practice

- 1 Unless the contrary is proved, the consent of such person shall be deemed to be affected by a defect which brings about its nullity.

Art.347 Persons whose insanity is not notorious

- 1 Juridical acts performed by a person may not be impugned on the grounds of his insanity where his condition is not notorious.
- 2 The insane person may not obtain the annulment of such acts unless he can show that, at the time he performed them, he was not in a condition to give consent free from defects.

According to Article 344(1), consent of a notoriously insane person (as defined in Article 341) is null and void. The mere fact that a person is insane as defined in 317 does not render the consent null. It goes without say that an interdicted person has no capacity to consent. Therefore in both cases the care provider is expected to obtain consent from guardian of the incapacitated person.

INFORMED CONSENT TO TREATMENT

Historically, consent meant no more than getting the patient's permission before commencing treatment. This permission requires only that the patient be told what would be done, not the risks or alternatives to treatment. In modern medical law, however, to be legally valid the consent should be informed, that is the consent must be given after understanding

what it is given for and of the risks involved. It is therefore imperative for the doctor to give reasonable information to his patient about the:-

- a) diagnosis
- b) nature of treatment or procedure
- c) risks involved
- d) prospects of success
- e) prognosis if the procedure is not performed
- f) alternative methods³

The whole idea is that the patient consenting for a certain procedure should give the consent after having sufficient knowledge about the issue he is consenting for. The consent itself should be based on such material disclosure otherwise it is not informed decision⁴.

Why does the patient need to be informed about his or her medical condition, the proposed treatment of it, the risks, consequences of, and alternatives to it?

The simplest available answer encompasses all of the moral and ethical demands: patients have a 'right' to know. Why? Because it enables individuals to make autonomous choices about what should happen to them. The matter of the freedom of the individual to decide, autonomy, self-determination, whatever one prefers to call it, is once again crucial to medical ethics and therefore medical law

According to Dr.C.K.Parikh, all informed consent rules recognize the so called therapeutic exception, eg, the apprehensive or neurotic patients who may be harmed by such full disclosure. In such instances, the author advises doctors to obtain informed consent from a responsible relation, or in his absence, to obtain medical consultation and chart the intentional omission and the therapeutic exception-basis in regard thereto.

IMPLIED AND EXPRESS CONSENT

Consent may either be implied or express.

Implied consent is not written. It is a common form of consent but it should not be applied to procedures more complex than inspection, palpation, percussion, and auscultation. It is not expressly asserted. The mere fact that a patient comes with his complaints before a doctor implies the consent of the former to be examined. Even then while examining private areas of opposite sex the express consent of the patient is required.

Express consent is a consent obtained after disclosing the procedure in explicit and distinct language. It may be oral or in written form. Oral consent is employed for the common minor examinations and therapeutic procedures. Oral consent where properly witnessed is as equally valid as written consent. However the later has the advantage of easy proof and permanent form. In any case where there is doubt, written consent should be obtained.

It goes without say that consent obtained by fraud, undue influence, incapacitated person is invalid consent.

LEGAL CONSEQUENCE FOR NON COMPLIANCE WITH THE RULES OF CONSENT.

The basis for such liability is Extra-contractual Liability Article 2028 – General Principle

Whosoever causes damage to another by an offence shall make it good.

Article 2029-Types of offence

- 1 An offence may consist in an intentional act or in mere negligence.
- 2 An offence may consist in an act or failure to act [commission or omission]

If one conducts a procedure without valid consent of the patient the act amounts to omission, failure to act something that the practitioner should have done, hence offence. It does not matter whether it is intentional act or negligence.

The wrong-doer will be liable where by his act the victim suffers damage. According to Article 2028 the wrong-doer shall compensate the victim.

While the above two Articles are principles for all torts. Article 2038 is specifically relevant with regard to medical intervention without consent.

Article 2038- Physical assault 1- Principle

- 1 A person commits an offence where he intentionally makes contact with the person of another against the latter's will.
- 2 An offence shall be committed regardless of whether the bodily harm done to the other person is caused by personal contact or by the use of an object, animate or inanimate

Such action against the practitioner is available where there is an absence of consent, or the consent does not accord with the medical/surgical procedure which subsequently takes place. Note that according to this article the plaintiff is not required to prove damage. The mere fact of making contact without consent is sufficient to constitute such offence. Therefore, if one commits an offence of assault and by doing so causes damage to another the above mentioned three articles shall apply.

The following legal expression may be mentioned as a concluding statement to remind every care provider to obtain informed consent before providing surgical or medical intervention to a patient.

*"As pure legal issue, forcing treatment on an unwilling person is no different from attacking the person with a knife."*⁵

References

1. Michael Davies, Text Book on Medical Law, page 12
2. Dr.C.K.Parikh: Parikh's text book of Medical jurisprudence, forensic Medicine and toxicology.
3. Dr.C.K.Parikh: Parikh's Text book of Medical jurisprudence
4. Michael Davies. Text Book on Medical Law, Second edition
5. Edward P.Richards III, J.D., M.P.H and Katharine C. Rathbun, M.D.,M.P.H. Law and the Physician: A practical Guide.