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The Doctor and the Law—5

Consent to Medical Treatment

BY

A. PALLEY,

B.A., LL.B. (Cape), M.B., CH.B., D.C.H. (Lond.)
Salisbury.

The application of any force to the person of another is, broadly speaking, an assault in law. The degree of force used is immaterial. Even a gesture or threat, which is such that the person threatened reasonably believes that force will be applied, may be an assault. It will be readily understood that the application of the slightest physical force may be an assault. On this basis any surgical procedure, no matter how trivial, would be an assault. A hypodermic injection, a vaccination, the mere palpation of an abdomen, would all be assaults. What then is it that removes these acts, when done by a medical practitioner, from the sphere of illegality? It is consent by the patient; and this consent renders the act, which would ordinarily be illegal, innocent.

The law does not allow consent to negative every and any act of assault and thereby render such assault innocent. Consent in these matters has a very limited application. It extends to surgical operations and medical procedures, firstly, on the ground that such "assaults" are performed for the benefit of the patient; secondly, it is in the interests of the State that its citizens should be fit and well. Public policy demands that such "assaults" should be permitted. This second factor of public policy also limits the extent to which consent excuses an assault. This again is a question of degree. It is particularly relevant where the act done is not necessary for the health of the individual. Clearly a man cannot in law ordinarily cause a mutilation to be inflicted upon himself. Would any doctor amputate a hand, or even a finger, merely because the patient so desired it, i.e., gave his consent? I think not. The doctor would demand some adequate medical reason. In law it would be against public policy that a man should cause mutilation of his limbs, and it would be an assault to which consent by the patient would be no defence.

Other cases, however, are not so well defined. There are certain operative procedures, generally minor, which are not necessary for the maintenance of the health of the patient. Doctors frequently pierce women's ear lobes to hang ear rings. This is merely a whim of fashion and can scarcely be said to improve their health. Perhaps the psychiatrist might argue that it creates contentment. But then it is on the same basis as the sailor who has tattoed across his chest all the names of his lady loves. The real reason is cosmetic and not medical. Not every doctor would agree that circumcision is a wise procedure. In all these cases the procedure is *bona fide* and not against public policy in so far that the health of the citizen is not affected to the point where the community suffers. The precise limits of what constitutes an assault and what does not, in medical practice, is as yet undefined in law. The demarcation field is still hazy, as this type of case seldom comes before the courts. These legal problems must still be solved. One must remember that the courts are the equivalent of the laboratories, where the law is as yet uncertain. It would be a rash doctor who would present himself as the guinea pig for legal experimentation. Yet I have known doctors, for no medical reason at all, perform a vasectomy or salpingectomy or tie the tubes, merely because the patient wished to be sterilised. In my opinion this is an assault to which consent can be no defence, as it is against public policy.

So far I have considered consent in its relationship to the criminal law. Side by side with the criminal stands the civil law. The former regulates the legal position between state and citizen, the latter between person and person.

Apart from criminal sanctions, should a doctor carry out a medical or surgical procedure without the patient's consent, in law the patient would be able to claim damages against the doctor for the wrong or delict committed by the doctor.

What then takes surgical procedures out of the category of assaults or civil wrongs and gives legality to an act which would otherwise be illegal? Legality is created by the consent of the patient as expressed by the legal maxim *volenti non fit injuria.*

Consent which gives legality to an otherwise illegal act has a wider meaning than the ordinary daily usage of the word. Consent in its legal sense has three elements: (a) knowledge of the intended act, i.e., knowing what the doctor proposes to do in the examination; (b) an appreciation of the scope of the examination and any probable consequences; and (c) the voluntary acceptance of any risk associated with the act.

Mere consent to the performance of a surgical procedure is not enough. Mere knowledge of the operation by the patient is insufficient. There

must also be an appreciation and realisation of the nature of the operation and its scope by the patient and any probable consequence or risk he runs. For example, a patient may agree to the performance of an arthrodesis as treatment, but in law his agreement would not be consent unless he were aware that the consequence of the operation would be a stiff limb and he further agreed to such a consequence. Risks associated with the procedure must also be explained to the patient. This does not mean that every possible eventuality must be discussed; by no means at all. But where the risk is probable it must be explained to the patient. A woman advised to have a bilateral ovariotomy must be told that the consequence of such an operation is a premature menopause. Unless the patient knows that such is the consequence, in law she would not be considered to have given her consent, though she may in fact have agreed to having her gonads removed. In a recent South African case (B. v. R. & H., 1953, T.P.D.) a psychiatrist administered electro-convulsive shock therapy to a patient of his, in the course of which the patient suffered a fracture of his humerus. The doctor had not explained to his patient the risk of a fracture as a probable consequence of the treatment. The learned judge in summing up the case stated: "I have to consider, firstly, did the plaintiff consent to shock treatment; secondly, was he informed of the risks of giving him such treatment; and thirdly, if he was not informed, was it the defendant's (i.e., the doctor's) duty to inform him," and the judge continued: "There is no doubt that a surgeon who intends operating must obtain the consent of the patient. . . . In a case which may have serious results I have no doubt that a patient should be informed of the serious risks which he runs. If such dangers are not pointed out to him, then in my opinion the consent to the treatment is not in reality consent; it is consent without knowledge of the possible injuries."

In this case, because the doctor had not informed the patient of likely injuries associated with the treatment, the court held that the patient had in law not consented to the operation, because he had not voluntarily consented to taking the risks attendant on the treatment.

Not only is it important to obtain consent as understood in law to the operation, but it is also essential to define the field of the operation. A doctor may only operate to the extent to which he is authorised by his patient. For example, a patient who consents to cystoscopic examination does not also consent to cauterisation of a papilloma. Again, if a woman consents to a hysterectomy she does not also consent to an ovariotomy. A patient who consents to the amputation of a digit does not consent to the amputation of a limb. Consent is very narrowly construed in law, and if a doctor carries out an operation, the scope of which extends beyond that to which the patient has consented, he could easily lay himself open to a claim for damages. Though it may be most convenient to extend the scope of the operation, this would not justify such extension in law. Even though such unauthorised extension were in the interests of the patient, it would not excuse the illegality of the act. The fact that such unauthorised extension were in the patient's interest would mitigate and diminish damages to a large extent.

All these requirements may very often create grave difficulties for the doctor. It is not always easy for the surgeon to satisfy them all, for example, in a case of malignancy with secondaries. He nevertheless must do it to the best of his ability. An advisable precaution in all cases is to obtain the consent of the patient in writing and to have further permission to allow the surgeon to exercise his judgment to extend or vary the operation, should it become necessary. Often an abdomen is opened on one diagnosis to find the diagnosis wrong. The actual pathology discovered necessitates a different approach. It is as well to be covered for such emergencies.

Where the circumstances are such that the doctor has been forced to extend the scope of the operation, but has acted *bona fide* and in the interests of the patient, the court would not uphold a claim for damages.

So many claims for damages could be avoided by the doctor insisting that a proper consent form is signed by the patient before operations. Surgeons particularly should insist on this. Where they are attached to institutions it becomes imperative. The institution owes it to its staff to protect them. The legal pitfalls yawning before medical practitioners are sufficiently extensive. It would seem elementary to take whatever precautions there are to avoid unnecessary claims.

Sometimes it is not possible to obtain the consent of the person owing to his physical condition or mental state. Under these circumstances it is unlawful for a doctor to carry out any medical or surgical procedure on the patient, subject, however, to one exception, i.e., urgency

and necessity. If an emergency arises and it becomes necessary to save the life of the patient or to carry out a procedure to preserve his health, and his condition is such that it is impossible to obtain his consent to the carrying out of such procedure, the law will excuse the assault on the patient as arising *ex necessitate*.

On the other hand, even though a doctor genuinely and *bona fide* believes a particular treatment essential for the health or even life of a patient, the law does not permit him to carry out the treatment if the patient refuses to give consent. If the patient withholds his consent under no circumstances may the doctor carry out any medical procedure. Not even the courts may order a patient to undergo a medical examination or treatment, excepting in the very few cases where an examination of an accused or mentally disordered person is authorised by statute.

To give consent to any medical procedure an individual must have capacity in law so to consent. By and large, this means a person over 21 years of age and sane. If the patient is under 21 years of age the consent of the parent or guardian must be obtained before treatment is started. Without consent the doctor cannot even recover his fees for services to the minor, though he may obtain the costs of any materials used. In the case of children there is seldom any problem involved, but difficulties may arise in the case of a person under 21 years of age but no longer supported by or under the care of a parent or guardian. In such cases, if the person is emancipated, i.e., earning his own living and no longer under the control of a parent, as a patient he becomes responsible for his own fees and may also consent to any medical treatment being carried out.

A person who is of unsound mind cannot in law enter into any contract. He cannot agree in law to the performance of any medical procedure or examination on his person. He is without legal capacity. This lack of legal capacity is rectified by the appointment of a curator to the person and property of the insane person. The curator is appointed by the court and all contractual dealings subsequently must be entered into with the curator. In cases where an insane person requires any medical attention, the consent of the curator must be obtained. If a claim should lie against the doctor it would be brought by the curator on behalf of the insane patient.

The problem of consent to medical treatment is complex and involved. The possibility of a claim owing to lack of consent is constantly present. Fortunately for doctors, such claims rarely arise; nevertheless, doctors should take all precautions to avoid them. Whenever any doubt arises about the legal capacity of a patient it is best to make quite certain before carrying out any medical treatment. In all cases the medical practitioner should be satisfied that the patient understands the nature of the treatment to be administered and any possible risks attached to it, and that he consents to undergo such treatment with any attendant risk.

It is obvious that the law must set out the basis of rights and liabilities that exist between doctor and patient. Doctors should not feel that the fulfilment of the requirements of the law put an undue burden on them in their practices. The customary and conventional doctor-patient relationship makes the risk negligible. Though the law may tend to create an unwarranted apprehension in some, this is unjustified.

All these legal questions are generally covered in the usual discussions which a doctor has with his patient before he begins treatment. A calm talk in the consulting room or on a domiciliary visit to the patient's home is the ideal means to create legal safety for the practitioner. A consulting room or a bedside chat is far more reassuring and acceptable to the patient. A full explanation and discussion at this stage avoids the possibility of another type of consultation within the rather grim book-lined walls of a lawyer's chamber.