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LIABILITY OF DOCTORS FOR NON-CONSENSUAL MEDICAL TREATMENT: A CRITICAL ANALYSIS OF CASES

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Abstract:

A doctor should obtain consent of a patient for administration of any treatment and performance of any medical procedures, respecting the right of self-determination of a patient emanating from the principle of bodily autonomy to decide what shall be done with his body. He invites liability for battery in case of any non-consensual medical treatment unless the situation is one which falls within the legally recognized exceptions viz., an emergency and where a statute is silent as to who is entitled to give consent. In this article an attempt is made to critically analyse a few judicial decisions laid down in some foreign jurisdictions imposing liability on doctors for medical intervention without the consent of the patients.

INTRODUCTION

Following are the circumstances under which in the past courts in the western countries have inflicted liability for non-consensual treatment.

Unauthorised Use of Instrument

There are medical procedures the performance of which necessitates use of instruments. A doctor should obtain the consent of a patient before using the instrument failing which he invites liability. In *Slater v. Baker and Stapleton*, a patient complained that the doctors unskillfully disunited the callous of his leg after it was set. There was evidence to show that one of the doctors inserted a heavy steel thing having teeth which could stretch or lengthen the leg. In effect, leg was broken. There was no consent on the part of the patient for the use of the steel instrument. The court found a verdict in favour of the patient and awarded damages to him. It was observed that a patient should be told what was about to be done to him so that he could take courage to undergo the operation.

LACK OF VOLUNTARY CONSENT

Mere consent is not sufficient. It must be voluntary, real and genuine consent. Involuntary consent invites liability. In *des solurs de be charite de la providence et al*, a patient complained back ache. The surgeon decided to perform an operation. Before the operation she told the surgeon to operate her administering general anesthesia and not spinal. He agreed to this and he told her that the anesthetist would be advised accordingly. She was taken to the operation theatre after sedation. She persisted for general anesthesia. But the anesthetist did not accept her wish. She became tired and eventually she told "you do as you wish". The operation was then performed with spinal anesthesia. She suffered paralysis down the waist. The court observed in this regard,

"When in cases in which there is no urgency the doctor for one reason or another is unwilling to render the services agreed upon by the patient, the only course of action open to him is to withdraw. He may

not overrule his patient and submit him to tasks that he is unwilling and in fact has refused to accept. And if he does so and damage results he will be responsible without proof of negligence or want of skill. In these circumstances it is not a defence to say that the technique employed was above reproach or that what happened was a pure accident.”

It is evident from the above observation that a doctor shall respect the pronounced wish of a patient unless there is an emergency. Otherwise he will invite liability.

But in *Mulloy v. Hop Sang*, the court took the position that even if there was emergency, departure from express instruction of a patient would expose the doctor to liability. In this case a patient sustained hand injury as a result of car accident. He instructed the surgeon to fix up the hand and not to amputate it. The patient repeated the same instruction in the operation room also. The surgeon replied that he would be governed by the condition following administration of anesthesia. The patient did not give any reply to that. There was no possibility of saving the hand. Accordingly the surgeon amputated his hand to avoid blood poisoning. The decision to amputate the hand was supported by two other surgeons. The court even though of the opinion that the operation was necessary and performed in a highly satisfactory manner, awarded damages to the patient.

Failure of a doctor to ascertain the pronounced wish of a patient :

Pronounced wish of a patient makes the task of a doctor easier to proceed with the performance of medical procedures and administration of treatment. If the wish is not pronounced, he shall venture to ascertain the same. In *Boase v. Paul*, a dentist failed to read properly a x-ray plate and find out what the patient expected him to do. In effect he extracted 12 healthy teeth instead of the diseased ones. He was held liable for battery.

INTERVENTION WITH A WRONG ORGAN

Sometimes a patient may approach a doctor seeking treatment for a particular limb. A doctor should treat the limb for which a patient has sought treatment. If he deviates from it to treat some other limb for which treatment is not sought he invites liability. In *Mohr v. Williams*, a patient having trouble in her right ear approached a surgeon. She gave her consent for an operation. While she was under anesthesia the surgeon examined both the ears and found the left ear in a serious condition. He performed the proposed operation on the left ear instead of right ear. It was held that the act of the surgeon amounted to battery and accordingly she was awarded damages.

In the above case, the surgeon performed the operation on a more diseased ear and not on the healthy one, in the interest of the patient. In fact, the treatment resulted in benefit to the patient. It is submitted that the court ought to have taken into consideration this factor to scale down the damages. Such an approach would have resulted in a proper balancing of patients right of self determination and medical paternalism. But the English judges have taken a lenient view of non-consensual treatment which has resulted in benefit to the patient. In *Beatty v. Culling Worth*, the doctor performed a bilateral ovariectomy operation. But the patient had consented only for a single operation. In the operation room she had told the doctor that if both the ovaries were diseased, he should remove none. He replied that he would be governed by the ensuing condition in the operation theatre that she should give him a freehand to do whatever he wishes to do in her best interest. The court found it for the doctor. The reason was that a doctor did not invite liability for doing any act what he did in the best interest of the patient, which he thought it to be humane to do to avert any injury, in the absence of any specific instruction as to not to operate.

The above decision confers absolute exemption from liability resulting in violation of the patient's right of self-determination. A doctor can be exonerated from liability, only when there is implied consent for the medical procedure.

The performance of an operation on a healthy limb or removal of a healthy limb will hold the doctor liable to pay aggravated damages as it is a serious form of battery that no patient will give consent for it.

Non-consensual procedure of convenience : Any procedure or operation performed for convenience without the consent of the patient invites liability. In *Murry v. McMurchy*, a doctor in the course of caesarian section of a woman, found that her uterus was in a malignant condition and it was dangerous for her to go for another pregnancy. The doctor performed the sterilization procedure by tying up the fallopian tubes, even though there was no necessity to do so. She brought an action against the doctors for want of consent. The court recorded a verdict in favour of the patient on the ground that even though the doctor had the convenience of performing the procedure on the spot, it's postponement until obtaining the consent was not unreasonable in the circumstances.

It is evident from the above decision that a doctor should not perform any procedure without the consent of a patient as he has the convenience of performing it on the spot. There must be an absolute necessity for the same that its postponement until obtaining the consent would expose the patient's life to danger. Hence it follows that a procedure of necessity exempts a doctor from liability but not a procedure of convenience.

Convenience need not be a ground for exoneration from liability. It should be taken as a factor to reduce the damages payable to a patient. The general presumption is that when a patient is aware of the danger he would have consented for the treatment. A malignant uterus will certainly expose a woman to danger, if she conceives. The only way out to avoid any eventuality is perpetual use of contraceptive devices or a sterilization operation for the removal of the uterus. On such an eventuality notwithstanding the fact that the procedure has been performed without consent, courts need to take a liberal view of the liability. The doctors need not be exonerated from liability. The fault must be considered as less serious one taking into consideration the beneficial effect of the procedure on the patient. But the procedure performed should not result in any health hazard to the patient.

UNLAWFUL OPERATIONS :

Law may declare certain operations as unlawful. For example termination of pregnancy which is not justified by any medical necessity is prohibited under the Medical Termination of Pregnancy Act, 1971. But the patient may give her consent for the procedure. Consent cannot transform an otherwise unlawful operation into a lawful one. Performance of an unlawful operation results in intervention with the body of a patient not authorized by law. It is immaterial that the intervention is consensual. Consent is not accepted as a good defence in criminal case. Under civil law consent operating as a defence has become a controversial issue that the legal opinion and courts are equally divided. But it is equitable to allow the doctor to raise the plea of consent, in a litigation by the consenting patient.

CONSENT MUST BE ONLY FROM THE PATIENT ENTITLED TO GIVE IT :

A doctor should obtain the consent of a person who is entitled to give it. In case of an adult who is otherwise mentally competent to give consent, his consent is necessary. A minor cannot give consent for any medical intervention as he is not capable of understanding the nature of proposed treatment and its consequences. In some jurisdictions minors are allowed to give consent for small procedures and treatments, provided they are beneficial to them. In the USA emancipated minors married minors and minors in the military service are allowed to give consent for all medical procedures. Law permits proxy consent of the parents or relatives in case of minors and mentally incompetent adult patients. A doctor should be very careful to ascertain the genuineness of the proxy consent. Generally a doctor should obtain the consent of parents unless there is a justifying circumstance to rely on the consent given by brother, sister or any other relative of a patient. In *Rishworth v. Moss*, the patient was a minor girl aged 11 years. Her parent sent her to spend 10 days holidays with her unmarried sisters aged twenty and twenty two. The surgeon performed an operation for removal of her tonsils and adenoids with her sisters consent. He was aware of the existence and residence of her parents. He believed that the sisters had authority to give consent. The parents brought an action against the doctor for want of their consent. The court found it in favour of the parents. It was held that though the sisters had limited power to subject the child to medical treatment, it did not extend to authorize any operation for removal of tonsils or adenoids.

It follows from the above decision that only parents of a child are entitled to give consent for major medical procedures. If there are no parents, any other guardian, brothers or sisters or any other relatives may give consent. But there can be medical intervention for minor ailments of a child with the consent of brothers or sisters. If for every treatment, parental consent is insisted for, it will expose both the patient and doctor to hardship. A doctor needs to make enquiry with every person accompanying a minor regarding his position. The person accompanying, if not a parent, doctor can refuse to treat the minor, which will certainly result in hardship to the latter.

Under the Consumer Protection Act, any non-consensual medical intervention amounts to deficiency in service. In *Force Society v. M. Ganeshwar Rao*, the case sheet did not contain the consent letter. The Andhra Pradesh State Commission held that non-consensual treatment amounted to deficiency in service.

In *Ram Gopal Varshney v. Lasor Sight India Pvt. Ltd.*, the doctor did not obtain the consent of a patient for a cataract surgery, even though he was conscious, mentally alert and capable of giving consent. Consent was given by his grand son. The National Commission held that there was deficiency in service in not obtaining the consent of the patient.

CONCLUSION

It is mandatory for a doctor to obtain consent of a patient for any medical intervention failing which he invites liability for battery unless the circumstances fall within the legally recognized exceptions. The conceptual basis for this requirement lies in the principle of bodily autonomy, according to which only the patient has a right to determine whether to undergo the treatment or not. Law permits proxy consent only in limited circumstances as discussed above. A doctor should properly screen the proxy consent to find out its genuineness, otherwise he invites liability. The requirement of parental consent for medical intervention with minor patients can be insisted for serious medical procedures, consent of brothers or sisters or other relatives of minor patients may be accepted for less serious procedures and treatments.

Sometimes treatment may be non-consensual. But it is beneficial to the patient. After recovery from the illness, patient tends to be wise after the event. The condition of the patient is such that if the doctor were to seek his consent, he would not have had any objection. Such a situation may arise in case of a procedure of convenience performed in the best interest of the patient. Therefore it is submitted that the courts must examine the matter of non-consensual medical intervention in the light of its beneficial effect to the patient to award only nominal damages to prevent the otherwise unfavourable swing of balance in favour of the patient. Likewise where a non-consensual treatment is said to result in injury to a patient, the courts must examine whether the doctor has exercised reasonable care in administering the treatment. If so they must be slow to award exemplary damages for the reason that a non-consensual treatment ipso-facto does not amount to a negligent treatment and accordingly a nominal damages may be awarded respecting the patient's right of self-determination.

¹Marshall v. Curry, [1935] 3 D.L.R.

²T v. T [1988] 1 All E.R. 613

³(1767)2, wills 359 as quoted in J.P. Eddy, "Professional Negligence, London, p.86 (1955)

⁵[1963] 53 D.L.R. 65

⁵per Casey J. Ibid

⁶[1935] 1 W.W.R. 714

⁷[1931] 1 D.L.R. 562

⁸[1905] 104 N.W.12

⁹[1949] 2 D.L.R. 442

¹⁰[1949] 2 D.L.R. 442

¹¹Earlier under English Law performance of sterilization operation was a crime. See Bravery v. Bravery, [1954] 3 All E.R. 59 (C.A.)

¹²Nathan, "Medical Negligence", London, p.159 (1957)

¹³Gillick v. West Norfolk and Wisbech Area Health Authority, [1985] 3 All E.R. 402 (H.L.); see infra n.18

¹⁴Ibid

¹⁵See Joseph H. King, "The Law of Medical Malpractices, St. Paul Minn West, p.140 (1972)

¹⁶(1913) 159 S.W. 122

¹⁷(1997) 3 C.P.J. 228 (Andra Pradesh S.C.D.R.C.)

¹⁸2009 J.M.C. 83 (N.C.); Samira Kohli v. Dr. Prabha Manchanda & Anr. JT 2008(1)S.C.399.

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