

Note on Agreement, Contract, Consent

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Question: What is an agreement?

Answer: The term “agreement” has been defined in Section 2(e) of the Indian Contract Act, 1872 as “every promise and every set of promises forming the consideration for each other.”

The term “promise” has been defined in Section 2(b) of the Indian Contract Act, 1872 as “when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise.”

Black’s Law Dictionary defines the term “agreement” as:

“A mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons.”

Thus, from the above it is opined that an agreement is an accepted proposal. Every agreement is the result of a proposal from one side and its acceptance by the other.

Question: What is contract?

Answer: An agreement is regarded as contract when it is enforceable by law. According to Section 2(h) of the Indian Contract Act, 1872 “an agreement enforceable by law is a contract”. Thus, an agreement which the law will enforce is a contract.

The conditions of enforceability of an agreement is defined in Section 10 of the Indian Contract Act, 1872. According to Section 10 of the Indian Contract Act, 1872, an agreement is a contract when it is made for some consideration, between parties who are competent, with their free consent and for a lawful object. The provisions of Section 10 of the Indian Contract Act, 1872 is reproduced hereunder:

“Section 10 of Indian Contract Act, 1872: What agreements are contracts –

All agreements are contracts if they are made by the free consent of parties competent to contract, for a

lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in India and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.”

Black’s Law Dictionary defines the term “contract” as:

“An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.”

Thus, every contract is an agreement but every agreement is not a contract. An agreement becomes a contract when the following conditions are satisfied:

1. There is some consideration for it.
2. The parties are competent to contract.
3. Their consent is free.
4. Their object is lawful.

Question: What are the types of contract?

Answer: The contracts are of two types - express contract and implied contract. As per the provisions of Section 9 of the Indian Contract Act, 1872, if the proposal or its acceptance is made in words, then the promise is express and if the proposal or its acceptance is made otherwise than in words, then the promise is implied. The provision of Section 9 of the Indian Contract Act, 1872 is reproduced hereunder:

“Section 9: Promises, express and implied–

In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.”

The Hon’ble High Court of Madras in the matter titled as “Maharashtra Rajya Sahakari Kappos Utpadak Panan Mahasangha Ltd. Versus Manga Bhaga Choudhary, (2009) 3 MadLJ 721, has held that a contract implied in fact requires meeting of minds. The courts have to refuse to read an implied term into a contract which is silent on the point or did not clearly indicate the nature of terms.

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Examples of implied contract: a bid at an auction is an implied offer to buy.

Stepping into omnibus and consuming eatables at a self service restaurant both create implied promises to pay for the benefits enjoyed.

Thus, an implied contract is one inferred from conduct of parties and arises where one person renders services under circumstances indicating that he expects to be paid therefore, and the other person knowing such circumstances, avails himself of benefit of those services. An express contract is an actual agreement of the parties, the terms of which are openly uttered or declared at the time of making it, being stated in distinct and explicit language, either orally (oral agreement) or in writing (written agreement).

Question: Who can enter into a contract?

Answer: As per the provisions of Section 10 of the Indian Contract Act, 1872 the parties must be competent to contract. The competence to contract is defined in Section 11 of the Indian Contract Act, 1872 which is reproduced hereunder:

“Section 11 of Indian Contract Act, 1872: Who are competent to contract—Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.”

Thus, as per the provisions of Section 11 of the Indian Contract Act, 1872, the following persons are incompetent to enter into a contract:

1. Minors
2. Persons of unsound mind
3. Persons disqualified by law to which they are subject.

Question: What is the age of majority?

Answer: According to the provisions of Section 3 of the Indian Majority Act, 1875, the age of majority is generally eighteen (18), except when a guardian of a minor’s person or property has been appointed by the Court, in which case it is twenty-one (21). The provisions of the Section 3 of the Indian Majority Act, 1875 is reproduced hereunder:

“Section 3 of Indian Majority Act, 1875: Age of majority of persons domiciled in India. -

- (1) *Every person domiciled in India shall attain the age of majority on his completing the age of eighteen years and not before.*

- (2) *In computing the age of any person, the day on which he was born is to be included as a whole day and he shall be deemed to have attained majority at the beginning of the eighteenth anniversary of that day.”*

Illustrations:

- (a) *Z is born in India on the first day of January 1850, and has an Indian domicile. A guardian of his person is appointed by a Court of Justice. Z attains majority at the first moment of the first day of January 1871.*
- (b) *Z is born in India on the twenty-ninth day of February 1852, and as an Indian domicile. A guardian of his property is appointed by a Court of Justice. Z attains majority at the first moment of the twenty-eighth day of February 1873.*
- (c) *Z is born on the first day of January 1850. He acquires a domicile in India. No guardian is appointed of his person or property of any Court of Justice, nor is he under the jurisdiction of any Court of Wards. Z attains majority at the first moment of the first day of January 1868.*

Question: What is the effect of the minor’s agreement?

Answer: Section 10 of the Indian Contract Act, 1872 requires that the parties to a contract must be competent and Section 11 of the Indian Contract Act, 1872 declares that the minor is not competent to contract. However, it is not clear from the provisions of aforesaid sections that if the minor enters into an agreement, then whether such agreement is voidable at the option of the minor or whether such agreement is void altogether.

The said controversy whether such minor’s agreement is voidable or void has been resolved in 1903 by the Judicial Committee of the Privy Council in their well-known pronouncement in “Mohori Bibee versus Dhurniodas Ghose, ILR (1903) 30 Cal 539 (PC) wherein it has been observed by Lord North that:

“Looking at these sections, their Lordships are satisfied that the Act makes it essential that all contracting parties should be “competent to contract,” and expressly provides that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Act. This is clearly borne out by later sections in the Act. Sect. 68 provides that, “If a person incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.” It is beyond question that an infant falls within the class of persons here referred

to as incapable of entering into a contract; and it is clear from the Act that he is not to be liable even for necessities, and that no demand in respect thereof is enforceable against him by law, though a statutory claim is created against his property. Under ss. 183 and 184 no person under the age of majority can employ or be an agent. Again, under ss. 247 and 248, although a person under majority may be admitted to the benefits of a partnership, he cannot be made personally liable for any of its obligations; although he may on attaining majority accept those obligations if he thinks fit to do so. The question whether a contract is void or voidable presupposes the existence of a contract within the meaning of the Act, and cannot arise in the case of an infant. Their Lordships are, therefore, of opinion that in the present case there is not any such voidable contract as is dealt with in s. 64.

A new point was raised here by the appellants' counsel, founded on s. 65 of the Contract Act, a section not referred to in the Courts below, or in the cases of the appellants or respondent. It is sufficient to say that this section, like s. 64, starts from the basis of there being an agreement or contract between competent parties, and has no application to a case in which there never was, and never could have been, any contract. It was further argued that the preamble of the Act showed that the Act was only intended to define and amend certain parts of the law relating to contracts, and that contracts by infants were left outside the Act. If this were so, it does not appear how it would help the appellants. But in their Lordships' opinion the Act, so far as it goes, is exhaustive and imperative, and does provide in clear language that an infant is not a person competent to bind himself by a contract of this description."

Thus, the minor's agreement being void, ordinarily it should be wholly devoid of all effects. If there is no contract, there should be no contractual obligation on either side.

Further, the law declared by the Privy Council in the matter titled as Mohori Bibee versus Dhurniodas Ghose, ILR (1903) 30 Cal 539 (PC) is that a minor's agreement is absolutely void but it is confined to cases where the minor is charged with obligations and the other contracting party seeks to enforce those obligations against the minor.

In the matter titled as "A.T. Raghava Chariar versus O. M. Srinivasa Raghava Chariar, ILR (1916) 40 Madras 308", the Hon'ble Madras High Court has held that:

"What is meant by the proposition that an infant is incompetent to contract or that his contract is void is

that the law will not enforce any contractual obligation of an infant.

Nothing in the Contract Act prevents an infant from being promisee, where consideration passes from minor, he can enforce the promise of the adult promisor; if the consideration for the promise is transfer of property by minor, promise would be unenforceable. Minor is wholly incompetent to transfer property. Minor can seek cancellation of the transfer of property to him by returning the consideration to the other party."

Accordingly, a minor is allowed to enforce a contract which is of some benefit to him and under which he is required to bear no obligation.

Question: If minor enters into an agreement by misrepresenting his age, then will there be any estoppel against him?

Answer: The minor is not estopped from setting up the defense of infancy. There can be no estoppel against a statute. The policy of law of contract is to protect persons below age from contractual liability and naturally the doctrine of estoppel cannot be used to defeat that policy.

The Hon'ble High Court of Bombay in the matter titled as "Gadigeppa Bhimappa Meti versus Balangowda Bhimangowda, AIR 1931 Bombay 561", has held that:

"The court is of opinion that where an infant represents fraudulently or otherwise that he is of age and thereby induces another to enter into a contract with him then in an action founded on the contract the infant is not estopped from setting up infancy."

Question: Can minor's agreement be ratified after the minor attains the age of majority?

Answer: The person cannot on attaining majority ratify an agreement made by him during his minority. Ratification relates back to the date of the making off the contract and therefore, a contract which was then void cannot be made valid by subsequent ratification.

In the matter titled as "Bhola Ram Harbans Lal versus Bhagat Ram, AIR 1927 Lahore 24" it was held that it would be a contradiction in terms to say that a void contract can be ratified.

If it is necessary to ratify the contract made by the minor, then a fresh contract should be made on attaining majority.

Question: Is a person of unsound mind or an insane person competent to contract?

Answer: In English Law, a person of unsound mind is competent to contract, although he may avoid his

contract if he satisfies the court that he was incapable of understanding the contract and the other party knew it. The contract is voidable at his option. It becomes binding on him only if he affirms it.

However, in India, the agreement of a person of unsound mind is absolutely void. According to Section 11 of the Indian Contract Act, 1872, a person of unsound mind is not competent to contract. The provision of Section 11 of the Indian Contract Act, 1872 is reproduced hereunder:

“Section 11 of Indian Contract Act, 1872: Who are competent to contract—Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.”

Question: What is a sound mind for the purposes of contracting?

Answer: According to Section 12 of the Indian Contract Act, 1872, a person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests. However, a person who is usually of unsound mind may make a contract when he is of sound mind. But a person who is usually of sound mind may not make a contract when he is of unsound mind. The provisions of Section 12 of the Indian Contract Act, 1872 is reproduced hereunder:

“Section 12 of the Indian Contract Act, 1872: What is a sound mind for the purpose of contracting:

A person is said to be of sound mind for the purpose of making a contract, if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.”

Illustrations:

- (a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.
- (b) A sane man, who is delirious from fever, or who is so drunk that he cannot understand the terms of contract, or form a rational judgment as to its

effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

Question: Is consent of parties essential while executing agreement?

Answer: According to Section 10 of the Indian Contract Act, 1872, an agreement is a contract when it is made for some consideration, between parties who are competent, with their free consent and for a lawful object. The provisions of Section 10 of the Indian Contract Act, 1872 is reproduced hereunder:

“Section 10 of Indian Contract Act, 1872: What agreements are contracts—

All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in India and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.”

Thus, one of the essential requirement of a contract is free consent of the parties.

Question: What is the meaning of the term “consent”?

Answer: The Oxford Law Dictionary defines the term consent as:

“Deliberate or implied affirmation; compliance with a course of proposed action. Consent is essential in a number of circumstances. For example, contracts and marriages are invalid unless both parties give their consent. Consent must be given freely, without duress or deception, and with sufficient legal competence to give it.”

The Black’s Law Dictionary defines the term consent as:

“Agreement, approval, or permission as to some act or purpose, esp. given voluntarily by a competent person; legally effective assent.”

Section 13 of the Indian Contract Act, 1872 defines the term consent as:

“Two or more persons are said to consent when they agree upon the same thing in the same sense.”

Thus, an agreement upon the same thing in the same sense is known as true consent or *consensus ad idem* and is at the root of every contract.

Question: What is the meaning of the term “free consent”?

Answer: According to Section 14 of the Indian Contract Act, 1872, consent is said to be free when it is not caused

by coercion, undue influence, fraud, misrepresentation and mistake. The provisions of Section 14 of the Indian Contract Act, 1872 is reproduced hereunder:

"Section 14 of the Indian Contract Act, 1872: Free consent defined:

Consent is said to be free when it is not caused by:

- (1) *Coercion, as defined in Section 15, or*
- (2) *Undue influence, as defined in Section 16, or*
- (3) *Fraud, as defined in Section 17, or*
- (4) *Misrepresentation, as defined in Section 18, or*
- (5) *Mistake, subject to the provisions of Sections 20, 21 and 22."*

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

When consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. For example, if the person is induced to sign an agreement by misrepresentation, then such person may either uphold the agreement or reject it, when he comes to know about the truth. If such person confirms the agreement, such agreement becomes binding on both the parties including that person whose consent was obtained by misrepresentation.

On the other hand, when the consent is caused by mistake, the agreement is void and is not enforceable at the option of either party.

Question: What is void agreement?

Answer: Section 2(g) of the Indian Contract Act, 1872 defines void agreement as:

"an agreement not enforceable by law is said to be void".

Thus, according to Section 2(g) of the Indian Contract Act, 1872, an agreement not enforceable by law is void.

According to Black's Law dictionary, the term void means of no legal effect. The term void contract is by Black's Law Dictionary a contract that is of no legal effect, so that there is really no contract in existence at all. A contract may be void because it is technically defective, contrary to public policy, or illegal.

As per Oxford Dictionary of Law, a void contract is:

"A contract that has no legal force from the moment of its making. Void contracts occur when there is lack

of capacity to contract and by the operation in some instances of the doctrine of mistake."

Question: What is voidable contract?

Answer: Section 2(i) of the Indian Contract Act, 1872 defines voidable contract as:

"an agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract."

Question: Are contracts valid if the consent is caused by coercion, undue influence, fraud and misrepresentation?

Answer: According to Section 14 of the Indian Contract Act, 1872, consent is said to be free when it is not caused by coercion, undue influence, fraud, misrepresentation and mistake. However, when consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

Section 19 of the Indian Contract Act, 1872 deals with voidability of agreements without free consent which is reproduced hereunder:

"When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of Section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable."

Further as per the provisions of Section 19A of the Indian Contract Act, 1872, if the consent is caused by undue influence, then such agreement is voidable at the option of the party whose consent was caused by undue influence. The relevant provision of the

Section 19A of the Indian Contract Act, 1872 is reproduced hereunder:

“Section 19A of the Indian Contract Act, 1872, Power to set aside contract induced by undue influence–

When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Any such contract may be set aside either absolutely or if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.”

Thus, in case the consent is caused by coercion, undue influence, fraud or misrepresentation, then the agreement is voidable. The party affected by the factors that make the contract voidable, has to avoid it because otherwise it remains valid. Thus, he has the option either to avoid the contract or in alternatively to affirm it. If the contract is affirmed, it becomes enforceable by both the parties and if it is avoided, it becomes void against both. When the party affected by such facts, avoids the contract, then the effect of rescission is that the contract is set aside and the parties are restored to their original position.

Question: Are contracts valid if the consent is caused by mistake?

Answer: According to Section 14 of the Indian Contract Act, 1872 when the consent is caused by mistake, the agreement is void. Instances of consent caused by mistake are:

1. Mistake of fact by both the parties: According to Section 20 of the Indian Contract Act, 1872, when both the parties to the agreement are mistaken relating to the fact which is essential for the agreement, then such agreement is void. The provision of Section 20 of the Indian Contract Act, 1872 is reproduced hereunder:

“Section 20: Agreement void where both parties are under mistake as to matter of fact:

Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement the agreement is void.

Explanation–An erroneous opinion as to the value of the thing which forms the subject – matter of the agreement, is not to be deemed a mistake as to a matter of fact.”

2. Mistake as to law–According to Section 21 of the Indian Contract Act, 1872 a contract is void if the same is caused by mistake as to any law

not in force in India. The provision of Section 21 of the Indian Contract Act, 1872 is reproduced hereunder:

“Section 21 of the Indian Contract Act, 1872 – Effect of mistakes as to law–

A contract is not voidable because it was caused by a mistake as to any law in force in India; but a mistake as to a law not in force in India has the same effect as a mistake of fact.”

3. Mistake as to fact by one of the party - According to Section 22 of the Indian Contract Act, 1872, when one of the party to the agreement is mistaken relating to the fact which is essential for the agreement, then such agreement is void. The provision of Section 22 of the Indian Contract Act, 1872 is reproduced hereunder:

“Section 22 of the Indian Contract Act, 1872 – Contract caused by mistake of one party as to matter of fact –

A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.”

Question: What is the meaning of consent for medical treatment?

Answer: Consent for the purpose of medical treatment means grant of permission by the patient for an act to be carried out by the doctor, such as a diagnostic, surgical or therapeutic procedure.

The doctor-patient contract is almost always of the implied type, except where a written informed consent is obtained because no formal contract is usually written when a patient visits a doctor.

The Black’s Law Dictionary defines the terms express consent and implied consent as:

“Express consent - Consent that is clearly and unmistakably stated.

Implied consent - 1. Consent inferred from one’s conduct rather than from one’s direct expression. – Also termed implied permission. 2. Consent imputed as a result of circumstances that arise, as when a surgeon removing a gallbladder discovers and removes colon cancer.”

Thus, it can be said that the relationship between a doctor and his patient is of an implied contract. Although there is no written or oral explicit contract between them, it is implied that the doctor is expected to cure the patient and the patient pays fees in consideration.

Illustrations:

- i. A patient enters a doctor's clinic and sits in the examination chair, his consent is implied for examination, diagnosis and consultation.
- ii. Persons who offer medical advice and treatment implicitly state that they have the skill and knowledge to do so, that they have the skill to decide whether to take a case, to decide the treatment, and to administer that treatment.

Question: What is the importance of consent in medical treatment?

Answer: In medical field, the consent plays a remarkable legitimate role, specially in the field of medical negligence. The consent should be free consent as envisaged in Section 10 of the Indian Contract Act, 1872. Consent must be voluntary, competent and informed. Voluntary means that when the patient gives consent, he or she is free from extreme duress and is not intoxicated or under the influence of medication and the doctor has not coerced the patient into giving consent.

The earliest expression of this fundamental principle, based on autonomy, is found in the Nuremberg Code of 1947. The Nuremberg Code was adopted immediately after World War II in response to medical and experimental atrocities committed by the German Nazi regime. The code makes it mandatory to obtain voluntary and informed consent of human subjects. Similarly, the Declaration of Helsinki adopted by the World Medical Association in 1964 emphasizes the importance of obtaining freely given informed consent for medical research by adequately informing the subjects of the aims, methods, anticipated benefits, potential hazards, and discomforts that the study may entail. Several international conventions and declarations have similarly ratified the importance of obtaining consent from patients before testing and treatment.

The 3 Judges Constitution Bench of Hon'ble Supreme Court of India in the landmark judgment titled as "Samira Kohli versus Prabha Manchanda, AIR 2008 SC 1385" has held that:

"...Except where consent can be clearly and obviously implied, there should be express consent. There is, however, a significant difference in the nature of express consent of the patient, known as 'real consent' in UK and as 'informed consent' in America. In UK, the elements of consent are defined with reference to the patient and a consent is considered to be valid and 'real' when (i) the patient gives it voluntarily without any coercion; (ii) the patient has the capacity and

competence to give consent; and (iii) the patient has the minimum of adequate level of information about the nature of the procedure to which he is consenting to. On the other hand, the concept of 'informed consent' developed by American courts, while retaining the basic requirements consent, shifts the emphasis to the doctor's duty to disclose the necessary information to the patient to secure his consent. 'Informed consent' is defined in Taber's Cyclopedic Medical Dictionary thus:

"Consent that is given by a person after receipt of the following information: the nature and purpose of the proposed procedure or treatment; the expected outcome and the likelihood of success; the risks; the alternatives to the procedure and supporting information regarding those alternatives; and the effect of no treatment or procedure, including the effect on the prognosis and the material risks associated with no treatment. Also included are instructions concerning what should be done if the procedure turns out to be harmful or unsuccessful."

In Canterbury v. Spence - 1972 [464] Federal Reporter 2d. 772, the United States Courts of appeals, District of Columbia Circuit, emphasized the element of Doctor's duty in 'informed consent' thus: "It is well established that the physician must seek and secure his patient's consent before commencing an operation or other course of treatment. It is also clear that the consent, to be efficacious, must be free from imposition upon the patient. It is the settled rule that therapy not authorized by the patient may amount to a tort - a common law battery - by the physician. And it is evident that it is normally impossible to obtain a consent worthy of the name unless the physician first elucidates the options and the perils for the patient's edification. Thus the physician has long borne a duty, on pain of liability for unauthorized treatment, to make adequate disclosure to the patient."

[Emphasis supplied]

The basic principle in regard to patient's consent may be traced to the following classic statement by Justice Cardozo in *Schoendorff vs. Society of New York Hospital - (1914) 211 NY 125*:

"Every human being of adult years and sound mind has a right to determine what should be done with his body; and a surgeon who performs the operation without his patient's consent, commits an assault for which he is liable in damages."

This principle has been accepted by English court also. In Re: F. 1989(2) All ER 545, the House of Lords while dealing with a case of sterilization of a mental patient

reiterated the fundamental principle that every person's body is inviolate and performance of a medical operation on a person without his or her consent is unlawful. The English law on this aspect is summarized thus in *Principles of Medical Law* (published by Oxford University Press -- Second Edition, edited by Andrew Grubb, Para 3.04, Page 133):

"Any intentional touching of a person is unlawful and amounts to the tort of battery unless it is justified by consent or other lawful authority. In medical law, this means that a doctor may only carry out a medical treatment or procedure which involves contact with a patient if there exists a valid consent by the patient (or another person authorized by law to consent on his behalf) or if the touching is permitted notwithstanding the absence of consent."

The Hon'ble National Consumer Disputes Redressal Commission in the matter titled as C. Jayapal Reddy versus G. S. Rao, Managing Director, Yashoda Group of Hospitals, 2014 (1) CPJ 271 (NCDRC) has held that:

"6. We feel necessary to discuss about What is the valid consent?"

Consent is not a one-off event of signatures on paper and not a submission of the patient to a particular treatment but rather a process of communication. It is then perceived as a proactive process empowering the patient to consciously decide on what s/he considers best. Thus, consent is a process of communication requiring the fulfilment of certain established elements, like competence, sufficient disclosure, understanding and volunteering.

The ICMR guidelines acknowledge the patients consent as a necessary prerequisite to the medical process. However, consent is not systematically required as it is formulated in the case of redesign of treatment, though, with the existing formulation, the achievement of the written consent is misleading and may ultimately allow the practitioner to override the patients opinion.

*The doctrine of informed consent finds its common law roots in the landmark decision of Justice Cardozo in *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 105 N.E. 92 (1914), in which he wrote:*

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 patients consent commits an assault for which he is liable in damages. This is true except in cases of emergency where the patient is unconscious and where it is necessary to operate before consent can be obtained."

Question: Is it necessary to obtain consent of the patient in India?

Answer: In India, the patient has a legal right to autonomy and self-determination enshrined within Article 21 of the Constitution of India, 1950. The patient can refuse treatment except in an emergency situation where the doctor need not get consent for treatment. The provision of Article 21 of the Constitution of India, 1950 is reproduced hereunder:

"Article 21. Protection of life and personal liberty—No person shall be deprived of his life or personal liberty except according to procedure established by law."

Apart from the requirement of consent being there under law of torts and various laws of the country, there is now specific provision i.e., the Clause 7.16 of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulation, 2002 which places the responsibility on the doctor to obtain consent from the patient, or his guardian in case of minor, before performing operation and if the doctor fails to obtain consent, then the same amounts to professional misconduct rendering the doctor for disciplinary action. The relevant provision of Clause 7.16 of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulation, 2002 is reproduced hereunder:

"Before performing an operation the physician should obtain in writing the consent from the husband or wife, parent or guardian in the case of minor, or the patient himself as the case may be. In an operation which may result in sterility the consent of both husband and wife is needed."

The 3 Judges Constitution Bench of Hon'ble Supreme Court of India in the landmark judgment titled as "Samira Kohli versus Prabha Manchanda, AIR 2008 SC 1385" has held that:

"18. We may also refer to the code of medical ethics laid down by the Medical Council of India (approved by the Central Government under Section 33 of Indian Medical Council Act, 1956). It contains a chapter relating to disciplinary action which enumerates a list of responsibilities, violation of which will be professional misconduct. Clause 13 of the said chapter places the following responsibility on a doctor:

"13. Before performing an operation the physician should obtain in writing the consent from the husband or wife, parent or guardian in the case of a minor, or the patient himself as the case may be. In an operation which may result in sterility the consent of both husband and wife is needed."

We may also refer to the following guidelines to doctors, issued by the General Medical Council of U.K. in seeking consent of the patient for investigation and treatment:

"Patients have a right to information about their condition and the treatment options available to them. The amount of information you give each patient will vary, according to factors such as the nature of the condition, the complexity of the treatment, the risks associated with the treatment or procedure, and the patient's own wishes. For example, patients may need more information to make an informed decision about the procedure which carries a high risk of failure or adverse side effects; or about an investigation for a condition which, if present, could have serious implications for the patient's employment, social or personal life.

x x x x x You should raise with patients the possibility of additional problems coming to light during a procedure when the patient is unconscious or otherwise unable to make a decision. You should seek consent to treat any problems which you think may arise and ascertain whether there are any procedures to which the patient would object, or prefer to give further thought before you proceed."

The Hon'ble National Consumer Disputes Redressal Commission in the matter titled as "Saroj Chandhoke versus Ganga Ram Hospital, 2007 (3) CPJ 189 (NCDRC) has held that:

"(ii). Consent:

These days, complete information with regard to surgery is required to be given to the patient so that the patient becomes aware of the procedure which is sought to be followed by the Surgeon. It should not be presumed that a patient may not/need not know the procedure or is incapable of understanding the medical terms and, therefore, there is no use in explaining them. There cannot be a presumption that all patients are ignorant about their anatomy or the adverse effects or benefits of surgery, and, in any case, those days are over. Hence, properly informed written consent before operation is the necessity."

The Hon'ble National Consumer Disputes Redressal Commission in the matter titled as "H. S. Tuli versus Post Graduate Institute of Medical Education & Research, 2008 (1) CPJ 392 (NCDRC)" has held that:

"Express Written Consent:

Express written consent is to be obtained for: (i) all major diagnostic procedures; (ii) general anesthesia;

(iii) surgical operations; (iv) intimate examinations; (v) examination for determining age, potency and virginity; and (vi) in medicolegal cases.

32. Brain surgery is a major surgery requiring several hours and use of general anesthesia. Informed consent for high risk in writing has to be obtained either from the patient or from her close relatives and if that is not taken and if the patient becomes paralyzed or dies then certainly there are chances that the patient's relatives would allege negligence on the part of the treating surgeons and the hospital. Hence, informed consent is very essential."

Thus, a medical practitioner cannot examine, treat or operate upon the patient without the patient's consent, except by committing a trespass or assault. This consent, which may be implied, amounts to an agreement on the part of the patient to permit the treatment in question and is sufficient for an implied promise to exercise proper care and skill. Further the consent obtained should be legally valid.

Question: What is the meaning of informed consent?

Answer: Informed consent means voluntary agreement made by a well advised and mentally competent patient to be treated or randomized into a research study.

The Black's Law Dictionary defines informed consent as:

"informed consent. 1. A person's agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives. • For the legal profession, informed consent is defined in Model Rule of Professional Conduct 1.0(e). 2. A patient's knowing choice about a medical treatment or procedure, made after a physician or other healthcare provider discloses whatever information a reasonably prudent provider in the medical community would give to a patient regarding the risks involved in the proposed treatment or procedure. — Also termed knowing consent. [Cases: Health 906.]"

Question: In which situations consent is not necessary to be obtained by the doctor or hospital?

Answer: In case of medical emergency, the doctor can operate on the patient without his or her consent and the doctor is protected by the defense of medical necessity of obtaining consent from the patient.

The 3 Judges Constitution Bench of Hon'ble Supreme Court of India in the landmark judgment titled as "Samira Kohli versus Prabha Manchanda, AIR 2008 SC 1385" has held that:

"...The doctor, therefore, is required to communicate all inherent and potential hazards of the proposed treatment, the alternatives to that treatment, if any, and

the likely effect if the patient remained untreated. This stringent standard of disclosure was subjected to only two exceptions: (i) where there was a genuine emergency, e.g. the patient was unconscious; and (ii) where the information would be harmful to the patient, e.g., where it might cause psychological damage, or where the patient would become so emotionally distraught as to prevent a rational decision."

The Hon'ble Madras High Court in the matter titled as "Arun Balakrishnan Iyer versus Soni Hospital, AIR 2003 Madras 389" has held that:

"22. When the doctor opines, in good faith, that emergency steps need to be taken in the interest of the patient, but fails to take such steps, he would be failing in his duty; and such failure would be a wrongful omission. Therefore, unless the patient proves that there was no such emergency or that those acts were not done bonafide, the doctor or surgeon cannot be found fault with."

Question: Whether consent given for diagnostic surgery, can be construed as consent for performing additional or further surgical procedure?

Answer: If in the course of one operation, there is a medical emergency requiring a medical procedure, the doctor can operate on the patient without his or her consent and is protected by the defense of medical necessity.

The 3 Judges Constitution Bench of Hon'ble Supreme Court of India in the landmark judgment titled as "Samira Kohli versus Prabha Manchanda, AIR 2008 SC 1385 has held that the doctor can act without the consent of the patient where it is necessary to save the life or preserve the health of the patient. However, the principle of necessity by which the doctor is permitted to perform further or additional procedure (unauthorized) is restricted to cases where the patient is temporarily incompetent (being unconscious), to permit the procedure delaying of which would be unreasonable because of the imminent danger to the life or health of the patient. Thus, unless the unauthorized additional or further procedure is necessary in order to save the life or preserve the health of the patient and it would be unreasonable (as contrasted from being merely inconvenient) to delay the further procedure until the patient regains consciousness and takes a decision, a doctor cannot perform such procedure without the consent of the patient. The relevant paragraphs of the judgment are reproduced hereunder:

"16. The next question is whether in an action for negligence/battery for performance of an unauthorized surgical procedure, the Doctor can put forth as defense

the consent given for a particular operative procedure, as consent for any additional or further operative procedures performed in the interests of the patient. In Murray vs. McMurchy - 1949 (2) DLR 442, the Supreme Court of BC, Canada, was considering a claim for battery by a patient who underwent a cesarian section. During the course of cesarian section, the doctor found fibroid tumors in the patient's uterus. Being of the view that such tumors would be a danger in case of future pregnancy, he performed a sterilization operation. The court upheld the claim for damages for battery. It held that sterilization could not be justified under the principle of necessity, as there was no immediate threat or danger to the patient's health or life and it would not have been unreasonable to postpone the operation to secure the patient's consent. The fact that the doctor found it convenient to perform the sterilization operation without consent as the patient was already under general anesthetic, was held to be not a valid defense. A somewhat similar view was expressed by Courts of Appeal in England in Re: F. (supra). It was held that the additional or further treatment which can be given (outside the consented procedure) should be confined to only such treatment as is necessary to meet the emergency, and as such needs to be carried out at once and before the patient is likely to be in a position to make a decision for himself. Lord Goff observed:

"Where, for example, a surgeon performs an operation without his consent on a patient temporarily rendered unconscious in an accident, he should do no more than is reasonably required, in the best interests of the patient, before he recovers consciousness. I can see no practical difficulty arising from this requirement, which derives from the fact that the patient is expected before long to regain consciousness and can then be consulted about longer term measures."

The decision in Marshall vs. Curry - 1933 (3) DLR 260 decided by the Supreme Court of NS, Canada, illustrates the exception to the rule, that an unauthorized procedure may be justified if the patient's medical condition brooks no delay and warrants immediate action without waiting for the patient to regain consciousness and take a decision for himself. In that case the doctor discovered a grossly diseased testicle while performing a hernia operation. As the doctor considered it to be gangrenous, posing a threat to patient's life and health, the doctor removed it without consent, as a part of the hernia operation. An action for battery was brought on the ground that the consent was for a hernia operation and removal of testicle was not

consent. The claim was dismissed. The court was of the view that the doctor can act without the consent of the patient where it is necessary to save the life or preserve the health of the patient. Thus, the principle of necessity by which the doctor is permitted to perform further or additional procedure (unauthorized) is restricted to cases where the patient is temporarily incompetent (being unconscious), to permit the procedure delaying of which would be unreasonable because of the imminent danger to the life or health of the patient.

17. It is quite possible that if the patient been conscious, and informed about the need for the additional procedure, the patient might have agreed to it. It may be that the additional procedure is beneficial and in the interests of the patient. It may be that postponement of the additional procedure (say removal of an organ) may require another surgery, whereas removal of the affected organ during the initial diagnostic or exploratory surgery, would save the patient from the pain and cost of a second operation. Howsoever, practical or convenient the reasons may be, they are not relevant. What is relevant and of importance is the inviolable nature of the patient's right in regard to his body and his right to decide whether he should undergo the particular treatment or surgery or not. Therefore at the risk of repetition, we may add that unless the unauthorized additional or further procedure is necessary in order to save the life or preserve the health of the patient and it would be unreasonable (as contrasted from being merely inconvenient) to delay the further procedure until the patient regains consciousness and takes a decision, a doctor cannot perform such procedure without the consent of the patient."

The Hon'ble National Consumer Disputes Redressal Commission in the matter titled as "Saroj Chandhoke versus Ganag Ram Hospital, 2007 (3) CPJ 189 (NCDRC)" has held that:

"VI. Conclusion:

In conclusion it is held that:

- (i) In a simple Hysterectomy operation, the Complainant lost her ovaries and left kidney. She was required to undergo other operations for control of fecal discharge from vagina. She was required to stay in the hospital for complete cure for months.
- (ii) Informed consent was obtained only for TAH. There was no necessity of trying to operate via vaginal route.
- (iii) No consent was obtained for removal of ovaries in advance planned surgery.

(iv) In the present case, the question is not whether TAH is preferable to VH. The patient was prepared for TAH and had given written consent for TAH and no consent was obtained or no information was given to the patient that her ovaries would be removed. In such set of circumstances, it cannot be said that because a surgeon is expert in the field he/she can carry out the surgery of his choice. If he/she does so, he/she does it at his/her risk in case of mishap.

No doubt, in case of emergency there can be deviation in mode of surgery, but not in a planned surgery where express consent for a particular mode is taken from the patient, particularly, when there is no emergency.

- (v) Before performing surgery, properly informed written consent is must. No doubt, while operating, to control adverse situation or to save the life of the patient or for benefit of the patient, other procedure could be followed or other part of the body could be operated.
- (vi) As held in Spring Meadows Hospital (supra) it is to be seen that superiority of the Doctor is not abused in any manner. Further, if during the operation any mishap occurs because of error of judgment, it would be deficiency in service or negligence, if that would not have been committed by a reasonably competent professional man professing the standard and type of skill that a surgeon held out as having. The Opposite Party No. 2 is an expert Gynecologist who has performed many such operations as contended by her and Opposite Party No. 1 is a known big Hospital. In such a case, it is difficult to accept that for no fault there was avulsion of vein to such an extent that left kidney was required to be removed. Inference could be that there was some error which resulted in cut of a vein."

Question: Whether the doctor is required to obtain consent of the patient in case of accident?

Answer: In Re F (Mental Patient: Sterilization), 1990 (2) AC 1, Lord Bridge has observed that doctors and other healthcare professionals would otherwise face on intolerable dilemma, if they administer the treatment which they believe to be in the interest of the patient, they might face an action for trespass to the person, but if they withhold that treatment they could be in breach of duty of care in negligence.

The Indian Medical Council (Professional Conduct, Etiquette & Ethics) Regulation, 2002 casts a duty on

all medical practitioners i.e. all medical practitioners must attend to sick and injured immediately and it is the duty of the medical practitioners to make immediate and timely medical care available to every injured person whether he is injured in accident or otherwise. The relevant provisions of Indian Medical Council (Professional Conduct, Etiquette & Ethics) Regulation, 2002 is reproduced hereunder:

“2. Duties of physicians to their patients

2.1 Obligations to the sick

2.1.1 *Though a physician is not bound to treat each and every person asking his services, he should not only be ever ready to respond to the calls of the sick and the injured, but should be mindful of the high character of his mission and the responsibility he discharges in the course of his professional duties. In his treatment, he should never forget that the health and the lives of those entrusted to his care depend on his skill and attention. A physician should endeavor to add to the comfort of the sick by making his visits at the hour indicated to the patients. A physician advising a patient to seek service of another physician is acceptable, however, in case of emergency a physician must treat the patient. No physician shall arbitrarily refuse treatment to a patient. However for good reason, when a patient is suffering from an ailment which is not within the range of experience of the treating physician, the physician may refuse treatment and refer the patient to another physician.*

2.1.2 *Medical practitioner having any incapacity detrimental to the patient or which can affect his performance vis-à-vis the patient is not permitted to practice his profession.*

2.4 The Patient must not be neglected:

A physician is free to choose whom he will serve. He should, however, respond to any request for his assistance in an emergency. Once having undertaken a case, the physician should not neglect the patient, nor should he withdraw from the case without giving adequate notice to the patient and his family. Provisionally or fully registered medical practitioner shall not willfully commit an act of negligence that may deprive his patient or patients from necessary medical care.

3.5 Treatment after Consultation

No decision should restrain the attending physician from making such subsequent variations in the treatment if any unexpected change occurs, but at the next consultation, reasons for the variations should be discussed/explained. The same privilege, with its obligations, belongs to the consultant when sent for

in an emergency during the absence of attending physician. The attending physician may prescribe medicine at any time for the patient, whereas the consultant may prescribe only in case of emergency or as an expert when called for.”

The Hon’ble Supreme Court of India in the matter titled as “Parmanand Katara versus Union of India, AIR 1989 SC 2039” has held that:

“There can be no second opinion that preservation of human life is of paramount importance. That is so on account of the fact that once life is lost, the status quo ante cannot be restored as resurrection is beyond the capacity of man. The patient whether he be an innocent person or be a criminal liable to punishment under the laws of the society, it is the obligation of those who are in-charge of the health of the community to preserve life so that the innocent may be protected and the guilty may be punished. Social laws do not contemplate death by negligence to tantamount to legal punishment.

Article 21 of the Constitution casts the obligation on the State to preserve life. The provision as explained by this Court in scores of decisions has emphasized and reiterated with gradually increasing emphasis that position. A doctor at the Government hospital positioned to meet this State obligation is, therefore, duty-bound to extend medical assistance for preserving life. Every doctor whether at a Government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life. No law or State action can intervene to avoid/delay the discharge of the paramount obligation cast upon members of the medical profession. The obligation being total, absolute and paramount, laws of procedure whether in statutes or otherwise which would interfere with the discharge of this obligation cannot be sustained and must, therefore, give way. On this basis, we have not issued notices to the States and Union Territories for affording them an opportunity of being heard before we accepted the statement made in the affidavit of the Union of India that there is no impediment in the law. The matter is extremely urgent and in our view, brooks no delay to remind every doctor of his total obligation and assure him of the position that he does not contravene the law of the land by proceeding to treat the injured victim on his appearance before him either by himself or being carried by others. We must make it clear that zonal regulations and classifications cannot also operate as fetters in the process of discharge of the obligation and irrespective of the fact whether under instructions or rules, the victim has to be sent elsewhere or how the police shall be contacted, the guideline indicated in the

1985 decision of the Committee, as extracted above, is to become operative. We order accordingly.

The Hon'ble National Consumer Dispute Redressal Commission in the matter titled as "Pravat Kumar Mukherjee versus Ruby General Hospital & Ors., 2005 (2) CPJ 35" has held that:

"Considering the aforesaid law, it is apparent that: emergency treatment was required to be given to the deceased who was brought in a seriously injured condition; there was no question of waiting for the consent of the patient or a passer by who brought the patient to the hospital, and was not necessary to wait for consent to be given for treatment;

There is nothing on record to suggest that the Doctor has informed the patient or the relatives or the person who has brought him to the hospital with regard to dangers ahead or the risk involved by going without the operation/treatment at the earliest.

Consent is implicit in such cases when patient is brought to the hospital for treatment, and a surgeon who fails to perform an emergency operation must prove that the patient refused to undergo the operation not only at the initial stage but even after the patient was informed about the dangerous consequences of not undergoing the operation."

Thus, the patient's consent is not necessary in case of accident/emergency as in such cases, the consent is implied when the patient is brought to the hospital. Further, it is an obligation on the doctor to treat his patient without any delay.

Question: If minor is in emergency, then whose consent is valid?

Answer: According to the Clause 7.16 of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulation, 2002, the doctor has to obtain consent from the patient or his guardian in case of minor before performing operation and if the doctor fails to obtain consent, then the same amounts to professional misconduct rendering the doctor for disciplinary action. The relevant provision of Clause 7.16 of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulation, 2002 is reproduced hereunder:

"Before performing an operation the physician should obtain in writing the consent from the husband or wife, parent or guardian in the case of minor, or the patient himself as the case may be. In an operation which may

result in sterility the consent of both husband and wife is needed."

However, in case of emergency involving children when their parents or guardian are not available, then the consent is taken from the person-in-charge of the child e.g., a school teacher can give consent for treating a child who becomes sick during a picnic away from home town or the consent of the headmaster of a residential school. Such person-in-charge of the child are known as in loco parentis i.e., acting as temporary guardian of a child.

Question: Are all consent given for medical treatment valid?

Answer: According to Section 10 of the Indian Contract Act, 1872, an agreement is a contract when it is made for some consideration, between parties who are competent, with their free consent and for a lawful object. Thus, for the purpose of entering into a contract, free consent is one of the essential.

According to Section 14 of the Indian Contract Act, 1872, consent is said to be free when it is not caused by coercion, undue influence, fraud, misrepresentation and mistake.

Thus, if the patient or his guardian gives consent under coercion, undue influence, fraud, misrepresentation or mistake or by a person who is minor, or is mentally unsound, not fully conscious, intoxicated or who is ignorant of the implications of such consent, then such consent is not valid.

Blanket consent given at the time of admission may be invalid.

Separate consent for specific procedure and for anesthesia before conducting the procedure may be taken.

A signed written consent form by itself does not constitute valid consent, though it is an evidence of consent given by the patient or his guardian. The following components are essential for a valid consent form:

1. The patient gives it voluntarily without any coercion
2. The patient has the capacity and competence to give consent.
3. The patient has an adequate level of information about the nature of the procedure to which he is consenting.



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