Consent in Dental Practice: Patient’s Right to Decide

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Abstract

Consent is the legal issue that protects every patient’s right not to be touched or in any way treated without the patient’s authorization. Consent can be given by a person who is conscious, mentally sound and above 18 years of age. Consent can be implied, expressed, informed or proxy. Much of a dentist work is done on the basis of consent which is implied either by the words or the behaviour of the patient or by the circumstances under which treatment is given. Expressed consent may be in oral or written form. It should be obtained when the treatment is likely to be more than mildly painful, when it carries appreciable risk, or when it will result in ablation of a bodily function. Informed consent implies that a dialog has taken place about the nature of the decision, reasonable alternatives, relevant risks, benefits and uncertainties of the decision, and the comprehension and acceptance of the health-care decision by the patient. If the dental practitioner fails to obtain consent, then he/she may be sued for the tort of battery and damages claimed for trespass to person - unless the failure to obtain consent is justified by necessity.

Keywords: Consent; Dental treatment; Informed consent; Informed refusal; Patient right

Introduction

“There are three factors in the practice of medicine: the disease, the patient, and the doctor. The doctor is the servant of science, and the patient must do what he can to fight the disease with the assistance of the doctor.”—Hippocrates.

The concept of consent comes from the ethical issue of respect for autonomy, individual integrity and self determination. The term consent means voluntary agreement, compliance, or permission [1]. Section 13 of the Indian Contract Act lays down that two or more persons are said to consent when they agree upon the same thing in the same sense (meeting of the minds) [2].

It is the legal issue that protects every patient’s right not to be touched or in any way treated without the patient’s authorization. The issue assumes that it is a right of mentally competent adults and of sound mind to determine what should be done with their body and the surgeon who performs operation without patient’s consent commits assault for which the surgeon is liable in damages” [3].

The change in attitude of patients with emphasis on being involved and informed on every aspect of care is not only apparent in adults but also when providing care for children and young adults [4]. The paramount concern for patients is that to be treated as a human being i.e. as an individual unique person [5], Thus, it is important for dentists to be well informed of the fundamental process of consent which exist under the law (affecting both adults and minors) in order to provide dental care within the legal framework [6].

Currently, the medical and dental professions are facing an ever increasing rate of malpractice suits [7-10]. Patients facing such situations may seek legal aid for redressal of their grievances. Therefore, one of the most important legal safeguards and moral obligations of dentists to their patients are obtaining consent for any course of health care action. Literature reviews regarding obtaining consent in dental practice have shown that most dentists agree as to the importance of consent before performing any dental procedures [11-13]. Consent was usually a general consent rather than treatment specific and written consent was only taken in the event of invasive dental procedures. In a cross-sectional analytic study in Pakistan, it was found that the first year graduates were more cognizant of the importance of obtaining consent and practiced taking informed consent from the patients in comparison to third and fourth year students [14]. 68% of the students felt that consent was essential to protect the dentist while only 9% felt that it was an essential patient right.

In a questionnaire study conducted by Avramova and Yaneva among Bulgarian dentists, it was found that though most dentists took consent while treating children, they were less prudent in taking consent while treating their professional colleagues, relatives, friends and longtime patients [12]. In a study among general dental practitioners in India, it was found that 70% practitioners felt that taking consent was a necessary safeguard for the doctor alone while only 27% felt that it was also necessary to protect both the doctor and the patient [13]. Additionally, 18% of the dentists stated that they would refuse to give a copy of the consent form. This reaction could stem from the basic lack of knowledge regarding the dentist’s legal obligation to provide a patient with the copy of consent form, or from fear/guilt due to incomplete, incorrect, misleading or destroyed information in the consent form that would put the dentist in an unfavourable position.

The studies indicate that theoretically most dentists are aware of their ethical, legal and moral obligations to take consent from their patients, but in practice many fail to do so. In fact, consent is taken only as a means of a safeguarding against a possible litigation rather than an ethical necessity.

Types of Consent

Depending upon the circumstances, in each case, consent may be implied, expressed, informed, proxy consent, loco parentis, blanket consent or oral consent [15].

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Implied consent

Rowe described implied consent as: ‘by being in the chair at the dental surgery with mouths open a patient implies that they are there for dental treatment’ and continued ‘in the past a dentist would undertake treatment as he or she saw fit, which the patient would accept without argument’ [16].

It is a duty of dentist to work on the basis of consent, which is implied either by words or behaviour of the patient or by the circumstances under which the treatment is given, e.g. it is common for a patient to arrange an appointment with a dentist, to keep the appointment, to volunteer the history, to answer question relating to the history and to submit without objection to dental examination. In these circumstances consent for the examination is clearly implied [1].

Though an implied consent is not written and its existence is not expressly asserted but nonetheless, it is legally effective. It implies consent to medical examination in a general sense i.e. when a patient approaches the dentist for treatment; it is presumed that there is consent for routine physical examination. Example: examination of pulse, blood pressure, temperature, rate of respiration etc. This is the most common variety of consent in both general and hospital practice [17].

Most dental treatment is carried out while the patient is conscious and they are therefore capable to stop the dentist when they wish to. This reinforces the reliability of implied consent as a means of exercising individual autonomy [6].

Expressed consent (Tacit consent)

Expressed consent is one, the terms of which are stated in distinct and explicit language. It is a must in any examination beyond routine physical examination [17]. Express written consent should be obtained for all major diagnostic procedures, general anaesthesia, for surgical operations, intimate examinations, and examination for determining age, potency and virginity and in medico-legal cases. It is prudent to obtain written consent, also where newer analgesic, narcotic or anaesthetic agents will significantly affect the patient’s level of consciousness during the treatment. It should be obtained when the treatment is likely to be more than mildly painful, when it carries appreciable risk, or when it will result in diminishing of a bodily function [1].

When the patient expresses his consent verbally it is termed as ‘oral or verbal expressed consent’ and when express in writing is known as ‘written expressed consent’ [17]. Expressed oral consent is obtained for relatively minor examinations or therapeutic procedures, preferably in the presence of a disinterested party [18]. Expressed oral consent, if properly witnessed, is as valid as written consent, but the latter has the advantage of easy proof and permanent form [17].

Informed consent

Informed consent is the process of obtaining permission of a subject to participate in research and to give an opportunity to decide about his or her healthcare. This notion originates from the legal and ethical right of the patient/subject to retain autonomy and from the ethical duty of the dentist/researcher to involve the patient in healthcare decisions [19].

Informed consent also implies that a dialog has taken place about the nature of the decision, reasonable alternatives, relevant risks, benefits and uncertainties of the decision, and the comprehension and acceptance of the health-care decision by the patient / subject [19].

Informed consent means understanding of the patients of [20]:

- The nature of his/her condition.
- The nature of the proposed treatment or procedure.
- The alternative to such a course or action.
- The risks involved in both the proposed and alternative procedure.
- The relative chances of success or failure of both procedures, so that the patient may accept or reject the procedure.
- If it is experimental, it should be stressed.

Proxy consent (Substitute Consent)

This type of consent is utilized in the event the patient is unable to give consent because he/she is a minor or mentally unsound/unconscious. In such situations a parent or close relative can provide proxy consent [21-25].

Loco parentis

In an emergency situation in case of children, when parents/guardians are not available, consent can be obtained from the person bringing the child for dental examination or treatment (For example: school teacher, warden, etc) [26].

Blanket consent

It is a consent taken on a printed form that covers (like a blanket) almost everything a dentist or a hospital might do to a patient, without mentioning anything specifically. Blanket consent is legally inadequate for any procedure that has risks or alternatives [27,28].

Oral consent

Consent need not necessarily be in writing. Oral consent in front of witnesses and implied consent, which is determined by the behaviour of the patient, is acceptable consent in certain situations. This is particularly true of simple procedures in dentistry [29].

The Twin Purposes of Consent

Consent can be considered as having two major purposes:

- Clinical purpose-the confidence, co-operation and, critically, the agreement of the patient will contribute to a successful administration of treatment and a satisfactory outcome for everyone; and
- Legal purpose-evidence that the clinician has sought, and been given, permission to intervene and affect the physical integrity of the patient [30].

Valid Consent Valid consent consists of three related aspects:

Voluntariness

Patients should give consent completely voluntarily without any pressure either from the dentist or any third party (e.g. relatives). Especially in India, it has to be kept in mind that initiative to the treatment may not be of the patient himself/herself and may be coerced by relatives into giving consent. Hence, the dentists have to ensure voluntariness of the consent [1,17,31].

Capacity to consent

The patient should be in a position to understand the nature and
implication of the proposed treatment, including its consequences. In this regard, the law requires following special considerations [1,17,31].

**Age of consent:** The age of consent is bound by legal definitions and within the context of the Indian law, there are two schools of thought. Section 90 of the Indian Penal Code of 1860 states that “Consent by intoxicated person, person of unsound mind or a person below twelve years of age is invalid.” This therefore implies that a person above 12 years of age can consent to medical/surgical/dental treatment if it is intended for their benefit and undertaken in good faith. On the other hand, according to Section 11 of the Indian Contract Act of 1872 - a competent person of sound mind who has attained the age of majority of 18 years can legally enter into a contract [32]. Since the dentist-patient relationship is essentially a contract, it implies that only persons 18 years of age and above can enter into a doctor-patient contract and can give consent for treatment [33].

In the absence of clear cut legislation, the majority of doctors/dentists in India consider the consent of a person above twelve and less than eighteen years of age valid for medical/dental examination only, but for dental interventions prefer to take the consent of the parents/guardians. This is a definite safeguard against civil liability [17].

**Mental incapacity:** It is well accepted that a person should be mentally capable to give consent for his or her own treatment. This implies that patients who are mentally retarded or mentally incapable due to any diseases may not be capable of giving their own consent. In such cases, consent from the legal guardian is essential. Patients who are under the influence of alcohol or drugs as well as patients suffering from extreme pain form a separate category and validity of consent in such situations is liable to be questioned [1,17].

**Knowledge Forms the Crux of the Matter Regarding the Consent**

It includes:

- Nature of the diagnosis
- Nature of treatment planned
- Forceable risk involved in the treatment
- Prognosis if treatment is not carried out
- Any alternative therapy available.

It is duty of a dentist to disclose all these points to the patients so that patients may exercise his right to self determination about the proposed course of the treatment [1,17].

**Consent for Children or Minors**

Obtaining consent for children is a difficult task. The primary responsibility for providing care and consent for the child or young person should lay with his/her parents. Patients under the age of majority or adults with diminished mental capacity should have treatment consent obtained from a parent or legal guardian. The adult accompanying the paediatric patient may not be a legal guardian allowed by law to consent to dental procedures. Examples of this include a grandparent, stepparent, noncustodial parent or friend of the family [34].

Where a child requires treatment without a parent or legal guardian present:

- Telephone consent may be obtained.

- Where the child or minor is assessed as competent they may provide consent.

- Where a responsible adult (i.e. teacher, Grandparent) is with the child, evidence of parental consent to treatment must be sighted or parental consent obtained.

When problem arise with the child and parents with different opinions then, according to law a person with parental responsibility can always override decisions made by children. In case of an emergency, the health practitioner has a right to treat the patient without the consent [34].

**When Consent is not Valid? [35,36]**

- Given by a person under 18 years of age.
- Given by a person of unsound mind.
- Given under fear, fraud or misrepresentation of facts.
- Person who is ignorant of the implications of the consent.
- Procedure for illegal surgical procedure.
- Patient who is unaware of harmful consequences of treatment.

**Situations where Consent may not be Obtained**

In the following situations, medical examination and treatment can be done even without consent [37]. In medical emergencies i.e. when the patient is not in a condition to give consent and there is nobody with the patient to give consent, but his/her condition warrants immediate treatment to save his/her life. In such situation, treatment to save life can be given without consent.

- In case of person suffering from a notifiable disease. In case of AIDS/HIV positive patients, the position in India regarding its being a notifiable disease or not, is not yet clear.
- If there is chance of spread of infection to others.
- Examination of immigrants.
- Members of armed forces, handlers of food and dairy products.
- Prisoners and criminals can be examined forcibly in the interest of the society.
- When the court orders for psychiatric examination and treatment.
- For vaccination- as vaccination is authorized by the law.
- Child offenders-when the Magistrate makes the request.
- Attempted suicide.

**Common Pitfalls of Consent [38]**

**Records**

The most common pitfall is the failure to have an adequate record of the consent process and as a consequence, incomplete details of what were discussed with the patient. The best and most contemporaneous record available is the patient’s clinical record card. It should contain, amongst other information, comprehensive records of the discussions between a patient and a dentist. This can be supplemented by patient information literature, written treatment plans, quotations and consent forms as appropriate.
Poor communication skills

Perhaps the greatest reason for an inadequate consent process is a lack of communication and interpersonal skills in either the patient or the dentist. The barriers to good communication are: poor listening skills, inappropriate assumptions about the patient, inappropriate language and prejudice. Poor communication increases the threat of complaints and litigation even when the clinician has not been negligent.

A failure to involve the patient

Consent is not about giving information to the patient. It is about involving the patient in a mutual discussion so that the patient can make his/her own decision. Patients are less likely to criticise their own decisions than those made by others.

A failure to provide alternatives

One of the key aspects of the consent process is to make the patients aware of the alternatives even if the treatments in question are not provided.

Informed Refusal

Informed consent need not always mean that the patient agrees to the treatment plan. A subset of informed consent known as informed refusal should be obtained when the patient does not wish to undergo treatment recommended by the dentist [39]. Informed refusal is a person’s right to refuse all or a portion of the proposed treatment after the recommended treatment, alternate treatment options, and the likely consequences of declining treatment have been explained in language the patient understands. A patient who refuses to follow the recommendation of a treating dentist must be advised of the consequences of the refusal. For example, if a dentist recommends that a patient should undergo endodontic therapy and the patient nonetheless elects to have the tooth extracted, an entry should be made in the patient’s record stating that the patient was informed of the risks of not complying with the recommendation. The most frequent dental recommendation that patients ignore is to seek the services of a periodontist. An entry in the patient’s record of the recommendation and the patient’s refusal may not be enough to satisfy the courts should the patient sue because of tooth loss due to periodontal disease [40].

Possible Consequences of not Obtaining Consent for Treatment [41,42]

Two areas of the law are relevant: trespass to person and negligence. If invasive treatment is provided without patient consent to the general nature of the procedure, then a practitioner may be sued for the tort of battery and damages claimed for trespass to person - unless the failure to obtain consent is justified by necessity.

However, the role of the law of trespass in the area of ‘informed consent’ is limited. Consent to a procedure is not usually negated by being obtained without disclosure of associated risks and possible alternative treatments. The most applicable sanction for failure to disclose this sort of information lies in the tort of negligence. It is expected that a dental practitioner’s general duty to act reasonably includes a duty to provide adequate information, particularly in relation to risks or hazards. If something goes wrong, then the practitioner may be exposed to liability for damages in negligence. A negligent act is usually found or alleged to have occurred in the procedure itself. However, a failure to provide information about the procedure and associated risks may also amount to negligence. For action in negligence on the latter score to succeed, two points must be established:

- That failure to disclose the information was unreasonable
- That this failure was a cause of harm to the patient

However a patient who does not consent and yet is not injured and therefore cannot succeed in an action in malpractice or negligence, may nonetheless succeed in an action in trespass to the person, a battery.

Conclusion

In dentistry, just as in medicine, unforeseen mishaps occur despite our best efforts. Therefore, it is just as important for dentists to obtain consent prior to every invasive and/or irreversible procedure. At first glance, most patients appear friendly and most dental procedures appear routine, but once a procedure goes wrong, an unhappy patient with a skillful attorney can become a dentist’s worst nightmare. A signed, written informed consent may be the only evidence that the mishap that occurred was a foreseeable risk acknowledged by the dentist and accepted by the patient. Although obtaining informed consent may at first seem awkward, cumbersome, and time-consuming, it may very well save a practitioner countless hours in the courtroom and thousands of rupees in legal fees should some mishap occur. Thus valid consent is an important ingredient of our dental practice today. Examination of a patient for diagnosis, therapeutic intervention, treatment and surgery, consent should be obtained to safe guard oneself from future dental litigation. So, we must adhere to aim in medicine “Do no harm”. By helping in healing we must not harm the patient.

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