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EC PSYCHOLOGY AND PSYCHIATRY
Guest Editorial

Implied Consent May be a Legal Defence but can be Open to Misinterpretation

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Received: November 29, 2022; **Published:** December 12, 2022

Abstract

Implied consent is often misconceived as a form of consent implied in situations where a healthcare recipient's actions or inactions and/or the circumstances of a particular situation may suggest that consent does not need to be actively obtained.

Implied consent as consent is a valid legal defence, but can be open to interpretation. Therefore, it is important to document why consent was considered implied in a particular situation. Irrespective of whether consent is explicit or implied, appropriate documentation of considerations for consent is of utmost importance.

Keywords: *Implied Consent; Legal Defence; Misinterpretation*

Introduction

From a health practitioner's perspective, obtaining informed consent from a patient before providing any treatment or care is critical. In terms of clinical care provision, informed consent must be real and must be actively obtained [1]. However, in some situations, consent can be implied, In such situations, healthcare practitioners must carefully consider whether to actively obtain informed consent.

Why informed consent was implied may not be a valid legal defence

In legal terms, if it can be established that in the process of delivering treatment and care, informed consent was implied, it can be a valid defence [2,3]. This defence is based on the presumption that even though consent may not have been expressly obtained by the healthcare professional, a healthcare recipient's actions (or inactions) and the circumstances of a particular situation suggested that consent was granted [4,5]. Examples of such situations include a general practitioner taking blood pressure, health professionals entering the patient's inpatient cubicle to examine the recipient of health care, the patient allowing the health professionals to examine them to make a diagnosis and a patient extending their arm for a health professional to withdraw blood sample [6,7].

Some clinicians also believe that a healthcare recipient presenting to an Emergency Department or in a medical emergency to receive healthcare is implying consent - thereby justifying the provision of healthcare without obtaining explicit consent from the healthcare recipient [8,9].

However, whether in these situations the consent is implied or has to be actively taken can be confusing for some clinicians.

Even if consent is implied in some situations, it still requires active consideration whether consent must be obtained

Even in situations where informed consent may well be implied, clinicians should consider whether informed consent should be taken and documented. Let's look at a simple example.

A patient extending their arm for a blood pressure reading to be taken by a health practitioner is often provided as an example of valid `implicit' consent. However, in actual fact there is no implicitness in a healthcare practitioner asking the patient whether they wish for their blood pressure to be taken and the patient consenting to it. It is explicit consent, based on the fact that both the healthcare practitioner and an informed healthcare recipient agree that the taking of blood pressure is appropriate. The action of an informed healthcare recipient extending their arm for a blood pressure reading to be taken reflects their active consent that taking blood pressure is appropriate and necessary. The consent given in this case is explicit, voluntary, specific and given by a competent person.

However, complexities involved in as simple an action as this are not difficult to imagine. If the blood pressure of a person is taken who does not understand what taking blood pressure involves but presents their arm anyway, this can not be considered implied consent. For example, a patient with a learning difficulty who may not fully comprehend the request or proposal for a blood pressure recording to be made, a patient with other psychopathology that involves a disturbance of mood, thought or perception that affects their understanding of this procedure, a patient who may have a delusional belief or a concern about their arm being compressed are all scenarios where consent cannot be said to be 'informed' or implied.

Proceeding with the idea that the taking of a blood pressure reading is an innocuous but important investigation likely to only cause temporary discomfort, has no long-term consequences for the healthcare recipient and/or is only taken on the presumption that the patient would probably consent anyway, would be an error, if it is done without consent.

Why presuming `implicit' consent can be risky?

When obtaining informed consent, it is no longer considered appropriate for healthcare practitioners to obtain informed consent based on the information they consider to be in the best interests of the patient. The information shared must be based on a materiality standard. This standard is based on the concept that the healthcare practitioner must disclose information based on the needs of the patient as a decision maker [10,11]. Healthcare practitioners must disclose what a reasonable person would want to know about the treatment before undergoing it.

Whether or not informed consent was given can also not be based on the fact that the relevant information was given to the patient and there also cannot be extensions to the consent provided. It cannot be argued that as the healthcare recipient has attended a clinic or a hospital, they have consented to subsequent treatment. Clearly, passivity is not consent. The onus is on the healthcare practitioner to actively determine that the healthcare recipient consents.

Does it matter whether `implicit' consent is documented?

In clinical practice, it is well understood that informed consent must be an interactive process. Whether it is documented and how it is documented is something that is a secondary matter. Documentation only establishes that informed consent may have been obtained. Yes, for some complex procedures that require alteration of the level of consciousness, or a surgical intervention, completion of an informed consent form is considered to be good practice. However, an informed consent form only serves as a reminder to engage the recipient of healthcare to make an informed decision after considering the potential or likely benefits of the procedure and material risks (if any) associated with that particular procedure. If the consent provided is not voluntary, specific or not provided by a person competent to be able to give informed consent, whether or not the piece of paper is signed or not, is meaningless [12].

It is always good practice to document discussions that may have occurred between the healthcare practitioner and the healthcare recipient. Irrespective of whether the consent was granted explicitly or implicitly, appropriate documentation of consent is important.

It is also important for healthcare practitioners to be cognizant of the fact that there are many situations where taking written consent may be countertherapeutic and even inappropriate. For example, in the course of the psychotherapeutic intervention, it may well be inappropriate to insist that written informed consent is documented before psychotherapy can begin. However, it is quite appropriate for the session to begin with the therapist providing the client with information about the psychotherapeutic setting and the nature of intervention while evaluating the healthcare recipient's capacity to understand the information, and in the process obtain informed consent. Obtaining informed consent in such a treatment setting is a process to enable the psychotherapist to be satisfied that the healthcare recipient has provided informed consent. To provide psychotherapy on the basis that the healthcare recipient has arrived for a therapy session and therefore implicitly consents to it would be an error. In such situations, obtaining verbal informed consent is appropriate. However, relying on implicit consent without the healthcare provider being certain, and to their satisfaction, that the healthcare recipient has indeed consented to any actions (or inactions), would be incorrect and inappropriate.

Even in situations where consent may be implied it would be good practice to document why consent was considered `implied.`

Why the onus of obtaining informed consent is still on the healthcare practitioner

The question does arise regarding why the onus of obtaining informed consent is on the healthcare practitioner.

If the healthcare recipient is as informed about the healthcare intervention as the healthcare provider, and the decision is made in partnership, indeed the onus to obtain informed consent cannot be on a healthcare practitioner. However, where the healthcare recipient is reliant on the healthcare professional to provide information to enable them to make an informed decision, the balance of responsibility to obtain informed consent begins to shift to the healthcare professional.

This is also the reason for an expectation that the consent obtained will be very specific and include a disclosure about the nature of the procedure or treatment, whether risks are material, substantial, probable or significant anticipated benefits and the probability of success and alternative treatments and their potential risks and benefits.

Informed consent is considered to be a way to ensure that the healthcare recipient can make an autonomous decision about what will be done to their body [13-15]. There is also a view that the real purpose of ensuring informed consent is obtained is to ensure that the healthcare recipient has not been deceived or coerced [16]. This is not possible unless the healthcare professional ensures that all information that is relevant to the healthcare recipient in deciding on a healthcare intervention is available and clearly understood.

Conclusion

In some ways implied consent is a misnomer. Consent may be implied in some situations but if the healthcare provider is satisfied that the healthcare recipient provided informed consent, it is actual or valid informed consent. If healthcare providers are left with the misunderstanding that there are healthcare settings and situations in which consent is implied and therefore it is not necessary to obtain informed consent, that would be unfortunate. Healthcare organisations and policymakers must be particularly cognizant of this risk when developing information resources for healthcare professionals that include reference to implied consent.

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Volume 12 Issue 1 January 2023