

# **THE LEGAL DOCTRINE OF INFORMED CONSENT**

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# **THE LEGAL DOCTRINE OF INFORMED CONSENT: THE BASIC PRINCIPLES**

**The Ethical and Professional Principle  
of Patient Autonomy in Law**

**“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 the Patient’s Consent commits an Assault.”**

**Schloendorff v Society of New York Hospital  
[1914] 211 NY 125**

# **THE LEGAL DOCTRINE OF INFORMED CONSENT: THE BASIC PRINCIPLES**

**The Constitutional Principle of  
Personal Autonomy and Bodily Integrity**

**In Re Ward of Court  
(Withholding of Medical Treatment) No 2  
[1996] 2 IR 79**

**Article 40.3.1**

**“The State guarantees in its laws to respect, and as far as is reasonably practicable, by its laws to defend and vindicate the personal rights of the Irish Citizen.”**

# **THE LEGAL DOCTRINE OF INFORMED CONSENT: THE BASIC PRINCIPLES**

**The Constitutional Principle of  
Personal Autonomy and Bodily Integrity**

**In Re Ward of Court  
(Withholding of Medical Treatment) No 2  
[1996] 2 IR 79**

**Article 40.3.2**

**“The State is obliged to by its laws to protect as best it  
may from unjust attack and, in the case of injustice  
done, vindicate the life, person, good name and  
property rights of every citizen.”**

# **THE LEGAL DOCTRINE OF INFORMED CONSENT: THE BASIC PRINCIPLES**

**The Constitutional Principle of  
Personal Autonomy and Bodily Integrity**

**Fitzpatrick v K [2008] IEHC 104**

**Mr Justice Laffoy**

**“A competent Adult is free to reject Medical  
Advice or decline Medical Treatment.”**

# **THE LEGAL DOCTRINE OF INFORMED CONSENT: THE BASIC PRINCIPLES**

**The Legislative Principle of Autonomy and  
Freedom of Religious Belief**

**S. 4 (1) of the Health Act 1953:**

**“Nothing in this Act or any instrument hereunder shall be construed as imposing an obligation on any person to avail himself or any service provided under this Act or to submit himself or any person for whom he is responsible to health examination or treatment.”**

# **THE LEGAL DOCTRINE OF INFORMED CONSENT: THE BASIC PRINCIPLES**

**The Legislative Principle of Autonomy and  
Freedom of Religious Belief**

**S. 4 (2) of the Health Act 1953:**

**“Any person who avails himself of any service provided under this Act shall not be under any obligation to submit himself or any person for whom he is responsible to a health examination or treatment which is contrary to the teaching of his religion.”**

# **THE LEGAL DOCTRINE OF INFORMED CONSENT: THE BASIC PRINCIPLES**

**The Legislative Principle of Autonomy and  
Freedom of Religious Belief**

**Ss 4 (1) and (2) of the Health Act 1953**

**Approved by the Supreme Court in the case of  
North Western Health Board v W (H) [2001] 3 IR 622**

# THE LEGAL DOCTRINE OF INFORMED CONSENT: THE KEY ELEMENTS

- **The Tort of Battery;**
- **Defence to the Tort of Battery:  
Informed Consent;**
- **Express Consent;**
- **Implied Consent;**
- **Standard of Care in Informed Consent;**
- **Causation in Informed Consent;**
- **Exceptions to the Legal Doctrine of  
Informed Consent.**

## THE LEGAL DOCTRINE OF INFORMED CONSENT: THE TORT OF BATTERY

The **Tort of Battery** is committed by intentionally bringing about a harmful or offensive contact with the person of the Patient. It represents the importance of the individual Patient's right to determine what should or should not be done to his/her body, and this includes any bodily touching of the person of the Patient without his/her Consent.

# **THE LEGAL DOCTRINE OF INFORMED CONSENT: THE TORT OF BATTERY**

**The Tort of Battery is also a potential action  
Where there has been a particularly egregious  
defect in warning the Patient, such that it  
amounts to misleading the Patient about a key  
ingredient of the proposed Medical Procedure  
or Treatment. It may contain the following  
elements:**

# **THE LEGAL DOCTRINE OF INFORMED CONSENT: THE TORT OF BATTERY**

**Failure to Disclose the nature of the  
Medical Procedure or Treatment  
(R v Williams [1923] 1 KB 340)**

**Failure to Disclose Lack of Qualifications  
(R v Tabassum [2000] 2 CR App Rep 328 &  
R v Richardson 43 BMLR 21)**

**Carrying out an Unnecessary Medical Procedure  
(Appleton v Garrett 34 BMLR 23)**

# THE LEGAL DOCTRINE OF INFORMED CONSENT: THE TORT OF BATTERY

## Daniels v Heskin [1954] IR 73

“ All depends on the circumstances, the character of the Patient, her health, her social position, her intelligence, the nature of the tissue in which the needle was embedded

Here the Patient was passing through a post partum period in which the possibility of nervous or mental disturbance is notorious.”

# THE LEGAL DOCTRINE OF INFORMED CONSENT: THE TORT OF BATTERY

**Malette v Schulman [1988] 47 DLR 8**

If the Patient does not give, or fails to give, his/her Consent to the proposed treatment or procedure, and it is subsequently carried out, then the **constituent elements of the Tort of Battery** are present.

# **THE LEGAL DOCTRINE OF INFORMED CONSENT: THE TORT OF BATTERY AND ASSAULT**

**Walsh v Family Planning Services [1992] 1 IR 496**

**Where there is no Informed Consent acquired by the Medical Practitioner from the Patient or the Medical Practitioner negligently fails to get an Informed Consent from the Patient, then a claim for Assault under the Criminal Law can arise.**

# **THE LEGAL DOCTRINE OF INFORMED CONSENT: THE TORT OF BATTERY AND ASSAULT**

**Reibl v Hughes [1980] 114 DLR 1**

**A claim for Assault under the Criminal Law should be confined to cases where there is no Informed Consent to the particular procedure and it was feasible for the Medical Practitioner to acquire the Informed Consent from the Patient.**

# THE LEGAL DOCTRINE OF INFORMED CONSENT: DEFENCE TO THE TORT OF BATTERY

The **Defence of Consent** allows a Medical Practitioner to come into contact with the person of the Patient without fear of committing the **Tort of Battery**. To be effective:

- Consent must be freely given;
- Patient must be capable of giving Consent; and
- Patient's consent must be an Informed Consent, i.e. the Patient must have the required information about the nature of the proposed treatment or procedure.

# THE LEGAL DOCTRINE OF INFORMED CONSENT: DEFENCE TO THE TORT OF BATTERY

**Chatterton v Gerson [1981] 1QB 431**

A Patient will only succeed in a Claim for the Tort of Battery if the Consent is not **real**, and the Claim will fail if the Medical Practitioner has informed him/her **in general terms as to the nature and the risks** involved in the proposed procedure.

# THE LEGAL DOCTRINE OF INFORMED CONSENT: DEFENCE TO THE TORT OF BATTERY

**Siddaway Bethlem Royal Hospital  
[1985] 1 AC 871**

Consent is not negated by a failure on the part of the Medical Practitioner to give the Patient sufficient information.

However, it is not a proper Consent if it is obtained from the Patient through **fraud or misrepresentation** on the part of the Medical Practitioner.

The question to be asked is not whether sufficient information had been disclosed to the Patient by the Medical Practitioner to enable them to make an Informed Consent.

# THE LEGAL DOCTRINE OF INFORMED CONSENT: DEFENCE TO THE TORT OF BATTERY

**Siddaway v Bethlem Royal Hospital  
[1985] 1 AC 871**

Instead, the issue to be addressed is whether or not a PRUDENT Medical Practitioner would have acted as the Defendant Medical Practitioner has done in releasing only certain amount of information to the Plaintiff Patient.

# **THE LEGAL DOCTRINE OF INFORMED CONSENT: DEFENCE TO THE TORT OF BATTERY**

**Walsh v Family Planning Services  
[1992] 1 IR 496**

**The Tort of Battery will only be held to have been committed in the event that there is no Informed Consent to the proposed procedure given by the Patient, and that it was feasible to look for and obtain the Patient's Informed Consent.**

# THE LEGAL DOCTRINE OF INFORMED CONSENT: EXPRESS CONSENT

**Express Consent** is given when the Patient clearly states that he/she is willing to go ahead with the proposed procedure. This can take the form of a verbal discussion in which the Medical Practitioner explains the benefits to be expected and the risks to be incurred when opting for the proposed procedure. It can, and should where possible, be given in writing, i.e. a **Consent Form**.

# THE LEGAL DOCTRINE OF INFORMED CONSENT: IMPLIED CONSENT

**Implied Consent** is given many times in general clinical practice. It extends to the realms of examination, investigation, and treatment.

An example of this is where the Patient holds out his/her arm in preparation for a blood sample being taken by a Medical Practitioner.

Similarly, a Patient who takes a prescription from a Medical Practitioner and then visits the Pharmacy is consenting to the course of medication prescribed.

# THE LEGAL DOCTRINE OF INFORMED CONSENT: THE STANDARD OF CARE IN INFORMED CONSENT

Medical Paternalism v  
Patient Self-Determination

Medical Judgement v  
Patient's Right to Know

# THE LEGAL DOCTRINE OF INFORMED CONSENT: THE STANDARD OF CARE IN INFORMED CONSENT

There is a **balance to be struck** between the **benefits of the proposed procedure for the Patient, and the risk of any potential side effects**. The Medical Practitioner owes the Patient a **Duty of Care** to ensure the right balance is struck in this regard, as his/her clinical decision(s) will directly affect the Patient.

# THE LEGAL DOCTRINE OF INFORMED CONSENT: THE STANDARD OF CARE IN INFORMED CONSENT

A Medical Practitioner is not negligent in obtaining the Patient's Informed Consent if he/she only discloses the **risks** that would have been mentioned by a **responsible Body of Medical Opinion**.

The Court has to be satisfied that there is a **logical basis** to the approach adopted by the Responsible Body of Medical Opinion in question.

A Medical Practitioner is under a **Duty of Care** to provide the Patient with the information necessary to enable the Patient to make a balanced judgement regarding the proposed treatment or procedure, and hence give an Informed Consent to the Medical Practitioner.

# THE LEGAL DOCTRINE OF INFORMED CONSENT: THE STANDARD OF CARE IN INFORMED CONSENT

**Siddaway v Bethelhem Royal Hospital  
[1985] 1 AER 871**

A Medical Practitioner is not Negligent in obtaining a Patient's Consent if he/she only discloses the risk that would have been mentioned by a Responsible Body of Medical Opinion.

A Medical Practitioner is under a duty to provide the Patient with the information necessary to make a **balanced judgement** regarding the proposed treatment or procedure.

# THE LEGAL DOCTRINE OF INFORMED CONSENT: THE STANDARD OF CARE IN INFORMED CONSENT

**Canterbury v Spence**  
**[1972] 464 F 2d 772**

A Patient of **adult years and sound mind** has a right to determine what shall be done with his/her body.

It is the Medical Practitioner's duty to warn of any risks in the proposed treatment or procedure and to give the information to which the Patient is entitled. The test for determining whether a risk should be divulged is its "**Materiality**".

# THE LEGAL DOCTRINE OF INFORMED CONSENT: THE STANDARD OF CARE IN INFORMED CONSENT

**Canterbury v Spence**  
**[1972] 464 F 2d 772**

**A risk is considered “Material” if a reasonable person, from what the Medical Practitioner knows or should know to be the Patient’s position, would be likely to attach significance to that risk when reaching his/her decision re: the proposed treatment or procedure.**

# THE LEGAL DOCTRINE OF INFORMED CONSENT: THE STANDARD OF CARE IN INFORMED CONSENT

**Rogers v Whitaker**  
**[1992] 67 ALJR 47**

While the **accepted Medical Practice of a Responsible Body of Medical Opinion** is a useful guide for the Court to use, the Court itself is to be guided by the **appropriate Standard of Care** that gives weight to the paramount consideration namely that a Patient is entitled to make decisions about any proposed treatment or procedure.

# THE LEGAL DOCTRINE OF INFORMED CONSENT: THE STANDARD OF CARE IN INFORMED CONSENT

**Rogers v Whitaker**  
**[1992] 67 ALJR 47**

A Medical Practitioner would breach his/her duty if he/she failed to warn a Patient of a **Material Risk inherent in the proposed treatment or procedure.**

A “**Material Risk**” is defined as one that a reasonable person in the Patient’s position, if warned of the risk, would be likely to attach significance to it.

# THE LEGAL DOCTRINE OF INFORMED CONSENT: THE STANDARD OF CARE IN INFORMED CONSENT

## Walsh v Family Planning Services [1992] 1 IR 496

A prudent Medical Practitioner will disclose all the relevant facts in an operation governing Sexual Capacity. The Court needs to know the following:

- The Medical Practitioner's judgement as to the consequences of disclosure to the Patient, and
- The accepted Medical Practice in such circumstances.

# THE LEGAL DOCTRINE OF INFORMED CONSENT: THE STANDARD OF CARE IN INFORMED CONSENT

**Walsh v Family Planning Services  
[1992] 1 IR 496**

**In Elective Procedures, such as a Vasectomy, there is a duty on the part of the Medical Practitioner to warn the Patient, despite the statistically negligible chance of any complication arising such as Orichalgia which emerged in the post Elective Procedure period.**

# THE LEGAL DOCTRINE OF INFORMED CONSENT: THE STANDARD OF CARE IN INFORMED CONSENT

**Geoghegan v Harris (High Court 21 June 2000)**

A more recent case before the High Court on the issue of pre-treatment disclosure was where the Plaintiff Patient alleged Negligence in the carrying out of a dental implant by the Defendant Dentist, during the course of which a bone graft was taken from the Plaintiff Patient's chin.

This was alleged to have damaged a nerve in the front of the chin and left the Patient with chronic neuropathic pain. It was alleged that the Defendant Dentist failed to disclose in advance of the operation the risk that such pain might be a consequence of the procedure.

# THE LEGAL DOCTRINE OF INFORMED CONSENT: THE STANDARD OF CARE IN INFORMED CONSENT

## **Geoghegan v Harris (High Court 21<sup>st</sup> June 2000)**

The Defendant Dentist accepted that he did not disclose this risk as he was of the view that he had a duty to give information about rare complications where the risk exceeded 1%.

The Defendant Dentist did not consider that this pain was associated with the proposed procedure. The Plaintiff Patient said that he would not have undergone the procedure even if the risk was 0.1%. Kearns J., having reviewed the cases in this area, observed that whichever approach was taken to determining the standard of disclosure, the same conclusion was reached as regards the most critical elements, namely:

# THE LEGAL DOCTRINE OF INFORMED CONSENT: THE STANDARD OF CARE IN INFORMED CONSENT

**Geoghegan v Harris (High Court 21 June 2000)**

- The requirement to give a warning of any Material Risk which is a known complication of a course of treatment or clinical procedure properly carried out; and
- The test of Materiality in Elective Procedures is to enquire whether there is any risk, however exceptional or remote, of grave consequences involving pain for an appreciable time into the future. The statistical frequency of the Material Risk is irrelevant.

# THE LEGAL DOCTRINE OF INFORMED CONSENT: CAUSATION IN INFORMED CONSENT

There are three elements to **Causation** in regard to Informed Consent:

- Was the Patient informed of the **potential complication** in respect of the proposed treatment or procedure?
- If not, would a Respected Body of Medical Opinion have informed the Patient of the complication in respect of the proposed treatment or procedure?
- If the Patient had been informed of the potential complication, would they have gone ahead with the proposed treatment or procedure?

# THE LEGAL DOCTRINE OF INFORMED CONSENT: LEGAL EXCEPTIONS TO INFORMED CONSENT

- **Emergency**

- **Minors**

- **Mental Incompetence**

**THE LEGAL DOCTRINE OF  
INFORMED CONSENT:  
LEGAL EXCEPTIONS TO INFORMED CONSENT**

**EMERGENCY**

**Marshall v Curry [1933] 3 DLR 260**

**Parmley v Parmley & Yule [1945] 4 DLR 81**

**Murray v McMurchy [1949] 2 DLR 442**

# **THE LEGAL DOCTRINE OF INFORMED CONSENT: LEGAL EXCEPTIONS TO INFORMED CONSENT**

## **MINORS**

**W v W [1972] AC 24**

**Gillick v West Norfolk & Wisbech AHA [1985] 402**

**In Re R [1991] 4 AER 177**

**North Western Health Board v W (H) [2001] 3 IR 622**

**Non-Offences Against the Person Act 1997**

**Child Care Act 1991**

# **THE LEGAL DOCTRINE OF INFORMED CONSENT: LEGAL EXCEPTIONS TO INFORMED CONSENT**

## **MENTAL INCOMPETENCE**

**In Re F [1990] 2 AC 1**

**In Re C [1994] 1 WLR 29**

**In Re Ward of Court [1996] 2 IR 73**

**Fitzpatrick v K [2008] IEHC 104**

# **THE LEGAL DOCTRINE OF INFORMED CONSENT: RECENT DEVELOPMENTS IN IRISH LAW**

## **CASE LAW**

**Fitzpatrick v Eye and Ear Hospital  
[2007] Unreported Supreme Court**

**“The Patient-Centred Test is preferable, and ultimately more satisfactory from the point of view of both Doctor and Patient alike, than any Doctor-Centred approach favoured by the Supreme Court in Walsh v Family Planning Services.”**

# **THE LEGAL DOCTRINE OF INFORMED CONSENT: RECENT DEVELOPMENTS IN IRISH LAW**

## **CASE LAW**

**Fitzpatrick v Eye and Ear Hospital  
[2007] Unreported Supreme Court**

**“There are obvious reasons why in the context of elective surgery a warning given only shortly before an operation is undesirable. A Patient may be stressed, medicated or in pain in the period and may be less likely for one or more of these reasons to make a calm as well as reasoned decision in such circumstances.”**

**THE LEGAL DOCTRINE OF  
INFORMED CONSENT:  
RECENT DEVELOPMENTS IN IRISH LAW  
CASE LAW**

**In Re K**

**[2007] Unreported Supreme Court**

**This case approved the ratio in the case of In Re Ward of Court adjudicated on in the Supreme Court in 1995. The ratio being that Medical Treatment may not be given to an Adult Person of full capacity without his/her Consent.**

**THE LEGAL DOCTRINE OF  
INFORMED CONSENT:  
RECENT DEVELOPMENTS IN IRISH LAW  
CASE LAW**

**In Re K**

**[2007] Unreported Supreme Court**

**However the Court also accepted the ratio in  
the case of Attorney-General v X [1992] 1 IR 1  
that a Mother's Personal Autonomy is limited  
where there is a conflict with the legal rights of  
the foetus.**

# **THE LEGAL DOCTRINE OF INFORMED CONSENT: RECENT DEVELOPMENTS IN IRISH LAW CASE LAW**

**In Re K**

**[2007] Unreported Supreme Court**

**According to Justice Hederman in the Supreme Court:**

**“There is no legal recognition of a Mother’s Right of Self-Determination which can give priority over the protection of unborn life. The creation of a new life, involving as it does pregnancy, birth and raising a child, necessarily involves some restriction of a Mother’s freedom of Self-Determination.”**

# **THE LEGAL DOCTRINE OF INFORMED CONSENT: RECENT DEVELOPMENTS**

## **LEGISLATION**

**The Power of Attorney Act 1996**

**Future Legislation**

**Mental Capacity Bill 2008**

**Advanced Directives/Living Wills**

# **THE LEGAL DOCTRINE OF INFORMED CONSENT**

**THANK YOU!**

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