Insights on Medicolegal Issues

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 cesarean section. During the course of cesarean 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:*
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> > *'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.'*
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> *The decision in Marshell 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 total abdominal hysterectomy (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 vaginal hysterectomy (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 health care 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) Regulations, 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) Regulations, 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.

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