Informed choice, consent and the law: the legalities of “yes I can” and “no I won’t”

Informed decision making as a human right


Being able to make decisions about what happens to our bodies is a basic human right – it goes to an individual’s fundamental autonomy, dignity and bodily integrity, as reflected in article 3 of the Universal Declaration of Human Rights, which states that “everyone has the right to life, liberty and security of person.”

To give someone medical treatment without their consent interferes with their dignity and security of person and, while international human rights law does not expressly prohibit this, it is regarded as implicit. Cases concerning the administration of medical treatment without consent have been considered under the sections of the International Covenant on Civil and Political Rights which deal with inhuman or degrading treatment (article 7), liberty and security (article 9) and privacy (article 17).

In Victoria and the ACT, the right to informed consent to medical treatment has been enshrined in human rights legislation. Section 10(2) of the ACT Human Rights Act protects individuals from being subjected to medical treatment without their “free consent”. Section 10(c) of the Victorian Charter of Human Rights and Responsibilities is even more comprehensive in prohibiting medical treatment without “full, free and informed consent”.

Informed decision making as a legal right

Competent adults have the right to accept or refuse medical treatment. This principle was articulated by Cardozo J in Schloendorff v. Society of New York Hospital (1914) 105 NE 92 and quoted in the Australian High Court case of Department of Health & Community Services v JWB & SMB (“Marion’s Case”) (1992) 175 CLR 218:

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 patient's consent commits an assault.

Consent in the context of assault only requires a consumer to understand the broad nature of the proposed treatment, however a care provider risks an action in negligence if he or she does not present adequate information to enable the consumer to make an informed decision. The High Court in the case of Rogers v Whittaker (1992) 175 CLR 479 referred to "the paramount consideration that a person is entitled to make his own decisions about his life" and found that:

The law should recognize that a doctor has a duty to warn a patient of a material risk inherent in the proposed treatment; a risk is material if, in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it.

Women have a legal right to make decisions about their care and care providers have a legal obligation to obtain women’s informed consent before carrying out medical procedures. The fact that a woman is carrying a baby has no impact on a care provider’s obligation to give her full information, or on her legal right to accept or refuse treatment. While there have been no Australian cases on this issue, the UK Court of Appeal has made this very clear in two cases. In Re MB [1997] 38 BMLR 175 CA the Court said:

The law is, in our judgment, clear that a competent woman who has the capacity to decide may, for religious reasons, other reasons, or for no reasons at all, choose not to have medical intervention, even though ... the consequence may be the death or serious handicap of the child she bears or her own death ... The court does not have the jurisdiction to declare that such medical intervention is
lawful to protect the interests of the unborn child even at the point of birth.

In the case of St George's Health Care NHS Trust v. S, R v. Collins and others ex parte S [1998] 3 All ER 673 the court held that:

An unborn child, although human and protected by the law in a number of different ways, is not a separate person from its mother. Its need for medical assistance does not prevail over her rights and she is entitled not to be forced to submit to an invasion of her body against her will, whether her own life or that of her unborn child depends on it.

**Recognition of women as the primary decision makers in maternity care**

The legal position on informed decision making and the right of a pregnant woman to accept or refuse treatment is clear. Yet some care providers are reluctant to recognise that decisions about care during pregnancy and birth should ultimately be made by the woman in question. This viewpoint fails to acknowledge the fundamental autonomy of women as protected by human rights instruments and Australian law. It also opens care providers up to a litigation risk. It is therefore in care providers’ own interests to ensure that women are making their own decisions about care and that those decisions are well informed.

All women should be given general information at the outset of their maternity care about the meaning of informed consent and their rights to receive all of the information they need in order to make informed decisions. This should include a clear statement that the woman can refuse to follow advice and recommendations. This information should also be provided whenever a decision needs to be made during a woman’s maternity care.

Signing a consent form does not, on its own, amount to giving informed consent. Informed consent requires a process of dialogue between a care provider and a consumer, and the signing of a consent form should be the final stage in showing that consent has been given. It does not constitute the entire information-sharing process, nor does it establish that the consent given is valid or informed.

Respecting a woman’s decision-making autonomy also means that a woman must not feel that she is being coerced into making a particular decision. Coercion also puts a care provider at risk in any legal claim where consent is an issue. Many women report that they feel coerced into making decisions to have interventions during pregnancy and childbirth. The clearest example of coercion is perhaps when a woman is told that her baby will die or be severely disabled if she fails to agree to a particular course of action. Less obvious examples that nonetheless impact on a woman’s ability to make free decisions include being forced to make decisions quickly in non-emergency situations or being told she will not have access to a particular model of care if she fails to agree to certain screening tests or other procedures.

Maternity care is no different to any other area of healthcare. Pregnant women have the same human rights and legal rights as everyone else. They have the right to give or refuse consent to medical procedures and to be given the information that they need to make their own informed decisions. Care providers (and women themselves) must have a comprehensive understanding of these concepts not only to ensure that rights are respected and the law followed but so that women are able to make the best possible decisions for themselves and their babies.

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