Canadian Nurses Protective Society

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Consent to Treatment: The Role of the Nurse

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Consent may be implicit or explicit. Holding out an arm to have a blood pressure taken is implicit consent, whereas an ECG or blood gases may require explicit consent. The main types of consent in the health care setting are general consent as required for admission to and basic care in a health care facility and specific consent for particular procedures or therapies to be performed. Consent must be valid and must not have been revoked or withdrawn.[1]

What is valid consent?

Signing a consent form is not sufficient. Six criteria for valid consent have been identified by Canadian courts:[2]

- the consent must be genuine and voluntary;
- the procedure must not be an illegal procedure;
- the consent must authorize the particular treatment or care as well as the particular care giver;
- the consenter must have the legal capacity to consent;
- the consenter must have the necessary mental competency to consent; and
- the consenter must be informed.

To be genuine and voluntary, consent should be obtained without coercion, threat, or undue influence and without the influence of drugs or alcohol. Following the administration of a pre-operative sedative, a patient may not have the capacity to give consent.

What is legal capacity?

Legal capacity is the ability to understand and appreciate the nature and consequences of decision making. A person who has reached the legal statutory age can consent to treatment. Some provinces/territories have enacted legislation which may reduce the age for consent. At common law, minor children have been permitted to consent to treatment or refuse treatment if they can demonstrate an appreciation for the nature and consequences of a particular treatment.[3] Where the minor does not have legal capacity, a parent, guardian or substitute decision maker may be empowered to make the decision.

How is mental competence determined?

Mental competence is the ability of an individual to understand and process information. When authorised professionals assess the competence of an individual, the following factors may be considered: age, disease, level of consciousness, and the presence of drugs or other substances.

What is required for consent to be informed?

The mere giving of consent to be treated is not sufficient; the consent must also be informed. For consent to be informed, sufficient information about material risks should be relayed to the

The Supreme Court of Canada has described obtaining consent as a process, not merely paperwork.

client.[4] This information should be disclosed in easily understood terminology, and should include the consequences of refusing treatment and an explanation of possible alternatives.

Who is responsible for obtaining the consent?

Any touching of a client requires verbal and in some cases, written consent. Legal experts suggest that the person carrying out the treatment should provide the relevant information to the client.[5] This means that a physician should provide the information and obtain consent for medical or surgical interventions. A nurse carrying out an invasive nursing procedure should provide an explanation and document that the explanation was given and consent obtained. Nurses who administer immunizing agents should be aware of disclosure and consent requirements in their particular province/territory.

Who may witness a consent form?

A nurse or other designated person may witness the signing of the consent form even when the physician has explained the procedure elsewhere. Institutional policies should be followed regarding the duration of a previously signed consent form. Witnessing a signature is not a declaration that the witness provided information about risks and alternatives.

Special circumstances:

a) Life Threatening Emergencies

A life threatening medical emergency may make it impossible or impractical to obtain consent. In these situations provincial/territorial legislation as well as hospital or institutional policies and procedures should be strictly adhered to.

b) Research

For research, a higher level of disclosure is required for informed consent.[6] On-going or renewable consent may be required for each specific drug trial, change of dosage or procedure. The person responsible for obtaining the consent may vary depending on the type of research and the process.

c) HIV Testing

HIV testing is not a routine blood test and consequently requires specific consent.[7] The “risks” involved are not just physical, but are also social, psychological and economic.

What are the legal implications of treatment without consent?

Failure to obtain consent can result in professional sanctions, civil liability and/or criminal charges. To minimize these legal risks consent should be: informed, sought by the care giver providing the treatment, documented and obtained by ethical means.

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1. *Ciariarello v. Schacter*, [1993] 2 S.C.R. 119 (S.C.C.).
2. Philpott, Mary, *Legal Liability and the Nursing Process*, W.B. Saunders Company, Canada, Limited, 1985, page 57.
3. *Johnston v. Wellesley Hospital* (1970), 17 D.L.R. (3d) 139 (Ont. H.C.).
4. *Hopp v. Lepp*, [1980] 2 S.C.R. 192, and *Reibl v. Hughes*, [1980] 2 S.C.R. 880.
5. Rozovsky, L.E., and F.A. Rozovsky, *The Canadian Law of Consent to Treatment*, Butterworths, Toronto, 1990, page 17.
6. *Halushka v. University of Saskatchewan* (1965), 53 D.L.R. (2d) 436, 52 W.W.R. 608 (Sask. C.A.).
7. Rozovsky, L.E., and F.A. Rozovsky, *AIDS and Canadian Law*, Butterworths, Toronto, 1992, page 7.