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Medical Malpractice Situations that may be Caused While Obtaining Informed Consent in Unconscious Patients

Bahar TURGUT[1]
[1]Department of Atatürk University, Vocational College of Social Sciences, Erzurum, Türkiye

Mehmet Cenk TURGUT[2]
[2]Department of Orthopedics and Traumatology, Atatürk University Training and Research Hospital, Erzurum, Türkiye

Ali AFSAR[3]
[2]Department of Orthopedics and Traumatology, Atatürk University Training and Research Hospital, Erzurum, Türkiye

ABSTRACT

In our study, the importance of informed consent in medical interventions and the difficulties encountered especially in emergency services are discussed. Informed consent includes the patient's information and consent about the procedure. Informed consent is a legal requirement. However, this process becomes difficult in emergencies, when the patient is unconscious or when the patient's relatives cannot be reached. This study was designed as a case report. In the incident, the patient's relatives are informed and their consent is obtained. This consent must be obtained in writing. However, due to the patient's life-threatening condition and the seriousness of his/her condition, we can say that "if the patient had been conscious, he/she would have consented to the surgical procedures to be performed in order to survive". Therefore, it is also possible to accept the presumed consent in the case. Even if no consent was obtained from the patient's relatives or only verbal consent was obtained, the doctors who performed the surgical procedures fulfilled their duty as doctors and are not legally responsible. For major surgical procedures such as the one in this case, the patient's consent must be obtained in writing.

Keywords: Criminal law, medical malpractice, informed consent, presumed consent, emergency medicine.

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Corresponding author: Bahar TURGUT
E-mail: bahar.karatas@atauni.edu.tr
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Introduction

Medical intervention is the diagnosis, treatment and all other medical practices performed by persons authorized to practice the medical profession in relation to a disease. In order for a medical intervention to be considered lawful, it must meet certain conditions. The most important of these conditions is the patient's informed consent to the medical intervention. Informed consent means that the patient is informed about the medical intervention and gives consent to the medical intervention after this information. However, it may be possible to narrow the scope of the information to be provided due to the urgency of the situation, especially in patients presenting to the emergency department, to fail to obtain the patient's consent because the patient is unconscious, to obtain the consent of the parent, guardian, or patient's relative instead, and to perform the medical intervention by accepting presumed consent in cases where the parent, guardian, or patient's relative cannot be reached. In a decision rendered by the 3rd Civil Chamber of the Court of Cassation, it was emphasized that informed consent need not be obtained in emergencies, stating that "...given the nature of the treatment, since it was an emergency case, there was no circumstance during the process that would require obtaining consent... and that obtaining informed consent could not be expected according to the ordinary course of life..." (Yargıtay 3rd Civil Chamber, 2025).

It is important to obtain informed consent from the patient before all interventional and non-interventional procedures that a medical doctor will apply to his/her patient within his/her professional skills and knowledge in order to protect the physician against possible medico-legal problems. However, the condition of trauma patients presenting to our Orthopedics and Traumatology Clinic may make it impossible to obtain consent in some cases. In such cases, taking into account the general condition and life-threatening situation of the patient, a signature can be obtained from the patient's relatives in order not to interrupt the treatment. In some cases, consent may not be obtained due to the absence of a relative. Since obtaining informed consent requires the physician to first explain the procedure to be performed, the surgeon may, in the emergency room, skip some of these explanatory steps in order to prioritize the patient's health and avoid delaying the intervention.

Case Presentation

A 26-year-old male patient is admitted to the cardiovascular surgery clinic due to vascular injury, multiple trauma and the need for intensive care after being admitted to an external center due to multiple gunshot wounds and assault injuries. The patient was intubated and GCS was 7 at the time of admission to our emergency department. Orthopedically, the patient had entry and exit wounds in the left humerus shaft region consistent with gunshot injury and humerus shaft fracture, in addition to entry and exit wounds in the left femur shaft region consistent with gunshot injury and femur shaft fracture. The patient had pneumothorax, orbital fracture, orofacial injury, vertebral fractures, nasal fracture and distal pulses of the left upper extremity could not be palpated. Due to the patient's general condition and active bleeding, the patient is taken to the operating room and the surgical procedure is started. Simultaneously with the premedication of the patient before the surgical procedure, since the patient was unconscious, the patient's relatives were informed about the procedure and their consent was obtained. Seven surgical departments were involved in the operation of the patient and the patient was taken to the anesthesia intensive care unit after damage-control and definitive surgeries were performed.

Methods

The patient who is the subject of our study was brought to the Emergency Department of Atatürk University Research Hospital by ambulance from an external center in an unconscious state. Since the unconsciousness of the patient may be the subject of many medical malpractice lawsuits, this issue was chosen as the basis of our article, and evaluations were made in light of current case law and legislation.

Conditions of Lawfulness of Medical Intervention

A medical intervention is a medical practice performed by a person authorized to practice the medical profession, which includes procedures such as examination, diagnosis, treatment, analysis, surgical intervention, psychiatric intervention and prescription of medication (Cantürk, 2015). Medical interventions can only be considered as a lawful intervention if certain conditions are met (Koca, 2009). Accordingly, in order for the medical intervention to be applied to the patient to be considered lawful;

1. The medical intervention to be applied to the patient must be performed by a person authorized to practice the profession of medicine (Özgenç, 2022). If the medical intervention to be applied to the patient requires specialization, the doctor concerned must be a specialist in this field (Koca & Üzülmez, 2023).
2. The medical intervention to be applied to the patient must be for the purpose of diagnosing and treating a disease (Altunkaş, 2015).

3. The medical intervention to be applied to the patient must be carried out in accordance with the data of medical science and the doctor must act in compliance with the duty of care and diligence (Ümit, 2017). At this point, the prohibition of increasing the risk should not be ignored (Hakeri, 2024). Namely, if the consequences that are likely to occur if the procedure is performed are more severe than the consequences that are likely to occur if the procedure is not performed, the risk to the patient's health should not be increased, in other words, the medical intervention should be abandoned.

4. Medical intervention requires the patient's consent (Artuk et al., 2023). When obtaining consent, the patient must have legal capacity and be an adult (Badur, 2017).

5. The patient's consent must be obtained duly and after the patient has been duly informed about the medical intervention (Arı, 2024).

6. The patient who consents to the medical intervention must be competent to give consent (Koç, 2007). In other words, the patient must be able to understand the information given to him/her (Yılmaz, 2024). If the patient is not competent to give consent, his/her parent or guardian must give consent (Koç, 2007).

The Concept of Informed Consent

In Article 2 of the Patient Rights Regulation (HHY), the transfer of information about the procedures to be performed before medical interventions to the patient is defined as "enlightenment"; and obtaining the patient's consent after being informed is defined as "informed consent". A person who has the right to lead a healthy life also has the right to request and consent to medical interventions to be carried out in order to improve his/her health when it deteriorates (Serel, 2016). However, consent alone does not render a medical intervention lawful. This consent is meaningful if it is given after the patient has been informed (Teyin, 2015). The patient's consent to this intervention after being sufficiently informed about the effects and consequences of the medical intervention is informed consent (Yenerer, 2003). How one should proceed at the stage of obtaining informed consent has been explained in a decision of the 13th Civil Chamber of the Court of Cassation. According to the decision, "The patient himself/herself determines the persons, other than the patient, who are to be informed. Any medical intervention may be carried out with the free and informed consent of the person. Consent that has been obtained through pressure, threat, incomplete disclosure, or deception is invalid. In emergencies, and in cases where the patient is not of legal age, or is unconscious, or unable to make a decision, the consent of his/her legal representative shall be obtained.". (Yargıtay 13th Civil Chamber, 2019).

There are two important issues to be considered in terms of the legality of informed consent (Polat, 2015). Firstly, the patient must be informed about the medical intervention to be performed in a way that he/she can understand socio-culturally and without using technical terms (Çelik, 2024). Secondly, the patient must consent to the medical intervention by stating that he/she understands the information provided to him/her (Güney, 2020).

The consent given by the patient without being sufficiently informed about the medical intervention to be applied to him/her is legally invalid (Özgenç, 2022). Therefore, medical interventions based on this consent are also unlawful. Medical interventions performed without a valid patient consent, except in cases where the doctor is obliged by law to treat the patient and in cases of necessity, are incompatible with human dignity and legally give rise to the doctor's responsibility. However, exceptions are made to this rule when public health is in question. For example, according to Article 67 of the Public Hygiene Law No. 1593, medical intervention must be applied to the patient who does not give consent in order to protect public health. In this case, the doctor is considered to have a diagnosis and treatment obligation and his/her legal responsibility does not arise.

Scope of Informed Consent

The scope of informed consent is defined in Article 15 of the HHY. Accordingly, the cause of the disease, by whom and how the intervention will be performed, alternative treatment options, possible risks of the intervention, potential benefits expected as a result of the intervention, possible complications, recommendations regarding the use of medication, risks that may occur in case of refusal of treatment and information on the possible course of the disease should be included within the scope of the disclosure. Therefore, the doctor should inform the patient about the patient's health condition, the disease and the course of this disease, the possible treatment method and process, the medications, the possible side effects of these medications and the risks that the patient will face if he/she does not accept the treatment (Mahmutoğlu & Karadeniz, 2021).

The more urgent the medical intervention to be made to the patient, the narrower the scope of the disclosure. In other words, in urgent cases, the stage of informing the patient should be accelerated in order to provide medical intervention as soon as possible. However, if the medical intervention is not urgent, the scope of the information should be expanded (Ozanoğlu, 2003).

If the patient is not in a position to handle the enlightenment due to his/her psychological condition, the scope of the enlightenment should be narrowed (Wiegand, 1994). In this case, the doctor should act cautiously and limit the information to be given to the patient if it will be beneficial for the treatment (Ünver, 2020). In particular, unfavorable odds regarding the patient's chances of recovery should be concealed from the patient. According to Article 19 of the HHY, information about the diagnosis of the disease may be withheld from the patient in cases where the patient would be adversely affected morally if informed, or if the course and outcome of the disease is deemed grave.

Form of Informed Consent

It is sufficient for the patient to verbally declare his/her consent to the medical intervention. Except for major surgical procedures, written consent is not required. This is because, pursuant to Article 70 of the Law No. 1219 on the Practice of Medicine and Medical Arts, doctors must obtain the patient's consent for any procedure they will perform, but only before major surgical procedures, the patient's consent must be obtained in writing. However, in our opinion, in order to provide legal assurance for the doctor, the consent should be obtained in writing and the use of standard forms should be avoided when obtaining consent in order to prove that it is done individually (Ferrara, 2013).

Presumed Consent

Presumed consent is invoked if the patient's consent for the medical intervention cannot be obtained and the parent, guardian or a relative cannot be reached (Kesmen Kayacan, 2024). If the patient is not able to make a statement, the consent of the parent, guardian or relative is taken for medical intervention (Alan, 2022). However, in emergencies where these persons cannot be reached, if the benefit to be protected is greater than the harm to be done, the patient's consent is considered to exist (Artuk et al., 2023).

In the case of presumed consent, if it can be said that the patient would have consented to this medical intervention if he/she were conscious, the procedures performed are in accordance with the law (Mahmutoğlu & Karadeniz, 2021). In this case, the procedures performed are within the scope of the fulfillment of the duty of a doctor according to Article 70 of the Law on the Practice of Medicine and Medical Arts. According to Articles 24/7 and 31 of the HHY, medical intervention is performed without the patient's consent when there is a risk to life or organ loss while the patient is unconscious. In this case, presumed consent is in question.

Results

In the case, the patient's relatives were informed and their written consent was obtained. Such consent must be obtained in writing. However, given that the patient's life was at risk and the gravity of his condition, it may be presumed that "had the patient been conscious, he would have consented to the surgical interventions performed in order to survive." For this reason, the acceptance of presumed consent is also possible in the case that is the subject of this study. Even in the event that no consent was obtained from the patient's relatives, or that only verbal consent was obtained, the physicians who performed the surgical intervention would not have been held legally liable, since they acted on the basis of presumed consent and fulfilled their duties as physicians.

Discussion

In the case under review, upon arrival at the emergency department, the patient was intubated, actively bleeding, and had no palpable distal pulse. The physicians immediately transferred the patient to the operating room and commenced the surgical intervention. As the patient was unconscious, he was not in a position to comprehend any information that might have been conveyed to him. Consequently, the patient lacked the legal capacity to give consent at that time. For this reason, the patient's relatives were informed of the medical intervention to be performed, and their written consent was obtained. In major surgical interventions of this kind, the patient's consent must be obtained in writing. However, where the patient is unable to make a statement due to unconsciousness, as in the present case, the written consent of the patient's parent, guardian, or relative must be obtained for the surgical intervention. If these persons cannot be reached at the time of the medical intervention, presumed consent comes into consideration. This is because, pursuant to Articles 24/7 and 31 of the HHY, medical intervention is performed without the patient's consent in cases where the patient is unconscious and there is a risk to life or of organ loss. In such circumstances, presumed consent applies.

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