Consent: luck or law?

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ABSTRACT

INTRODUCTION The aim of this study was to identify whether clinicians are obtaining a valid consent for surgery, and ascertain the parents' perception of parental responsibility when giving consent for their children.

PATIENTS AND METHODS Adults consenting for 100 children were questioned about the possession of parental responsibility, and their understanding of the concept.

RESULTS Only 4 children had surgery without valid consent, these forms being signed by fathers without parental responsibility. However, only 5% of the sample stated that parental responsibility was required. More than 80% believed that cohabitation was a sufficient qualification to provide consent; fewer than 15% recognising any influence of marital status. It seems that, although 96% of consenters had parental responsibility, the validity of their consent was a product more of luck than of lawful behaviour.

CONCLUSIONS The results demonstrate a wide gulf between the standards set by the Children Act 1989 and common practice, as perceived by parents. Furthermore, this reveals a significant disparity between the principles behind the statute, and the role that parents believe that they play in the 21st century.

KEYWORDS

Consent – Parental responsibility – Children Act 1989

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Consent is required for any uninvited physical contact. Doctors need to touch their patients, whether for simple examination or for more invasive interventions. Although oral consent is adequate in English law for any of these procedures, there is an understandably low threshold for obtaining written consent.

From whom should consent be obtained, whether oral or written, when dealing with child patients?

It is clear that any doctor seeking consent should know that only those persons with parental responsibility for a child can provide legal consent, assuming that the child has not achieved sufficient capacity to provide his or her own consent. However, it becomes clear from teaching law to doctors that surprisingly few possess this information.

Are parents in a similar situation? If they are, then paediatric surgeons will need to be far more prescriptive when obtaining consent, should they wish to ensure that it is valid. After all, invalid consent means that surgery is being performed without consent.

At issue in this research is whether the adult who consents for the child is aware of their ability (or otherwise) to provide it. Additionally, we explore the adult consenters' understanding of the concept of parental responsibility.

Patients and Methods

One hundred children admitted for either elective or emergency surgery over a 1-month period were studied prospectively. One investigator (KE) interviewed the adult who had consented for surgery, following the child's return to the ward from theatre.

A standardised questionnaire (Appendix 1) was used as a script for this interview, and the questions were always read from the sheet, to ensure uniformity. Additionally, the adult was asked who they believed could give consent on behalf of the child, including the influence of marital status. The answers were recorded at the time of the interview.

Results

It can be seen that 75 consent forms were signed by the mother; 17 by married fathers; 4 other forms by either an adult with parental responsibility, or by the competent children. This leaves the 4 forms signed by unmarried fathers, none of whom had acquired parental responsibility. In each of these cases, the consent was invalid (Fig. 1). Technically (in a narrow, legal sense!) these children had been assaulted.

Figure 1 Who signed the consent form?

The majority (79) of the adults studied believed that either parent could provide the consent, although 4 thought that both parents should sign. Two mothers thought that the right to consent was exclusively theirs. Eight adults believed that the consent could be given by whoever provided care or residence, irrespective of their relationship to the child. Only 5 cited parental responsibility as determinant of who could provide consent (Fig. 2).

Only 15 were aware of the influence that marital status can have on the ability to provide valid consent. Marital status was thought to be irrelevant by 82, provided the parents were living together (Fig. 3). Within this group, a diverse selection of responses was obtained, revealing that many

provided valid consent mainly by chance. Amongst these responses, a father explained that he had signed the consent form to protect the mother from guilt in case anything went wrong. A second father signed the consent form because it did not involve a religious issue, for example circumcision. Another father signed because he was not carrying the child at the time. A mother would have been happy for a special friend (who did not have parental responsibility) to sign, and elected for that friend to escort her child to theatre while she stayed in the ward.

Discussion

If the consent is invalid, there is no consent.¹ In the UK, only those with parental responsibility (PR) can provide valid

Figure 2 The consenter's opinion of who should sign the consent form.

Figure 3 Does the consenter believe that marital status influences the ability to give consent?

consent for an 'incompetent' child. Almost invariably, the child's natural mother has PR, unless the child has been adopted away from her.

The man who is acknowledged by the mother as the father will have PR, provided that he was married to the mother at the time of the child's birth.² However, in children born before December 2003, unmarried fathers cannot automatically be assumed to have PR. For children born after this date, unmarried fathers automatically obtain PR if their name is registered on the birth certificate.⁵

Parental responsibility can be obtained with the consent of the court, by a very simple and inexpensive procedure. This is obviously mainly a provision for the unmarried father to assume responsibility, a move much encouraged by the State. Similarly, step-parents are able to obtain PR, because it does not come automatically with the children they are acquiring by marriage. Additionally, in some circumstances, PR is conferred on other adults who share the care of a child, and the local authority.

It appears that although the vast majority of our patients were operated on with valid consent, in many cases this was a matter of luck. In most cases, children are brought in for surgery by their mothers, so it could be anticipated that valid consent would be provided. However, there is a profound lack of understanding of the rules governing consent. Children are being presented in good faith for surgery by adults who have no ability to provide consent.

One may take the view that it does not much matter. All those involved are working in the best interests of the child,

to provide a surgical procedure. What does it matter if the consent is invalid?

The simplest analogy is with incomplete driving documentation. Providing you have no accidents, and the police do not stop you, then who cares? Firstly, your behaviour is contrary to the law. Additionally, if you are stopped (or worse, have an accident) then your imperfect documentation will cost you dearly, possibly out of all proportion to the incident that prompted the scrutiny of your papers.

So, dear reader, we are hoping you are now asking yourself what happens if there is a surgical 'misadventure', and it is discovered that you were operating without consent?

Conclusions

The results demonstrate a wide gulf between the standards set by the *Children Act 1989* and common practice, as perceived by parents. Furthermore, this reveals a significant disparity between the principles behind the statute, and the role that parents believe that they play in the 21st century.

References

1. Grubb A. *Principles of Medical Law*, 2nd edn. Oxford: OUP, 2004.
2. *Children Act 1989*. s2(1).
3. *Adoption and Children Act 2002* s 111 amending *Children Act, 1989*.

See next page for **APPENDIX**

APPENDIX 1

QUESTIONNAIRE TO DETERMINE WHO GIVES CONSENT FOR SURGERY

*Note: This sheet should be used as a prompt and filled in by the designated doctor performing the study.
It should not simply be left with the parents to fill it in.*

		Please Tick
ELECTIVE	Day surgery	_____
	In-patient	_____
EMERGENCY		_____

Age of child: _____ Date of surgery: _____/_____/_____

Sex: _____

Indications for surgery: -----

What is your relationship to this child?

Please Tick

1. Birth mother
2. Natural father, married to mother
3. Natural father, unmarried, but registered on birth certificate
4. Adoptive parent
5. Stepfather
6. Friend of patient/family (specify)
7. Stepmother
8. Natural father, not married to mother
9. Natural father, unmarried, not registered on birth certificate
10. Other relative (specify)
11. Representative of social services (specify)
12. Other (specify)

If you are not in categories 1–4, have you obtained parental responsibility (Y / N, please circle)

and how have you done this? -----

Do you have any documentation of parental responsibility with you today? -----

In your opinion, who can give consent for surgery on behalf of a child? -----

Does the marital status in anyway influence the consent form? -----