

## MEDICINE AND THE LAW

# Failure to obtain informed consent – is it a criminal offence?

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There is a plethora of literature that suggests that a failure by a medical practitioner to obtain informed consent from a patient amounts to assault. Assault is a loaded concept in South African (SA) law, and has applicability to both criminal and civil law. When one thinks of the term ‘assault’, it is normally associated with a criminal activity. It is well documented that a civil case can be levelled against a medical practitioner who fails to obtain informed consent from a patient. However, the criminal law aspect has not been explored in the same level of detail. This article aims to delve deeper into this aspect by outlining the requirements for assault as defined by the SA common law, and to evaluate whether a criminal offence has actually been committed by a medical practitioner in the event that proper informed consent was not obtained.

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The practice of obtaining informed consent has its history rooted in medicine and medical research, in terms of which disclosure of information as well as withholding of certain information occurs daily.<sup>[1]</sup> South African (SA) law has various instruments that specifically provide for the right to informed consent. The Constitution is the first port of call. Section 12 (2) states that ‘Everyone has the right to bodily and psychological integrity, which includes the right – (a) to make decisions concerning reproduction; (b) to security in and control over their body; and (c) not to be subjected to medical or scientific experiments without their informed consent.’<sup>[2]</sup> The National Health Act No. 61 of 2003 makes it abundantly clear in terms of section 7 that a health service may not be provided to a patient without the patient’s informed consent, subject to section 8 and the subsections of section 7.<sup>[3]</sup> SA case law also highlights the importance of informed consent.<sup>[4]</sup> McQuoid-Mason<sup>[5]</sup> refers to Smith,<sup>[6]</sup> who observes that ‘obtaining proper informed consent is usually regarded as a time-consuming task that is a diversion from the work for which a surgeon is uniquely qualified. He goes on to say that it is abundantly clear in law that there is a definite obligation on the part of the healthcare practitioner to ensure that informed consent is obtained from a patient before operating on him/her.’<sup>[5]</sup>

The question is, what recourse is available to a patient whose right to informed consent has been violated? ‘In the absence of informed consent, an invasive medical intervention constitutes assault.’<sup>[7]</sup> Generally speaking, there are three options available to an aggrieved patient – (s)he may lay a charge against the healthcare practitioner with the Health Professions Council of SA (HPCSA), and/or (s)he may institute action against the healthcare practitioner in a civil court, and/or (s)he may lay a criminal charge. The former options have been utilised, and healthcare practitioners have been sanctioned accordingly.<sup>[8]</sup> The standard of proof utilised in such circumstances is on a balance of probabilities: the complainant will have to show that his/her version of events is more probable than that of the defendant.

The question of criminal liability for failure to obtain informed consent has not been dealt with in any kind of detail under SA law. This article will lay out the criteria for assault as defined by the SA common law. There is no piece of legislation that outlines what an assault is under our legal system, hence we will extrapolate the elements of assault from case law. The article will look at two scenarios: failure to obtain informed consent for purposes of surgery, and failure to obtain informed consent in general. The elements of the criminal law offence of assault will be applied to these situations to investigate whether such a charge can be upheld in a court of law.

## What constitutes assault under criminal law?

Assault is defined as ‘unlawfully and intentionally applying force to the person of another, or inspiring belief in that other person that force is immediately to be applied to him or her.’<sup>[4]</sup> Essentially, there are three elements, which are: ‘(1) unlawfulness; (2) force or apprehension of force; and (3) intention.’<sup>[9]</sup> Each of these elements needs to be proven beyond a reasonable doubt by the state in order to secure a conviction of assault. One could also be charged with assault with intent to do grievous bodily harm, depending on the nature of the harm, in which case the state would have to prove the following: ‘(1) assault; (2) grievous bodily harm; and (3) intent.’<sup>[9]</sup>

The element of force is relatively straightforward, and this includes unlawful touching, causing of bruising, wounding, breaking or mutilation.<sup>[9]</sup> With regard to the element of intention, it is important to note that the accused must have ‘an intention to assault’ (and to assault unlawfully): negligence will not be sufficient to sustain the charge.<sup>[10]</sup>

This brings us to the element of unlawfulness. ‘There are a number of circumstances in which assault is justified or treated by the law as not unlawful.’<sup>[9]</sup> The circumstance that is of importance to us is that of consent. Generally, consent is not a competent defence to a charge of assault,<sup>[11]</sup> but there are two circumstances that are recognised by law as being valid – sports, such as boxing for example, and ‘therapeutic

surgical operations performed by the surgeon with the consent of the patient.<sup>[9]</sup>

This aspect requires further consideration. We know that it is trite in SA law that the type of consent required is informed consent. If this is lacking, does it mean the normally accepted defence of consent falls away? There are a number of aspects that make up informed consent, and it is beyond the scope of this article to discuss these. It is important to consider what happens in the event that it is established that proper informed consent was not obtained. This, of course, would depend on the factual matrix that a court may be presented with.

Let us assume that a surgeon performed an operation, and for whatever reason, failed to obtain informed consent from the patient in circumstances when this could and should have been done. Here, force would have been applied, and thus this element would be satisfied. (S)he would have had the necessary intention to cause harm (by cutting open the patient, for example), but the question that would arise is: did (s)he have the intention to act unlawfully? Here *dolus eventualis* would suffice: did (s)he subjectively foresee the possibility of acting in an unlawful manner and causing harm to the patient, and did (s)he reconcile him- or herself to that possibility?<sup>[12]</sup> If the answer to these questions is yes, then the element of intention will be satisfied. This element needs to be proven beyond a reasonable doubt. Remember that negligence will not suffice, so it will be of no avail to the state to prove that another healthcare practitioner would have acted differently in the circumstances. The test is a subjective one. It is a difficult task to know what one's true or direct intention is, hence *dolus eventualis* is used as a means to assist in this regard.

In the event that these two elements are satisfied, we move on to whether the action was unlawful. The healthcare practitioner would normally utilise consent as a defence, but if this was not complied with, i.e. informed consent was not obtained, then it would seem that the conduct of the practitioner could potentially fall outside the ambit of what is protected by the law.

The other scenario that was outlined above was a situation where informed consent was not obtained, but there was no surgery performed. For instance, a healthcare practitioner may have consulted with a patient and prescribed a certain course of action for the patient – for instance (s)he may have recommended that the patient stop eating dairy products, but did not explain the other options available. Applying the elements above, there is no force that has been applied, either directly or indirectly. In order to sustain a criminal conviction, all the elements of assault need to be satisfied and proven beyond a reasonable doubt. Seeing that the first element cannot be proven, it would be pointless carrying on the exercise. We have already outlined that for a conviction of assault, the required form of fault is intention, and negligence will not suffice. At best, in this scenario, the practitioner could be held liable for contravening the National Health Act, and there might be a civil action provided the patient is able to prove that the healthcare practitioner acted in a manner that resulted in harm.

## Conclusion

The article considers the question of whether healthcare practitioners could be held criminally liable for assault if they fail to obtain informed consent from their patient. The article started off by establishing that informed consent is an important principle provided for in terms of our law. It then turned to look at the issue of assault. Assault is quite loosely used in the literature, and is normally related to instances involving a civil action. This article focused squarely on criminal liability, and laid out the core elements of assault as provided for in terms of SA law. These elements are (i) unlawfulness; (ii) force or apprehension of force; and (iii) intention. The article considered two scenarios namely, failure to obtain informed consent when a patient submits for a surgical operation, and a situation where a healthcare practitioner prescribes a course of action without obtaining the patient's informed consent. The prospects of success of the state securing a conviction in the latter instance are virtually non-existent. However, the former scenario gives rise to a situation where each of the elements could potentially be proven by the state. These elements need to be proven beyond a reasonable doubt, and they are not without significant challenges. The state would have to prove that the healthcare practitioner had the necessary intention, i.e. the intention to act in a manner that causes harm and to do so unlawfully, and they would also need to show that informed consent was not obtained. Should they be able to do so, then for all intents and purposes, the failure to obtain informed consent would amount to the criminal law offence of assault.

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