BEYOND MEDICAL PATERNALISM: A CRITICAL ANALYSIS OF THE JUDICIAL APPROACH TO INFORMED CONSENT

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ABSTRACT

Paternalism in healthcare, also known as medical paternalism, refers to the intentional limitation of a patient's autonomy by a healthcare provider, justified by the goal of helping the patient. This concept has historical roots in India and was once considered necessary in certain situations, but growing awareness of patients' rights and bodily autonomy has led to a reassessment of this approach. In the context of healthcare, medical paternalism is often observed when a doctor makes decisions for the patient without their involvement or consent. While such actions may be necessary in some cases, it raises ethical and legal questions about the extent of a patient's right to self-determination. The legal remedies for medical negligence are heavily based on the presence of informed consent and full disclosure by healthcare providers, among other factors. In landmark judgments, the judiciary has interpreted informed consent as a fundamental right of patients. However, whether these judgments should be followed strictly or only in spirit remains open for discussion. The article aims to focus on the fundamental elements of informed consent as understood in medical jurisprudence and the necessary extent of medical paternalism in certain situations. The primary focus is to ensure that patients understand the risks and benefits of the treatment they are receiving, and they have the right to make decisions about their care based on their values, beliefs, and preferences.

Introduction:

The word paternalism refers loosely to acts of treating adults as a benevolent father treats his children. It is defined as 'The intentional limitation of the autonomy of one person by another, where the person who limits autonomy justifies the action exclusively by the goal of helping the person whose autonomy is limited. [1] It is a moral stance that places the principle of beneficence above respect for autonomy.

Joel Feinberg, [2] a renowned philosopher, has proposed two types of paternalism: weak and strong paternalism. Weak paternalism pertains to interventions made to protect individuals from self-harm caused by inadequate information or comprehension. Such interventions are intended to enable individuals to make informed decisions, and their autonomy is not necessarily compromised. In contrast, strong paternalism involves overriding an individual's autonomy to prevent them from making choices that could potentially harm them, even if they are competent and well-informed. As strong paternalism represents a more significant infringement on individual autonomy, it is often more contentious.

Weak paternalism may be justified under specific conditions where an individual's autonomy is compromised or substantially nonautonomous. These conditions may include the influence of psychotropic drugs, physical distress such as painful labor, or a medical condition that affects decision-making capacity. Thus, in situations where an individual is substantially incapacitated due to illness or weakness, a medical professional who overrides their preferences in the interests of their medical welfare is acting justifiably through weak Paternalism.

The increasing recognition of human rights, alongside the involvement of the State in safeguarding these rights through legislative mandates, has brought patient autonomy, as against paternalism, to the forefront of medical jurisprudence. This has been highlighted through various judicial interpretations that emphasize the importance of patient autonomy in healthcare decision-making. Thus, the conflict between weak paternalism and patient autonomy has led to a state where decision-making for the overall benefit of patients is

[1] Beauchamp, Tom L., and McCullough, Laurence B. 1984. Medical Ethics: The Moral Responsibilities of Physicians. Englewood Cliffs, NJ: Prentice-Hall.
[2] Feinberg, Joel. 1986. Harm to Self. Vol. III, The Moral Limits of Criminal Law. New York: Oxford University Press.

complicated. This has resulted in the evolution of the definition, scope, and complex conundrum of consent, which has varied legal implications.

Consent, Real consent and Informed Consent:

According to The Indian Contract Act, 1872

> 13. 'Consent' defined. —Two or more persons are said to consent when they agree upon the same thing in the same sense. "
>
> 14. 'Free consent' defined. —Consent is said to be free when it is not caused by coercion, undue influence, fraud, misrepresentation, mistake…

The Indian Penal Code, 1860 states:

> 90. Consent known to be given under fear or misconception. —A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or Consent of insane person. —if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or Consent of child. —unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

The definitions underscore the necessity of achieving a meeting of the minds and eliminating factors such as mistake, undue influence, misconception of facts, misrepresentation etc. in order for consent to be deemed valid. The statutory provisions mainly address the legal form and essential components of the valid consent, but they do not adequately elucidate the fundamental principles of requisite disclosures necessary for its attainment.

The Supreme Court of India has expounded on the essential information that must be disclosed in a consent for it to be deemed legally valid. In Samira Kohli vs. Dr. Prabha Manchanda[3] the Court has elaborated thus…

[3] Samira Kohli vs. Prabha Manchanda Dr. & ANR 1(2008)CPJ 56 (SC)

> "14. Consent in the context of a doctor-patient relationship, means the grant of permission by the patient for an act to be carried out by the doctor, such as a diagnostic, surgical or therapeutic procedure. …. Except where consent can be clearly and obviously implied, there should be express consent. There is, however, a significant difference in the nature of express consent of the patient, known as 'real consent' in the UK and as 'informed consent' in America. In UK, the elements of consent are defined with reference to the patient and a consent is considered to be valid and 'real' when (i) the patient gives it voluntarily without any coercion; (ii) the patient has the capacity and competence to give consent; and (iii) the patient has the minimum of adequate level of information about the nature of the procedure to which he is consenting to. On the other hand, the concept of 'informed consent' developed by American courts, while retaining the basic requirements consent, shifts the emphasis to the doctor's duty to disclose the necessary information to the patient to secure his consent. 'Informed consent' is defined in Taber's Cyclopedic Medical Dictionary thus : "Consent that is given by a person after receipt of the following information : the nature and purpose of the proposed procedure or treatment; the expected outcome and the likelihood of success; the risks; the alternatives to the procedure and supporting information regarding those alternatives; and the effect of no treatment or procedure, including the effect on the prognosis and the material risks associated with no treatment. Also included are instructions concerning what should be done if the procedure turns out to be harmful or unsuccessful. "

Thus, the components of an informed consent are extensive and impose a significant responsibility on healthcare providers to ensure their proper execution.

The Principles relating to Consent :

The Apex Court, in Samira Kohli vs Dr. Prabha Manchanda, explored the principles underlying the Consent as:

> 32…. : (i) A doctor has to seek and secure the consent of the patient before commencing a 'treatment' (the term 'treatment' includes surgery also). The consent so obtained should be real and valid, which means that : the patient should have the capacity and competence to consent; his consent should be voluntary; and his consent should be on

the basis of adequate information concerning the nature of the treatment procedure, so that he knows what is consenting to.

(ii) The 'adequate information' to be furnished by the doctor (or a member of his team) who treats the patient, should enable the patient to make a balanced judgment as to whether he should submit himself to the particular treatment or not. This means that the Doctor should disclose (a) nature and procedure of the treatment and its purpose, benefits and effect; (b) alternatives if any available; (c) an outline of the substantial risks; and (d) adverse consequences of refusing treatment…. A balance should be achieved between the need for disclosing necessary and adequate information and at the same time avoid the possibility of the patient being deterred from agreeing to a necessary treatment or offering to undergo an unnecessary treatment.

(iii) Consent given only for a diagnostic procedure, cannot be considered as consent for therapeutic treatment. Consent given for a specific treatment procedure will not be valid for conducting some other treatment procedure. The only exception to this rule is where the additional procedure, though unauthorized, is necessary in order to save the life or preserve the health of the patient and it would be unreasonable to delay such unauthorized procedure until the patient regains consciousness and takes a decision.

(iv) There can be a common consent for diagnostic and operative procedures where they are contemplated. There can also be a common consent for a particular surgical procedure and an additional or further procedure that may become necessary during the course of surgery.

(v) The nature and extent of information to be furnished by the doctor to the patient to secure the consent should be of the extent which is accepted as normal and proper by a body of medical men skilled and experienced in the particular field.... "

Upon critical examination of the aforementioned principles, the following inferences may be deduced:

1. The prescribed form of informed consent serves to enable patients to make balanced decisions, but the responsibility of determining the level of information considered adequate remains largely with treating physicians.

2. The drive towards greater objectivity in these principles has led to a broadening of their scope, potentially facilitating the implementation of more paternalistic judgments.

3. Subjectivity may inadvertently seep into the informed consent process, as the choice of alternative procedures and the evaluation of associated risks are contingent upon the expertise of the professional.

The interrelation between Informed Consent, Therapeutic Privilege, and Weak Paternalism

In an Indian context, the concept of 'therapeutic privilege' in relation to 'the Informed consent' is multifaceted, as highlighted by the Indian Supreme Court in the case of Samira Kohli vs. Prabha Manchanda. The Court recognized that in resource-limited government healthcare sectors, the use of therapeutic privilege may be necessary to ensure that essential medical care is delivered to patients in need.

> 26. In India, the majority of citizens requiring medical care and treatment fall below the poverty line. Most of them are illiterate or semi-literate. They cannot comprehend medical terms, concepts, and treatment procedures. They cannot understand the functions of various organs or the effect of removal of such organs. They do not have access to effective but costly diagnostic procedures. Poor patients lying in the corridors of hospitals after admission for want of beds or patients waiting for days on the roadside for an admission or a mere examination, is a common sight. For them, any treatment with reference to rough and ready diagnosis based on their outward symptoms and doctor's experience or intuition is acceptable and welcome so long as it is free or cheap; and whatever the doctor decides as being in their interest, is usually unquestioningly accepted. They are passive, ignorant and uninvolved in treatment procedures.. …. What choice do these poor patients have? Any treatment of whatever degree, is a boon or a favor, for them. The stark reality is that for a vast majority in the country, the concepts of informed consent or any form of consent, and choice in treatment, have no meaning or relevance. "

Thus, the concept of therapeutic privilege is implicitly accepted, wherein healthcare providers are entrusted with the moral mandate of relieving patients of their sickness. The above

observation, by the Apex Court, also highlights the challenges faced by healthcare service providers in complying with the rigorous requirements of informed consent mandated by law.

Weak Paternalism, thus, seems to be implicitly recognised in the form of therapeutic privilege wherein the Doctor is permitted to make decisions for those who are challenged to understand the intricacies of therapeutic procedures.

Conclusion:

Despite being rejected and deemed inappropriate, medical paternalism appears to be accepted in a weaker form as implied by the Supreme Court in its judgments in India. It is also recognized as necessary in a significant proportion of cases, particularly in government healthcare sectors, due to socio-cultural factors that may impact the efficient delivery of healthcare services.