

## Being Admitted to the Hospital is Not Implied Consent

Written by Cristen Pascucci

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Even in 2017, women's consent rights in childbirth are disturbingly unclear to the professionals and institutions delivering their medical care. One aspect is the idea of "implied consent"—a concept mischaracterized by hospitals to a number of women who have contacted me, and sometimes used to justify violations of their dignity and rights.

Specifically, when these women have complained to their hospitals about receiving one or more non-consented or forced procedures in birth, they were told that their explicit consent was not necessary because they had a) agreed to be admitted to the hospital or b) signed blanket consent forms giving the medical staff permission to treat them. Sometimes these hospitals refer to this, erroneously, as "implied consent." The idea is that once the women were admitted or signed those forms, they should no longer have had the expectation that the care team must obtain consent for each procedure during treatment—including medication, surgical cuts, and procedures performed on and through the vagina—but, rather, expect that the care team had the authority to administer whatever treatment they chose for the duration of that patient's labor or hospital stay. Put another way, from the perspective of the hospital, these women had forfeited their rights to informed consent and refusal in order to give birth in their facilities.

# Being Admitted to the Hospital is Not Implied Consent

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INFORMED CHOICE



By Cristen Pascucci

**E**ven in 2017, women's consent rights in childbirth are diminishing, not least to the professionals and institutions following their medical care. One specific idea of "implied consent"—a concept first characterized by hospitals in a number of women who have contacted me, and sometimes used to justify violations of their dignity and rights.

Specifically, when these women have complained to their hospitals about receiving cesarean or non-consented or forced procedures in birth, they were told that their explicit consent was not necessary because they had already agreed to be admitted to the hospital or to sign a hospital consent form giving the medical staff permission to treat them. Sometimes these hospitals refer to this, incorrectly, as "implied consent." The idea is that once the women were admitted or signed these forms, they should no longer have had the expectation that the care treatment obtain consent for each procedure during treatment—including medication,

surgical care, and procedure performance of one and through the vagina—but, rather, expect that the care team had the authority to administer whatever treatment they chose for the duration of that patient's labor or hospital stay. Put another way, from the perspective of the hospital, these women had forfeited their rights to informed consent and refused to give birth in their facilities.

This is how hospitals in wrong, legally and ethically. First, let's take a critical look at this idea by pulling it back to all medical care—not just Labor & Delivery departments. We can make this comparison because patients are patients, whether they are in the emergency department or in Labor & Delivery. Patients in Labor & Delivery do not have different, or fewer, legal rights than other patients. Pregnant or not, you retain your basic legal rights. (Caveat: There are certain states where fetal personhood laws conflict with this idea and make things a little more tricky, but there is no federal, statutory law that covers a different set of rights or restricts the rights of pregnant people in the United States.)

Neither in these cases that involve obstetricians or L&D departments with special legal authority over the medical care of their patients who are pregnant. Obstetricians and hospitals certainly have tried to claim this right in court—the example, in testimony for the Malawski v. Broadwood Medical Center, or when lawyers defending the hospital in *Drey v. St. Louis University Hospital*, all argued that doctors do not need to wait for a court order to "override" a woman's refusal of surgery to labor (that is, that they do not need to respect her right to free pregnancy) or when the implied-consent doctor in *Forster v. Sherris* argued the doctor's need to respect pregnant women's decisions. Despite these claims, there is no general basis for a hospital to argue that implied consent applies in any way differently on their L&D unit or to their pregnant patients than it would to the rest of the hospital or non-pregnant patients.

With that in mind, consider the effect of the idea that admission to a hospital is "implied consent" for treatment: the patient would lose the right to information about their medical care or the right to say "no" to it. Informed consent—the basic legal right to receive information and give or refuse permission to our medical care—cannot co-exist with this flawed definition of implied consent. The concepts contradict each other.

case of a woman receiving a non-consented procedure stripping during a consented vaginal exam, she was told by a hospital representative, "When you sign the consent for care, that goes from the beginning all the way through until discharge"; in contrast, the hospital representative was saying that since the patient had signed a consent form at admission, they did not need her ongoing permission to administer medical procedures.

This is not, in any way, legally or ethically. The American College of Obstetricians and Gynecologists (ACOG), says plainly:

Often, informed consent is confused with the consent form. In fact, informed consent is "the willing acceptance of a medical intervention by a patient after adequate disclosure by the physician of the nature of the intervention with its risks and benefits and of the alternatives with their risks and benefits." The consent form only documents the process and the patient's decision.

—Joint Committee on Ethics Committee Opinion 0001, "Ethical Decision Making in Obstetrics and Gynecology," 2013

CONSENT FORMS AND INFORMED CONSENT ARE PRIMARILY MEANT TO PROTECT THE PATIENT. SOMETHING HAS GONE TERRIBLY AWRY WHEN HOSPITALS USE THESE PROTECTIONS AGAINST PATIENTS, RATHER THAN IN DEFENSE OF THEM.

In fact, "implied consent" in medical care is something that is generally understood to apply to emergency situations when the person is both unconscious and incapable of consent (i.e., a person presents at an ER with a gunshot wound and then passes out before he can agree to a certain course of treatment). It is a concept with very limited scope that applies to a limited range of situations—none of which are the very broad scope of pregnancy. Moreover, says attorney Sarah Din-Telle, formerly of National Advocates for Pregnant Women and a specialist in birth law, "implied consent never overrides non-consent. So if someone walked into a hospital with a baby hanging out of her vagina, she has implicitly consented to them treating her in seeking help. But the second she says 'No, stop that,' they have to stop. She hasn't consented to every possible thing that 'No' might conceivably seek help, but consent is always revocable."

The idea that consent is cheap and revocable brings us to our next point: the confusion around consent forms and the power they do or do not have. I have found pregnant women and medical professionals state that executing consent forms means "signing away your rights." In one

ACOG is clear that the documentation of informed consent is fundamentally different from the actual process of informed consent—a process based on a constitutively based idea that because beings own their own bodies, embodied in a right that extends to their medical care. We should understand that consent forms and informed consent are primarily meant to protect the patient. Something has gone terribly awry when hospitals use these protections against patients, rather than in defense of them.

Indeed, based on my extensive interviews with wholoppy emergency care consumers, hospitals were so routinely respond to complaints about violations of informed consent with something along the lines of "We're sorry for the communication problem, but your treatment was medically appropriate"—and then claim the patient didn't have the right to say no to the treatment in the first place (ACOG says otherwise). I can think of several women off the top of my head who had vaginal exams without their consent, or who consented to the vaginal exam but then had had an additional procedure that was not documented in Episode 4 of Birth Without Bodies, the hospital representative claimed.

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