

# Legislative Research on the Right of Informed Consent of Patients in Emergency Assistance

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## Abstract

With the development of society and the improvement of people's living standard, people pay more and more attention to whether their right of informed consent is guaranteed, however, in medical practice, sometimes medical staff may infringe patients' right of informed consent in order to rescue patients in an emergency situation, which leads to medical disputes. There are also many problems in our legislation concerning the right to informed consent of patients in Emergency Relief: the status of the subject of the right is unclear, the arrangement of the next of kin is unclear, and the solution to informed consent in emergency situations is unclear, the main body of informed consent right is the patient, the next of kin and the solution of informed consent in emergency.

## Keywords

Emergency Assistance; Patient's Right to Informed Consent; Legislative Study.

## 1. Introduction

With the development of society, people's awareness of rights is becoming stronger and stronger, and patients' awareness of rights is gradually strengthened in the doctor-patient relationship. Among all the rights of patients, the most important one is the right of informed consent, which reflects the respect for patients' autonomy. But in the process of medical emergency, due to the urgency of the time, emergency rescue can allow the breakthrough of informed consent right of patients to take medical treatment, this will lead to two kinds of system of collision, the two systems for the protection of patients' life and health are equally important, informed consent right of patients can guarantee patients know medical risks, The purpose of emergency care is to protect the patient's life and health, so the balance between the two is crucial.

## 2. Analysis on the Basic Concept of the Right of Informed Consent of Patients in Emergency Rescue

### 2.1. The Concept and Characteristics of Emergency Rescue

Emergency aid means that in the case of special emergency, the patient or the patient's family can be carried out without the consent of the patient for emergency treatment. Article One thousand, two hundred and twenty of the Civil Code of our country stipulates the system of emergency relief, the original intention of which is to protect people's right to life and health, so that people can be treated in an emergency. The premise of emergency rescue is that the patient is in an "emergency situation." However, there is no unified conclusion about "emergency situation." For "emergency" we can sum up the following characteristics: First of all, must have the urgency, although the current "emergency" of different conclusions, but it is not difficult to see that the urgency is one of its most important characteristics, only when the

patient's condition is urgent, that is, if not treated promptly will result in death or serious bodily harm, can the doctor give emergency help to the patient; moreover, it must be risky, risk is not "emergency" unique characteristics, any medical behavior has a certain degree of risk. However, the progress of science and technology, the development of society and the improvement of medical level make people gradually forget this characteristic of medical behavior, some of the more extreme patients or their families believe that as long as the patient enters the hospital, he will surely recover. If there is no successful treatment, then all the blame will be placed on the doctor, in recent years, it is not uncommon for patients or their family members to hurt doctors and all kinds of "medical disturbances". This is mainly due to a lack of understanding of the risks of medical practices or "emergencies". Finally, to have a professional, medical treatment from beginning to end is always very professional activities, so the "emergency" needs to be judged by a professional physician.

The Civil Code of our country is the most detailed regulation of the Emergency Relief Law, we can see the components of the emergency relief by studying the relevant laws and regulations: First, the emergency relief must be carried out in the time of the emergency. "emergency" has been discussed above, not repeated here, the law so as to prevent medical institutions from abusing the system of emergency relief and thus violating the rights and interests of patients; second, emergency assistance may be given without the consent of the patient or the patient's family. Doctors may not be able to communicate with the patient or obtain the consent of the patient's family on the spot in case of an emergency, in order to safeguard the patient's life and health, the law chooses the right of informed consent to give way to the right of life health among the right of informed consent and the right of life health. Finally, if the consent of the patient or the consent of the patient's family is not obtained in the case of emergency assistance, relief treatment can only be carried out with the consent of the person in charge. This is actually a review of the true state of emergency care by the person in charge of the medical institution, who is also a professional physician and a reflection of professionalism.

## **2.2. The Connotation of the Patient's Right to Informed Consent**

The right of informed consent of patients means that patients decide their own medical affairs on the basis of fully understanding their own situation and all the information of medical decision-making. Patients' right to informed consent includes two parts: the right to know and the right to consent, the right to know refers to the patients' right to know their own situation, the risks brought by medical treatment, the doctors' treatment plan and the expected effect of medical treatment. The right of consent refers to the patient's right to consent to medical treatment on the basis of full understanding of the information provided by the doctor under the condition of his free and true consciousness. The patient's right to know and the patient's right to consent are complementary, the right to know is the basis and premise of the right to consent.

At present, the law of our country is rather confused about the subject of the exercise of the right of informed consent of patients. Some laws stipulate that the subject of the exercise of the right of informed consent of patients is patients themselves, and some laws stipulate that the family members of patients, some laws provide for the patient himself and his family members. At present, the relevant provisions of the Civil Code Prevail, and the Civil Code of China stipulates that the patient's right of informed consent shall be exercised independently or given priority by the patient, only when the patient appears unable to exercise power or when the condition is not suitable to explain to the patient, the patient's family can act on his behalf. At the same time, the law of our country clearly stipulates that the right of informed consent should be exercised in written form. In practice, even if the patient gives his or her oral consent, the absence of a written consent does not preclude the illegality of the surgery. One of the conditions for the exercise of the right of informed consent is the patient's ability to consent.

There are three main theories about the patient's ability to consent: The theory of Civil Law, the theory of criminal responsibility and the theory of capacity. We think it is more reasonable to adopt the theory of identification capability, because when adult patients know their illness may be because of anxiety, tension and other emotions can not make a reasonable judgment of their illness and then can not make the right choice; Under age patients are not necessarily unable to make the right and reasonable choices when they fully understand their conditions and medical information, so both the capacity doctrine and the criminal liability doctrine have their drawbacks. Patients should not only have the ability to consent but also voluntary consent. Patients must give their consent voluntarily, and neither medical staff nor patients' family members can interfere with them.

### **3. Legislative Issues on the Right of Informed Consent of Patients in Emergency Rescue**

#### **3.1. The Status of the Subject of the Right is Unclear**

Our country's law clearly stipulates that the patient's right to informed consent belongs to the patient only if it is "inappropriate or inappropriate" to explain the situation to the patient before informing the other person, but the current laws and regulations on "other people" vary. The subject of the right of informed consent is the patient, the family member and the related person in the regulation on the administration of medical institutions, and the subject of the right is the patient The Law of the People's Republic of China on medical practitioners stipulates that the subject of rights is the patient or family member, while the Civil Code stipulates that the subject of rights is the patient or close relative The Law of the People's Republic of China on Basic Medical Care and health promotion stipulates that the subject of rights is the patient or close relative. The above-mentioned laws and regulations for patients with the right to informed consent of the main provisions of the inconsistent lead to the medical institutions in the performance of the obligation to inform the object is difficult to find an accurate. And the scope of "family" and "related person" itself is very vague, there is the suspicion of expanding the scope of the subject of rights. At the same time, emergency assistance is time is short, urgent, ambiguous to inform the object will increase the workload of medical institutions, waste medical resources endanger the patient's right to life and health, inform the object error may also cause medical disputes.

#### **3.2. The Arrangement of Next of Kin is not Clear**

The law of our country clearly stipulates that "others" may be informed when it is "unsuitable or unsuitable" to fulfill the obligation of informing the patient, both the law of the People's Republic of China on basic medical care and health promotion and the Civil Code clearly stipulate that close relatives may be the persons responsible for informing patients in case of emergency, however, the two laws do not regulate the scope and order of next of kin. In practice, different close relatives may have different views on the same medical decision because of the degree of kinship or distance between them and the degree of closeness between patients, it is a difficult problem for medical institutions to choose the most suitable patients to be informed. In order to better protect patients' right to life and health, and in order to facilitate medical institutions to better fulfill the obligation of informing in the case of emergency relief, the law should clearly define the scope and order of the next of kin. At present, there are three models about the order of the right of informed consent: Legal Order, voluntary order and juxtaposition. The author thinks that the two systems can not solve the difficult problem of informing in practice. The two systems require all close relatives to select the person who can best represent the interests of patients, this conflicts with the urgency of emergency care, which wastes a great deal of time if the electoral process does not go well; the juxtaposition is such that all close

relatives can decide on the patient's behalf, however, many close relatives can not represent the best interests of patients, and random selection will harm the interests of patients. Therefore, the legal order system should be adopted to regulate the order of next of kin.

### **3.3. Lack of Clarity on the Solution of Informed Non-consent in Emergency Situations**

The case of Xiao Zhijun in 2007 is a typical case of informed Non-consent in an emergency situation. Xiao Zhijun firmly refused to consent to his wife's Caesarean section, which led to the tragic occurrence of two dead bodies, the issue of informed consent in emergency situations has always been a hot topic. In emergency situations, when a patient or family member refuses treatment, the medical staff of the medical institution will be faced with a dilemma. If the medical staff chooses to listen to the refusal of treatment by the patient or family member, if medical personnel choose to treat patients actively without listening to the opinions of patients and their close relatives, they may violate the rules of medical treatment and even lead to disputes between doctors and patients, if the law makes provision for cases in which a patient or close relative does not agree to medical assistance in an emergency, it will cause the medical staff to vacillate in reality, waste a lot of time and miss the best opportunity for emergency treatment. In real life, there are many reasons for the informed consent of patients or close relatives. Some close relatives may deliberately abuse the right of informed consent because of conflicts with patients, thereby endangering the patients. Because of the lack of medical professional knowledge, some patients make a wrong judgment of the disease. In real life, there are many cases of refusing treatment because of lack of knowledge, such as the case of Yulin Puerpera jumping off a building and the case of Xiao Zhijun; Some of them do not agree with informed consent due to economic reasons. At present, medical institutions in our country do not provide free services. Therefore, there is a conflict between the launching of emergency relief meetings and the collection of rescue fees. In general, the occurrence of emergency relief is relatively sudden, patients and their close relatives may not be able to raise the rescue fee, rescue fee collection is indeed a major problem.

## **4. The Legislative Solution to the Right of Informed Consent of Patients in Emergency Rescue**

### **4.1. The Subject of the Right to Informed Consent Shall be the Patient**

Above we have carried on the certain elaboration to the exercise right subject of informed consent, the different law, the administrative regulation to the right subject of informed consent is inconsistent to cause the question in the practice. In this regard, to unify the existing legislation, that is, to make it clear that the subject of the exercise of patients' right to informed consent can only be patients themselves, only if the patient lacks or loses the ability to consent, or if the physician finds it inappropriate to tell the patient, can the agent be represented by another person, and the agent is authorized by the patient, patients and agents should sign power of attorney, clear the scope of the agency, in order to maximize the protection of patients' legitimate rights and interests. At the same time, it is very important to correctly distinguish the patient's consent ability, which is the ability of patients to make decisions based on full understanding of medical information, as the subject of the right of informed consent, patients must have the ability of consent. A completely civil capacity in his right mind has the ability to consent; an adult in his right mind has the ability to consent within the limits of what he can understand as a medical practice; The ability to consent is restricted to minors in civil capacity and to minors without civil capacity within the limits of what they understand to be medical practice.

#### 4.2. To Specify the Order of Next of Kin

Both the law of the People's Republic of China on basic medical care and health promotion and the Civil Code clearly stipulate that close relatives may be the persons responsible for informing patients in case of emergency, however, the two laws do not regulate the scope and order of next of kin. According to the relevant judicial interpretation of the Supreme People's Court, the scope of close relatives includes: spouse, parents, children, brothers and sisters, grandparents, grandfathers, grandchildren, grandchildren. The wide range of these close relatives is not conducive to the protection of patients. The order of the next of kin may be governed by Article twenty-eight of the Civil Code, which provides for the guardianship of persons without civil capacity or limited civil capacity. The act provides that the spouse shall be the first in line and that the spouse shall be the first in line, and that the spouse shall be the second in line, if there is no spouse and the parent or child shall be the second in line, although the number is also large, in practice there is a certain age gap between parents and children, and there may be a situation where one of the parents has no guardianship capacity, which greatly reduces the number of personnel and improves the efficiency of information; If you do not have a spouse, parents or children, you may consider looking for a person with a special relationship with the patient to act as an agent, it is up to the medical institution to decide the best medical scheme for the patient according to the principle of best interests.

#### 4.3. To Informed Consent in Emergency Situations

As mentioned above, there are several reasons for the informed consent of patients or close relatives, and different solutions based on different reasons play an important role in solving the problems of patients' right to informed consent in emergency care, first of all, for economic reasons, informed consent is not accepted. China's medical system is not sound, so the current problem of difficult and expensive access to medical care still exists, but since 2013, our country has set up a special emergency fund to help those who can not afford it, and we should also participate in social insurance to reduce the risk. For those who do not have enough knowledge of their own reasons to give informed consent, we can adopt Japan's "comparative theory of adverse factors", that is, to compare the harmfulness of the act of rescue with the harmfulness of the act of refusing to accept the act of rescue, if the harm caused by the patient's failure to accept the assistance is greater than the harm caused by the assistance, the medical institution should immediately take the assistance, patients and close relatives are themselves in a state of great tension and fear during emergency treatment. In addition, medical personnel emphasize the risk of treatment, which will cause patients or close relatives to make wrong judgments and make wrong decisions, at this point should be based on the "comparative disadvantage" to treat patients. Finally, informed consent of terminally ill patients should be respected, because for these patients the life cycle may not be long and suffering from the disease, respecting the informed consent of these patients is also respecting them.

### 5. Conclusion

Informed consent of patients is a fundamental right of patients. In general, medical institutions should clearly inform patients of medical information, and patients should make the decision whether to consent to medical treatment on the basis of clear medical information. But when a patient is in an emergency situation, the patient's informed consent or the patient's relatives may not be available, then the patient's right of informed consent and the health and life safety of patients in the conflict, from the Angle of legislation, this article found that the patient's problem and put forward the corresponding countermeasures to solve these problems, on the one hand, is conducive to protect the lawful rights and interests of patients, On the other hand, it also helps to ease the conflict between doctors and patients.

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