

Consent as a Matter of Law

Jay Wiseman (2018)

From a legal point of view, consent is: A mentally competent, informed, limitable, revocable, willingness to have a legally protected interest affected by the behavior of another person who might not have another legally defensible reason to affect that interest.

There are three basic parts to this rule. Let me unpack each one.

(Part One)

A mentally competent -- the person has sufficient mental capacity to understand what's going on. They are not so young, so intoxicated, so senile, or their level of consciousness so impaired that they can't understand what's involved. There are few hard and fast rules around this point (age of consent as expressed by a statute would be one exception) so every incident need to be evaluated on a case-by-case basis.

informed -- the person has been given information that is sufficient (and accurate) enough to enable them to make a good decision. For instance, if a top were to tell a bottom that the top had "over a decade" of experience in using a single tail whip when in fact the top had less than an hour of experience in using it, then the bottom can't make an informed decision and therefore their consent is invalid.

(Note: there is an interesting doctrine, particularly in rape law, about the distinction between what's called "fraud in the inducement" and what's called "fraud in the factum." As a general rule, fraud in the inducement is a defense to a rape accusation whereas fraud in the factum is not a defense. I've included at the end of this letter a link to a page that has a pretty good introductory article on this topic.)

limitable -- consent can be limited. For example, one person might tell another, "You can touch me above the waist but not below the waist." or, "You can come into my apartment, but only for ten minutes." It's a good idea to make sure this limitation is clearly communicated.

revocable -- consent is generally revocable. For example, in the situations described just above, a person might say, "I've changed my mind. You can't touch me anywhere," or "Come to think of it, no. You can't come in at all." As with limited consent, it's a very good idea to ensure that revocation of consent is clearly and unambiguously communicated.

willingness -- the person's consent was not obtained by duress. This generally means that consent was not obtained by a credible threat of immediate physical harm to the person or to someone they are close to such as a spouse or child. Note that the threat generally needs to be of immediate physical harm. For example, if a burglar were to say to a woman whose house he has broken into, while waving a large knife, "Have sex with me or I'll kill your baby." and the baby is right there in a crib in her bedroom, then she would be acting under duress and her consent would be invalid. On the other hand, let's say that Boss says to Employee, "Have sex with me or you're fired." That generally would not be sufficient to constitute duress as a matter of law. (A sexual harassment case would, of course, be a different matter.)

(Part Two)

to have a legally protected interest... What this means is that if one of your legally protected interests is violated then the offender could end up in criminal and/or civil court. You have a legally protected interest in

your person (battery, false imprisonment), your peace of mind (assault, intentional infliction of emotional distress), your property (theft, vandalism, trespassing), your privacy (invasion of privacy), and your reputation (defamation). This is not a complete list of legally protected interests.

(Part Three)

affected by the behavior of another person who might not have another legally defensible reason to affect that interest. Consent is largely about human behavior. If your car is damaged by an act of God, then your consent hasn't been violated. If your car is damaged by your crazoid ex, then your consent has been violated. Also, if the cops show up at your house with a warrant for your arrest, then they can take you into custody without your consent and not face accusations of assault, battery, false imprisonment, trespassing, etc.

Types of Consent

There are five ways of expressing consent, which consist of expressly stated consent and four types of implied consent.

Expressly stated consent is consent communicated through words, spoken or written. An example would be when a hospital patient signs a "consent for surgery" form.

Consent can be implied through behavior, for example if Person A says to Person B, "I'd like to tie you up." and Person B smiles and puts their hands behind their back, then it would be reasonable for Person A to believe that Person B had consented to being bound. (Hopefully, unless they already know each other pretty well, they negotiate more than this before proceeding further, but you get the idea.)

Consent can be implied as a matter of law. This usually involves giving first aid to someone who is unconscious, or whose brain is not functioning adequately due to intoxicants, head injury, diabetes, and so forth. These people can be treated even if they do not consent without the rescuers risking being charged with battery or other offenses because the law presumes that the victim would indeed consent to being given such aid if their brain was working properly.

Consent can be implied by social custom. For example, tapping someone on the forearm to ask what time it is not a battery under our current social customs. Obviously, how far such touching can go varies in different societies and in the same society over time.

Consent can be implied by failure to object where a reasonable person would object. As I mentioned, this is the old "never ask a girl if you can kiss her" rule. This rule is becoming more unpopular with time but is still the law in most jurisdictions.

In law, "bad things" generally happen either intentionally or unintentionally.

For example, in tort law there are a fairly small number of "intentional torts" such as battery, false imprisonment, and willfully damaging property known to belong to someone else. Because these "bad things" are done "on purpose" they are often punished more severely than a harmful act not done on purpose. A plaintiff can often recover "punitive" damages for an intentional tort, and these can be for much more than is necessary to compensate the plaintiff for the harm done to them (aka "compensatory damages").

Everything else is pretty much unintentional.

There are subcategories (so to speak) under "unintentional."

For instance (and simplifying a bit), if "something bad" happens even though everybody was being reasonably careful then that is considered an "accident" and nobody is facing a legal penalty.

However if "something bad" happens because somebody wasn't being reasonably careful then that is often some type of negligence and the plaintiff can recover whatever "compensatory damages" are necessary "to make them whole again" (for example, payment of their medical bills) but the plaintiff is usually not awarded punitive damages because the harm they suffered wasn't done "on purpose."

(There is a negligence variant called "gross negligence" -- not rigidly defined but usually involves notably reckless conduct on the defendant's part -- and in those cases the plaintiff can recover punitive damages in addition to compensatory damages for any harm they suffer.)

I have an essay titled "Consent As A Matter Of Law" that I'll be happy to send upon request. (I may have been able to attach that essay to this post. If not and you want a copy just drop me a line.)

I also have a presentation that I give on this topic and I'd be happy to give it before a group if reasonable logistical arrangements can be made.