

RESTATEMENT OF TORTS -

§ 2.01 Consent [34-38]

[A] *Overview*

Consent is a defense to intentional tort liability. If the asserted victim gives permission, what would otherwise be tortious is instead privileged. [See Restatement § 892.]

[B] *Express and Implied Manifestations of Consent*

An individual can convey consent expressly in words or through pictorial gestures. Alternatively, an individual can imply consent. Consent is implied when, under the circumstances, the conduct of the individual reasonably conveys consent. [See, e.g., *O'Brien v. Cunard S.S. Co.*, [28 N.E. 266](#) (Mass. 1891).]

[C] *Consent by Law*

Consent can also be implied by law. Generally courts recognize by law consent to emergency medical treatment by health professionals when a victim is unconscious and unable to provide consent.

[D] *Invalidating Manifestations of Consent*

[1] Incapacity

Both express and implied manifestations can be held invalid. An individual can be held to lack capacity to consent. A child, depending on her age, may consent only to less significant matters.

An individual without sufficient mental capacity due to insanity or retardation may not legally consent. Incapacity can also be the result of drug ingestion (including alcohol). [See, e.g., *Bailey v. Belinfante*, [218 S.E. 2d 289](#) (Ga. Ct. App. 1975).]

[2] Action Beyond Scope of Consent

Consent is also invalidated if the action goes beyond the consent manifested. What constitutes the dimensions of the consent can often be a different issue of fact. [See, e.g., *Hackbart v. Cincinnati Bengals, Inc.*, [601 F.2d 516](#) (10th Cir. 1979).]

Since medical treatment requires consent, the determination of the effective actual consent is critical in this context. A medical procedure without the patient's consent can constitute a battery. [See, e.g., *Mohr v. Williams*, [104 N.W. 12](#) (Minn. 1905).] The failure to inform the patient of risks when procuring consent is now, however, usually treated under negligence.

[3] Fraud

Consent is invalid if it is induced by fraud that misrepresents an essential aspect of the interaction.

[4] Duress

Consent procured under physical threat is invalid. However, as a general rule, economic pressure, while coercive, does not negate consent.

[5] Illegality

The traditional majority rule holds that a person *cannot* consent to a criminal act; the consent is always invalid. Taking the minority position, the Restatement holds that a person can consent to a criminal act for purposes of tort liability. The consent is still valid except where the criminal law is specifically designed to protect members of the victim's class. [See Restatement §§ 60, 61.]