

The Law of Consent

A General Overview of the Relevant Legal Principles from an Investigative Perspective

Contents

1. When Consent Becomes a Legal Issue
2. Legal Limits on Consent
3. The Illustrative Circumstance
4. The Legal Question
5. Assent Is Not Consent
6. Circumstances That May Negate Consent
7. The Requirement for Informed Consent
8. Preliminary Conclusion

1. When Consent Becomes a Legal Issue

Consent necessarily arises as a legal question where the existence or absence of consent is capable of determining whether conduct is criminal or not. In many criminal investigations, the issue is not whether an act occurred, but whether the person said to be affected by that act legally consented to it.

2. Legal Limits on Consent

The law also places limits upon what a person is capable of consenting to. For example, section 63 of the Crimes Act 1961 provides that "No one has a right to consent to the infliction of death upon himself or herself", and where a person is killed, that consent does not affect the criminal responsibility of any person who is a party to the killing.

Outside those limits, consent may nevertheless determine whether conduct that would otherwise constitute a criminal offence is rendered lawful, or whether criminal liability remains.

3. The Illustrative Circumstance

Consider a simple circumstance. Person A invites Person B to receive something that Person A has promoted as being substantially beneficial with very little risk. Person B also understands that by accepting what is offered, an unusual circumstance affecting them will be eased. Acting upon that understanding, Person B voluntarily attends Person A and receives what is offered.

Subsequently, however, the outcome proves harmful, and the issue becomes one of consent. The material question is no longer whether Person B attended or accepted the offer. Rather, it is whether Person B legally consented to what Person A was in fact offering.

4. The Legal Question

This is the question that the subsequent investigation must answer. Although many factual considerations may arise, the common law provides principles capable of determining whether consent existed in law.

5. Assent Is Not Consent

The first distinction is between assent and consent. Legal commentary explains that assent is a factual matter, whereas consent is a legal conclusion. Accordingly, Person B may have factually assented by attending and receiving what was offered. However, that factual assent does not itself establish legal consent. Whether assent will be recognised as legally effective consent depends upon whether there are sufficient reasons in law to give it that effect.

6. Circumstances That May Negate Consent

For example, what if Person B acted upon misinformation or failed to understand some material aspect of what was being offered? What if Person A, wishing Person

B to accept the offer, withheld important information, overstated the benefits, understated the risks, or otherwise failed to communicate material facts? In such circumstances, legal commentary explains that a number of matters are capable of preventing factual assent from being recognised as legal consent. These include, but are not limited to:

- a crucial mistake;
- circumstantial pressure;
- wrongdoing by Person A;
- deception;
- inadequate understanding; and
- mere submission.

7. The Requirement for Informed Consent

Legal commentary further explains that Person B should be sufficiently informed about what they are agreeing to and the consequences that may follow.

8. Preliminary Conclusion

Accordingly, Person A cannot establish legal consent merely by pointing to the fact that Person B accepted the offer. Acceptance alone establishes factual assent. Whether that assent amounts to legally effective consent requires a separate legal inquiry.