

## Medico-Legal: Consent of a patient

The consent of a patient constitutes a crucial element requisite for a doctor to be legally authorized to provide treatment to the patient. According to common law, consent to treatment from an adult patient must be directly provided by the patient while they possess the capacity to do so, and it must be given voluntarily. This pertains to the inherent right of an individual patient to autonomously make decisions regarding whether to grant or withhold consent.

Under the English common law, it can be seen from the case of *Re T (adult: refusal of medical treatment)*<sup>1</sup> (1992) 4 All ER 649, the Court of Appeal had reaffirmed that an adult patient with the required capacity has the rights to give or to refuse consent to any proposed treatment. As a general rule, medical procedures can be carried out only after the patients have given their consent. (Mason, J.K., et al.,2002 )<sup>2</sup>

Battery is one component in the tort law of trespass against person. In the English case, *Airedale NHS Trust v Bland*<sup>3</sup> (1993) A.C 789 Lord Keith had stated that:

“It is unlawful, so as to constitute both a tort and the crime of battery, to administer medical treatment to an adult who is conscious and of sound mind, without his consent.”

In fact in *Re F (Mental Patient: Sterilisation)*<sup>4</sup> (1990) 2 A.C. 1,12, Lord Donaldson, MR stated that prima facie, all or almost all medical treatment and surgical procedures on an adult patient will be invalid if no consent had been given, regardless of the fact that the treatment is for the benefit of the affected patient.

A comprehensive study conducted by Yousuf, Fauzi, How, Rasool, and Rehana<sup>5</sup> (2007) underscored the considerable level of awareness exhibited by medical professionals in Malaysia and Kashmir pertaining to the legal nuances surrounding informed consent within the medical context.

Despite the findings, they persisted in adhering to the traditional medical paternalistic approach of disclosing information at their sole discretion. Amidst their demanding schedules, certain doctors may be wholly unaware of both the significance and the legal mandate concerning informed consent.

On the extreme end, some doctors might take matters pertaining to consent frivolously without considering its legal implications. In the case of *Tan Ah Kau v the Government of Malaysia*<sup>6</sup> (1997) 2 AMR 1382, in this case, Tan Ah Kau as the plaintiff sought to claim damages for the alleged negligence of the defendant as the servant and/or agent of the defendant. The plaintiff's claim for damages was founded on the defendant's negligence and/ or breach professional duties in carrying out a surgical operation on him. The doctor made the patient sign two blank consent forms prior to the operation. The patient who had a spinal tumor sustained a spinal

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<sup>1</sup> (1992) 4 All ER 649

<sup>2</sup> Mason, J.K., et al.,2002

<sup>3</sup> (1993) A.C 789

<sup>4</sup> (1990) 2 A.C. 1,12

<sup>5</sup> Yousuf, Fauzi, How, Rasool, and Rehana

<sup>6</sup> (1997) 2 AMR 1382.

injury during the operation and subsequently became paralyzed from the waist down. Justice Low Hop Bing held that the consent obtained from the patient was invalid and the doctor was liable for medical negligence.

In *Chatterton v Gerson*<sup>7</sup> (1981) 1 QB 432, Justice Bristow held that failure to disclose inherent risks present in the medical procedure will not vitiate any consent given by the patient. The consent is still valid in law but the doctor had committed a breach in his duty to give advice. This breach is to be dealt with under the law of medical negligence and not trespass, specifically, battery.

Therefore, it is imperative for physicians to rigorously adhere to the prescribed procedure for obtaining informed consent, as outlined in the Malaysian Medical Council Guidelines of Consent for Treatment of Patients by Registered Medical Practitioners<sup>8</sup> (2017). The guidelines underscore the obligation for doctors to engage in effective communication with the patient, ensuring comprehension, and to disclose all material risks during the informed consent process. Non-compliance with these standards may be interpreted as a failure to meet the requisite standard of care.

Material risk is illustrated in the case of *Rogers v Whitaker*<sup>9</sup> (1992) 175 CLR 479 as “in the circumstances of the particular case, a reasonable person in the patient’s position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner was or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it”.

A further example can be demonstrated in the case of *Foo Fio Na v Dr. Soo Fook Mun & Anor*<sup>10</sup> 1 MLJ 593 [2007], the appellant, involved in a car accident near Assunta Hospital, was treated by the first respondent, resulting in paralysis. Alleging medical negligence, the appellant sued the respondents in January 1987. The High Court found the first respondent negligent for not informing the appellant of paralysis risks and for the treatment procedure. Vicarious liability was imposed on the hospital as the first respondent's employer.

The Court rejected the Bolam Test, determining negligence. The Court of Appeal overturned the decision, citing insufficient evidence linking the surgery to paralysis. The appellant appealed to the Federal Court to contest the decision. The case raises questions on a doctor's duty of care. Despite the High Court's finding of negligence, the Court of Appeal's ruling highlights the challenges of proving causation in medical negligence cases. In the case's judgment, the court reiterated the doctor's duty of care towards their patients, as articulated in *R. Bateman*<sup>11</sup> [1925] 94 LBKB 79, emphasizing that doctors owe patients a duty of diligence, care, knowledge, skill, and caution when providing treatment. The court examined the doctor's duty to inform the patient of treatment risks, particularly in cases involving surgery.

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<sup>7</sup> (1981) 1 QB 432

<sup>8</sup> Malaysian Medical Council Guidelines of Consent for Treatment of Patients by Registered Medical Practitioners

<sup>9</sup> (1992) 175 CLR 479

<sup>10</sup> (2007) 1 MLJ 593

<sup>11</sup> [1925] 94 LBKB 79

Despite the appellant's consent to the operations, the court found negligence in failing to adequately inform her of the risks, especially the risk of paralysis, and in the delay in addressing her paralysis post-operation. Bolam test should not apply in relation to all aspects of medical negligence.

Rogers v Whitaker test should be applied in relation to the duty to warn and advice. Drawing on Bolitho and Rogers v. Whitaker, the court highlighted the necessity for courts to scrutinize medical practices and endorsed the Rogers v. Whitaker test over the Bolam test in determining medical negligence. The court emphasized the importance of accountability within the medical profession and concluded that the Rogers v. Whitaker test is more appropriate in assessing medical negligence cases, thereby allowing the appeal and shifting costs.

A 2015 study by Vossoughi, Macauley, Sazama, and Fung<sup>12</sup> revealed that, despite receiving some form of training on informed consent, nearly half of the surveyed medical students and physicians considered the training inadequate. The study identified a need for more attention to various aspects of informed consent, particularly in discussions with patients about risks, benefits, and alternatives to recommended treatments. This lack of formal training has led to doctors feeling uninformed and lacking confidence, resulting in crucial information being overlooked during consent procedures.

Another study by Wood et al. (2016)<sup>13</sup> found that junior doctors often feel incompetent and pressured during consent procedures for unfamiliar treatments. Recommendations include incorporating consent training into medical curricula, conducting observation sessions with senior doctors, and emphasizing patient understanding in line with autonomy principles. The shift in focus from doctors' disclosure obligations to patient comprehension underscores the ethical and legal imperative for doctors to undergo formal training, continuously update their knowledge, and align their practices with the standard of care and current legal requirements, despite the challenges encountered in patient care.

The focus of informed consent has shifted from doctors' obligation to disclose information to the extent of patients' understanding and comprehension of the information, which represents the emphasis of autonomy (Beauchamp, Childress 2009)<sup>14</sup>. Doctors are ethically and legally obligated to the disclosure of information during informed consent. Hence, formal training is crucial and doctors should also reinforce their awareness, knowledge, and practice, consistent with the standard of care as well as keeping updated with current legal standings despite all challenges encountered while serving the patients.

### ***References:***

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<sup>12</sup> Vossoughi, Macauley, Sazama, and Fung

<sup>13</sup> Wood et al.

<sup>14</sup> (Beauchamp, Childress 2009)