



Consent – the basics

MPS



Putting members **first**

Advice correct as of May 2014

“Consent” and “informed consent” are two different concepts. Consent is valid if the patient has indicated his or her consent to the treatment (by way of written consent, verbal consent or conduct) even though the nature, effect and risks of the treatment have not been properly explained to him or her. Providing treatment without a valid consent is very dangerous. The doctor may be prosecuted for criminal offences such as wounding and assault occasioning actual bodily harm in the criminal court.

However, what doctors should always obtain from a patient is not only consent, but also informed consent. That means the consent has to be given voluntarily by the patient after having been informed of the relevant aspects of the medical treatment, including the general nature, effect and risks involved.

Why is consent important?

Since the 1990s, the failure to obtain informed consent has become one of the biggest causes of medical negligence claims against doctors. A significant proportion of cases were settled simply because informed consent was not obtained, or because it could not be proved that it was obtained, due to the lack of supporting documentation.

Respect for patients’ autonomy is expressed in common law; to impose care or treatment on competent people without respecting their wishes and right to self-determination is not only unethical, but may be illegal, with the risks of criminal, civil and disciplinary consequences.

How to obtain consent

Consent may be implied or express. The Medical Council of Hong Kong (MCHK) says that in respect of minor and non-invasive treatments, consent can usually be implied from a patient’s conduct in consulting the doctor for his or her illness (but not in a situation where the consultation was only for the purpose of seeking an opinion).

Oral consent is acceptable for minor invasive procedures. Documenting oral consent in the patient’s medical records offers protection to doctors, in case of subsequent dispute as to whether consent has been given.

Express and specific consent is required for major treatments, invasive procedures, and any treatment which may have significant risks. S. 2.5 of the Code of Professional Conduct specifically says:

“(i) Consent for major surgical procedures involving general anaesthesia must be given in writing.

(ii) For written consent, a reasonably clear and succinct record of the explanation given should be made in the consent form. The patient, the doctor and the witness (if any) should sign the consent form at the same time. Each signatory must specify his/her name and the date of signing next to his/her signature.”

Patients have the right to withhold their consent, provided they are competent enough to do so – that is, that they are able to exercise judgment clearly and freely. Any refusal must be respected and such refusals must be documented.

Key principles

According to the MCHK, consent is valid if:

- It is given voluntarily
- The doctor has provided proper explanation of the nature, effect and risks of the proposed treatment and other treatment options (including the option of no treatment)
- The patient properly understands the nature and implications of the proposed treatment.

Where the patient is not competent to give consent, the MCHK’s *Code of Professional Conduct* says: “The views of the family members should be considered provided that such views are compatible with (i) the patient’s best interests; and (ii) the patient’s right of self-determination.”

Explaining the treatment

MCHK’s *Code of Professional Conduct* says that it is the doctor’s duty to ensure that the patient truly understands the doctor’s explanation about the proposed treatment and the related risks and benefits. Therefore, an

explanation should be given in clear, simple and consistent language, and in terms that the patient can understand.

According to the Code, the explanation should cover not only significant risks, but also risks of serious consequence even though the probability is low (i.e. low probability serious consequence risks).

The Code also provides that a doctor should not withhold information necessary for making a proper decision for any reason, even if the patient's family members ask for the information to be withheld from the patient, unless in the doctor's judgment the information will cause serious harm to the patient (such as where the information may have a serious effect on the patient's mental health). However the threshold for withholding information is high, and upsetting the patient or causing him to refuse treatment will not be proper justification for withholding information. Any decision to withhold information must be recorded in the patient's records.

Children

The MCHK says: "Consent given by a child under the age of 18 years is not valid, unless the child is capable of understanding the nature and implications of the proposed treatment." Where the child cannot understand, consent should be obtained from the child's parent or guardian. However, even where a child is competent to give valid consent, the MCHK says a doctor should encourage the child to involve the parents in decision-making, with regards to important or controversial procedures.

According to the Code, it is usually sufficient to obtain consent from one parent, but in major or controversial medical procedures, "there may be the duty to consult the other parent." In cases where the parents cannot agree on a decision, or where they refuse treatment that is clearly in the best interests of the child, legal advice must be sought.

More information

- Medical Council of Hong Kong, *Code of Professional Conduct* – www.mchk.org.hk/

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