Consent – the basics

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Valid consent is characterised by a process of informed decision-making, which recognises a person's legal right to control their own body. Consent is valid if the patient has been given sufficient information to voluntarily and competently give it. Consent is needed for all interactions, but particularly for invasive procedures.

Why is consent important?

Doctors often assume that a patient who walks into a consultation room gives implied consent for all subsequent procedures. "Implied consent" will not protect the doctor in the event of any litigation.

Since the 1990s, the failure to gain informed consent has become one of the biggest causes of clinical negligence claims against doctors. A significant proportion of cases were settled simply because informed consent was not obtained.

Respect for patients' autonomy is expressed in consent law; to impose care or treatment on people without respecting their wishes and right to self-determination is not only unethical, but illegal.

How to obtain consent

- Doctors must explain procedures and their purpose
- Listen to the patient's objections and questions carefully; never brush them aside
- Record any refusals for investigations or treatment
- No invasive procedure should be undertaken without the patient's consent or, in the case of a minor, from the parent or guardian
- Common and significant side effects must be explained before any treatment is given.

Key principles

For consent to be informed:

- **The patient must be competent** – Assessment of a person's capacity should be based on his/her ability to understand, retain and weigh up the information relevant to a particular decision. The person must also be able to communicate the decision. A patient who is unable to make a decision about a complex proposal is not necessarily incapable of making any decisions at all, and may be perfectly able to consent where the issues are simpler. The starting point in the case of adults is always to presume that the patient has capacity until it is shown otherwise.
- **The patient must have sufficient information to make a choice** – Without adequate information, patients are unable to make decisions about their treatment. The information provided should, for example, include:
  - an explanation of the investigation, diagnosis or treatment;
  - an explanation of the probabilities of success, or the risk of failure; or
  - harm associated with options for treatment.

  The patient should be given time to ask questions.
- **The patient must be able to give their consent freely** – Pressuring patients into consenting to treatment invalidates the consent. To ensure that consent is freely given, patients should, where possible, be given time to consider their options before deciding to proceed with a proposed treatment. Be aware, too, that patients' friends and relatives may also try to exert their influence and that this can be subtle, but nevertheless powerful.

Verbal or written consent?

There are very few occasions where the law specifically requires written consent. In the main, verbal consent is just as valid as written consent. Consent is a process – it results from open dialogue, not from getting a signature on a form.

Completed consent forms provide some evidence that consent was obtained, but mean little beyond that – it is important to realise that they do not constitute proof that the consent was valid. If there is any dispute over whether valid consent was obtained, the key issue will not be whether the patient signed a form or not, but whether they were given all the information they needed to make a considered decision. It is, therefore, crucial that the essential elements of discussions with the patient are documented in the medical record.

The notes do not need to be exhaustive, but should state the nature of the proposed procedure or treatment and itemise the risks, benefits and alternatives brought

to the attention of the patient. Any particular fears or concerns raised by the patient should also be noted.

Audio and visual recordings

Written consent is needed for all audio and video recordings. They form part of the patient's medical record and are subject to the same standards of confidentiality and consent. Informed consent must be obtained prior to recording, copying, storing and transmitting images of patients.

Further information

- Malaysian Medical Council, *Duties of a Doctor* – www.mmc.gov.my
- Malaysian Medical Council, *Consent for Treatment of Patients by Registered Medical Practitioners* – www.mmc.gov.my

For medicolegal advice please call us on:

1 800 81 5837 (FREECALL)

or email us at: querydoc@mps.org.uk

www.medicalprotection.org

This factsheet provides only a general overview of the topic and should not be relied upon as definitive guidance. If you are an MPS member, and you are facing an ethical or legal dilemma, call and ask to speak to a medicolegal adviser, who will give you specific advice.

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