Consent (2): Disclosure and Voluntariness

By Dr Myint Soe

Editor's Note

Part 1 of this article, on "Consent (1): Overview and Capacity", was published in the previous issue of the SMA News.

TERMINOLOGY

"Disclosure" refers to the provision of relevant information by the clinician and its comprehension. This would therefore concern what is now commonly known as "informed consent".

"**Voluntariness**" refers to the patient's right to come to a decision freely, without force, coercion or manipulation.

EXTENT OF DISCLOSURE

This generally means that to be legally valid, consent to treatment must be informed. A signature on a form is not, of itself, sufficient. The doctor should explain what treatment is proposed in a way which is comprehended by the patient and must be willing to answer questions. Where questions are asked they must be properly answered. In appropriate cases, the patient should be warned positively that the treatment could worsen the condition. A balance must be struck between telling patients enough to enable them to form a valid consent and yet not so much as to frighten or alarm them needlessly. This can be very difficult, even with years of experience.

In the case of emergencies the doctor should not hesitate to provide treatment which is immediately necessary. Treatment which can be left until later should be deferred until proper consent is obtained. Legal actions against doctors for providing treatment without consent in an emergency are very rare; and medical, rather than legal, considerations should prevail.

CASE LAW ON DISCLOSURE

Bolam v Friern Hospital Management Committee (1957)

This case lays down the "medical test" for negligence. Has a doctor acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art even though there may be another body of medical opinion which disagrees? This case involved a mental patient who had to undergo electro convulsive therapy. The patient then sustained fractures; the risk in such a case was 1 in 10,000. The patient was not informed of such a risk, but a consent form was signed. Expert opinion differed in that case, but the doctor concerned was not held negligent.

Sidaway v Board of Governors of Bethlem Royal Hospital (1985) H.L.

In this case, the patient was operated on the cervical vertebrae. The operation was performed properly. The patient had been informed of risk damage to the nerve root, and not the risk of the spinal cord itself. The doctor concerned had also failed to inform the patient that the operation was one of choice and not of necessity. The *Bolam* test was generally upheld by a majority of four to one in the House of Lords; Lord Scarman dissenting. The doctrine of informed consent was rejected by the House of Lords.

LATER ENGLISH DECISIONS

After *Sidaway's* case, there have been some indication that the *Bolam* test may have to be reconsidered. One recent English case is that of *Bolitho v City* and *Hackney Health Authority* (1997) 3 WLR 1151. It was made clear by the House of Lords that the *Bolam* test may not be used in deciding every issue in a case involving medical negligence. It was pointed out that in the generality of cases, the *Bolam* test had no application in deciding questions of causation as in that case. Nonetheless, on the facts, the *Bolam* test was still applied. One might also mention the recent English case of *Penney & Anor v East Kent Health Authority* (2000) Lloyd's Rep Med 41. In that case, the Court of Appeal accepted that two sets of competent experts may genuinely hold different opinions. In such a case, the *Bolam* test would have no application, if what the judge is required to do is to make findings on facts.

AMERICAN, CANADIAN AND AUSTRALIAN DECISIONS

The American (US) case of *Canterbury v Spence* (1972) is credited as laying down the doctrine of "informed consent". It rejected the *Bolam* test and decided that all material facts or information must be supplied to the patient to be able to decide properly. Though it has been rejected in the majority of American States, it has found favour in Canadian, Australian and other courts.

The Australian case which has been widely referred to in Singapore is the Australian High Court decision in *Rogers v Whitaker* (1992) where a doctor was held negligent for not informing a patient of a possible rare complication with a chance of approximately 1 in 14,000. A notable recent Australian decision, also decided by the High Court is that of *Rosenberg v Percival* (2001). What *Rogers v Whitaker* decided and what it did not decide was considered in that recent case.

VOLUNTARINESS

The concept of "voluntariness" would not only cover the question of coercion and undue influence, but would also cover the question of "manipulation".

Coercion in the form of violence or threats of violence will hardly exist today concerning medical matters. However, undue influence could exist in certain situations. An interesting case is *Re: T* (1992). In that case, a young woman refused blood transfusion as she was influenced by her mother who was a Jehovah's Witness. The English Court of Appeal found that while it was proper for a patient to seek advice, their will might be overborne by pressure brought by others. If that happened, the apparent consent would be regarded as invalid. Admittedly, it will be difficult for medical practitioners to assess the situation, but they must be aware that strong pressure from others may negate the independence of judgment of the patient.

"Manipulation" is sometimes alleged against doctors where patients feel that they have been rushed into hospitalisation and made to undergo surgery or treatment without being given time for reflection. This would be related to ethical conduct (or professional misconduct) especially when expert evidence can be led to show that the treatment or surgical operation could have waited and the patient be given sufficient time to reflect and think. In other words, the doctors concerned would more or less be expected to show that it was an "emergency" whereby serious harm to the patient was avoided by the immediate action. ■

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