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CONSENT ISSUES IN ADULTS AND PAEDS

CONSENT TO MEDICAL TREATMENT

- * AN ETHICAL AS WELL AS A LEGAL PRINCIPLE
- Important concept in law "no wrong is done to the one who consent" – BUT without consent, a person commits non-consensual touching amounting to trespass of battery.
- Important in medical ethics as its respecting patient's moral right to bodily integrity and self-determination

MAIN ISSUE - PATIENT'S SIGNATURE ON THE FORM IS NOT SUFFICIENT TO AMOUNT TO A LEGALLY VALID CONSENT...

- □ The doctor's duty is not... fulfilled by bombarding the patient with technical information, which she cannot reasonably be expected to grasp, let alone by routinely demanding her signature on a consent form Montgomery v Lanarkshire (2015- UK)
- A signed consent form does not automatically absolve a doctor from liability and does not prove that valid consent to treatment has been truly obtained. The vital factors will always be the quality, extent and accuracy of the information given prior to the signing of the consent form. Dr Milton Lum (Nov 24 The Star)

LEGALLY VALID CONSENT

- Requirements:
- a. Mental competence reach the age of majority, not mentally incapacitated able to have sufficient understanding
- b. Own free will no duress, undue influence
- c. Sufficient information of the proposed treatment consent must be real, must be informed in nature not just "in a form" only

HOWEVER... CONSENT REQUIRES "INFORMATION"

- Patient needs to be informed prior to medical treatment particularly before the medical treatment.
- It requires doctors "to provide their patients with sufficient information so that the patients could assent to or withhold consent from a proffered medical treatment."
- The right of self-determination is to give the patient a MEANINGFUL CHOICE rather than a meaningless one.



ONE OF DOCTOR'S DUTIES -DUTY TO WARN/ DISCLOSE **MATERIAL RISKS**

Standard of care REASONABLE
PRUDENT
PATIENT TEST

"DOCTOR'S DUTY OF CARE TAKES ITS PRECISE CONTENT FROM THE NEEDS, **CONCERNS AND CIRCUMSTANCES OF THE** INDIVIDUAL PATIENT" "PATIENTS ARE NO LONGER PASSIVE RECIPIENTS IN MEDICAL CARE" - LORD KERR AND LORD REID IN MONTGOMERY V LANARKSHIRE (2015)

GLOBALLY LAW ON INFORMED **CONSENT HAS BEEN DEVELOPED THROUGH** PATIENT-**CENTRED APPROACHES**

FEDERAL COURT IN ZULHASMINAR (2017)

DOCTOR NEEDS TO DISCLOSE TO THE PATIENT ALL 'MATERIAL RISKS' INHERENT IN A PROPOSED TREATMENT. WHAT IS "MATERIAL" WOULD BE DETERMINED BY THE "PRUDENT PATIENT" TEST WHICH WAS INTRODUCED IN THE UNITED STATES CASE OF CANTERBURY V SPENCE (1972) 464 F. 2D 772 AND LATER ADOPTED IN THE AUSTRALIAN CASE OF ROGERS V WHITAKER (1992) 175 CLR 479.

The Reasonable Prudent Patient Test

WHAT RISKS ARE MATERIAL?

REASONABLE PATIENT

What a reasonable patient would want to know and would likely attach significance to it

PARTICULAR PATIENT

What the particular patient you are treating would want to know and would likely attach significance to it

- The likelihood and gravity of risks
- The desire of the patient for information
- The physical and mental health of the patient
 - The need for treatment and alternatives available
 - Medical practice at the time
 - Nature of the procedure whether routine or complex

MEDICAL OPINION **NO LONGER** CONCLUSIVE...OTHER **FACTORS** SURROUNDING CIRCUMSTANCES OF THE PATIENT NEED TO **BE TAKEN INTO** ACCOUNT...

RISKS THAT WERE CONSIDERED TO BE 'MATERIAL' IN SELECTED MALAYSIAN CASES

- Foo Fio Na v Hospital Assunta & Anor [2007] 1 MLJ 593 The risk of paralysis in a spinal cord operation was considered to be a material risk of which the patient should have been warned.
- Lechemanavasagar a/l S Karuppiah v Dr Thomas Yau Pak Chenk & Anor [2008] 1 MLJ 115 The risk of esophageal perforation on the upper part of the esophagus is a material risk that needed to be warned before undertaking the surgery to remove the fishbone.
- Dr Ismail Abdullah v Poh Hui Lin (Administrator for the Estate of Tan Amoi @ Ong Ah Mauy, Deceased) [2009] 2 MLJ 599 The deceased patient needs to be informed of the risks of acute pancreatitis and acute respiratory distress syndrome ('ARDS') in a procedure to remove the stones by the endoscopy method (ERCP) failing which he will undertake an operation called cholecystectomy. However, the defence of therapeutic privilege in not warning the patient of any material risks in the operation can be applied in a life-saving operation.

MATERIAL RISKS...CONTINUE

- Hasan bin Datolah v Kerajaan Malaysia [2010] 2 MLJ 646 Risk of paralysis was a material risk in both surgical procedures, namely, a fenestration and a laminectomy.
- Norizan Bte Abd Rahman v Dr Arthur Samuel (2013) MLJU 81 The risk of uterine rupture if the procedure to terminate pregnancy was done simultaneously with the insertion of an intrauterine contraceptive device ('IUCD') in a single procedure was material and must be informed to the patient.
- Abdul Razak Dato Abu Samah v Raja Badrul Raja Zeezaman [2013] 10 MLJ 34 The risk of aspiration that could materialise if the surgery was undertaken without emptying the stomach content through the insertion of Ryle's tube needed to be informed to the husband of the deceased patient who would have persuaded his wife to subject herself to the Ryle's tube procedure.

MATERIAL RISKS...CONTINUE

- Dr Hari Krishnan v Megat Noor Ishak [2018] 3
 MLJ 281 failure to advise on risk of bucking and blindness inherent in the surgery.
- Ahmad Thaqif Amzar v Kuala Trengganu Specialist Hosp Sdn Bhd & Ors [2020] MLJU 2154 Failing to advise plaintiff's parent to refer HSNZ the risks of large abscess can lead to obstruction in the plaintiff's airway
- Ourisha Taranjeet Kaur v Dr Premitha Damodoran [2020] 6 CLJ 446 – Failure to advise on risks and benefits of the delivery options of a 'big baby'

CASES WHERE CONSENT IS NOT NECESSARY

- Provision 5 MMC Guidelines 2016 Consent of the patient may not be required for any treatment that may be ordered by a court of law, for example, an order for the specific treatment of a minor, or a patient on life-support.
- ❖Statutory Exceptions Example
- **❖ THE PREVENTION AND CONTROL**
- **❖** OF INFECTIOUS DISEASES ACT 1998
- ❖ Defence of NECESSITY: "treatment which is necessary to preserve life, health and well-being of the patient my lawfully be given without consent." Fv West Berkshire Health Authority or Re F (Mental Patient: Sterilisation) [1990]
- Therapeutic Privilege

A CHILD WHO IS IN NEED OF MEDICAL TREATMENT WILL FALL WITHIN THE AMBIT OF SECTIONS 17 & 18 OF THE CHILD ACT 2001 AND PARENTAL CONSENT IS NOT NEEDED IF THE CHILD IS IN NEED OF TREATMENT TO RESTORE AND PRESERVE HIS OR HER HEALTH.

WHEN IS CONSENT OF 'PARENT AND GUARDIAN' NOT NECESSARY

- Where there is an immediate risk to the health of the child certified by doctor in writing – the consent of the parent or guardian or person with authority to consent is not necessary.
- The protector may authorize the medical, surgical or psychiatric treatment that is considered necessary. – Section 24(3)

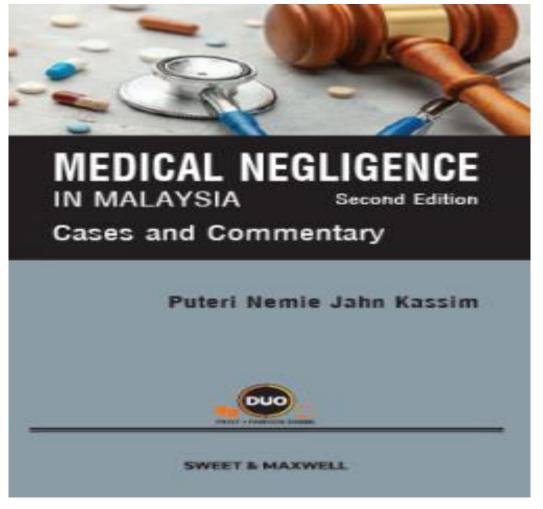
SITUATION OF EMERGENCY

- A situation of emergency does not confer an absolute power to consent to the Protector. The protector's power to consent is subject to the following circumstances:
- (i) that the parent and guardian or person with authority to consent has unreasonably refused to give consent or abstained from giving consent s24(3)(a)
- (ii) the parent or guardian or person with authority to consent is not available or cannot be found within reasonable time s24(3)(b)
- (iii) the protector believes on reasonable grounds that the parent or guardian or person with authority to consent has ill-treated, neglected, abandoned or exposed or sexually abused the child s 24(3)(c)

NO LIABILITY INCURRED

 Section 26 further provides that even if the medical examination or treatment of the child is made without the consent of the parent or guardian or person with authority to consent but instead with the consent of the protector or police officer, all who are involved including the Protector, the Police officer, the Doctor and all persons who assist the doctor will not incur liability.

THANK YOU...



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