



# THE NECESSITY OF SPOUSAL CONSENT FROM THE SHARI'AH AND MALAYSIAN LAW PERSPECTIVES

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# Introduction



- ❑ The concept of patient autonomy and the right to self-determination has dominant influence in judicial decisions on medical practices as “patients are now widely regarded as persons holding rights, rather than as the passive recipients of the care of the medical profession....[and] as consumers exercising choices.”
- ❑ *Zulhasnimar Hassan Basri & Anor. v. Dr. Kuppu Velumani P. & Ors.* [2017] 8 CLJ 605 has adopted the ‘reasonable prudent patient test’ in determining the standard of care for medical practitioners with regards to their duty to warn of material risks before procuring consent from the patient.
- ❑ The medical practitioner must consider all relevant factors concerning the patient in order to disclose the material information to the patient, such as “the nature of the matter to be disclosed; the nature of the treatment; the desire of the patient for information; the temperament and health of the patient; and the general surrounding circumstances.”

# Definition and Importance of Consent in Medical Treatment

- ✓ **Oxford English Dictionary** : “Consent” is *“the voluntary agreement to or acquiescence in what another person proposes or desires, compliance, concurrence, permission.”*
- ✓ **Malaysian Medical Council Guidelines on Consent for Treatment of Patients by Registered Medical Practitioners 2016** : The expression of “consent” is defined as *“the voluntary acquiescence by a person to the proposal of another; the act or result of reaching an accord; a concurrence of minds; actual willingness that an act or an infringement of an interest shall occur.”*
- ✓ **Shari'ah Perspective** : The word “*adhina*” has been used to coin the term “consent” in Islam, which is literally taken from the part of body which allows humans and other animals to hear.
- ✓ **Ibn Manzur** : The word “*adhina*” closely resembles consent as “*adhina li Uli al-amr*” means ‘give permission to the Ruler’, and “*ista`dhana*” means ‘asked for permission.’



# Elements For A Legally Valid Consent Under Medical Law

**1.**

## CONSENT MUST BE REAL AND INFORMED IN NATURE

The patient must be given sufficient information to make informed decision.

**2.**

## CONSENT MUST BE GIVEN THROUGH OWN WILL

The patient must give consent with freedom of choice without any coercion, duress or undue influence.

**3.**

## LEGAL COMPETENCY OF PATIENT

The patient has reached the age of majority, of sound mind and has sufficient understanding of the treatment proposed.

# R (Burke) v. GMC (2005) 3 FCR 169 (Court of Appeal)



## ❖ Lord Phillips MR:

- ❑ “Where a competent patient makes it clear that he does not wish to receive treatment which is objectively, in his medical best interests, it is unlawful for doctors to administer that treatment. Personal autonomy or the right of self-determination prevails.”

# The Involvement of Family Members and Spousal Consent in Medical Treatment



- ❖ Although competent persons have autonomous choices in accepting or refusing medical treatment proposed to them, but in certain circumstances, the involvement of family members is seen as necessary for the decision to be more meaningful.
- ❖ In some circumstances, medical practitioners “...should discuss treatment with the patient's family so that a collective decision can be made...[as] getting consent should not be just about what the law requires and making a patient sign on the dotted line...[as medical practitioners] must be sensitive and compassionate in ensuring that patients and their families understand clearly the risks involved in surgical procedures.”
- ❖ Involvement of family members in patient's treatment has been considered as good medical practice amongst the medical fraternity as part of respecting cultural values.

“Asian people do not practice self-determination in the explicit fashion required in the West.

Rather, they engage in the **family-determination of medical decision-making**....The Eastern cultural assumption is that a family member's disease is an issue for the whole family. Special fiduciary obligations are recognized: **the family must take care of the sick.**”



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➤ The involvement of family members may be helpful for patients who may not be able to comprehend and digest fully the information given by the medical practitioners as they may be too overwhelmed with pain due to their illness.

➤ Nevertheless, the involvement and influences of family members in medical decision-making must be treated with caution.



# *Re T (Adult: Refusal of Medical Treatment)* [1992] 4 All ER 649

Lord Donaldson of Lynton MR:

“...a special problem may arise if at the time the decision is made the patient has been subjected to the influence of some third party. This is by no means to say that the patient is not entitled to receive and indeed invite advice and assistance from others in reaching a decision, particularly from members of the family.

But the doctors have to consider whether the decision is really that of the patient.”



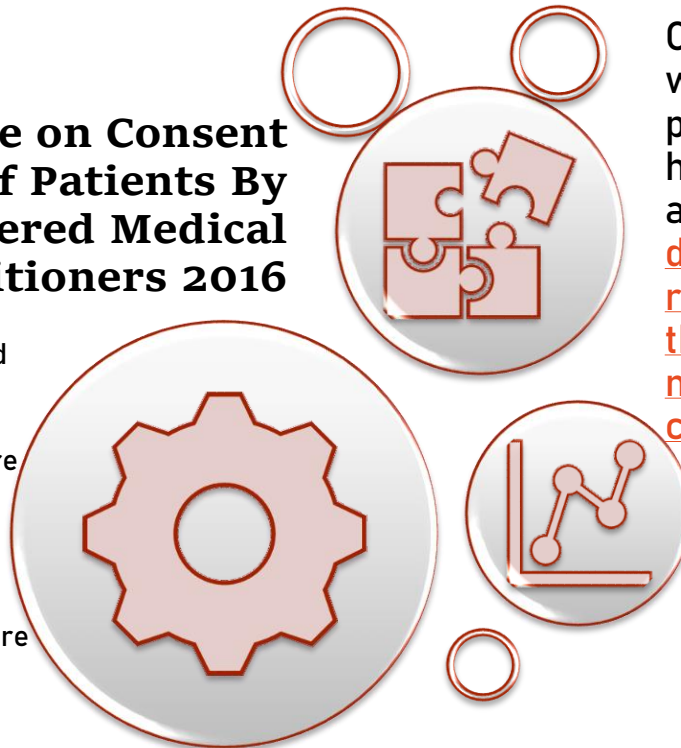
- ❑ However, the involvement of the spouse in a medical decisions affecting his or her reproductive rights, such as vasectomy, tubectomy and hysterectomy has been quite common in many countries, due to the fact that the opinions and words of either the husband or wife are crucial before the final decision affecting their reproductive rights are made and finalised.
- ❑ The implication that the husband can no longer impregnate the wife or the fact that the wife can no longer bear any children for the husband has significant and long term repercussions requiring consensus and understanding from both parties on the reproductive implications on their future married life.
- ❑ By informing the spouses on the reproductive implications and procuring their consent would prevent the couple from being embroiled in matrimonial disputes in the future.



# Malaysian Medical Council (MMC) Guideline

## MMC Guideline on Consent for Treatment of Patients By Registered Medical Practitioners 2016

- Sterilization: A permanent method of birth control. Sterilization procedures for women are called tubal ligation. The procedure for men is called vasectomy.
- Hysterectomy: A surgical procedure to remove a woman's uterus.
- Orchidectomy: A surgical procedure in which one or both testicles are removed.



Consent for sterilization procedures in a woman or man should be given by the patient concerned. Similarly, hysterectomy and orchidectomy should also involve consent by the patient. Any discussion between the spouses in this respect does not and should not deny the rights of the patient concerned in making the final decision and giving consent.

### Provision 16(g) on Consent for Sterilization, Hysterectomy and Orchidectomy

# The Necessity of Spousal Consent from the Malaysian Law Perspective



***Gurmit Kaur a/p Jaswant Singh v. Tung Shin Hospital & Anor.***  
[2012] 4 MLJ 260

The court was of the view that hysterectomy is a major gynaecological operation which is very important to married couples. Thus, consent from the husband should be obtained, especially for this type of operation where there was no possibility for the wife to get pregnant after the removal of the uterus.

***Abdul Razak Datuk Abu Samah v. Raja Badrul Hisham Raja Zezeman Shah & Ors.*** [2013] 10 MLJ 34

The court decided that consent of the spouse may be required when it is evident that the patient is dependent on the spouse to make decisions in regards to the proposed medical treatment OR when it is evident to the doctor that the decisions are being made jointly by both spouses in respect of the treatment for one of the spouses.

# The Necessity of Spousal Consent from the Shari'ah Perspective

- Islam acknowledges the principle of individual autonomy as Allah SWT declared man as His viceroy on earth as stated in Surah *Al-Isra*'verse 70: "*We have honoured Adam's children.*"
- In Islam, the patient's permission of the treatment is essential if the patient is in full legal capacity to give it. Thus, autonomy can only be exercised if the patient participates in the decision-making process with the ability to understand and make intelligent decisions, following an informed discussion with his medical practitioner.



- ❖ Before the medical treatment is undertaken, consent of patient (*rida al-marid*) is one of the basic requirements to be satisfied before any medical procedure to be administered on the patient. The relationship between the medical practitioner and the patient is usually labelled as medical contract (*al-'aqd al-tibby*).
- ❖ If the patient is incapable of giving consent, the permission of his (or her) legal guardian shall be sought according to the order of guardianship in *Shari'ah*. If the guardian resolves not to give permission, and it is clearly detrimental to the person under guardianship, the right of permission shall then be transferred to the next guardian and ultimately to the ruler.



# The Importance of Family in Islam

- Islam recognizes the family as an essential social-cultural institution. Family obligations are considered a moral injunction from God.
- *Surah Al-Ra'd* verse 21, Allah SWT said: *"Those who join together those things which Allah hath commanded to be joined..."*.
- The Prophet Muhammad PBUH said: *"The best of you are the ones who treat their families best."*
- The involvement of family members and the next of kin in the decision making process for the best interest of the patient shall NOT BE SEEN as to infringe the autonomy of an individual patient.



# Husband As The Protector...

- The responsibility of the husband towards his wife had also been discussed in Islam thoroughly, as the husband is considered as the protector and maintainer to the wife, in Islam.
- *Surah An-Nisa'* verse 34 states that: “*Men are the protectors and maintainers of women because Allah has made one of them excel over the other, and because they spend out of their possessions (to support them). Thus righteous women are obedient and guard the rights of men in their absence under Allah's protection.*”



# Husband And Spousal Consent...

- ❑ As the head of the family, the husband is responsible for managing all matters properly and for the safety and welfare of the people under his care, that is, his wife and children.
- ❑ Due to the huge responsibility trusted to the husband, therefore the husband should be prepared to lead “a kingdom that he built”.
- ❑ Thus, spousal consent or more specifically the husband's consent, in Islam is deemed necessary and considered to be part of good medical practice as a person's freedom of choice is contingent upon the responsibilities that he has towards others.



# Conclusion



- ✓ Under the Malaysian Medical Law and the *Shari'ah*, individual autonomy is essential and central to the development of law and medical ethics.
- ✓ Nevertheless, the concept of autonomy should not be viewed in isolation as what is considered as 'best interest' of the patient would require the acknowledgment of the patient's cultural, psychological, and spiritual needs before the final medical decision is taken.
- ✓ Therefore, the importance of familial roles and cultural values should thus be respected and embedded in medical decision-making in the holistic development of medical law and ethics.



**.THANK YOU.**