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**MEDICAL NEGLIGENCE: A COMPARATIVE STUDY
ON INFORMED CONSENT UNDER THE COMMON
LAW AND MALAYSIAN LAW**

BY

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**INTERNATIONAL ISLAMIC UNIVERSITY
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MARCH 2001

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**A THESIS SUBMITTED IN PARTIAL FULFILMENT OF
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ABSTRACT

This research is on the subject of law of Torts. Generally it deals with medical negligence, particularly on "informed consent". This research attempts to discover whether the requirement of "informed consent" is a must and what is the standard of disclosure that is needed in every medical treatment given by the doctors to their patients. Does this requirement defeats the good faith of the doctor when he acts without consent, but for the best interest of the patients?

The research conducted is mainly library based studying on the relevant textbooks, articles, journals and relevant statutes. It focuses on the standard of disclosure required in satisfying the concept of "informed consent", without jeopardizing the interest of both the doctors and the patients.

From the analysis and comparison made, it is submitted that it is very important to strike a fair balance between the rights of the patients to know and the special privileges given to the doctors in with-holding information whenever necessary. In conjunction to the above, the writer wishes to highlight the need to have a special independent Act of Parliament to deal with medical negligence issues especially in Malaysia, which would lay down in detail issues like the age limit to make one eligible to consent, the standard of care required, the degree of disclosure needed and others. Hopefully, once we have this particular Act, it will make matters pertaining to medical negligence clearer. Thus at the same time, it would benefit both the doctors and the public in understanding the real situation.

ملخص البحث

يعالج هذا البحث مادة من مواد قانون الضرر. إن البحث عامة يتناول الإهمال العلاجي وما يتعلق بـ " الاتفاق في التعامل". يكشف البحث تساؤلات حول الاتفاق في التعامل، هل هو ضروري، وما هو معيار الإخطار اللازم الذي يحتاج في كل علاج طبي يقوم به الأطباء لمرضاهم. هل هذا الاحتياج يغلب على كفاءة الطبيب عندما اتخذ أي قرار دون موافقة المريض سبقا، ولكن كل ذلك لمصلحة المرضى.

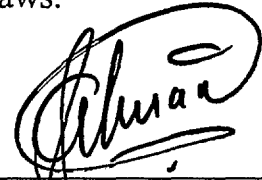
يتصف البحث ببحث مكتبي حيث تعتمد مصادر البحث على كتب ومقالات وبحوث ولوائح متعلقة به. يركز البحث جميعه على معيار الإخطار اللازم اتباعه ليوافق مطالب الاتفاق في التعامل دون تلافي أهمية أي طرفين سواء من جهة الأطباء أو المرضى.

واستنادا على التحليل والمقارنات التي قام بها الباحث، اتضح أن من المهم أن يعطي العدالة بين حق المريض ليعرف مستوى صحته وبين الامتيازات الخاصة التي يجوز للطبيب أن يخفي المعلومات المعينة بشأن المريض عند اللزوم. وعلاوة على البيانات السابقة، أكد الباحث ضرورة إيجاد لائحة برلمانية خاصة تبين القضايا المختلفة بشأن الإهمال العلاجي الطبي، تشمل حد السن المناسب لأهلية المرء في إبداء الموافقة ومستوى العناية التي يشترط فيه وحد الإخطار في التعامل مع المريض وأمور أخرى.

إنه يرجى من اللائحة الخاصة لهذا الموضوع أن يبين بوضوح الأمور المتعلقة بالإهمال العلاجي. وفي نفس الوقت يفيد الأطباء والناس لفهم الأمر الواقع.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Laws.



Syed Ahmad Al Sagoff
Supervisor

I certify that I have read this ^{work} study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Laws.



Mohd Akram Shair Mohamed
Examiner

This thesis was submitted to the Kulliyyah of Laws and is accepted as partial fulfillment of the requirements for degree of Master of Comparative Laws.



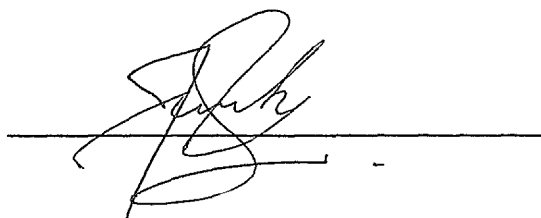
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Dean Ahmad Ibrahim Kulliyyah
of Laws

DECLARATION

I hereby declare that this thesis is the result of my investigations, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references and a bibliography is appended.

Name : FARAH SALWANI BINTI MUDA @ ISMAIL

Signature :

A handwritten signature in black ink, appearing to be 'Farah', written over a horizontal line.

Date: 1st March 2001

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This work is specially dedicated to my beloved Abah and Ummi.

Thank You for being my inspiration and strength...

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Mental Disorders Ordinance 1952

Mental Health Act 1983, England

LIST OF ABBREVIATIONS

A.C	Appeal Cases
All. E. R.	All England Reports
A.M.R	All Malaysian Reports
Anor	Another
C.L.J.	Current Law Journal
C.L.R.	Current Law Reports
Co.	Company
et. al	(et alia); and others
Ibid	(ibidem); in the same place
K.B	King's Bench
Ltd.	Limited
Med. L.R.	Medical Law Report
M.L.J	Malaysian Law Journal
P/PP	Page/Pages
Q.B.	Queen's Bench
Supp	Supplement
S.W.T.	Subhanahu Wa Ta'ala (Praise be to Allah and the most High)
Vol/Vols	Volume/Volumes

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CHAPTER 1

INTRODUCTION

Medical treatments proposed are normally initiated by obtaining informed consents from the patients first. "Informed consent" is a term, which is used in contemporary legal discussions about consent in medical practice. It arose as a means of narrowing and interpreting the conceptual definition of consent. Consent where properly provided, requires an element of receiving and understanding information.

One might question why is it so important for these patients to be informed about his or her medical conditions, the treatments available for it, any risks or consequences resulting from it and others. The simplest answer available is because morally and ethically, these patients have a right to know about themselves, no matter how small or simple the matter might be in the eyes of others. With such information too, it enables them to decide autonomous choices affecting them personally. Thus indirectly, this reflects to us how important it is to establish a good doctor-patient relationship. By having this special bond, the doctors feel responsible to provide all the necessary information needed, while on the other hand, the patient will also feel comfortable to discuss and seek advice regarding their condition and the proposed treatments.

Time passes and things change. It cannot be denied that compared to the olden days, the public nowadays require their doctors to treat them as responsible adults. They expect the doctors to listen to their problems as well as to be consulted before any treatment is prescribed. So, the doctors are expected to provide factual information and appropriate assurance and guidance on the management of their medical problems. However, the doctors too have certain discretionary powers in satisfying the concept of "informed consent". It depends upon them to decide how much information is sufficient or suitable to be exposed depending to the different levels of patients. This is because, there are times when too much information provided would result to more harm rather than assistance upon the patients.

What can be adduced is that, we must strike a fair balance between the rights of the patients to know and the scope of duty shouldered upon these doctors. Both the patients and the doctors must be respected accordingly since the survival of both actually depends upon each others existence. Thus, understanding and tolerance is very much needed in order to ensure a harmonious doctor-patient relationship.

CHAPTER 2

1.0 THE DUTY TO INFORM AND DISCLOSE

When a doctor attends and diagnoses his patients, it leads to a situation where the doctor needs to inform his patient about his condition and seek the patient's consent to provide care and treatment. At the same time, the patient as an individual, has rights to be respected. He has rights to avoid any bodily harm, interference and even intentional touchings to his body. This also includes having the right to determine what should be done to him. Mr. Justice Cardozo of the New York Court of Appeal said in the case of *Schloendorff v Soc. Of New York Hospital*,¹

"Every human being of adult years and sound mind has a right to determine what shall be done with his own body..."

It is necessary to obtain consent, before any treatment is administered, especially when the treatment is extensive. Actual consent in administering medical treatment may be expressed in a number of ways. For example, once a patient turns up for examination or consults a doctor for treatment, or calling the doctor for a home visit, the patient could be deemed to have consented to whatever the doctor does.

¹ 211 N.Y.125, at 129. (N.Y.C.A.1914).

However, this does not actually satisfy the requirement of consent under the civil law.² The real consent to be obtained must be one that is given voluntarily and with clear information accompanying it. But, the issue is, whether it is a duty imposed upon doctors to inform and disclose to their patients particulars of a treatment and matters related to it before any consent is obtained?

1.1 THE POSITION UNDER THE COMMON LAW

Failure to communicate adequate information by the doctors or medical practitioners can result in lawsuits. These failures arise due to lack of proper consultation or discussion before any treatment is administered. Typical cases involve allegations of failure to disclose to the patient the inherent risks in the proposed mode of treatment, causing consent to be given without full knowledge of the important facts.

Doctors as professionals in their field owe a duty to their patients to disclose necessary and material facts pertaining to the proposed treatment. The contemporary term used is "informed consent". The term arose as an attempt to narrow down and interpret the conceptual definition of consent. As a result, a doctor carries the duty to inform and describe to his patients the proposed treatment that he would recommend. He should voluntarily reveal or disclose:

² S.A.M. McLean and A.J. Mc Kay, *Consent In Medical Practice*, Gower Publishing Co. Ltd., England, 1981, pp. 96-97.

- a) the nature of the treatment;
- b) any material risks; and
- c) any special or unusual risks³.

Before the 1970s, the British courts had apparently given little consideration to the question of what information must be disclosed before a medical consent is considered as real and effective.⁴ There was no specific doctrine available and applied to regulate the disclosure of information until the case of *Chatterson v. Gerson*⁵. In this case, the plaintiff suffered severe and chronic pain in a post-operative scar in her right groin. She received treatment from a doctor specialized in treatments for pain. She consented to be operated by the doctor to block the sensory nerve, which transmitted the pain signals from the scar site to the brain. Normally, the defendant doctor would explain to his patient about the consequences that might take place after the operation. This includes the feeling of numbness over a larger area than the pain source and loss of muscle power, which is temporary in nature. The plaintiff argued that the defendant doctor did not warn her of the numbness and muscle weakness.

After the operation, she experienced the numbness but fortunately the pain ceased. However, after ten months, the chronic pain returned and she went for a second operation. Before the second operation, the defendant doctor did not warn her of the usual possible effects that might occur since it would be the same as the first operation. But again, the

³ Arthur J. Meagher, Peter J. Marr and Ronald A. Meagher, *Doctors And Hospitals: Legal Duties*, Butterworths Canada Ltd, Canada, 1991, p. 63.

⁴ Sheila A.M. McLean, *A Patient's Right To Know*, Gower Publishing Co. Ltd, England, 1989, p. 101.

⁵ [1981] 1Q.B. 432.

second operation was unsuccessful and failed to relieve the pain. The plaintiff then claimed for trespass and negligence against the doctor and the hospital. To her, they had failed to obtain her consent to the operation, since she was not informed nor warned of its implications.

The court dismissed the plaintiff's action. Bristow J. held that an action of trespass could only be established if it was clear that the doctor failed to explain in broad terms the nature of the operation that prevented the plaintiff from making a real consent. The court also held that it was a doctor's duty to explain to the patient what he intends to do and any implications that might occur from it. Doctors have a responsibility to explain all the above carefully in a similar way another responsible doctor would have done, in order to provide the patient with a chance to give real consent. Any failure on the part of the doctor to inform the patient of the nature of the operation and its implications can establish an action in negligence.

The doctor also has a duty to warn the patient of the risks of misfortune inherent in the procedure however well it is carried out. In this case, the defendant had performed his duty towards the plaintiff when he explained to her of the implications before the first operation took place. Even though he did not warn the plaintiff of the implications inherent in the second operation, the plaintiff had failed to prove that if she had been properly informed, she would have refused to undergo it.

Later, in the case of *Sidaway v. Bethlehan Royal Hospital Governors*, Lord Scarman said,

*"I think that English law must recognize a duty of the doctor to warn his patient of risks inherent in the treatment which he is proposing; and especially so if the treatment be surgery. The critical limitation is that the duty is confined to material risks..."*⁶

Clearly it is a doctor's duty to warn and inform his patients. However, even though disclosing information is a duty, it would only be meaningful if all the information provided could be understood and comprehended by the patients. Thus a doctor has to use his skill in trying to communicate what he really means according to the level of intelligence of his patient. For example, when dealing with old, uneducated villagers, the doctor should explain the matter in a simple manner acceptable to the person. But a doctor should not be made responsible if the patient is unable to assimilate or completely grasp the information given.

All the information provided or explained by the doctor would then allow the patient to understand his health problems better and be prepared to receive the proposed treatment necessary for it. It will also enable him to make a right choice, which will then lead to a real "informed consent".

⁶ [1985] A.C. 871, p. 889 H.

1.1.1 What to disclose and its extent

Consent involves the element of understanding and also making the right choice. Doctors are required to explain at least the basic principles involving the procedures and risks involved in a particular therapy, including its nature and consequences.

Lord Scarman in the case of *Chatterson v. Gerson*⁷ made it clear when he said:

“In my judgment, there is no obligation on the doctor to canvass with the patient anything other than the inherent implications of the particular operation that he intends to carry out. He is certainly under no obligation to say that if he operates incompetently he will do damage. The fundamental assumption is that he knows his job and that he will do it properly but he ought to warn of what may happen by misfortune however well the operation is performed, if there is a real risk of misfortune inherent in the procedure.”

Every practicing doctor should also bear in mind that each time they disclose information to patients, they should not just treat it as an act of disposing their duty only, but it should also be viewed as providing guidance and assistance for patients to balance the medical advantages and disadvantages available. Other relevant factors like family, social responsibilities and future life should also be highlighted to them, before any decision is made regarding treatment. So, as long as the doctors perform this duty within the Bolam principle, i.e. acts in accordance with accepted proper practice by a responsible body of informed medical men, the doctor will be considered as discharging his duty well and free from any negligence claims.

⁷

[1981] 1 Q.B. 432.

Despite the doctor's duty to disclose information, another issue that always arises is how much information should a doctor disclose to his patients? Would it be everything regarding the treatment or are there certain limitations to it? The British courts have tended to rely on the notion of 'clinical judgment' or good medical practice in determining whether the disclosure was adequate or not.⁸ The case of *Bolam v. Friern Hospital Management Committee*⁹ suggested that if the risk was minimal, doctors do not have a duty to disclose it. Here, the plaintiff was suffering from mental illness and was suggested to undergo electro convulsive therapy. He had signed the consent form for treatment but was never warned of the risk of fracture involved. However, the fracture risk was very small, i.e. one in ten thousand cases.

During the treatment, the doctor chose not to use any relaxant drugs or manual control which could have prevented the risk of fracture. There was no suggestion that the treatment (administering ECT without the use of a muscle relaxant) was an inappropriate type of treatment but rather that a muscle relaxant should have been given. Evidence was led showing that some doctors always administered a relaxant (which also had its own risks) whereas others do not. The court decided that the doctor was not negligent in choosing not to rely on the relaxant drugs. Moreover, the risk of fractures was too minimal and thus need not be disclosed. Even if he had disclosed it, there was no guarantee that the plaintiff was capable of considering that risk in view of his severe depressed condition.

⁸ Sheila A.M. McLean, *Legal Issues In Medicine*, Gower Publishing Co. Ltd., England, 1981, p. 102.

⁹ [1957] 2 All. E. R. 118.