

**INFORMED CONSENT IN MALAYSIA:
A SOCIO-LEGAL STUDY**

BY

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ABSTRACT OF THE THESIS

The right of a person to control his body is a concept that has long been recognized in Malaysia under the law of torts. The purpose of requiring informed consent is to preserve that right in medical decision-making. Informed Consent is a relatively new concept in medical litigation cases. However in the late 1990's, it has become one of the important claims under negligence made against the doctor for failure to disclose relevant information to patients in respect of the treatment proposed. Whether Malaysia has begun to recognize patient's right to decision-making is yet to be seen. Furthermore the social-cultural relationship between doctors and patients had to be considered. In this respect, the researcher had conducted interviews with doctors and patients to gauge their reaction towards a shared process of decision-making, which is the central issue in the doctrine of informed consent. Findings suggest that in a society where primary health care is the main thrust to achieve health for all, the possibility of recognition of the rights of patients to receive information before making decisions about treatment appears remote. The findings also underscore the importance of incorporating aspects of informed consent as part of providing quality service to patients.

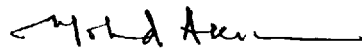
ملخص البحث

إن حق الشخص في التصرف في جسده لهو مفهوم متجذر في قانون المسؤولية المدنية في ماليزيا. والهدف من جعل طلب الموافقة رهين بالإطلاع الوافي على ما يوافق عليه الشخص هو المحافظة على ذلك الحق في أثناء اتخاذ القرار الطبي. ولا بد من القول بأن مفهوم هذا الحق مستجد نسبياً في مجال التقاضي الطبي في ماليزيا. ولكن في نهايات التسعينيات صار من أهم الأسس التي رُفعت على أساسها دعاوى ضد الأطباء بسبب عدم قدرتهم في إعلام مرضاهم بالمعلومات المختصة بالعلاج الذي سيجري لهم. وما إذا كانت ماليزيا صارت تعترف بحق المريض في أن يكون جزءاً من عجلة اتخاذ القرار الطبي بشأنه هو أمر يلوح في الأفق. إضافة إلى ذلك فإن العلاقة الاجتماعية الثقافية بين الطبيب والمريض لا بد أن توضع في الاعتبار. وفي هذا الصدد قد قام الباحث بإجراء مقابلات شخصية مع أطباء ومرضى للتعرف على ردودهم في شأن مشاركة الطرفين في اتخاذ القرار باعتبار أن ذلك الأمر هو المحور الأساس في مقولة ذلك الحق. توصل هذا البحث إلى أنه في مجتمع ما يكون فيه الهم الأولي هو تحقيق الصحة للجميع تكون فيه إمكانية الاعتراف بحق المرضى في معرفة المعلومات اللازمة قبل اتخاذ قرار علاجهم أمر بعيد المنال. وقد توصل البحث كذلك إلى أهمية إدخال هذا الحق بالنسبة للمرضى كجزء من اعطائهم خدمة صحية عالية الجودة.

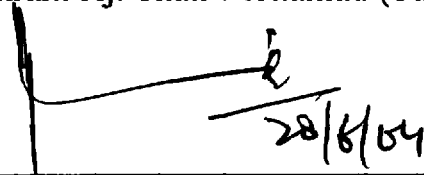
APPROVAL PAGE

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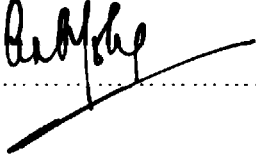


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DECLARATION

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.

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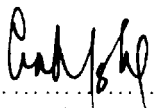
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INFORMED CONSENT IN MALAYSIA: A SOCIO LEGAL STUDY

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Dedicated to:

Azhar Hussin, husband and loving father

***Nurul Farhana, eldest child and the
twins who***

***Were born during the initial stages of
this writing,***

Muhammad Akmal and Nurul Akmalia

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In the name of God, Most Gracious, Most Merciful.

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Optical Act 1991

Private Hospitals Act 1971

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Poisons Act 1952

Prevention and Control of Infectious Diseases Act 1988

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Telemedicine Act 1997

ENGLAND

Children Act 1989

Family law Reform Act 1969

Family law Reform Act 1969

Mental Health Act 1983

National Assistance Act 1948

Public Health (Control of Diseases) Act 1984.

LIST OF ABBREVIATIONS

AIDS	-	Acquired Immunodeficiency syndrome
ASEAN	-	Associations of Southeast Asian Nations
CAP	-	Consumer Association of Penang
FOMCA	-	Federation of Consumers Association of Malaysia
HIV	-	Human immunodeficiency virus/
MMC	-	Malaysian Medical Council
MMT	-	Malaysian Medical Tribune
MNHS	-	Malaysian National Health Service
MOH	-	Ministry of Health
TB	-	Tuberculosis
UDHR	-	Universal Declaration of Human Rights
UNICEF	-	United Nations Children's Fund
WHO	-	World Health Organisations
WMA	-	World Medical Associations

CHAPTER 1

INTRODUCTION

1.1 Aims and purpose of research

In the last 10 years and more now in Malaysia, consent has appeared as a significant subject in the fields of medical procedure, medical treatment and in research involving human subjects. Health care professionals, researchers and the courts have been involved in interpreting the issue of consent and its application to fellow Malaysians. Further, the marked differences in the socio-political environment, the cultural and historical background of each country would give a different perspective of its application.

Although the concept of consent has found its way in the Malaysian code of professional conduct,¹ it has not been systematically studied to ascertain to what extent is the concept been acknowledged and accepted by the health care institutions, the legal mechanism and the public/patient at large. The study aims to explore how consent was viewed from various perspectives. Further, health care professionals need to balance the need to safeguard patient's interest and its main objective to do whatever is possible to benefit the patient's health. Patient's interest would include the competent patient's freedom to make health care decisions, known as the principle of autonomy. Conversely, the doctor also needs to uphold the principle of non-maleficence and beneficence namely not to harm the patient's health.

¹See Chapter 2, sub-topic 2.2.3

In everyday practice, these moral principles would serve as guidelines in a doctor-patient relationship. However if there is a conflict between the principle of autonomy that is the need to respect patients rights to decision-making and that of beneficence, which should prevail? These set of moral rules are usually vague² and would not be able to solve every human situation. One method of handling this problematic medical issue is to use the ethical principle of 'paternalism'. Here, the doctor will have to exercise his skill and expertise in order to justify medical interventions or treatment if the need arise to save a patient's life although without the patient's consent.

A case in point is the Jehovah Witness believer.³ The patient (x) was involved in an accident and was in dire need of a blood transfusion. Nevertheless the patient refused because values such as the patient's religious belief that she or he would not go to heaven with contaminated blood made her reject the life-saving procedure. The doctor felt that the patient had made the wrong decision and insisted in carrying out the procedure to save her life. The doctor ordered the necessary procedure and saved her life but by so doing he had violated the right of the patient namely the moral principle of autonomy. He was in fact exercising his paternalistic attitude to solve this seemingly difficult area of conflicting interest.

² The dilemmas faced by doctors due to rapid advances in medical technology, such as how much should they depend on life support systems taking into account the cost involved in their procurement and use.

³ Physicians face a special challenge in treating Jehovah's Witnesses. Members of this faith have deep religious convictions against accepting blood, packed RBCs [red blood cells], WBCs [white blood cells], or platelets.

The research aims to look into this aspect by taking into account the socio-cultural needs and beliefs of the patients and the factors influencing doctors in making health care decisions and to what extent the paternalistic approach is adopted. In addition, one has to look into socio-economic factors and the political climate to assess the status of patient's rights including the right of the patient to participate in medical decision-making. Whether patient's rights are recognised here would be greatly influenced by the political climate and the government's policy towards health care **needs.**

According to the Ministry of Health (MOH) Malaysia,⁴ primary health care is the main thrust of the Malaysian Health care system. As such, public health programs such as disease control, food quality control, family health services, child immunization, ante natal care, and so forth are provided throughout the country to enhance the quality of life for the population. With this in mind, various activities are carried out to meet health care needs.

Some of the activities carried out include promotion of healthy lifestyle and modifying habits through the Healthy Lifestyle Campaigns⁵ of the Ministry, collaboration with other agencies in health including schools, teacher's training colleges, dental associations and the related health care industries to increase awareness on the

⁴ Key note address by the Director General of the MOH entitled " Effective utilization of health resources during current economic situation: MOH experience", public health seminar held in Kuala Lumpur, in August 1998.

⁵ Annual report 2000, MOH.

importance and care of oral health⁶ to the community. HIV/AIDS surveillance programs were launched such as routine confidential HIV-Screening for ante natal mothers, for tuberculosis patients and for compulsory screening for foreign workers seeking employment in Malaysia.

The MOH as the guardian of the health of the nation gives high priority to the occupational health program to ensure that the workforce enjoys good health whilst minimizing health hazards in the work environment. To achieve this, various programmes and strategies such as the development of occupational disease database, training and promotional activities, developing and reviewing guidelines and code of practice on occupational health and safety are regularly carried out.

Further, the Ministry is concerned with the shortage of personnel in various health care centers due to poor salary, unattractive incentives and stiff competition from the private sector. Consequently in an attempt to get better response to work in government hospitals, the Ministry has introduced new schemes and facilities in addition to salary, leave entitlement, medical benefits, computer loan, car loan and housing loan. These moves are taken to ensure that the MOH has a well-organized structure with an optimum number of productive and quality personnel that will be able to assist the organization implement its activities efficiently and effectively.

A review of the reports and documents from the MOH reveals that the primary aim of the government is to deliver optimal health care services. In a society where primary

⁶ Oral health care delivery encompassing all aspects of promotive, preventive, curative and rehabilitative dental services to the community.

health care is the main thrust to achieve health for all, other aspects of health care receive a minimum amount of consideration, hence the dearth in literature especially with regards to patient's rights such as the right to obtain information, consent and medical decision-making, confidentiality and so forth. According to MOH, the main challenge for the future is how to make health care services more efficient and readily accessible to the people.⁷

When clinical treatment involves decision-making, questions of faith, cultural values, traditional background and religious convictions will come into play. One study on Asian values acknowledged that culture is a significant aspect that has to be taken into consideration so that problematic medical issues can be tackled in a culturally sensitive way.⁸ She submitted further by stating that culture should not be allowed to subsume or excuse human rights violations and that the most effective way to promote 'the so-called foreign values' within a society is to understand the society's cultural context and develop strategies to harmonize cultural values and human rights.

Harriet⁹ further states that the debate on Asian values is part of a larger discourse within the human rights movement between the universalist and the relativist schools of thought. Universalism refers to the theory that human rights are universal and capable of application in all cultures. It assumes that human rights have certain shared

⁷ Refer again to the keynote address of the Director –General of Health, Malaysia.

⁸ Samuels H., *Hong Kong on women, Asian values and the law*, Human rights Quarterly 21:3(1999)707-734

⁹ A law expert in human rights and women issues.