4 Consent to Treatment

The basis of any discussion about consent is that a patient gives consent before any investigation and treatment proposed by the doctor. Doctors offer advice, but the patient decides whether to accept it.

Before a patient can consent, the options have to be presented in such a fashion as to allow a decision to be made. Consent must involve the ability to choose. One of the patient's options is not to be troubled with having to make a decision. Doctors sometimes argue that patients do not want to be told all the facts. In an increasingly articulate society doctors are moving away from this paternalistic approach and any doctor who decides to withhold information should examine stringently the reasons for doing so. Society is moving away from paternalism towards partnership and at the same time people are taking increasing responsibility for the effects of their own way of life including its effects on health. Even though a few patients 'don't want to be told', there is now little justification for withholding information – unless 'to tell all' would be clearly detrimental to the individual. It is therefore only when the patient specifically delegates responsibility for the decision to the doctor that it is ethically right for the doctor not to disclose all the relevant facts.

Normally, the patient will wish to decide. The doctor should remember that his specialised training and knowledge puts him in a powerful position compared with the patient who will usually lack the detailed knowledge to grasp the essential facts immediately. The lack of this knowledge does not mean that the patient is unable to understand. Consent without understanding is invalid and it is the doctor's moral, professional and legal duty to help the patient reach this understanding. In so doing the doctor should follow the patient's lead and present as many of the risks and benefits as the patient needs to know.* Naturally a doctor can only discuss matters in relation to the accepted state of medical knowledge at the time.

One of the problems about consent is that it must follow disclosure of information and thus understanding of the medical condition. As UK case law

*The doctor would be well advised to have regard to patients in whom levels of consciousness are impaired, post head injury states and impaired consciousness due to intoxication.

has evolved, the amount of information that a doctor is legally obliged to disclose to a patient in the context of consent to treatment is based on the concept of what information a reasonable member of the medical profession would give the patient in a particular set of circumstances to enable him to reach a decision. This has been most recently affirmed by the 1983 Sidaway case [1985, 1 A11 E.R. 643] which explored the concept 'informed consent'. Equally, cases and allegations about lack of consent are usually based on assault and battery or negligence. It is important to remember that a doctor's legal obligations are much less than his moral obligations. The legal minimum is not necessarily ethical.

Exceptions

While the principles of consent remain, there are exceptions in particular situations. These are emergencies, and the treatment of minors, the mentally incompetent and the senile.

Despite recent legal cases, no legal minimum age has been set for consent to treatment. It has been suggested that sixteen is the 'Age', as section 8(1) of the Family Law Reform Act 1969 states that 'the consent of a minor who has attained the age of sixteen years to any surgical, medical or dental treatment which, in the absence of consent, would constitute a trespass to his person shall be as effective as it would be if he were of full age: and where a minor has by virtue of this section given effective consent to any treatment, it shall not be necessary to obtain any consent for it from his parent or guardian'.

However, the Act goes on to state that 'nothing in this section shall be construed as making ineffective any consent which would have been effective if this section had not been enacted'. As the Common Law position before 1969 was uncertain, there remains in effect no set minimum age for consent.

Thus the criterion for consent should not be age but competence. This is an entirely subjective judgement based upon the individual child and the circumstances when the child presents. Little difficulty is raised where a patient under the age of sixteen requires immediate treatment when no parent or guardian is available. Emergencies cannot wait for consent and there can be little doubt that a court, having regard to parents' duty to provide medical care for their child, will uphold the doctor's action in providing such care as might reasonably anticipate the parents' consent. If there is difficulty in contacting the parents, the doctor must assess the urgency of the need for treatment before embarking on any procedure.

Similarly, if the treatment is minor, such as for a cough or cold, the doctor is not likely to be faced with a difficult judgement in relation to an under sixteen's ability to consent. If treatment is difficult, dangerous or raises moral issues, the doctor may experience difficulties including external pressure placed upon him by society's perception of the situation. The most contentious issues relate to

advising and providing treatment on contraception and the termination of pregnancy.

Opinions have been expressed that doctors providing contraception, even with the parents' consent, for minors under the age of sixteen might be aiding and abetting the offence of unlawful sexual intercourse. Legal advice is that if the doctor acts in good faith in protecting the girl against the potentially harmful effects of intercourse, he would not be acting unlawfully. Furthermore, Lord Scarman stated in the House of Lords' judgement in the case of Gillick versus West Norfolk and Wisbech Area Health Authority and the Department of Health and Social Security [1985, 3 A11 E.R. 402] that:

> 'If the prescription is the bona fide exercise of his clinical judgement as to what is best for his patient's health, he has nothing to fear from the criminal law or from any public policy based on the criminality of a man having sexual intercourse with her'.

If a girl under the age of 16 requests contraception but refuses to allow her parents to be informed the question of the validity of the girl's consent is raised. It appears that section 8(3) of the Family Law Reform Act 1969 would consider such consent valid in certain cases.

When faced with this problem, a doctor should take the following steps:

(a) Attempt to convince the girl of the advisability of involving her parents in this decision. This should be part of the counselling extended over a number of interviews, where appropriate. In many cases the doctor will gain consent to involve a parent or a person in loco parentis.

(b) If he is unsuccessful, the doctor must then decide whether the girl has the mental maturity to understand his advice and the possible consequences of her action. If she has not, then her consent is not informed and so invalid. The doctor cannot provide treatment in these circumstances but should keep confidential the fact and content of the consultation.

(c) If he is satisfied that she can consent, he makes a clinical decision as to whether the provision of contraception is in the best interests of the patient.

(d) A decision not to prescribe does not absolve him from keeping the interview confidential.

Lord Fraser of Tullybelton, in the House of Lords' judgement October 1985, in the case of Gillick versus West Norfolk and Wisbech Area Health Authority and the Department of Health and Social Security, expressed the following line of conduct for a doctor in such a situation:

1. That the girl (although under sixteen years of age) will understand his advice;

2. That he cannot persuade her to inform the parents that she is seeking contraceptive advice;

3. That she is very likely to begin or to continue having sexual intercourse with or without contraceptive treatment;

4. That unless she receives contraceptive advice or treatment her physical or mental health or both are likely to suffer;

5. That her best interests require him to give her contraceptive advice, treatment or both without the parental consent.

Mental Health

When an adult is mentally incapable of giving valid consent, e.g. by reason of mental illness, serious subnormality or senility, the doctor must decide, as in any other case, what is in the best interests of the patient. No other individual, unless duly appointed as a guardian, has legal authority to consent to treatment on the patient's behalf. The doctor's authority in these matters depends however on the type of treatment and his own status under the 1983 Mental Health Act.

Exceptionally, the doctor may also consider any threat posed to others by the patient's condition. Any doctor who is clinically in charge of a patient at the relevant time may initiate or participate in compulsory admission to hospital for treatment, but the fact of admission to hospital under a section of the Mental Health Act does not necessarily indicate the patient's ability to give or withhold consent. The patient's right to give or withhold consent to treatment for a physical condition is not lessened by the fact of his being admitted under such an Act. What must be considered is whether the patient is able to appreciate the reasons for the nature of, and the possible consequences of, the proposed treatment, and what would happen if the proposed treatment were withheld.

In the mentally handicapped child under the age of eighteen sterilisations should be performed only after the courts have granted wardship. Other procedures – such as minor non-emergency surgery – may be consented to by the parent or guardian.

In the mentally handicapped adult recent court cases appear to imply that no-one, not even the courts, can give valid consent on the patient's behalf. (Reference, Re: B (A Minor) (Sterilisation), reported in 'The Times' Law Report, 1 May 1987). In these cases the courts may rule that the medical intervention will not act against the best interests of the individual.

The legal complexities lead to enormous practical difficulties and consideration is being given by groups such as MENCAP for the need for clarification of the laws.

Detained Persons

In the case of police surgeons, consent carries a number of aspects. A detained person will, in general and by nature of being confined and/or intoxicated, be less free to give consent. He may also be restricted in terms of privacy during the consultation. Under all circumstances, with the exception of intimate body searches, a person in custody is not obliged to submit to medical treatment. The same right applies in the provision of specimens for forensic examination, and the person should be so informed. In the case of an unconscious prisoner, and where ability to give valid consent is inhibited by intoxication, examination and procedures to ensure proper medical care are appropriate; the taking of specimens for forensic purposes is not. These matters are dealt with in chapter 5.

Police surgeons are reminded that special circumstances exist regarding consent to intimate body searches; they are invited to consult the BMA guidelines on this (Appendix II).

Consent to Operations on Reproductive Organs

The other main problem concerns the reproductive systems.

The custom of obtaining the consent of the patient's spouse to operations on the reproductive organs is one of courtesy not legal necessity. Nevertheless, because the patient's partner may properly hold that he or she has an interest in such an operation, it is good practice to attempt to get both partners' consent. Similar considerations apply to the investigation or treatment of the foetus or embryo, or of the intra-uterine environment, particularly as the foetus cannot give any consent.

The limited 'rights' of the unborn child derive from the Offences Against the Person Act 1861 and the Infant Life Preservation Act 1929. The Abortion Act 1967 on the other hand, by legalising the termination of pregnancy within certain limits, diminishes the protection which an unborn child otherwise had. Doctors should have regard for these considerations when the mother refuses treatment for the foetus.

Abortion, and the ethical problems associated is referred to in more detail in chapter 15.

Obtaining consent

At times consent is implied, as in attendance for an inoculation which implies that the patient expects the inoculation. This does not, however, absolve the doctor from explaining any risks. Equally there are times when oral consent is not sufficient and written consent essential. It is important that consent should be free of any form of pressure or coercion, particularly where treatment is offered to patients such as those serving in the Armed Forces, in other types of employment which limit the individual's freedom of action, and to prisoners

serving a custodial sentence. No influence should be exerted through any special relationship between a doctor and the person whose consent is sought. This matter is discussed more fully in chapter 5.

The GMC has said of the relationship between doctors and their patients:

> 'Patients grant doctors privileged access to their homes and confidences. . . . Good medical practice depends upon the maintenance of trust between doctors and patients and their families, and the understanding by both that proper professional relationships will be strictly observed. In this situation doctors must exercise great care and discretion in order not to damage this crucial relationship'.

The doctor/patient relationship is based on trust. The doctor will be constantly on his guard to be objective in his judgement in the face of the many outside pressures which may be exerted on him. These may be economic pressures from relatives, advertising, the media, or from other sources.

A doctor is entitled to decline to provide any treatment which he believes to be wrong, but there is a distinction between treatment which a doctor believes to be detrimental to a patient's best interests and treatment to which a doctor has a conscientious objection. A doctor must not allow his decision as to what is in the patient's best interest to be influenced by his own personal beliefs. If a person who is already a doctor's patient requests treatment which the doctor believes to be against the patient's best interests, he should tell the patient and point out that the patient has the right to seek advice elsewhere. If a person who is found by the doctor to need treatment which the doctor cannot provide or take part in because of the doctor's own principles, the doctor must tell the patient and ensure that the patient is referred to alternative medical care.