Consent (1): Overview and Capacity

By Dr Myint Soe

Editor's Note:

Part 2 of this article will be published next month. In it, Dr Soe writes about disclosure and voluntariness in the area of consent. This 2-part series is based on a similar talk which he gave during the Seminar in Bioethics and Health Law on 12 July 2001 at Tan Tock Seng Hospital.

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NECESSITY OF CONSENT

Both in civil law and criminal law *consent* for medical treatment is required. This will include surgical operations, giving injections, and even performing an abortion.

Without valid consent, many treatments (including surgical operations) would be regarded as *trespass* to the person (in the law of tort) and *simple hurt* or *grievous hurt* (in the law of crime). Apart from legal considerations, consent is essential to receive the trust and co-operation of the patient. Thus, doctors and dentists are being made aware that the giving of advice and information as to the risks and side-effects is now required by law. Hence doctors and dentists are now being increasingly sued for negligence for lack of "informed consent". This aspect of consent will be dealt with in the second part of this article relating to disclosure and voluntariness.

AGE OF CONSENT

For civil law, the age of consent will generally be the age of majority. In Singapore law, that would be 21 years of age. For Malaysia and England it would be 18. See however, *Gillick's case* (1986) decided by the House of Lords, where parental consent was mentioned as being 16 years for minors. This is because of s.8 of the English *Family Law Reform Act* 1969 which refers to any surgical, medical or dental treatment to a minor. Thus, for minors above 16, consent from the parent or guardian would not be required in England. However, in Singapore, the age of consent for everyone (adults or minors) would prima facie be 21.

However, although the age of consent is *prima facie* 21, it is likely that judges in Singapore may be following the dicta in *Gillick's case* (supra). It was suggested in that case that the test to be applied was whether the child had sufficient understanding and intelligence to enable him or her to understand fully what is proposed. In practice, a Singapore Judge may feel that the parent or guardian may be in a better position to decide. However, it would be against good sense not to accept the views of a minor whose age is over 16 or 18 and usually more educated or knowledgeable than his/her parents or guardians. There is however, no direct authority in this regard.

In practice, the type of procedure to be done may be relevant. Thus a 15- or 16-year-old boy who requires a minor knee operation as a result of playing football, should be able to decide and consent on his own. What about an appendictomy or a heart-operation? Problems may also arise if the minor has some mental illness. They may have some lucid intervals, when they might be able to make up their own mind. Otherwise, the doctors concerned would be wise to listen to the parents or guardians. Where the minor and the parents or guardian have irreconcilably different views, a Court Order may be the best solution.

Things would be different in the case of an emergency, e.g. appendicitis. The minor may not want an operation but the parents may agree to it. Hence, it is generally accepted that in giving life-saving treatment the doctor will have to decide.

AGE OF CONSENT IN CRIMINAL LAW

Under s.89 of the Penal Code of Singapore, the position of a minor under 12 years of age is clear. The consent of the guardian or other person having lawful charge must be obtained. The position is also clear for minors above the age of 18. Under s.87, they can consent to surgical treatment, even if it amounts to "grievous hurt".

What is unclear in criminal law is for minors between the ages of 12 and 18. In construing the various sections in the Penal Code, it does not say that consent will not be a valid defence in criminal law, if given by a person below 18. Hence, as a matter of justice and good sense, the "maturity test" enunciated in *Gillick's case* can be used.

CONSENT OF ADULTS

Once a person is over 21 and of sound mind, his/her consent would normally be valid, subject to the usual factors which might vitiate consent such as undue influence, coercion or mistake. Also, this is subject to the provisions of civil law or criminal law where consent is prohibited. There are however one or two points which deserves mention, with regard to capacity to consent.

As one has to be of sound mind, the question of mental illness may come in. There are adults who may not be "insane", but may have diminished capacity to reason as a result of substantial impairment of the mind. This, among other things, may be due to illness or disease. Sometimes, even drugs may cause a person's mind to be clouded. Doctors should therefore take care to see that the adult patient is in his full senses, and his judgment is in no way clouded.

The House of Lords decision in *Re: F* (1989) 2.WLR 1025 may be referred to in this connection. The patient in question was a 36-year-old mentally handicapped woman and was sterilised by an Order of Court at the request of the mother. The main consideration was whether it would be in the best interests of the patient to do so. The House of Lords however felt that it would be safer to get an Order of Court in such cases.

Sometimes, the patient may be "mentally handicapped" in the sense that he/she is in a vegetative state and therefore cannot give consent. The case of *Airedale NHS Trust* v *Bland* (1993) 2 WLR 317 would be relevant in this regard. The patient in this case was a 17-year-old boy whose lungs were crushed at a football ground disaster. He was put on a life support machine and had remained in a completely vegetative state for over

Page 5 ►

◀ *Page 4 – Consent (1) Overview and Capacity*

3 years. An Order was given by the Court on application by the Health Authority (consented to by the parents and the consulting physicians) to stop the life-supporting measures. It was held by the House of Lords that the object of medical treatment is for the benefit of the patient, and the principle of sanctity of life was not absolute. Hence, in the circumstances, the life supporting measures can be stopped.

LIMITATIONS TO CONSENT

Euthanasia

No person can consent to being killed. Hence, euthanasia is illegal in Singapore and may amount to murder. However, in view of developments in Holland, and more recently in England, there could be some modification in the law in the near future.

Abortion

The *Termination of Pregnancy Act* (Cap. 324) contains another example of a situation where no consent can be validly given. Thus, under s.4 of the Act (modelled on English Law) no treatment can be given by a medical practitioner for the termination of pregnancy if the pregnancy is more than 24 weeks duration. Exception is made where the treatment is necessary to save the life of the pregnant woman, or to prevent grave permanent injury to the physical or mental health of that person. The above Act is to be read together with s.315 of the Penal Code which punishes a person destroying the life of a child capable of being born alive (i.e. an unborn child of 28 weeks) unless it is necessary to save the life of the mother.

Sterilisation

At one time, sexual sterilisation was regarded in some circles as being against public policy. By the *Voluntary Sterilisation Act* (Cap.347), sterilisation has been made legal in Singapore since the end of 1974 if carried out by a registered medical practitioner. Consent can be given by the following:

a. by a person over 21 (who is not married).
b. by a person under 21 (who is married).
c. by a person under 21 (who is not married, if the parents/guardian consents).
d. by the wife or husband of a married person where there is mental illness or deficiency, or epilepsy.
e. by the parent/guardian of an unmarried person as in (d) above.

CONSENT TO DEATH

Though euthanasia is still illegal, the law generally recognises that a person owns his own body. He is therefore entitled to decide to live or die. Thus, under the Penal Code, suicide has never been a crime in Singapore. The right to die has been further recognised with regard to the artificial prolongation of the dying process. Section s.3 of the *Advance Medical Directive Act* (Cap.4A) allows a person above 21 and of sound mind to execute a directive (witnessed by a medical practitioner) that he does not desire to be subjected to extraordinary life-sustaining treatment in the event of his suffering from a terminal illness. Under s.11 this does not affect the right, power or duty which a medical practitioner or any other person has in relation to palliative care. ■