NHS Management Executive

A guide to consent for examination or treatment

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CHAPTER 1

A patient's rights in accepting treatment

1. A patient has the right under common law to give or withhold consent prior to examination or treatment (except in special circumstances which are described in Chapter 2, paragraphs 10-15, and Chapter 4). This is one of the basic principles of health care. Subject to certain exceptions the doctor or health professional and/or health authority may face an action for damages if a patient is examined or treated without consent.

2. Patients are entitled to receive sufficient information in a way that they can understand about the proposed treatments, the possible alternatives and any substantial risks, so that they can make a balanced judgement. Patients must be allowed to decide whether they will agree to the treatment, and they may refuse treatment or withdraw consent to treatment at any time.

3. Care should be taken to respect the patient's wishes. This is particularly important when patients may be involved in the training of professionals in various disciplines and students. An explanation should be given of the need for practical experience and agreement obtained before proceeding. It should be made clear that a patient may refuse to agree without this adversely affecting his or her care.

4. When patients give information to health professionals they are entitled to assume that the information will be kept confidential and will not be disclosed to anyone without their consent other than for the provision of their health care. The only exceptions to this general rule are where disclosure is ordered by a Court; required by statute; or considered to be in the public interest e.g. for some forms of research. Further information will be issued shortly in health circulars on 'Confidentiality, Use and Disclosure of NHS Information' and 'Guidance on Local Research Ethics Committees.' Where disclosure is made in the public interest appropriate safeguards must be applied.

CHAPTER 2

Health professional's role in advising the patient and obtaining consent to treatment

Advising the patient

1. Where a choice of treatment might reasonably be offered the health professional may always advise the patient of his/her recommendations together with reasons for selecting a particular course of action. Enough information must normally be given to ensure that they understand the nature, consequences and any substantial risks of the treatment proposed so that they are able to take a decision based on that information. Though it should be assumed that most patients will wish to be well informed, account should be taken of those who may find this distressing.

2. The patient's ability to appreciate the significance of the information should be assessed. For example with patients who:

i. may be shocked, distressed or in pain;

ii. have difficulty in understanding English;

iii. have impaired sight, or hearing or speech;

iv. are suffering from mental disability but who nevertheless have the capacity to give consent to the proposed procedure *(see also Chapter 5—Consent by patients suffering from mental disorder).*

3. Occasionally and subject to the agreement of the patient, and where circumstances permit, it may help if a close family member or a friend can be present at the discussion when consent is sought. If this is not possible another member of the staff may be able to assist the patient in understanding. Where there are language problems, it is important an interpreter be sought whenever possible.

4. A doctor will have to exercise his or her professional skill and judgement in deciding what risks the patient should be warned of and the terms in which the warning should be given. However, a doctor has a duty to warn patients of substantial or unusual risk inherent in any proposed treatment. This is especially so with surgery but may apply to other procedures including drug therapy and radiation treatment. Guidance on the amount of information and warnings of risk to be given to patients can be found in the judgement of the House of Lords in the case of Sidaway V Gov of Bethlem Royal Hospital [1985] AC 871 *(See also Chapter 6).*

Obtaining consent

5. Consent to treatment may be implied or express. In many cases patients do not explicitly give express consent but their agreement may be implied by compliant actions, e.g. by offering an arm for the taking of a blood sample. Express consent is given when patients confirm their agreement to a procedure or treatment in clear and explicit terms, whether orally or in writing.

6. Oral consent may be sufficient for the vast majority of contacts with patients by doctors and nurses and other health professionals. Written consent should be obtained for any procedure or treatment carrying any substantial risk or substantial side effect. If the patient is capable, written consent should always be obtained for general anaesthesia, surgery, certain forms of drug therapy, e.g. cytotoxic therapy and therapy involving the use of ionising radiation. Oral or written consent should be recorded in the patient's notes with relevant details of the health professional's explanation. Where written consent is obtained it should be incorporated into the notes.

7. **Standard consent form.** The main purpose of written consent is to provide documentary evidence that an explanation of the proposed procedure or treatment was given and that consent was sought and obtained. The model consent forms *(see Appendices)* set out the requirements for obtaining valid consent to treatment in terms which will be readily understood by the patient. In the majority of cases these forms will be used by registered medical or dental staff but there may be occasions when other health professionals will wish to record formally that consent has been obtained for a particular procedure. A separate form is available for their use.

8. It should be noted that the purpose of obtaining a signature on the consent form is not an end in itself. The most important element of a consent procedure is the duty to ensure that patients understand the nature and purpose of the proposed treatment. Where a patient has not been given appropriate information then consent may not always have been obtained despite the signature on the form.

9. Consent given for one procedure or episode of treatment does not give any automatic right to undertake any other procedure. A doctor may, however, undertake further treatment if the circumstances are such that a patient's consent cannot reasonably be requested and provided the treatment is immediately necessary and the patient has not previously indicated that the further treatment would be unacceptable.

SPECIAL CIRCUMSTANCES

Treatment of Children and Young people

10. *Children under the age of 16 years.* Where a child under the age of 16 achieves a sufficient understanding of what is proposed, that child may consent to a doctor or other health professional making an examination and giving treatment. The doctor or health professional must be satisfied that any such child has sufficient understanding of what is involved in the treatment which is proposed. A full note should be made of the factors taken into account by the doctor in making his or her assessment of the child's capacity to give a valid consent. In the majority of cases children will be accompanied by their parents during consultations. Where, exceptionally, a child is seen alone, efforts should be made to persuade the child that his or her parents should be informed except in circumstances where it is clearly not in the child's best interests to do so. Parental consent should be obtained where a child does not have sufficient understanding and is under age 16 save in an emergency where there is not time to obtain it.

11. *Young people over the age of 16 years.* The effect of Section 8 of the Family Law Reform Act 1969 *(see Chapter 3)* is that the consent of a young person who has attained 16 years to any surgical, medical or dental treatment is sufficient in itself and it is not necessary to obtain a separate consent from the parent or guardian. In cases where a child is over age 16 but is not competent to give a valid consent, then the consent of a parent or guardian must be sought. However, such power only extends until that child is 18.

12. *Refusal of parental consent to urgent or life-saving treatment.* Where time permits, court action may be taken so that consent may be obtained from a judge. Otherwise hospital authorities should rely on the clinical judgement of the doctors, normally the consultants, concerned after a full discussion between the doctor and the parents. In such a case the doctor should obtain a written supporting opinion from a medical colleague that the patient's life is in danger if the treatment is withheld and should discuss the need to treat with the parents or guardian in the presence of a witness. The doctor should record the discussion in the clinical notes and ask the witness to countersign the record. In these circumstances and where practicable the doctor may wish to consult his or her defence organisation. If he/she has followed the procedure set out above and has then acted in the best interests of the patient and with due professional competence and according to their own professional conscience, they are unlikely to be criticised by a court or by their professional body.

Adult or competent young person refusing treatment

13. Some adult patients will wish to refuse some parts of their treatment. This will include those whose religious beliefs prevent them accepting a blood transfusion. Whatever the reason for the refusal such patients should receive a detailed explanation of the nature of their illness and the need for the treatment or transfusion proposed. They should also be warned in clear terms that the doctor may properly decline to modify the procedure and of the possible consequences if the procedure is not carried out. If the patient then refuses to agree, and he or she is competent, the refusal must be respected. The doctor should record this in the clinical notes and where possible have it witnessed.

Teaching on patients

14. Detailed guidance about medical students in hospitals is the subject of a separate circular to be issued shortly. It should not be assumed, especially in a teaching hospital, that a patient is available for teaching purposes or for practical experience by clinical medical or dental or other staff under training.

Examination or Treatment without the patient's consent

15. The following are examples of occasions when examination or treatment may proceed without obtaining the patient's consent:

i. For life-saving procedures where the patient is unconscious and cannot indicate his or her wishes.

ii. Where there is a statutory power requiring the examination of a patient, for example, under the Public Health (Control of Disease) Act 1984. However an explanation should be offered and the patient's co-operation should nevertheless be sought.

iii. In certain cases where a minor is a ward of court and the court decides that a specific treatment is in the child's best interests.

iv. Treatment for mental disorder of a patient liable to be detained in hospital under the Mental Health Act 1983 *(see Chapter 5).*

v. Treatment for physical disorder where the patient is incapable of giving consent by reason of mental disorder, and the treatment is in the patient's best interest *(see Chapter 5).*

CHAPTER 3

Family Law Reform Act 1969 Section 8

Consent by person over 16 to surgical, medical and dental treatment

1. 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 an effective consent to any treatment it shall not be necessary to obtain any consent for it from his parent or guardian.

2. In this section "surgical, medical or dental treatment" includes any procedure undertaken for the purpose of diagnosis, and this section applies to any procedure (including, in particular, the administration of an anaesthetic) which is ancillary to any treatment as it applies to that treatment.

3. Nothing in this section shall be construed as making ineffective any consent which would have been effective if this section had not been enacted.

CHAPTER 4

Examples of treatments which have raised concern

Maternity Services

1. Principles of consent are the same in maternity services as in other areas of medicine. It is important that the proposed care is discussed with the woman, preferably in the early antenatal period, when any special wishes she expresses should be recorded in the notes, but of course the patient may change her mind about these issues at any stage, including during labour.

2. Decisions may have to be taken swiftly at a time when the woman's ability to give consent is impaired, e.g. as a result of medication, including analgesics. If the safety of the woman or child is at stake the obstetrician or midwife should take any reasonable action that is necessary. If, in the judgement of the relevant health professional, the woman is temporarily unable to make a decision, it may be advisable for the position to be explained to her husband or partner if available, but his consent (or withholding of consent) cannot legally over-ride the clinical judgement of the health professional, as guided by the previously expressed wishes of the patient herself.

Breast Cancer

3. The usual principles of explaining proposed treatment and obtaining the patient's consent should be followed in treating cases of breast cancer. Breast cancer does not normally require emergency treatment. The patient needs reassurance that a mastectomy will not be performed without her consent, and that unless she has indicated otherwise the need for any further surgery will be fully discussed with her in the light of biopsy and other results. This is a particular case of the principle, set out in para 9 of Chapter 2, that consent to an initial treatment or investigation does not imply consent to further treatment.

Tissue and Organ Donation: Risk of Transmitted Infection

4. Where tissues or organs are to be transplanted, the recipient should be informed at the time when consent to operation is obtained of the small, but unavoidable risk of the transplant being infected. Further guidance is available in a CMO letter, "HIV Infection, tissue banks and organ donation" (PL/CMO/92).

CHAPTER 5

Consent by patients suffering from mental disorder

1. Consent to treatment must be given freely and without coercion and be based on information about the nature, purpose and likely effects of treatment presented in a way that it is understandable by the patient. The capacity of the person to understand the information given will depend on their intellectual state, the nature of their mental disorder, and any variability over time of their mental state. The ability of mentally disordered people to make and communicate decisions may similarly vary from time to time.

2. The presence of mental disorder does not by itself imply incapacity, nor does detention under the Mental Health Act. Each patient's capability for giving consent, has to be judged individually in the light of the nature of the decision required and the mental state of the patient at the time.

Mental Health Legislation – treatment for mental disorders

3. The Mental Health Act 1983 took a major step forward in providing for mentally disordered people, detained in hospital under the powers of the Act, to be given treatment for **mental disorder,** without their consent where they are incapable of giving consent. Certain procedures and safeguards are laid down in relation to specific groups of treatment, including the need for multidisciplinary discussion and the agreement of doctors appointed to give a second opinion.

Mental Incapacity and treatment for physical conditions

4. The Mental Health Act 1983 does not contain provisions to enable treatment of **physical disorders** without consent either for detained patients or those people who may be suffering from mental disorder but who are not detained under the Mental Health Act.

The administration of treatment for physical conditions to people incapable of giving consent and making their own treatment decisions is a matter of concern to all involved in the care of such people, whether they are detained in hospital or in hospital but non-detained, in residential care or in the community.

The House of Lords' decision in In Re F [1989] 2 WLR 1025; [1989] 2 All ER 545

5. This decision helped to clarify the common law in relation to general medical and surgical treatment of people who lack the capacity to give consent. No-one may give consent on behalf of an adult but the substantive law is that a proposed operation or treatment is lawful if it is in the best interests of the patient and unlawful if it is not. Guidance given in that case is set out below.

i. In considering the lawfulness of medical and surgical treatment given to a patient who for any reason, temporary or permanent, lacks the capacity to give or to communicate consent to treatment, it was stated to be axiomatic that treatment which is necessary to preserve the life, health or well-being of the patient may lawfully be given without consent.

ii. The standard of care required of the doctor concerned in all cases is laid down in Bolam v Friern Hospital Management Committee [1957] 1 WLR 582, namely, that he or she must act in accordance with a responsible body of relevant professional opinion.

iii. In many cases, it will not only be lawful for doctors, on the ground of necessity to operate or give other medical treatment to adult patients disabled from giving their consent, it will also be their common law duty to do so.

iv. In the case of the mentally disordered, when the state is permanent or semi-permanent, action properly taken, may well transcend such matters as surgical operation or substantial medical treatment and may extend to include such (humdrum) matters as routine medical and dental treatment and even simple care such as dressing and undressing and putting to bed.

v. In practice, a decision may involve others besides the doctor. It must surely be good practice to consult relatives and others who are concerned with the care of the patient. Sometimes, of course, consultation with a specialist or specialists will be required; and in others, especially where the decision involves more than a purely medical opinion, an inter-disciplinary team will in practice participate in the decision.

Documentation

6. Proposals for treatment should as a matter of good practice, be discussed with the multidisciplinary team and where necessary other doctors and, with the consent of the patient where this is possible, with their nearest relative or friend. The decisions taken should be documented in the clinical case notes. In cases involving anaesthesia, and surgery, or where the treatment carries substantial or unusual risk it would also be advisable for documentation to record that the patient is incapable of giving consent to treatment and that the doctor in charge of the patient's treatment is of the opinion that the treatment proposed should be given and that it is in the patient's best interests. A model form is suggested to register medical opinion – where a patient is incapable of giving consent *(Appendix B)*.

Sterilisation

7. In **Re F** it was said that special features applied in the case of an operation for sterilisation. Having regard to those matters, it was stated to be highly desirable as a matter of good practice to involve the court in the decision to operate. In practice an application should be made to a court whenever it is proposed to perform such an operation. The procedure to be used is to apply for a declaration that the proposed operation for sterilisation is lawful, and the following guidance was given as to the form to be followed in such proceedings:

i. applications for a declaration that a proposed operation on or medical treatment for a patient can lawfully be carried out despite the inability of such patient to consent thereto should be by way of originating summons issuing out of the Family Division of the High Court;

ii. the applicant should normally be those responsible for the care of the patient or those intending to carry out the proposed operation or other treatment, if it is declared to be lawful;

iii. the patient must always be a party and should normally be a respondent. In cases in which the patient is a respondent the patient's guardian *ad litem* should normally be the Official Solicitor. In any cases in which the Official Solicitor is not either the next friend or the guardian *ad litem* of the patient or an applicant he shall be a respondent;

iv. with a view to protecting the patient's privacy, but subject always to the judge's discretion, the hearing will be in chambers, but the decision and the reasons for that decision will be given in open court.

Mental disorder means mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind and "mentally disordered" shall be construed accordingly.

CHAPTER 6

The Sidaway Case

The question of how much information and warning of risk which should be given to a patient was considered by the House of Lords in the case of Sidaway v Gov of Bethlem Royal Hospital [1985] AC 871. Lord Bridge indicated that a decision on what degree of disclosure of risks is best calculated to assist a particular patient to make a rational choice as to whether or not to undergo a particular treatment must primarily be a matter of clinical judgement. He was of the further opinion that a judge might in certain circumstances come to the conclusion that the disclosure of a particular risk was so obviously necessary to an informed choice that no reasonably prudent medical man would fail to make it. The kind of case which Lord Bridge had in mind would be an operation involving a substantial risk of grave adverse consequences. Lord Templeman stated that there was no doubt that a doctor ought to draw the attention of a patient to a danger which may be special in kind or magnitude or special to the patient. He further stated that it was the obligation of the doctor to have regard to the best interests of the patient but at the same time to make available to the patient sufficient information to enable the patient to reach a balanced judgement if he chooses to do so.