

Can a patient waive the right to be informed?

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There has been significant debate since *Rogers v Whittaker* about the need for doctors and other health professionals to inform patients of proposed courses of treatment and in particular about the risks of an operation. I was recently asked to consider the opposite. That is, does a patient have the right to choose to be kept completely in the dark about his or her condition, and about the nature and risks of proposed treatment?

Or to put the question the other way around; Can a patient relieve a doctor of his duty to provide information and to warn?

Mrs X was a public patient at a major teaching hospital. She was from a non-English speaking culture. She became ill and an investigation revealed that she had cancer in the liver and kidneys and lungs. She suffered from breathlessness and a bad cough. At the time of diagnosis she had a short time to live.

After the diagnosis was confirmed she was seen by the consultant chest physician. The patient's adult son and daughter were present at the consultation. At one point the patient asked the doctor whether she had cancer. Immediately her son stood up and spoke to his mother in their native language. Both the children made it clear that their mother was not to be told anymore. Nothing further was said to Mrs X at that time.

The patient's children subsequently gave the doctor a statutory declaration executed by the patient which said as follows:

"In the event of finding that I have a serious illness, I absolve any medical practitioner of his duty to provide me with details of his diagnosis. I emphasise (that) I

do not wish to know the nature of any illness I may have or details of the treatment.

I also wish to have a member of my family present during consultations and treatment to ensure that my wishes are carried out and to explain any relevant details I may need to know about the treatment"

A tough dilemma faced the doctor. His experience told him that elderly patients are often quite philosophical about terminal illnesses, but that patients' families are the ones who often cannot handle the situation or wrongly think that their parent cannot handle the situation.

What, at law, is the doctor's

duty to provide information and

can the patient relieve the

doctor of that duty?

What is the legal position

The duty arises in four ways:

1. Where a procedure such as an injection, operation etc is to be carried out then consent must be obtained to prevent the procedure from being a trespass to the person. For that consent to be proper it must be given on the basis of information supplied to the patient about what is to be done and why. In Australia the information needs only to be of

a general nature and not a detailed and precise explanation. A failure to give a detailed explanation may found an action in negligence but not in trespass. Consent can be implied from the circumstances.

2. The duty also arises in the type of situation which arose in *Rogers v Whittaker* and in *Chappell v Hart*. As is well known the plaintiffs in those cases successfully sued in negligence on the basis of the failure by the doctors to properly warn the patients of the relevant risks. The duty here goes further than that required to defeat an action in trespass. The information must be sufficient to enable the patient to make a proper and informed decision about whether or not to accept the treatment proposed.
3. Where a patient needs to be given information to make a choice about such things as lifestyle changes.
4. Where the patient will not necessarily use the information for any purpose but may still be entitled to it e.g. The patient who is dying and where nothing can be done.

A breach by the doctor of some of the above duties may not of course lead to a claim for damages but may leave the doctor open to disciplinary action only.

I do not propose to discuss the legal position where a patient for one reason or another is unable to make a choice, whether it be because of age or intellectual infirmity. However what should the doctor do in the circumstances presented by Mrs X? She is of sound mind and able to rationally make a decision (even though her present will may be overcome by some undue pressure). ▶

The four problems

The problems presented in this case are fourfold:

1. Can a patient really relieve the doctor of his duty to inform an adult and rational patient?
2. Is the patient's *real* wish being expressed in the statutory declaration?
3. Is the waiver a fully informed one and based itself upon proper information?
4. How far does the waiver go?

Number 2 above raises the most obvious problem. There is a real suspicion that some pressure has been applied to the patient for whatever reason. Any consent or waiver given as a result of undue pressure would not be a proper consent (see *Beausoleil v Sisters of Charity*.) A doctor would be very unwise indeed to accept the statutory declaration at face value. One, but not the only, practical solution would be to arrange for a social worker and a psychologist to interview the patient in the absence of all family members in order to ascertain the patient's real wishes concerning what she is to be told. If the patient's real wish is not as expressed in the statutory declaration then it could be ignored, subject to proper documentation being created as to the views expressed by the patient. A meeting with the family may also be wise to inform them of what is proposed. Those interviewing would need to be properly briefed.

If Mrs X really has expressed her own views in the Statutory Declaration then question 1, 3 & 4 arise. In a general sense there is no reason why a patient cannot choose to limit the amount of information that she is to be given. There is no reason why the patient cannot choose not to be advised of the nature of her illness. But can a course of chemotherapy or radiotherapy, with their very unpleasant side effects be given to her without her being told anything? Could she later sue in trespass or negligence if she was told nothing about what was being done or about the likely side effects and if her consent to the procedure was not obtained? In my view the patient would have to be given some informa-

tion about the nature of the treatment and the reason for it, at least in general terms.

There are certainly situations

where a doctor can properly

limit what a patient is told.

The so-called therapeutic privilege, where disclosure would hold a serious risk of psychological detriment to the patient. (See *Sidaway v Bethlem Royal Hospital Governors*.) Even in those situations it would be rare where some information concerning what was happening was not given to the patient. Each situation must be examined on its own facts. In *Rogers v Whittaker* the Court approved what King CJ said in *F v R* about the factors to be considered by a doctor in deciding whether to advise or disclose of some risk in a proposed procedure. They were:

1. Nature of the matter to be disclosed.
2. Nature of treatment.
3. Patient's desire for information. (Mrs Whittaker was very inquisitive)
4. The patient.(ie the nature of the patient)
5. The nature of all the circumstances e.g. Is it an emergency?

The answer in Mrs X's case will depend upon the doctor's assessment of all of the above factors. It would be very unlikely that a decision would be made to tell her nothing, at least about the general nature of the treatment if any is required, because the risks to the doctor as a result of so doing so may be too great. However it is certainly not possible to give a definitive answer without being in the position of the clinician. What the doctor must do is look carefully at all the relevant factors and ascertain what Mrs X really wants. He must then do what he thinks is right and hope for the best.

The answer to our four problems posed above seem to be:

1. Can a patient really relieve the doctor of his duty to inform an adult

and rational patient?

Yes in some circumstances but each case depends very much on a detailed judgement of the circumstances. A waiver of the right to receive any information probably cannot ever be given where treatment of an invasive nature is to take place. (except in the case of therapeutic privilege). The suggestion that information be withheld should not come from the health professionals again except in the case of therapeutic privilege.

2. Is the patient's *real* wish being expressed in the statutory declaration?

Whether Mrs X's wish is as set out in the statutory declaration cannot be ascertained without significant further enquiry.

3. & 4. Is the waiver a fully informed one and based itself upon proper information, and how far does the waiver go?

These are matters to be assessed after further inquiry about the patient's real wishes. The difficulty in obtaining an informed waiver is that in obtaining a waiver the patient will need to be given some information and thus may be indirectly informed of something that she does not wish to know about. That may be unavoidable. ■

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