CONSENT TO MEDICAL TREATMENT: A DOCTOR'S VIEW ON HOW THE GHANAIAN COURTS MAY RESOLVE CONSENT RELATED INFORMATION DISCLOSURE DISPUTES.

Adwedaa E
Anesthesiologist and The Director of Perioperative Services at the Cypress Regional Hospital, Canada and a Clinical Assistant Professor, College of Medicine, University of Saskatchewan, Canada

Summary

Many doctors may be unaware of how the courts may rule on disputes on 'consent to medical treatment' in Ghana. The knowledge of how the courts may resolve an allegation of failure to obtain consent brought by a patient against a doctor may help doctors improve on how they communicate with their patients and consequently improve patient care.
The primary purpose of consent for medical treatment is respect for individual autonomy. There is no evidence that the Ghanaian society values respect for individual autonomy any less than anybody in any other culture. There are no specific legislations in Ghanaian law or reported cases from Ghanaian courts that establish how a 'valid or informed consent is defined in Ghanaian law. The Ghanaian legal system operates the 'common law'. If a patient brings a claim alleging that his doctor did not seek his consent prior to treatment or that the information provided to him prior to granting his consent was inadequate, the Ghanaian court's approach to resolving it is likely to be patient focused and similar to the approach used in other common law jurisdictions. Good doctor-patient communication is therefore, very important.

Key Words: Consent, negligence, information disclosure, material risk, standard of care, patient autonomy

Introduction

In a recent conversation with two medical colleagues it transpired that it was unclear to them how 'consent to medical treatment' is viewed legally. They admitted that knowledge of how the court will judge them in the event of a legal claim against them by a patient who alleged that they did not seek his consent prior to an investigative or treatment procedure would help them communicate better with their patients and improve the care they provide to them. They went on to suggest that many doctors, like them are unaware of how the court may resolve consent related claims, and that communication of many doctors with their patients will improve if they knew how the courts dealt with such claims. The reason for writing this article is to raise awareness among doctors on how the courts may deal with disputes on 'consent to medical treatment'. It is my hope that such awareness will improve doctor-patient communication.

The focus of this article is limited to consent of the autonomous adult patient to medical treatment. It describes how the common law has determined valid and informed consent to medical treatment in other common law jurisdictions and concludes that although one cannot say for certain how the Ghanaian court will determine valid and informed consent to medical treatment they are likely to adopt those determinations.

Author for Correspondence:
Dr Ebenezer Adwedaa
Cypress Regional Hospital, 2004 Saskatchewan Drive, Swift Current,
SK, S9H 5M8, Canada
E mail: ejoaa@doctors.org.uk

The law on consent

Consent to medical treatment in this article refers to a 'free or voluntary' and 'informed' authorization of medical treatment by a patient.
The law in Ghana comprises the constitution, legislation enacted by parliament, rules and regulations of authorities under a power conferred by the constitution, the existing law and the common law[1]. In Ghana, like many other countries, there are no specific legislations on consent to medical treatment[2]. A search through the major 'law data bases' in Ghana [3,4,5,6,7]reveal that there are no reported cases in Ghanaian case law that establish directly what constitutes a valid or informed consent to medical treatment. There are however general laws on battery and negligence in Ghana[8]. In addition to this there are other provisions on information disclosure. The code of ethics of the Ghana Health Service[9]requires that 'All service Personnel shall provide information regarding patient's condition and management to the patient…'.The Patient's Charter[10]provides that: *'The Patient is entitled to full information on his/her condition and management and the possible risks involved…'; 'The patient is entitled to know of alternative treatments and other health care providers within the service if these may contribute to improved outcomes'; and 'The patient has a right to know the identity of all his/her caregivers and other persons who may handle him/her including students,*

trainees and ancillary workers'. These provisions attempt to ensure that patients are informed when they have to consent to medical treatment. The content and scope of the information to be provided has to be determined in the context of the particular situation.

If a patient were to bring a claim to court on 'consent to medical treatment', the court through the common law will interpret these existing provisions to define what constitutes a valid or adequately informed consent. The 'common law' allows Judges to make rulings which become precedents that must be followed as subsequent cases present to court. Rulings in common law are often influenced by precedents in other countries with similar jurisdictions[11,12,13,14,15]. The principle that the court in Ghana will apply in common law to determine how much information disclosure satisfies the requirement for valid, as well as informed consent is unlikely to differ from that applied in other common law jurisdictions. Ghanaian judges like judges in other common law jurisdictions often refer to precedents in similar jurisdictions[13,15].For example in the reported medical negligence case: *Kumah v Attorney-General*[13],Justice Taylor referred to precedents in Courts in western countries such as the UK and USA in his ruling, as did Justice Dery in his ruling in: *Elizabeth Vaah v. Lister Hospital and Fertility Centre*[15].

As far back as 1914 it was determined in a court in the USA that every human being of a sound mind and adult years has a right to determine what shall be done with his own body[16]. Medical treatment is not without risks. No patient is likely to subject himself to a medical procedure which he knows will result in more harm to him than the benefit to be derived from it. Unsurprisingly a patient may become unhappy if he is not told of a significant medical risk and he suffers that risk on undergoing treatment. This is the basis for the law requiring doctors to seek their patient's consent before they treat them. The basis of consent to medical treatment has its roots in the protection of patients from infringements on their personal liberty, freedom and choice[17]. Personal autonomy and the respect of individual autonomy is something that is valued by most people irrespective of culture, race, educational or social status[18].

When patients bring medical claims in court it is often because the treatment was badly executed, they did not authorise the treatment or the doctor did not inform them of a risk that materialised[19].

Misconceptions about consent

Some mistakenly believe the need for 'consent to medical treatment' is to protect the doctor from legal action. Although a doctor fulfils his legal obligation by seeking a patient's consent prior to treatment, the primary purpose for seeking consent is respect for patient autonomy. Many institutions have a consent form that patients sign as a written document of the consent process. It is mistakenly believed that a signed consent form is proof of patient consent. Although the signed form may be *prima facie* evidence of consent by the patient, that in itself is no conclusive proof that the patient gave consent to treatment. If the patient can show that in spite of that document he did not give his consent to treatment, the doctor may still be liable.

The doctor's obligation

The perception of some in Ghanaian society is that doctors often inadequately inform them or fail to inform them at all about their treatment[20]. Many patients are subjected to treatment and investigations that they know very little or nothing about. Traditionally the relationship between the doctor and his patient has been described as a 'fiduciary relationship'. That relationship means the doctor owes his patient a duty of good faith, trust, confidence and candour[21]. This kind of doctor-patient relationship is based on the assumption that the patient is unlearned in medical sciences and therefore dependent upon and trusts his doctor to act in his best interest and provide him with adequate information and appropriate treatment. In the past it was accepted that the doctor provided to the patient only the information he deemed necessary and proceeded to treat the patient without regard for what the patient wanted to know. With the increased emphasis on individual rights, liberty and freedoms and respect for individual autonomy things have changed[22,23]. Now patients have a right to, and expect to actively take part in decisions about their treatment.

Consent related claims: Battery and Negligence

The legal channel for bringing claims on lack of valid consent to court is in the tort of battery whereas those on failure on the part of the doctor to disclose adequate information are brought in the tort of negligence. Tort law is the law that deals with ensuring compensation for individuals who have been wronged by other individuals in ways that may not be punished as crimes.

Battery:

The tort of battery is designed to protect the individual from non-consensual touch or contact by another (where they had the requisite capacity to provide consent but did not). It is based on the principle of respect for another individual's bodily integrity and the related principle of respect for individual autonomy. A person who touches another person against that other person's consent commits battery against the other person. If an individual is found liable in the tort of battery he is also guilty of criminal assault and could face a jail sentence[24].

If a doctor does not seek consent from a patient and goes ahead with treatment of the patient that involves physical contact he commits battery against the patient. A patient does not need to establish any tangible injury nor is he required to prove that he

would have refused the procedure had he been asked about it. Barring emergency situations where it is impossible for the doctor to obtain consent, if a doctor performs an operation on a patient, even if it is medically indicated in the patient's best interest, but without the patient's consent and even if the patient recovers well, the doctor has still committed battery. In one case a surgeon who obtained consent from a patient for an operation on her right ear realised while the patient was under a general anaesthetic that the patient needed an operation on the left ear and proceeded to operate on the left ear. The patient subsequently sued the surgeon for battery and won[25]. In another case[26] a woman who was given an injection in her left arm although she had expressed her wish to be injected in her right arm sued her doctor for battery and won.

If a doctor accidentally performs a wrong procedure on a patient or obtains consent from a patient by deception or omission of relevant information in bad faith he commits battery because the patient would not have provided a valid consent for treatment[27]. In *Appleton v Garrett*[28], a dentist was found liable in the tort of battery because he deliberately misled patients as to the necessity and benefits of treatment and grossly over-treated them in a manner that was considered inappropriate.

It is important to note that the onus is on a patient to prove in a claim in battery that he did not agree to the treatment[29].In order to avoid the charge of battery the doctor needs to disclose a certain minimum amount of information to the patient prior to treatment. It is only after such disclosure that the consent to treatment is considered valid. The landmark judgment that defines what patients must be told to ensure a valid consent to treatment is the judgment in *Chatterton v Gerson*[30].The principle from the judgment in this case is used widely in English speaking common law jurisdictions[31,32]. It is likely that the Ghanaian courts will use it. In this case it was held that:'…once a patient is informed in broad terms of the nature of the procedure which is intended, and gives her consent, that consent is real, and the cause of the action on which to base a claim for failure to go into risks and implications is negligence, not [battery]'[30].

What was established in this judgment is that the provision of information in broad terms about a procedure is sufficient to obtain a valid consent for the procedure. It has been suggested that information in broad terms should include details of what the treatment involves, why the treatment is being administered and who is performing the treatment[33].Some patients opt not to receive any information or opt for the doctor to make decisions on their behalf. Treating such patients in their best interest will not constitute battery[32], although it is recommended that the doctor makes every effort to establish that that is what the patient actually wants.

As was established in the ruling, although the doctor who provides information in 'general terms' may not be liable in battery he may still be liable to the charge of medical negligence. This means that a doctor does not need to provide detailed information to his patient about the procedure to obtain a valid consent, but is required to do so if consent is to be informed.

Negligence:

Negligence in tort law is the failure on the part of one person to take reasonable care which causes foreseeable damage to another[34]. For the doctor to be found guilty of the charge of negligence, he must first owe the patient a duty of care. Then he must breach that duty of care owed to the patient and that breach of duty of care must cause the injury that the patient complains of[35]. A doctor often treats a patient because he owes the patient a duty of care. This duty of care includes disclosure of adequate information to the patient to enable the patient make an autonomous decision about whether or not to undergo the said treatment. Legal causation is then determined by whether or not the patient would have undergone the treatment had he known about the risk. If the patient proves that had he known about the risk he would not have undergone the treatment, then the failure of information disclosure has been legally proven to have caused the injury that he suffered.

Standard of care in information disclosure

The court decides what standard to use as the standard of care in information disclosure. The doctor who fails to meet that standard is considered to be in breach of his duty of care. In determining the standard of care in information disclosure, the courts generally adopt one of two standards. These have been referred to as the 'Professional Standard' and the 'Patient Standard'.

The Professional standard:

This standard requires the doctor to provide to the patient information that a body of reasonable or responsible doctors consider appropriate to disclose to the patient in the particular situation[35]. If a body of reasonable doctors do not routinely disclose a particular piece of information to their patients in similar situations then the doctor who failed to disclose such information has not breached his duty of care. The criticism with this standard is that it does not take account of the importance of the information to the patient and therefore does not respect patient autonomy enough. It is also thought that it perpetuates the attitude of 'doctor knows best' which society has become less tolerant of lately[36]. There is also a general belief that doctors protect one another and are unlikely to testify against a colleague who has failed to deliver on what is the 'proper' standard of care[37]. It has been documented that the Ghanaian courts have difficulty in getting doctors to provide expert evidence for claimants in

medical negligence cases[37]Although the professional standard is still widely used as the standard for information disclosure they are no longer used 'uncritically'. There is increased emphasis on the patient's need for information[38].
Some courts are moving away from the use of the professional standard because of its perceived shortcomings and instead adopting the 'patient standard'[32,39,40,41].

'***The Patient Standard':***

This standard requires that every piece of information that the patient considers important in coming to a decision about the treatment is disclosed regardless of whether or not a body of reasonable doctors routinely discloses it[42]. This standard is prone to abuse of hindsight and patient self-interest. As a solution to that the court uses an objective patient standard. This objective standard is the standard of the reasonable patient. Here, doctors are expected to provide to their patients any 'material' risk inherent in the proposed treatment[39]. 'A risk is said to be 'material' when a reasonable person, in what the doctor knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forgo the proposed therapy'[39].

It has been suggested that 'material information' should generally include details about the proposed treatment, its risks and side effects and the consequences of these to the patient, alternative treatments, their risks and side effects, the consequences to the patient and the consequences of refusing treatment[33]. Even with this suggestion questions still remain about how much detail to provide.

The incidence of a risk alone does not determine the 'materiality'. In one case[31], it was accepted that failure to warn a patient of a risk of about 1% incidence is not negligent whereas in another[40], failure to warn of a risk whose incidence is 1:14000 was found to be negligent. Frequently occurring side effects even if minor in nature are generally considered 'material'. Serious side effects even if of low incidence are considered 'material'. A risk is also considered 'material' if the patient asks specifically about it[40]. It is therefore the duty of the doctor to always give the patient the opportunity to ask questions in the consent process and to answer as honestly as he can, all questions that the patient poses to him during the process.

Importance of doctor-patient communication

Regardless of the standard used to judge the adequacy of information disclosure in 'consent to medical treatment' there is an increased emphasis on the patients' need for information. The doctor therefore needs to work with his patient to find out the information needs the patient has and meet them.

Conclusion

In conclusion, the Courts in Ghana are likely to determine what constitutes valid as well as informed consent in common law. This is likely to be based on precedents from other common law jurisdiction. The legal determination of information requirement for consent to medical treatment is patient focused. Doctors who fail to communicate well with their patients may find themselves liable if claims are brought against them either in battery or negligence whereas those who work with their patients in order to provide the patients with information that those patients require are unlikely to find themselves in court let alone be found liable in information disclosure disputes.

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