

## 6 Consent and informed decision making

There are ethical and legal reasons why doctors must adequately inform patients about proposed treatments or procedures, especially in regard to risks and dangers, and be satisfied that patients understand and consent to such measures. Ethically, this arises principally from respect for the patient's autonomy. The two-way information exchange required to bring patients to a position from which they can provide meaningful consent (an exchange referred to as *shared decision making*) is an essential component of good medical practice. Doctors who fail to adequately inform their patients—about their condition, treatment options or material risks of treatment—may be sued on the grounds of negligence if harm results from undisclosed risks (see Chapter 9). Exceptions to the requirement for consent are uncommon but include genuine emergencies and situations where treatment has been ordered by a court. Other than in those situations, if a doctor undertakes any procedure that involves touching the patient without consent, the doctor has committed an assault, or more precisely in legal terms, a battery, and an action in trespass may be brought against the doctor in a court.

Just as there are both ethical and legal reasons for seeking informed consent, so too there are ethical and legal paths to understanding the principles involved in seeking informed consent. The legal pathway involves a detailed appreciation of what the courts in Australia and elsewhere have said about consent [1]. The ethical or professional pathway involves achieving good communication with the patient, as outlined in the previous chapter. This chapter refers briefly to the relevant legal cases where appropriate, but in general adopts the ethical pathway, as this is more likely to be readily understood, assimilated and applied by medical trainees and medical practitioners and is likely to conform to legal obligations. The High Court of Australia has suggested that the term *duty to disclose* might be preferable to *informed consent* [2]. Others have suggested the use of terms such as *shared and/or informed decision making*. We have retained the term *informed consent* as it remains in widespread use and appears to be well understood [3]. While the term *informed consent* has become enshrined in law in the US, this is not the case in Australia.

There has been a trend in recent times for doctors to refer to the process of gaining a patient's consent with the shorthand phrase 'consenting the patient'. This trend is to be deprecated as it risks devaluing or trivialising the process and may lead doctors to see this as something done to patients rather than a vital two-way process that respects their autonomy [4].

Although the ethical and legal requirements of obtaining informed consent are accepted and broadly understood by doctors, complexities in obtaining a patient's consent still arise, particularly regarding what and how much information needs to be disclosed, what constitutes a material risk, what to do when dealing with minors or adults who may not be competent to give consent, what constitutes implied consent and whether and when therapeutic privilege can be relied on. This chapter provides advice about these complexities and identifies recent professional and legal developments that have helped clarify how doctors should meet these difficulties.

## 6.1 Elements of valid consent

For consent to be valid, it needs to:

- be freely given; this includes avoiding rushing patients through failure to provide sufficient time for them to consider matters or failing to recognise other pressures (e.g., from their families)
- involve disclosure by the doctor of sufficient information about the proposed treatment, including its material risks (see sections 6.2 and 6.3)
- be specific for the proposed procedures—the catch-all phrase ‘any other procedures that may be deemed necessary’ should only be used to refer to unforeseen and urgent problems and, if the phrase is used, a note should be made of the matters discussed under it
- be given by the patient when they are competent<sup>1</sup> to consent—or by the appropriate person when the patient is believed not to be competent
- involve sufficient indication for a reasonable belief on the part of the doctor that the patient has an understanding of the proposed procedure or treatment.

No guidance exists in relation to how long consent, once given, remains valid. If significant time has elapsed between a patient giving consent and the commencement of treatment, the continuing existence of that consent should be confirmed.

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<sup>1</sup> The terms *competence* and *capacity* (to make decisions) are often used interchangeably. *Capacity* is regarded as a legal term, while *competence* is widely used in medical practice.