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# Medical Consent: What is required?

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# Consent & Trespass

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“Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient’s consent, commits an assault, for which he is liable in damages”

“This is true except in cases of emergency where the patient is unconscious and where it is necessary to operate before consent can be obtained.”

*Schloendorff v The Society of the New York Hospital* (1914) 211 N.Y 125 per Cardozo J at 129-130

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# Consent

“At issue here is the freedom of the patient as an individual to exercise her right to refuse treatment and accept the consequences of her own decision. Competent adults ...are generally at liberty to refuse medical treatment even at the risk of death. The right to determine what shall be done with one’s body is a fundamental right in our society. The concepts inherent in this right are the bedrock upon which the principles of self-determination and individual autonomy are based. Free individual choice in matters affecting this right should, in my opinion, be accorded very high priority.”

*Malette v Shulman* (1990) 67 DLR (4<sup>th</sup>) 321, Per Robins J.A. at 336

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# What is effective consent?

1. understanding of what is being proposed (provision of information)
  2. capacity (legal competence), and
  3. freedom to make a 'voluntary' decision.
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## *Rogers v Whitaker* (1992) 175 CLR 479

“The law should recognise that a doctor has a duty to warn a patient of a material risk inherent in the proposed treatment; a risk is material if, in the circumstances of the particular case, a reasonable person in the patient’s position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risks would be likely to attach significance to it.”

(490)

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Key factors to be disclosed: as  
per King *CJ F v R* (1983) 33 SASR 189 at  
193-4

- Nature of the matter to be disclosed
  - Nature of the treatment
  - The desire of the patient for information
  - Temperament and health of the patient and
  - General surrounding circumstances
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# Legal test or medical test?

