

## **The Meaning of a Valid Consent to Medical Treatment in Malaysia: Tan Ah Kau V Government of Malaysia Revisited**

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### **ABSTRACT**

A doctor can treat his patient only when a consent is deemed legally valid under the eyes of the law. A valid consent justifies any medical treatment or procedure that a patient requires. Since most treatment will usually involve some kind of physical contact between a doctor and his patient, any medical treatment given without first obtaining a valid consent can tantamount to a battery under the law of torts in Malaysia. However, medical cases relating to the issue of consent have always been decided by the courts in this country under the spectrum of the law of medical negligence as opposed to the law of trespass, specifically, battery. Consequently, there exists a need to determine what is actually meant by a valid consent in law. This determination is crucial as it will enable the aggrieved party to choose the most appropriate cause of action to be taken when the validity of consent given is being challenged.

**Keywords: Consent, battery, negligence, medical treatment**

### **INTRODUCTION**

It is the aim of this article to determine what is accepted by the law in Malaysia as being a valid consent to medical treatment. Is a consent considered to be valid once the patient had signed the consent form, or is a consent can be said to be valid only if the patient has been informed of the nature and purpose of the medical procedure that is going to be performed on him? The determination of what constitutes a valid consent is relevant as it will in turn determine the most appropriate cause of action that can be taken by the patient against his/her doctor should there be a dispute regarding the giving of consent by the affected patient. In this article, the discussion will be made by referring to the meaning of a valid consent according to common law principles.

Regarding the issue of what is meant by a valid consent in Malaysia, the discussion will be based largely on the case of *Tan Ah Kau v The Government of Malaysia* ((1997) 2 AMR 1382). Tan Ah Kau is the most relevant case in respect of this issue on validity, as in this case, the High Court had decided that the consent given by the patient/plaintiff was not a valid consent. One would have thought that since no valid consent was given, the case should have been decided under the sphere of trespass law. However, the plaintiff in Tan Ah Kau had brought his case as a medical negligence case, and henceforth, despite declaring that the consent was not valid, the court proceeded to decide the case under the law of negligence. Unfortunately, no discussion or analysis was made by Justice Low Hop Bing on the legal consequences of treatment given

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by a doctor when the consent of his patient was found to be invalid especially in reference to the law of battery.

### **A REAL CONSENT IS A VALID CONSENT: THE COMMON LAW POSITION**

With regard to the English case of *Chatterton v Gerson* ((1981) 1 QB 432), Justice Bristow held that a real consent is a valid consent in law. Thus, the question must be - what is meant by a real consent? According to him, a real consent is a consent given by the patient after the doctor has explained to him/her in broad terms the nature of the procedure that is going to be performed on him/her. Therefore, in order to be valid, the consent must be real. Failure on the part of the doctor to explain in broad terms the nature of the procedure will vitiate any consent given by the patient. This will consequently cause any treatment involving any form of physical contact perceived as battery. However, the judge in the above-mentioned case then went on to say that failure to disclose inherent risks present in the medical procedure will not vitiate the consent. The consent is still valid in law but the doctor had committed a breach in his duty to give advice. This breach of duty is to be dealt with under the law of medical negligence and not trespass, specifically battery. The principle enunciated in *Chatterton v Gerson* ((1981) 1 QB 432) was subsequently approved and applied in *Hills v Potter* ((1983) 3 All ER 716), whereby in this case, it was decided that since the patient had given his consent to the surgery performed on him, the consent would negate the doctor's liability under battery. Rather, failure to disclose information such as inherent risks present in the procedure falls under the sphere of a doctor's duty to give advice in the law of negligence and it will not vitiate any consent given. Justice Hirst in *Hills v Potter* ((1983) 3 All ER 716) held:

*As to the claim for assault and battery, the plaintiff's undoubted consent to the operation which was performed (to cure the neck deformity) negatives any*

*possibility of liability under this head ... the proper cause of action, if any, is negligence.*

The principle in *Chatterton* was also affirmed by the Court of Appeal and the House of Lords in the landmark case of *Sidaway v Board of Governors of Bethlem Royal Hospital* ((1984) 1 All ER 1018 (Court of Appeal) and (1985) AC 871 (House of Lords)). At the Court of Appeal, Lord Donaldson held that:

*I am wholly satisfied that as a matter of English Law, a consent is not vitiated by a failure on the part of the doctor to give sufficient information before the consent is given.*

What is accepted as a valid consent under the English common law was aptly summarised by Lord Donaldson in *Freeman v Home Office* (No.2) ((1984) 1 All ER 1036). According to His Lordship:

*If there was real consent to the treatment, it matters not that the doctor was in breach of his duty to give the patient the appropriate information before the consent was given. Real consent provides a complete defence to acclaim in the tort of trespass to the person ... subject to the patient having been informed in broad terms of the nature of the treatment, consent in fact amounts to consent in law.*

Therefore, what is actually meant by the phrase 'nature of the procedure'? Kennedy and Grubb (1998) opined that the phrase is:

*...a relatively narrow notion encompassing by description the character of the act(s) to be done by the doctor, and qualitatively, the intended effect(s) of the procedure and its purpose.*

From the opinion given above, it can be concluded that the phrase 'nature of the procedure' includes the patient's understanding of the purpose or effect desired from the proposed procedure. Therefore, even though the court in *Chatterton v Gerson* ((1981) 1 QB 432) had employed the word 'nature', at present, it is the norm for the courts in England to use the phrase 'nature and purpose of procedure'.

In order to succeed in his claim against his doctor in a case based on battery, the patient must prove that there was in fact no valid consent in the first place. However, in circumstances where he had been informed in broad terms the nature of the procedure, he would have no redress under the law of battery. Justice Bristow was of the view that it is against the principle of justice to allow a patient who was already informed of the nature of the medical treatment and procedure to take an action for battery against his doctor ((1981) 1 QB 432).

It is thus clear that under the English common law, the courts in England have divided the types of information that a doctor needs to disclose to his patient for the purpose of determining whether the consent given is a real consent or otherwise. A consent is real and therefore valid only if the patient is given the information regarding the nature and purpose of the proposed medical procedure. Failure to give those information will vitiate the consent and consequently render the doctor liable for battery. On the other hand, failure to perform his duty under the law to disclose the information regarding the inherent risks present in the proposed procedure will only render him liable for negligence but the consent remains legally valid.

**TAN AH KAU V THE GOVERNMENT OF  
MALAYSIA ((1997) 2 AMR 1382):  
AN ANALYSIS**

In this case, Tan Ah Kau as the plaintiff sought to claim damages for the alleged negligence of the defendant as the servant and/or agent of the defendant. The plaintiff's claim for damages was founded on the defendant's negligence and/

or breach professional duties in carrying out a surgical operation on him. The surgical operation performed by the defendant had resulted in the plaintiff being paralysed completely from the waist down. In his testimony, the plaintiff claimed that he signed two blank forms, and at the same time, no explanation was given to him by the doctor relating to the reason for the operation before it was carried out ((1997) 2 AMR 1382). The doctor did not explain that the surgery would cause the blockage of blood flow. In fact, the plaintiff did not know that it was cancer before the operation ((1997) 2 AMR 1382). Therefore, the question for the court to decide was whether at the time the plaintiff signed the consent forms, he understood the nature and consequences of the consent, and also whether the plaintiff knew the subject matter which was central to his consent in light of the evidence that most patients opt out when the complications (especially the risk of paralysis) are explained to the patient. The plaintiff was not fully informed, therefore, he was not given the opportunity to decide whether to opt for or opt out of the operation ((1997) 2 AMR 1382).

During the trial, it was also revealed that during the operation, the surgeon discovered that the tumour was intramedullary and a biopsy was done. However, the consent was taken on the basis that the tumour was extramedullary. The court was of the opinion that in relation to the intramedullary tumour, to constitute a valid consent (that is valid in light of the surgical discovery), a consent to cover this would be necessary and advisable ((1997) 2 AMR 1382). Therefore, a fresh consent ought to have been obtained based on the finding that the tumour was intramedullary. The doctor who performed the operation also admitted during trial that he had not explained to the plaintiff that during the operation itself, there would be an incision or cutting through the tumour resulting in bleeding and swelling of the spinal cord and that itself would cause the plaintiff immediate paralysis. He further admitted that explaining the information would cause the plaintiff to reject the operation. To the above testimony by

the doctor, Justice Low Hop Bing held that no valid and proper consent was obtained from the plaintiff ((1997) 2 AMR 1382).

Consequently, the High Court held that the whole question of obtaining the consent of the plaintiff in relation to the surgical operation remained cloudy and had not been satisfactorily established by the defendant. Therefore, no consent was obtained from the plaintiff at all, or even if the consent had been obtained, the content of such consent had not been fully and comprehensively explained to the plaintiff in order to enable him to understand the nature and consequences of the consent in relation to the operation and the diagnosis ((1997) 2 AMR 1382). Furthermore, the plaintiff was not given the opportunity to decide whether to opt for or to forego the operation. Therefore, in this case, the defendant was held liable for medical negligence.

As stated above, Tan Ah Kau was a negligence case. The approach taken by the court and the absence of any reference to the law of battery clearly showed that the court accepted that the correct law to be applied is the law of negligence. However, it is submitted that this approach clearly went against the principle that a valid consent must be a real consent as enunciated in *Chatterton v Gerson* ((1981) 1 QB 432). By holding that, "*no consent was obtained from the plaintiff at all, or even if the consent had been obtained, the content of such consent had not been fully and comprehensively explained to the plaintiff in order to enable him to understand the nature and consequences of the consent in relation to the operation and the diagnosis*" ((1997) 2 AMR 1382), the court must be taken to mean that there was no consent at all or that the consent given by the plaintiff was vitiated by the doctor's failure to explain to him the nature and purpose of the operation. The plaintiff's consent was, therefore, not a real consent as envisaged by Justice Bristow in *Chatterton* ((1981) 1 QB 432). His Lordship had also in fact specifically stated that the consent was not a valid and proper consent ((1997) 2 AMR 1382). Again, this statement clearly went against the principle of a valid consent under the common

law. Thus, the question remains whether despite the wordings of judgment mentioned above, the consent was in fact still valid for the purpose of sanctioning and justifying the physical touch to the plaintiff's body.

It is submitted that if the court had applied the common law approach in a case such as this, the court should identify whether there is a valid consent or otherwise in order to do so, the court must determine first of all, what is meant by 'the nature of the procedure' and whether it had been explained to the patient. If the learned judge had applied this approach at the first instance and concluded that the nature of the procedure was not explained to the plaintiff as required by the common law, then he could have justified his finding that no valid and proper consent was obtained from the plaintiff.

Nevertheless, in this respect, one might perhaps be tempted to argue in defence of the Lordship that what he really meant by the above-mentioned finding was, the facts that were not disclosed to the plaintiff were the facts relating to the risks present in the operation (i.e the risk of paralysis) and not the nature of the operation itself. The validity of the consent remained unaffected. Hence, in such circumstance, negligence was the correct cause of action in accordance with the principle in *Chatterton* ((1981) 1 QB 432).

In response to such an argument, it is however submitted that, where the risk is so serious and significant that it could affect the decision of the plaintiff as to opt for or opt out of the operation, the risk must be explained and failure to do so would vitiate the consent given by the plaintiff. Hence, any operation done thereof would constitute a battery against the body of the plaintiff.

In support of the above submission, reference can be made to the points put forward by Jones in his book titled *Medical Negligence* (Jones, 2001). He stated that, there are views that disagree with the division on the types of information to be disclosed to a patient (Jones, 2001). According to him, it has been forcefully argued that the distinction created by the courts is untenable as it assumes an inherent difference

in terminology and substance between the nature of the treatment and the risks inherent in the treatment. Some risks may be so significant that they relate to the nature of the operation itself, so non-disclosure of the risks would vitiate the consent and lead to liability in battery (Tan Keng Feng, 1987). Therefore, it is his contention that there are risks which are so significant that they are closely related to the nature of the treatment and thus making failure to disclose those necessary information fatal to the consent given by the patient. This will, of course, expose the doctor to an action for battery (Jones, 2003). However, Jones admitted that it is not really clear on what is meant by the phrase 'nature of a medical treatment,' and this will eventually depend on how a person chooses to characterise the nature of a particular activity.

In contrast to the Tan Ah Kau's case, in *Dr. Ismail Abdullah v Poh Hui Lin* (administrator for the estate of Tan Ah Moi @ Ong Ah Maury, deceased) ((2009) 2 MLJ 599), the doctor did inform the deceased and her family members that he would attempt to remove the stones in the gall bladder by the endoscopy method, failing which he would undertake an operation called cholecystectomy. Apparently, the deceased consented to it. However, the defendant was sued for medical negligence for *inter alia*, which was failing to advise the deceased of the risks of acute pancreatitis and acute respiratory syndrome. During the trial, the deceased's understanding as to the nature and purpose of the procedure was never questioned. Instead, the focus was on the issue of what types of risks which are required to be disclosed to a patient. The High Court held that only material risks of injury arising from a treatment or surgery will need to be disclosed. The court stated that, the decision of the Federal Court in *Foo Fio Na v Dr. Soo Fook Mun & Anor* ((2007) 1 CLJ 229) represents the law in this aspect.

In *Foo Fio Na* ((2007) 1 CLJ 229), the Federal Court had cited with approval the principle propounded by the Australian High Court in *Rogers v Whitaker* ((1992) 109 ALR 625). In *Rogers*' case, it was held that in relation to the duty to disclose risks, a doctor has the 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 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 risk would likely to attach significance to it. The Federal Court then decided that the test in *Rogers v Whitaker* ((1992) 109 ALR 625) would be a more appropriate and viable test of this millennium.

However, one must bear in mind that the decision of the Federal Court had nothing to do with the issue of the validity of the plaintiff's consent, as that issue was never raised by the counsels. The consent was accepted to be valid by all quarters. Instead, the question posed to the Federal Court was whether the Bolam's test in the area of medical negligence should apply in relation to all aspects of medical negligence, that is, the doctor's duty in giving diagnosis, treatment and advice (disclosure of information). Consequently, the decision of the Federal Court is important in so far as the issue of the applicability of the Bolam's test (*Bolam v Friern Hospital Management Committee* (1957) 1 WLR 582) in medical negligence cases.

Referring back to Dr. Ismail's case, since the validity of the deceased patient's consent was not questioned by the court, it is not relevant to discuss the issue of the validity of the deceased patient's consent from the perspective of the common law principle as envisaged in *Chatterton v Gerson* ((1981) 2 QB 432).

The wisdom of creating a distinction between the types of information disclosed to a patient was also questioned by Somerville. She suggested that some risks could be so serious and probable that they should be regarded as part of the basic nature and quality of the act of the act (Somerville, 1987). For example, if an operation has a 90 percent risk of death (but despite this, the patient wants to proceed with it to avoid a certain death at a later time without the operation), the nature and degree of risk could be regarded as part of the basic nature and quality of the act of surgery (Somerville, 1987).

The opinion and suggestion by both Jones and Somerville could be based on the fact that a risk which is so significant that it relates to the nature of the proposed treatment will undoubtedly influence the patient in deciding whether to agree to the proposed treatment or otherwise. Subsequently, in such circumstances, the consent by a patient without first being given the necessary information is not a real consent. Thus, the doctor can therefore be sued for battery. Expanding the scope relating to the meaning of a real consent will eventually give more room for the law of battery to function in the consent to medical treatment cases. The case of *Kelly v Hazlett* ((1976) 75 DLR (3d) 536) is a case in point, where it was held that in some cases it may be difficult to distinguish and separate the matter of consequential or collateral risks from the basic nature and character of the operation or procedure to be performed. The more probable the risk, the more it could be said to be an integral feature of the nature and character of the operation.

It is humbly submitted that it cannot be denied that there are cases where the risks involved are so serious that they should be treated as being part of the nature of the medical procedure proposed. The case of *Tan Ah Kau v The Government of Malaysia* is a perfect example. If the issue of whether a risk is so significant that it is related to the nature of the procedure, and that it must be disclosed to the patient is brought up in court, it is incumbent for the court to hear expert evidence before deciding whether the consent given by the patient is a real valid consent or otherwise according to the principle established in *Chatterton v Gerson* ((1981) 1 QB 432).

In 1999, the trial judge in the case of *Foo Fio Na v Dr. Soo Fook Mun* ((1999) 6 MLJ 738) had the opportunity to delve further on the issue of the validity of a patient's consent. The learned judge had observed that regarding the first operation performed on the plaintiff who had rendered her paralysed from the neck down, the procedure (operation) and the reason for it was not told to the plaintiff. He went on to hold that the failure to do so and the misrepresentation

by the second defendant that it was a minor operation clearly shows that the plaintiff would not consent to such an operation, and the consent, if any, was not obtained properly. In response to that statement, the questions should be - Was there a valid consent in the first place? If there was a consent but it was not obtained properly, what were the legal consequences? Can it still be accepted as a valid consent in law? Unfortunately, no further discussion was made by the learned judge on what he meant by "the consent, if any, was not obtained properly". Thus, the possibility of the case being tried under the law of trespass remained undetected by all parties involved. Moreover, as is the norm in Malaysia in consent to treatment cases, the case was decided under the law of negligence as the focus was on the duty of the defendant doctor to disclose information and/risk to the plaintiff.

Although drawing distinctions between the defective consent which gives rise to a cause of action in battery and defective consent which gives rise to a suit in negligence may appear to be only or largely a theoretical exercise, it actually has very real significant ramifications to medical practice (Somerville, 1987). This is because, there can exist situations where it would not be possible for the patient/plaintiff to establish negligence on the part of the doctor because a reasonable standard of care has not been breached. On the other hand, it would be possible for him to establish battery, as battery does not depend on the breach of a reasonable standard of care. The consent of a patient has the effect of transforming what would otherwise be unlawful into accepted and therefore acceptable contact, and battery consists of unconsented touching to the patient (Cockburn & Madden, 2006). Henceforth, there can be battery regardless of whether the touching is done with reasonable care or not. To put it simply, if battery is not available, a patient/plaintiff may be without a cause of action in cases where the treatment is performed in the absence of a valid consent as the doctor has not committed a breach of the duty of care (Somerville, 1987). This view is shared by Grubb who agreed that a doctor can be sued for battery if he does not disclose information

relating to the nature of the procedure (Grubb, 1985). As Teff put it, to hold that a patient has given his valid consent to a medical procedure where he is not aware of what is really involved, is at best over-literal and artificial. The consent given by a patient in such circumstances should not be regarded as an obstacle that will prevent him from taking an action against his doctor for battery (Teff, 1994).

One good example of an incident that could have been brought under the law of battery is an incident in Penang, where one doctor was suspended from the Malaysia Medical Register for a period of one year for disregarding and/or neglecting his professional responsibilities. Despite being informed of his patient's election for an open procedure, he went against the wish and performed a Laparoscopically Assisted Vaginal Hysterectomy instead. He did not explain the risks to the patient nor did he seek her consent for the said procedure (Press Release, Disciplinary Punishment By The Malaysian Medical Council Against Errant Registered Practitioners in The Year 2008). Even though the case was not brought to court, it is humbly submitted that should the patient have decided to sue her doctor, such a case would have fallen under the sphere of the law of battery. This is because, an action for battery is the most appropriate form of action compared to negligence in cases where a different treatment is given to that which has been consented to (Cockburn & Madden, 2006).

### CONCLUSION

In conclusion, it is submitted that the meaning of a valid consent in Malaysia is still uncertain. The law of torts in this country is formed by applying legal principles developed from cases decided by the courts in England. However, from the case of Tan Ah Kau ((1997) 2 AMR 1382), it is not clear whether the courts in Malaysia really adhere to the common law principle relating to the meaning of a valid consent as accepted in England. This position will remain cloudy as long as there is no case brought to the Malaysian High Courts pertaining to this issue.

Be that as it may, it is submitted that in consent to treatment cases, one should not overlook the role that can be played by the law of battery. This is because, it cannot be denied that there are cases where there is in fact no valid consent given by the patient. Failure to explain or disclose to a patient the risks that are so significant and serious that they affect the nature of a particular procedure should be held capable of vitiating the validity of the patient's consent and thereby give rise to an action for battery. Legal clarity pertaining to this issue will enable parties intending to commence legal proceeding against their doctors to choose the best cause of action to take, whether negligence or battery, according to the facts of each particular case. As stated above, the development of the law of torts depends on cases decided by the civil courts in Malaysia. Therefore, it is the duty of the judges to use their wisdom in interpreting legal principles to ensure legal clarity and certainty for the purpose of justice.

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