

**RUSSELL KENNEDY**  
MEMBER OF THE KENNEDY STRANG LEGAL GROUP

**ISQUA**  
**October 2009**

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**ISQUA October 2009**  
**INFORMED CONSENT**  
**“When Yes really means No”**  
**– a patient perspective”**

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**INFORMED CONSENT**

**When “Yes” really means “No”**

- The duty:
  - Consent or Assault!
  - Negligence – reasonable care and skill
  - Informed consent – warnings of material risks

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**INFORMED CONSENT**

- Patient autonomy (Ethics)
  - Patients decide on treatment and options
  - Doctor has knowledge & power
- Patient Rights
  - eg. NZ HDC Code of Consumers Rights
  - Right 5 – to effective communication
  - Right 6 – to information explaining conditions, options for treatment, risks & side effects, benefits & costs – to make informed choice or give informed consent

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**INFORMED CONSENT**

- Communication:
  - Doctor/patient relationship
  - Moderating expectations
  - Risk management

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**INFORMED CONSENT**

- Legal Obligations
  - UK - “Slater v Baker & Stapleton” 1767
  - Aust - “Rogers v Whitaker” 1990
  - USA - “Schloendorff v NY Hospital” 1914

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## INFORMED CONSENT

### Rogers v. Whitaker

“A risk will be considered material if, in the circumstances of the particular case, a reasonable person in the position of the patient, if warned of the risk, would be likely to attach significance to it, or if the medical doctor is, or should reasonably be, aware that the particular patient, if warned of the risk, would be likely to attach significance to it.”

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## INFORMED CONSENT

1. **Would a reasonable person, in the position of the patient, be likely to attach significance to the risk?**
2. **Is the doctor aware, or should the doctor be reasonably aware, that this particular patient would be likely to attach significance to that risk?**

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## INFORMED CONSENT

- **NOT** percentages of risk –  
(1 in 10; 1 in 10,000; 1 in 1,000,000)
- **NHMRC GUIDELINES**

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## INFORMED CONSENT

- **Factors:**
  - Would it influence the patient?  
Serious? Slight?
  - Drastic intervention requires greater explanation
  - Desire of patient. Inquisitive?  
Real understanding?
  - Will full disclosure create other health risks?

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## INFORMED CONSENT

- **Factors:**
  - Emergency situations
  - Children, unconscious, impairment, cultural/language
  - Other professionals – anaesthetists / surgeons
  - Explanation / Communication
  - Time!

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## INFORMED CONSENT

- **Causation**
  - Link to whether patient would have decided differently

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## INFORMED FINANCIAL CONSENT

- Not legal obligation, but:
  - Government policy?
  - Professional obligation? Ethical?
  - Affect patient's decision?
- Disclose all fees
- Costs of procedure, or deferral or cancellation
- Public v Private ("Gap")

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## INFORMED CONSENT

- **Standard consent / information sheets**
  - Videos, brochures
  - Useful
  - Not a replacement for "real" communication
  - Still need to consider particular position of the patient

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## INFORMED CONSENT

- **How?**
  - Language  
(jargon, medical terms, latin!)
  - Risks  
(how it affects the patient – not the medical complications)
  - Listen & answer questions
  - Effect on this **particular** patient

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## INFORMED CONSENT

- **Finding Time**
  - Clinics in advance
  - Emergency (must be real)
  - Day procedure / O & G

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## INFORMED CONSENT

- **Notes:**
  - Detail, Detail, Detail
  - Record all issues of significance discussed with the patient
  - Checklist

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## CHECKLIST

- **Diagnosis**
- **Risks / Benefits**
- **Treatment / Non Treatment**
- **Alternatives**
- **Right of patient to decide**
- **Opportunity for questions**
- **Follow up / After care issues**
- **Consent in writing**

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