

The duty to provide information to patients

By Dr Ian Kerridge, Dr Michael Lowe and Professor Cameron Stewart



Dr Ian Kerridge

A doctor's duty to provide treatment information to patients is often referred to as the duty to seek "informed consent".

The point is that patients must have sufficient information so they can make a decision about whether or not to consent to the proposed treatment. Individuals have the right to make decisions about their own health care.

Consent is the most visible way in which the healthcare system demonstrates respect for patient autonomy. This ensures that competent patients are able to make their own decisions and that non-competent patients are protected from harm.

Any failure to comply is treated under the law of negligence. If the patient has not been given adequate information, then an action alleging negligence may be successful.

A defining case in the interpretation and establishment of consent was the 1992 decision of the High Court in *Rogers v Whitaker*.

In summary, the Court ruled that the

provision of information to patients needs to be patient focused. That is, the doctor needs to assess the amount and type of information that the patient requires, not the type of information that doctors themselves or their colleagues think a patient should get.

The key question that the Court had to answer was whether a surgeon should have warned his patient of a one-in-14,000 risk of a complication that could lead to blindness.

The High Court affirmed lower courts' decisions that the doctor should have warned his highly inquisitive patient of the rare side effect. The Court said: "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 be reasonably aware that the particular patient, if warned of the risk, would be likely to attach significance to it."

Although the judgement was focused on risk, it is clear that the High Court intended the principle to cover information beyond only the risks linked to the procedure.

Additional factors must be considered when providing information to patients, including:

- the nature of the treatment
- the desire of the patient for information (that is, how inquisitive the patient is)
- the nature of the matter to be disclosed
- the temperament and health of the patient, and
- the general surrounding circumstances of the case.

Finally, the most crucial issue is not whether patients have simply been given information, but whether they appreciate and understand the information. For doctors to assess this accurately, they must initiate and complete, as necessary, a process of communication that:

- is repeated, reinforced and checked for understanding
- includes diagrams or illustrations
- is in simple language and free of jargon
- provides the patient with enough time for decision making
- encourages realistic expectations and increases knowledge.

This process should be clearly documented in the case notes.



Dr Michael Lowe



Prof. Cameron Stewart

This article has been derived from: Kerridge I, Lowe M, Stewart C. Ethics and law for the health professions. 3rd edition. Sydney: The Federation Press; 2009, Chapter 14 "Consent". See page four for ordering details.

When you should disclose a medical risk

Which factors should guide a doctor to recognise when a medical risk is "significant" and should be disclosed?

According to Professor Rachael Mulheron,¹ the following 12 factors have become evident in several *Rogers v Whitaker* cases which have turned upon the allegation that a doctor failed to warn of material risks of complications in medical treatments and procedures.

ONE The magnitude of the risk of adverse effects

The more remote the risk, the less the need for the doctor to impart information concerning it. In those circumstances, a reasonable person in the patient's position is unlikely to attach significance to the possibility of the adverse consequences. However, a low probability of the risk does not, of itself, preclude a duty to warn (when a low magnitude risk is combined with factors pointing toward a duty to disclose).

TWO Defendant's experience of the risk occurring

This factor has been the subject of inconsistency. On the one hand, some case law suggests that a duty to warn can arise (because of other factors), notwithstanding that the doctor did not know of the risk and had practised for years without the risk manifesting. Yet, if a defendant doctor has never observed the adverse risk, some judges have taken this as an indication that the risk was not material, and that the doctor was justified in forming that view and withholding information about the risk from the patient.

THREE Gravity of potential harm

The more serious the harm of the risk, then the greater the need to disclose it. A duty to warn is more readily found in those cases because a reasonable person would regard the

risk as significant, and hence material.

FOUR Need for the treatment

The more lifesaving or critical the treatment, or the more urgent the need for it, then the less the need for advice about the risks. Where doctors are treating emergencies, then risks of adverse outcomes would not be considered by a reasonable person to be as significant. Hence a duty to warn will be less likely to arise.



Prof. Rachael Mulheron

(Considerations of therapeutic privilege may also arise in such cases.²) In the case of elective cosmetic surgery which is being undertaken for solely aesthetic reasons, there is a greater need for advice about risks.

FIVE Whether the proposed treatment was the only course available to the patient

The greater the number of treatment alternatives, then the greater the need for advice about different treatments and the risks of each procedure. A patient is likely to consider risks of a procedure significant and material if another procedure was available which did not involve such risks.

SIX Temperament and health of the patient

In *Rogers v Whitaker*, the High Court noted that the duty to warn of all relevant information may be curtailed in circumstances where information "will harm an unusually nervous, disturbed or volatile patient".² However, if a patient's medical history suggests an increased risk of an adverse consequence, then a duty to warn is more likely to arise.

SEVEN The desire of the patient for information and the type of information requested

Since *Rogers v Whitaker*, a

request for information or advice has particular legal significance. If a patient's questions indicate that he or she attaches significance to a risk, then the doctor should provide information to that patient to fulfill the duty to warn. Uncertainties have arisen, however, where the patient asks questions about matters other than the risks of a treatment or procedure.

EIGHT Practice of other doctors at the time of the defendant's conduct

The High Court commented in *Rogers v Whitaker*: "Whether a medical practitioner carries out a particular form of treatment in accordance with the appropriate standard of care is a question in the resolution of which responsible professional opinion will have an influential, often a decisive, role to play; whether the patient has been given all the relevant information to choose between undergoing and not undergoing the treatment is a question of a different order. Generally speaking, it is not a question the answer to which depends upon medical standards or practices."

NINE Whether pamphlets were given to the patient to supplement information

This factor has been raised as being relevant in determining the extent of a doctor's duty to warn. The significance of treatment information pamphlets appears to be mixed. On the one hand, the fact that a risk is not mentioned in the pamphlet has sometimes indicated that the risk must have been too remote a possibility to be considered "material". On the other hand, sometimes it has been said that, if the pamphlet does not refer to a risk, then it behoves the doctor to mention it. There is also concern about how much information can be contained within an educational pamphlet and be properly digested by a patient.

TEN State of medical knowledge

Whether a risk is material must be weighed "in the circumstances of the particular case", according to *Rogers v Whitaker*. This requires that the Court assess whether a duty to warn arose in light of the risks that were known (or should reasonably have been known) at the time.

ELEVEN Whether the patient might not work again (at least in the same occupation) if one of the risks became a reality

If a patient might not work again in his or her present employment should a risk manifest, then that has been a factor pointing toward a duty to warn of that risk, because reasonable patients would attach significance to the risk.

TWELVE Where the patient has unreasonable expectations of success due to prior experiences

If a patient has unrealistic expectations of the success of a medical procedure due to his or her viewing of other patients' successes, then the doctor must be careful to explain the risks associated with the proposed procedure. A patient may also have unrealistic hopes of success of a new treatment, where that same patient has previously undergone procedures which were disappointing in their results. Risks inherent in that new treatment are likely to be material in those circumstances.

References
1. Mulheron, Rachael. (2000) Twelve Tests to Identify Whether a Medical Risk is "Material". National Law Review:1 (available in full text at: <http://pandora.nla.gov.au/nph-arch/2000/Z2000-Mar-8/http://www.nlr.com.au/articles/mulheron/mulheron.htm>)

2. Mulheron, Rachael. (2003) The Defence of Therapeutic Privilege in Australia. *Journal of Law and Medicine*: 201

Professor Mulheron teaches Medical Law and Tort Law at Queen Mary University of London's Law Department, and has previously held positions in law schools at Notre Dame (Australia) and Warwick University.



TREATMENT OF GUM INFECTIONS *New edition*

100 copies @ 60 cents each: \$60

200 copies @ 54 cents each: \$108

500 copies @ 51 cents each: \$255

PATIENT RECALL MAILER TIME FOR A CHECK-UP *New edition*

100 copies @ 60 cents each: \$60

200 copies @ 54 cents each: \$108

500 copies @ 51 cents each: \$255

1000 copies @ 49 cents each: \$490

ORAL HEALTH AND SMOKING

100 copies @ 52 cents each: \$52

200 copies @ 49 cents each: \$98

THE FITTING AND CARE OF DENTURES

100 copies @ 90 cents each: \$90

200 copies @ 84 cents each: \$168

500 copies @ 81 cents each: \$405

DENTAL IMPLANTS

100 copies @ 90 cents each: \$90

200 copies @ 84 cents each: \$168

500 copies @ 81 cents each: \$405

BISPHOSPHONATES TREATMENT AND ORAL HEALTH

100 copies @ 60 cents each: \$60

200 copies @ 54 cents each: \$108

500 copies @ 51 cents each: \$255

CROWNS AND BRIDGES

100 copies @ 60 cents each: \$60

200 copies @ 54 cents each: \$108

500 copies @ 51 cents each: \$255

TOOTH ENAMEL DEFECTS

100 copies @ 52 cents each: \$52

200 copies @ 49 cents each: \$98

FISSURE SEALANTS

100 copies @ 52 cents each: \$52

200 copies @ 49 cents each: \$98

DENTAL EXTRACTIONS

100 copies @ 60 cents each: \$60

200 copies @ 54 cents each: \$108

500 copies @ 51 cents each: \$255

ENDODONTIC SURGERY

100 copies @ 60 cents each: \$60

200 copies @ 54 cents each: \$108

TOOTH WHITENING *NEW*

100 copies @ 60 cents each: \$60

200 copies @ 54 cents each: \$108

500 copies @ 51 cents each: \$255

PREVENTION OF HEART INFECTION FOLLOWING DENTAL TREATMENT *New edition*

100 copies @ 52 cents each: \$52

200 copies @ 49 cents each: \$98

WISDOM TEETH AND WHAT TO DO ABOUT THEM

100 copies @ 90 cents each: \$90

200 copies @ 84 cents each: \$168

500 copies @ 81 cents each: \$405

1000 copies @ 78 cents each: \$780

BRUXISM

100 copies @ 52 cents each: \$52

200 copies @ 49 cents each: \$98

500 copies @ 46 cents each: \$230

ORTHODONTICS

100 copies @ 90 cents each: \$90

200 copies @ 84 cents each: \$168

500 copies @ 81 cents each: \$405

1000 copies @ 78 cents each: \$780

ORAL APPLIANCE THERAPY

100 copies @ 52 cents each: \$52

200 copies @ 49 cents each: \$98

500 copies @ 46 cents each: \$230

COMMON DISORDERS OF THE JAW JOINT

100 copies @ 52 cents each: \$52

200 copies @ 49 cents each: \$98

DENTAL CARE FOR BABIES AND YOUNG CHILDREN

100 copies @ 90 cents each: \$90

200 copies @ 84 cents each: \$168

500 copies @ 81 cents each: \$405

1000 copies @ 78 cents each: \$780

DENTAL X-RAY EXAMINATIONS

100 copies @ 52 cents each: \$52

200 copies @ 49 cents each: \$98

CRACKED TOOTH SYNDROME

100 copies @ 52 cents each: \$52

200 copies @ 49 cents each: \$98

WOMEN'S DENTAL HEALTH

100 copies @ 90 cents each: \$90

200 copies @ 84 cents each: \$168

NEW pamphlet Tooth Whitening

New edition **Root Canal Treatment**

ROOT CANAL TREATMENT *New edition*

100 copies @ 60 cents each: \$60

200 copies @ 54 cents each: \$108

500 copies @ 51 cents each: \$255

VENEERS, BONDING, BLEACHING AND COMPOSITES

100 copies @ 90 cents each: \$90

200 copies @ 84 cents each: \$168

500 copies @ 81 cents each: \$405

HOME DENTAL CARE (ENGLISH, 4 PAGES)

100 copies @ 85 cents each: \$85

200 copies @ 80 cents each: \$160

500 copies @ 77 cents each: \$385

HOME DENTAL CARE AND ORAL HYGIENE (TICK THE BOXES OF LANGUAGES YOU REQUIRE)

ARABIC CHINESE GREEK

ITALIAN TURKISH VIETNAMESE

100 copies @ 50 cents each: \$50

200 copies @ 47 cents each: \$94

CONSCIOUS SEDATION IN THE DENTAL SURGERY

100 copies @ 65 cents each: \$65

200 copies @ 58 cents each: \$116

INFECTION CONTROL IN THE DENTAL PRACTICE

100 copies @ 52 cents each: \$52

200 copies @ 49 cents each: \$98

AMALGAM FILLINGS

100 copies @ 52 cents each: \$52

200 copies @ 49 cents each: \$98

PAMPHLET HOLDERS (CLEAR ACRYLIC)

♦ **Wall mounted**
A4, single pocket, \$16 per unit
Number of units required:

♦ **Free standing**
A4, single pocket, \$19 per unit
Number of units required:

Sharps and Needlestick Injury Poster *New edition*

Emergency steps for health professionals

Third edition updated and reviewed by expert panel • 420x600mm • in full colour • laminated

\$28 each • Number of posters required:

Please return this form by facsimile to: **03 9888 6465**

OR email: **orders@mitec.com.au**

OR order online: **www.mitec.com.au**

OR telephone orders: **03 9888 6262**

OR post to: ADA PATIENT EDUCATION
MI-TEC MEDICAL PUBLISHING
P.O. Box 24
CAMBERWELL, VIC, 3124

SEP 2009 TELEPHONE ORDERS 03 9888 6262. PRICES DO NOT INCLUDE 10% GST. GST APPLIES TO ORDERS WITHIN AUSTRALIA ONLY. PRICES MAY CHANGE OVER TIME. POSTAGE AND HANDLING ARE CHARGED AS AN AT-COST DISBURSEMENT. MI-TEC MEDIA PTY LTD A.C.N. 053 106 497 A.B.N. 65 053 106 497

If you have a practice stamp, please make an imprint below.

PLEASE PRINT CLEARLY

Name: DR

Post Office Box or Street Address:

City/Town: State: Postcode:

Phone: Fax:

Please add your → 1.
email addresses 2.

Receive the latest titles from ADA Bookshop. All email addresses and customer details are confidential.

Pay now by credit card, or we can invoice with the shipment.
(If paying by cheque, please pay on receipt of invoice.)

Card number:

Name on card: Expiry date:

Signature:

- Please tick**
- Mastercard
 - Visa
 - American Express
 - Diners Club

Prices do NOT include GST. 10% GST will be added to the Tax Invoice for orders within Australia only. Prices may change over time. Postage and handling are charged as an at-cost disbursement.

Australian Dental Association Inc

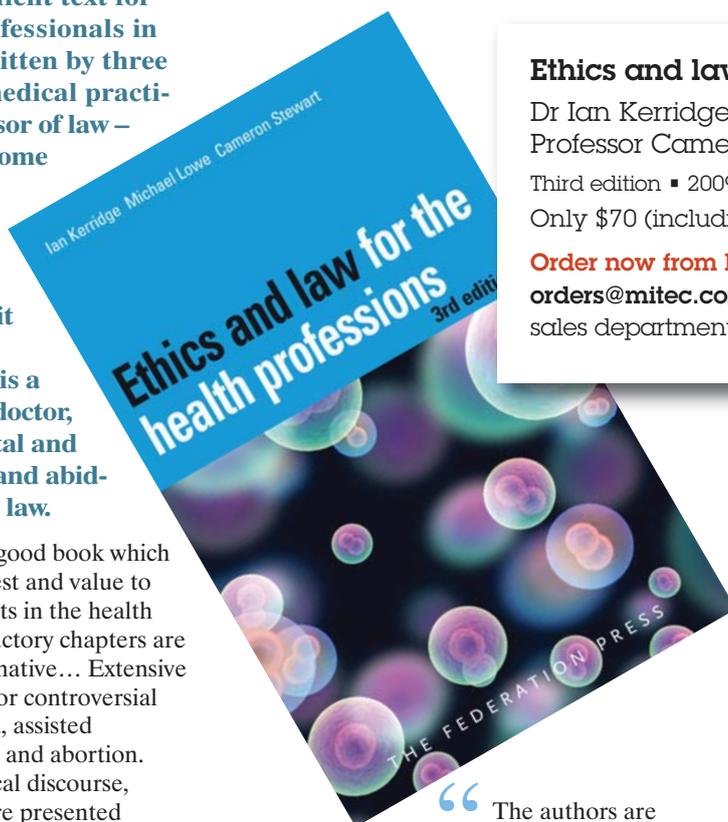




This is an excellent text for all health professionals in Australia. Written by three Australians – two medical practitioners and a professor of law – this comprehensive tome touches on every key topic in the medicolegal and ethics environment. At nearly 900 pages, it represents excellent value for money and is a must-have for every doctor, dentist, nurse, hospital and clinic with a serious and abiding interest in health law.

“ This is an exceptionally good book which should be of great interest and value to practitioners and students in the health professions. The introductory chapters are concise, clear and informative... Extensive coverage is given to major controversial areas such as euthanasia, assisted reproductive technology and abortion. In the true spirit of ethical discourse, alternative arguments are presented without bias... The authors have extensively revised and added to the previous edition... The writing is uniformly lucid and direct... Neither of us can remember being so effusive before in a book review... It should be widely available in consulting rooms, medical and general libraries and in children’s wards of hospitals... It is also remarkably good value for money. ”

Journal of Paediatrics and Child Health



Ethics and law for the health professions

Dr Ian Kerridge, Dr Michael Lowe and Professor Cameron Stewart

Third edition ■ 2009 ■ 895 pages including index
Only \$70 (including gst)

Order now from **Mi-tec Medical Publishing**
orders@mitec.com.au or call our
sales department on **03 9888 6262**

About the Authors

Dr Ian Kerridge: Staff haematologist and bone marrow transplant physician at Westmead Hospital, Sydney, Chair of the Australian Bone Marrow Donor Registry Ethics Committee, Director and Associate Professor in Bioethics at the Centre for Values, Ethics and the Law in Medicine at the University of Sydney.

Dr Michael Lowe: Clinical Dean of the Northern Territory Clinical School, Faculty of Medicine, Health and Molecular Sciences, James Cook University. Interests in clinical ethics, medical education, chronic disease and Indigenous health.

Professor Cameron Stewart: Associate Professor in the Centre for Health Governance, Law and Ethics at Sydney Law School and Honorary Associate Professor in the Centre for Values Ethics and the Law in Medicine in the Faculty of Medicine, University of Sydney.

“ The authors are extensively qualified in medical ethics and the interrelationship between medicine and the law... This excellent work traverses a huge territory from ethical theories through legal principles, standards of care, capacity, consent, confidentiality, non-treatment orders, mental illness and many other medical areas where ethics and law are intertwined. ”

Law Institute Journal (Vic)

