11

Cracks in the Lintel of Consent

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I saw the Lord standing upon the altar: and he said,
'Smite the lintel of the door, that the posts may shake …'[1]

Introduction

For thousands of years, human societies that used the built environment have employed the construction technique of 'post and lintel'. This simple system of architecture provides for buildings to support and spread weight across a beam (the 'lintel'), while being held up by columns at either end ('the posts'). It provides a strong foundation for most architecture systems, and has stood the test of time, having been adopted by Neolithic societies into the modern day. One of the problems with this system is its ability to deal with pressures that twist the beams or with weight being unevenly applied across of the lintel. These stresses lead to cracks and, ultimately, structural failure.

The doctrine of consent is much like the lintel of health law. It has been used and adapted as a solution to nearly all the structural problems of the discipline. It has borne the weight in the conflict between autonomy and paternalism, the competing standards of information provision, struggles over refusal of treatment and the care of children and adults unable to make health care decisions for themselves. For many who view autonomy as the central value of health law, consent is the beginning and end of arguments concerning ethico-legal disputes. However, after 100 years of autonomy-based logic in health law, cracks are beginning to appear in the lintel.

This chapter will outline where three cracks are emerging in the doctrine(s) of consent. It refers to 'doctrines(s)' as consent is split into two doctrines – one concerning the defence that health care professionals can raise claims of wrongful treatment, and the other creating a duty to provide patients with information about risks which are material to them. Arguably, this *dualism* is one of the causes of cracking – consent is being ask to solve two separate (but related) problems in the relationships between patients and health care professionals. One is the *negative* right of bodily inviolability; the other is the *positive* right to be given information about risks.

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1 *Book of Amos*, Chapter 9, King James Bible.