

Consent

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August 2016

Judge Cardozo 1914

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

Fundamental principles

- **autonomy / right to self-determination**
- **A medical practitioner must obtain consent prior to any examination, procedure or treatment**
- **In the emergency setting examination or treatment may proceed without consent - ‘best interests of patient’**

For consent to be valid

- **Voluntary**
- **Capacity**
- **Information - risk disclosure / alternative treatments**

Capacity

- **Mental Capacity Act 2005**
- **Starting premise - adult patients presumed to have capacity unless shown otherwise**
- **Capacity - decision and time specific**

Capacity

- **Comprehend**
- **Retain**
- **Use / weigh**

information put to patient about a proposed plan of treatment

Capacity

- **Treating doctor assesses capacity**
- **NOT a psychiatrist**
- **Mental illness does not necessarily disqualify the patient from having capacity**

Lack of capacity

- In acute / emergency situation where obtaining consent impossible the doctor acts in the 'best interests' of the patient
- Relatives cannot consent on behalf of an adult (but ideally inform them of plan)

Lack of capacity

- **Patient advocates**
 - If no relatives available
- **Lasting Powers of Attorney**
 - Person with capacity can appoint an attorney to act on their behalf should they lose capacity in the future
- **Court appointed deputies**
 - Court of Protection - take decisions on financial, welfare and health matters

Information / risk disclosure

- Shift from Bolam in the 1950s to Montgomery in 2015
- ‘Doctor knows best’
- ‘Reasonable doctor’
- ‘Prudent patient’

Remedies if consent invalid

- **Action in the tort of battery**
- **Action in negligence**

Remedies if consent invalid

- **Action in negligence**

Standard in general negligence

- ‘Reasonable man’ test
- Greer LJ 1933 - “... the man in the street ... the man on the Clapham omnibus ... the man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves ...”

Standard in general negligence

- 'Reasonable woman' test

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Bolam 1957

- Yardstick to determine clinical negligence in
 - Medical treatment
 - Diagnosis
 - Risk disclosure

Bolam 1957

“... he [a doctor] is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art ...

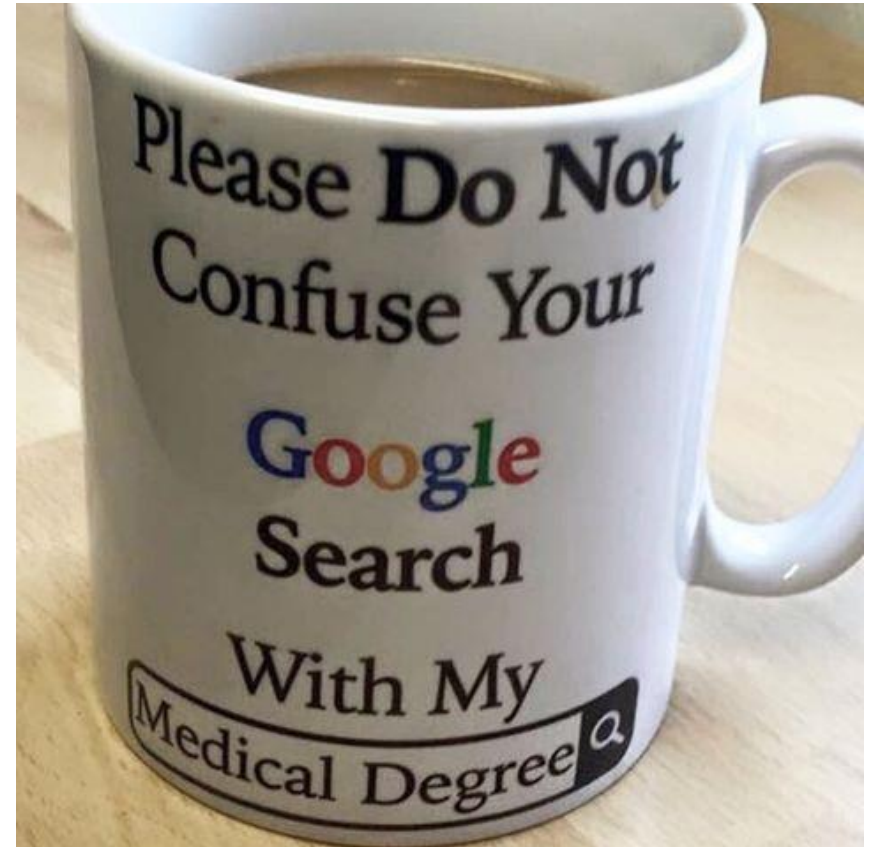
... a man [doctor] is not negligent if he is acting in accordance with such a practice merely because there is a body of opinion that takes a contrary view.”

Bolam 1957

- **Doctor-friendly judgement**
- **Cases will never succeed so long as an expert can be found to give evidence that the treatment (or lack of risk disclosure) was ‘reasonable’ and supported by a ‘responsible body’ of opinion**
- **Doctors ‘judges in their own cause’**

Since then ...

- Societal desire for increased autonomy
- Reduced deference towards professions
- Ready access to information via the internet



Sidaway 1985

- Reasonable doctor concept
- Bristow J - “In my judgement once the patient is informed in broad terms of the nature of the procedure which is intended, and gives her consent, that consent is real ...”
- Diplock LJ - judges a separate case!!

Sidaway 1985

- But new doctrine of ‘informed consent’ and concept of ‘prudent patient’ noted by Scarman LJ dissenting -
- “... the patient’s right to know of the material risks, which itself is seen to arise from the patient’s right to decide for himself whether or not to submit to the medical treatment proposed ...”

Rogers v Whitaker 1993

- Patient blind in one eye not warned of 1:14,000 risk of surgery on her bad eye causing sympathetic ophthalmitis which may lead to blindness in the other eye, which unfortunately developed**
- Doctor has a duty to warn patient of material risk inherent to the proposed treatment**

Material risk

- “... a risk is material if a reasonable person in the patient’s position, if warned of the risk would be likely to attach significance to it ...”
- NO numerical value put on the likelihood of a risk which should be disclosed

Chester v Afshar 2004

- Patient had been warned of the risk of nerve root damage in spinal surgery, but not warned of the 1 to 2% risk of cauda equina syndrome which she sustained during surgery

Chester v Afshar 2004

- Steyn LJ - “In modern law medical paternalism no longer rules and a patient has a prima facie right to be informed by a surgeon of a small, but well established, risk of serious injury as a result of surgery.”
- Prudent patient test

Montgomery 2015

- **Pregnant patient diabetic and of short stature - 'high risk' pregnancy**
- **10% risk of shoulder dystocia**
- **Obstetrician withheld information regarding risk of shoulder dystocia and did not offer an elective c-section**

Montgomery 2015

- **Foetus became stuck during labour**
- **Baby born severely injured with subsequent disability**
- **Mother had a failed symphysiotomy**

Montgomery 2015

- Supreme Court noted -
- “An adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken ...

Montgomery 2015

- ... The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatment.”
- Bolam ‘professional acceptance test’ of doctor-limited information disclosure dismissed

Consent in 2016

- **Given voluntarily by a pt with capacity**
- **Fully informed of any material risk**
- **Fully informed of any reasonable alternative treatments**
- **To enable the patient to reach a fully informed, autonomous decision regarding their treatment**

- **Fully informed of any reasonable alternative treatments**

Fracture patients

- Pain
- Opiate analgesia
- Cardiopulmonary disturbance
- ? Capacity
- ? Voluntary
- Reasonable alternative treatments discussed?
- Plate / nail / ex-fix / cast?
- Bone transport vs. Masquelet? etc

Thank you

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