

How can you give standard advice
on consent when a patient's
response may depend on the
humour or articulation of the
individual doctor?

By Mary O'Rourke QC

Unlike *Bolam* and *Sidaway* where you call a mate or check a book have we now lost standardisation?

- Was no clamour or apparent pressing need to review/depart from *Sidaway* which had stood test for time for 30 years
- Mrs Montgomery by common accord could (indeed should) have succeeded in her claim without SC departing from *Sidaway*

So is standard advice on consent issues now gone?

- Answer seems to be yes and that doctors cannot fall back on calling a mate or checking a book as they will have to tailor it to the patient's needs/ understanding and expectations.
- Looks like the SC re-formulation with its focus on the patient's position has deprived doctors of the safety net of doing as others would do as no longer an "off the peg" consent in each case but rather a requirement for "bespoke" tailoring

A personal view?

- SC put on their patient hats
- All of us are patients at some point in our lives (and accompany relatives who are patients to consultations)
- SC members very unusual patients as in top 2% intellectually of general population and therefore potential recipients of “informed consent” – bespoke tailoring will work for them
- Lost sight of doctor position and teaching for him to bespeak and indeed how against his background and that of the patient?

Reasonable person in patient's position

- Who is the reasonable person in multicultural and multi ethnic Britain with different socio economic and education levels?
- Does such a patient/ person actually exist? (cf man on Clapham omnibus or passenger on Piccadilly line) – or do they mean “bespoke” to that patient's (group) circumstances?
- Even within a group who is (s)he influenced by?
- Is (s)he an optimist or pessimist (glass half full or empty)?
- Is (s)he influenced by authority figures?

Reasonable person in patient's position (cont'd)

- What emotional factors are relevant to him/ her?
- Low self-esteem or anxiety relevant?
- How does the doctor know if dealing with a risk taker or risk averse individual?
- How much info does a doctor need when the doctor and patient are unknown to each other?
- How can the doctor “bespeak” and where does his training / teaching help – and particularly against his own characteristics and ability to draw out his patient and influence them

What do patients want to know?

- Many (according to researchers) want to be told what to do and actually want the doctor to choose as (s)he has seen cases and got knowledge of outcomes
- They don't want to drown in a sea of alternatives!
- BUT the doctor may not be able to crystallise intelligence – multiple factors to consider – so when bespeaking as a tailor not as simple as just measuring up and getting a result
- Also time of taking consent can be an issue (drugged up and/or following a scary incident)

Doctor's perspective

- Real and genuine concerns as to how this will work among those who do the serious procedures (e.g transplant surgeons)
- Concern of obstetricians as to C-section decisions when patient already drugged up when crisis arises
- Concerns when technically elective procedure/ surgery but benefits huge in terms of outcome (e.g spinal surgery)
- Concerns in non-surgical cases – eg cardiac and other stents
- Concerns as to own characteristics when no longer *Bolam*

Is there any room any more for standard advice?

- Maybe not – given will be patient not doctor dependent
- Whilst may have similar cohort of patients in an area or may choose to treat them as such then to a degree can adopt an “off the peg” approach
- BUT problems arise with the doctor’s perspective of the patient AND his perspective influenced by his characteristics and patient’s response may also depend on these
- Cultural issues into play on both sides
- Also language issues into play on both sides
- Welcome to multi-cultural/ multi linguistic NHS of today

Patient's perspective

- Difficult time – as something wrong (other than elective cosmetic surgery cases) and need treatment and may be struggling with bad news
- Fear factors in terms of consequences and also not taking risk – how much they say may depend on empathy of doctor and his articulation
- Patients may over rely on doctor due to lack of availability of other appropriate advice – but surely relationship with doctor and his humour/ articulation an issue as to how much the patient reveals and takes in?
- There is (as SC recognised) an Internet factor and too much detail and info overload for the patient – so how to bespeak?

So can we accommodate variation in humour and articulation of the doctor?

- Lack of patient intelligence will increase duty on doctors
- Increased intelligence will do likewise
- Lack of language skills on either side will increase the duty
- So how do we deal fairly with today's NHS doctors?
- Cases will turn on identification of “material risk” (doctor question) but also on how that is expressed to a patient

Montgomery not a good decision for doctors with the expertise and training?

- Like a wine choice consultation – do you rely on sommelier when big choice and you are not so knowledgeable – so should his characteristics not be relevant? Bespoke tailor or dressmaker – you look for their flair and ideas
- Has the law been changed at service level – and by those never at the coal face and to remove standard advice?
- Will we now see increased confusion and more cases due to uncertainty as to how to bespeak with no guidance?
- What is the definition of materiality – who decides – do *Bolam* and *Sidaway* revive on this issue alone – so “off the peg” on that issue?
- What about doctor and patient collaboration on agreed treatment plans – any room for this concept when GMC preaches that as a model and young doctors so trained?

Conclusions

- SC judges did not understand practical difficulties for doctors and/or consider multi- ethnic NHS in all aspects?
- And indeed difficulties for patients with life and death decisions to be made at short notice
- Answer surely is that greater burden now on doctors to bespeak and as test is patient focused the doctor's articulation and humour will impact him/ her and the patient (and the outcome) (as with fancy tailor).