Arguing Consent and Candour in Clinical Negligence Cases
Answers to 13 Thorny Questions: Directly from 6 QCs, 1 Expert Witness and 1 Solicitor

Patients

Do patients hear what is being said during the consent process?
How do you approach consent induced stress?
How is expert evidence changing and being used?

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Conflict of interest

- Surgeon
- Patient
- Consenter
- NHS practice
- Private practice
- Medicolegal practice
  - Medical negligence
    - Claimant/defendant

Am I going to

- Skilfully address all the medicolegal issues arising from the title
- Answer all your questions
- Open up new areas of litigation
- Massively increase your business
- Improve the lot of patients undergoing surgery

Bolam 1957

Sidaway 1985*

Rogers 1993

Smith 1994

Bolitho 1998

Pearce 1999**

Afshar 2004*

Montgomery 2015**

Hippocrates

Your journey

Paternalism and consent: has the law finally caught up with the medical profession

GMC 2008

Is medical paternalism a thing of the past?

- 41 female
- Teacher
- 2 years low back pain
- 4-5 week exacerbation
- Slight numbness in left foot
- 2 episodes of urinary leakage, no perineal numbness
- Seen as routine follow up in orthopaedic dept.
- Admitted immediately for scan
- Bed rest
- Surgery within the week

- Told
  - Had to have an operation
  - Told needed new “rubber replacement, “great”
  - No choice about surgery
  - No alternative to operation
- No recollection of discussion about complications although several on consent form

- Post op
- Vomiting ++
- Discharged at 5 days
- Walking all preop symptoms gone

- 2 weeks following discharge
  - Spontaneous onset
  - Increasing severe pain down the left leg
  - Couldn’t stand or lie
- 24 hours ambulance to hospital A&E
  - Asked for review by orthopaedic team
  - Refused
  - A&E doctor records that she is post op “discectomy”
- After 4 hours sent home with stronger analgesia
- Taken to A&E front door by wheelchair and husband told to pick her up

- Next three days
  - Screaming in pain
  - Progressive numbness
  - No sphincter disturbance
- Admitted under orthopaedic team
  - 3 days bed rest and then scan

Outcome

- During this period developed incontinence

- Revision surgery
  - Replace PDN
  - Complete perineal numbness
  - Whole left leg felt numb

- Four years later
  - Whole leg dysaesthesia
  - Profound numbness
  - Foot drop
  - 80% back pain
  - No genital or anal sensation
  - Self catheterising
  - Manual evacuation

Consent: patients and doctors making decisions together

General Medical Council

Working with doctors Working for patients

GMC 2008

Working together

- In principle
  - Improve medical care
  - “Police” poorly performing doctors
  - Improve quality of patient experience
  - Reduce impact/cost of adverse events
- In practice
  - Not much change
  - Resource limited healthcare system
  - No risk management culture

Spinal osteotomy

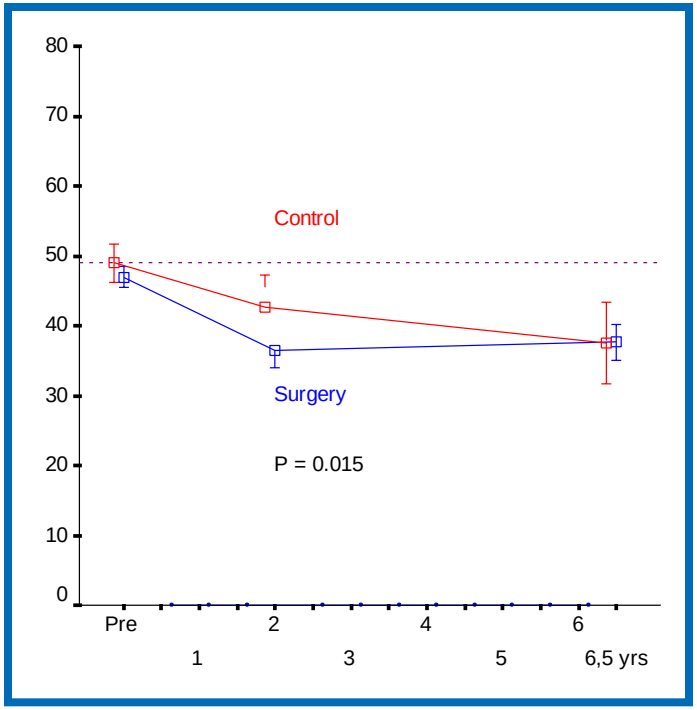
- Consent
  - >100% significant complication rate
  - ~ 30% revision rate

Low back pain surgery

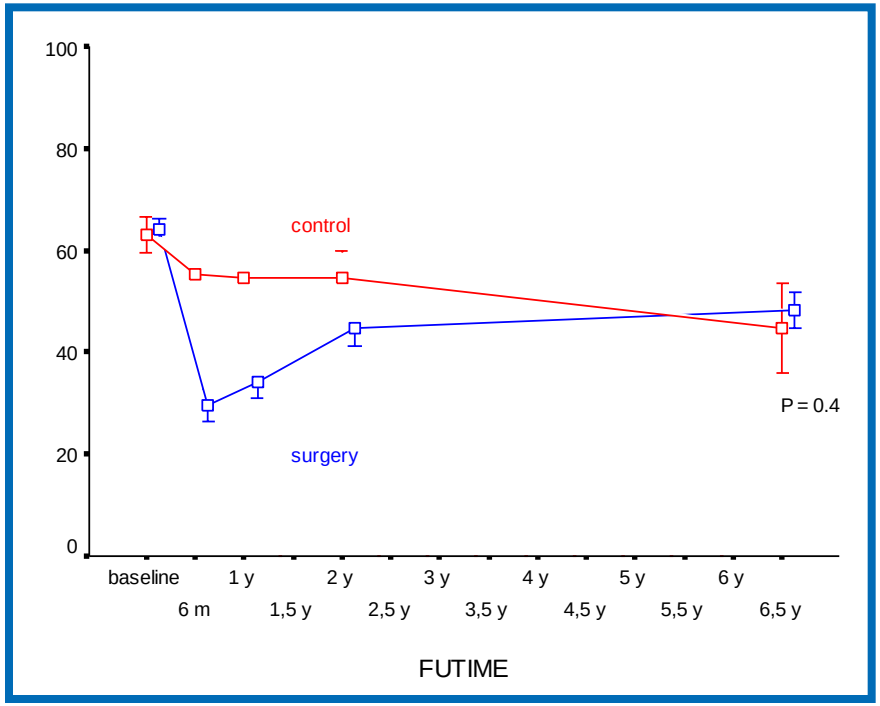
- Consent
  - Complications
  - Alternatives
  - Outcomes

Swedish Lumbar Spine Study

ODI



VAS



By courtesy of Peter Fritzell

Patients don't listen to or hear what is being said during consent process

Cryo- ablation

- Cardiologist
- Invasive cardiologist
  - Out patient visit
  - Pre op visit
- Internet/medline

VOMIT

Victim Of Medical Imaging Technology

- SBO
- Black discs
- Degenerate discs
- Instability
- Disc collapse

- **“The worst changes Mr O’Dowd has ever seen”**

Health care literacy

Recent surveys in the UK show that the **percentage of adults below the literacy level expected at the end of full-time compulsory education (16 years) is 43%;** for **numeracy** the percentage below the expected level at the end of compulsory education is **78%.**[3] This is reflected in the levels of health literacy. **Forty-three per cent of the English adult working-age population cannot fully understand and use health information containing only text. When numerical information is included in health information, this proportion increases to 61%.**[4]

Lost in translation

- Language numbers
  - Guys and St Thomas's
  - Lewisham education services
  - London

Lost in translation

- Language numbers
  - Guys and St Thomas's 112
  - Lewisham education services 140
  - London >200

Consent induced stress

- 43-year-old manufacturer.
- Fall at work leading to neck and back injury which essentially settled. Onset of acute symptoms from cervical spondylotic myelopathy including upper and lower limb pain, weakness and numbness. Operation March 2015 three level ACDF. Consenting letter by clinical fellow reads as follows:
- Surgery is not expected to change the symptoms but is indicated to prevent deterioration. He has been informed that clinical improvement is not impossible but that cannot be guaranteed. I have informed him about the risks as bleeding, infection, nerve damage, paralysis, bladder function disturbances, bowel function disturbances and death. He agrees to proceed with this surgery".
- Patient is a simple fellow who focuses on the negatives in what he has been told. He was very stressed and had many sleepless nights before the surgery because of his perception of the risks.
- My feeling is that this consenting procedure was too focused on the negative side and produced marked anxiety particularly in relation to paraplegia, which is almost unheard of in anterior cervical decompression and fusion.

Information for the prudent patient

- Surgeon driven
  - Discussion
  - Leaflets
  - Web addresses
- Patient driven
  - Professional bodies
  - Patient organisations
  - Expert patients

- Daily Mail
- July 1997
- 300 cases
- ‘New disc’
- Return to sport

Lumbar Discectomy and Decompression

INFORMATION FOR PATIENTS UNDERGOING SURGERY

Informed consent is the process of the surgical team providing information to the patient and their carers to enable them to come to a decision regarding the benefits and risks of a proposed operation. This document is intended to assist in that process. It contains information that Spine Surgeons of the British Association of Spine Surgeons believe represents a reasonable information source so that you, the patient, can consider the advantages and disadvantages of this surgery. There are two helpful resources at the end of this page about getting well after your operation.

INTRODUCTION

No surgery is guaranteed and all surgery has risks associated with it.

Your surgeon will discuss with you the potential risks and benefits of surgery specific to you. This is a general information source to complement that information.

This type of Surgery is normally carried out for patients suffering with nerve pain in the leg. (sciatica). Sciatica is common in patients in their 30s and 40s. In this group of patients, it is usually due to a disc prolapse or protrusion.

In the older patient it may be due to degenerative changes which can produce a narrowing or stenosis

Expert patient

The Expert Patients Programme (EPP)

The Expert Patients Programme (EPP) is a self-management programme for people living with a chronic (long-term) condition. The aim is to support people by:

- increasing their confidence
- improving their quality of life
- helping them manage their condition more effectively

What is an expert patient?

Many GPs who care for people with chronic conditions say that the patient often understands the condition better than they do. This is not surprising – many patients become experts as they learn to cope with their chronic conditions

“Medical experts”

- Inexperienced at entry into consultant grade
- Full time NHS employment
- More technical and protocol driven
- Less experiential so
- More evidence based approach

Not always doctors

- Modern MSK
  - ESP clinic, ESP consent, ESP procedure, ESP follow up
    - Epidural
    - Nerve root block
    - Facet injection
- Teaching hospital microdiscectomy
  - ESP clinic,
  - Nurse led assessment clinic and consent
  - Pre op registrar/ fellow/trust doctor
  - Post op registrar/ fellow/trust doctor
  - Telephone follow up clinic

How is expert evidence going to change and be used

- Expert supply
- Non surgical centric
  - Paramedical
  - Anaesthetic
  - Patient
- Beyond “risks and complications”
  - Alternatives
  - Outcomes
  - Technique
- Patient focussed consent resources
  - Surgeon driven
  - Internet driven
  - Patient driven

Conclusion
As an expert

- Meet patient rather than notes review
- No real debate about complications and risks
- Alternatives, documented
- Outcomes, documented
- Para medical opinion
- GMC compliant
- Afshar/Montgomery compliant
- Patient expert