



# Consent and Capacity

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# Why?

- ✦ Professional behaviour and standards (GMC)
- ✦ Legal Obligation
- ✦ People have a right to self determination (Lord Donaldson)

# Objectives

To understand:

- ✦ The professional and legal basis for consent and capacity
- ✦ When and how to get consent
- ✦ What to tell patients
- ✦ How to assess capacity

# What for?

- ✦ Examination, general/intimate
- ✦ Procedures/Surgery
- ✦ Investigations, (blood tests, pregnancy tests, etc)
- ✦ Prescribing contraception to children
- ✦ Organ donation
- ✦ Research
- ✦ Photography
- ✦ Be involved with teaching

# Forms of Consent

- ✦ Implied
- ✦ Express
  - ✦ Verbal
  - ✦ Written
- ✦ Informed



# Implied Consent

- ✦ For examination, patient undresses or allows exam
- ✦ Blood taking, patient holds out arm etc
- ✦ NOT sufficient for intimate examination

# Oral Consent

- ✦ IS legally valid
- ✦ Aspects as above need to be discussed and this documented (eg for thrombolysis)
- ✦ Maybe more appropriate in more urgent cases (eg fracture dislocated ankle)



# Written Consent

- ✦ Legal requirement ONLY for fertility treatment (Human Fertilisation and Embryology Act 1990), frontal lobotomy
- ✦ Best practice to try and get in writing wherever possible
- ✦ On standard NHS forms in duplicate
- ✦ No abbreviations, plain language, ensure all understood
- ✦ Not legally binding (ie can have failed to give informed consent even if form filled)
- ✦ Patients must be competent



# GMC: Good Medical Practice

- ✦ Give patients info that they need or want to know about treatment and prognosis
- ✦ In a language they can understand
- ✦ Ensure that they actually do understand
- ✦ Respect patients right to refuse treatment/research/teaching

# What information?

- ✦ Nature of treatment and benefit
- ✦ Risks, serious, common and permanent or is important to the patient (GMC)
- ✦ Alternatives
- ✦ Depends on complexity or procedure, ability of patient to comprehend and on urgency of procedure

# Case Law

- ✦ Bolam
- ✦ Re C
- ✦ Sidaway
- ✦ Bolitho



# Bolam v Friern Hospital Management Committee ([1957] 1 WLR 583)

## **Facts**

Mr Bolam was a voluntary patient at mental health institution run by the Friern Hospital Management Committee. He agreed to undergo electro-convulsive therapy. He was not given any relaxant drugs, and his body was not restrained during the procedure. He flailed about violently before the procedure was stopped, and he suffered some nasty injuries, including fractures of the acetabula. He sued the Committee for compensation. He argued they were negligent for (1) not issuing relaxants (2) not restraining him (3) not warning him about the risks involved.

## **Judgment**

McNair J "...acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art"

# Re C [1994] 1 WLR 290

- The patient was an adult detained in Broadmoor mental hospital. He had gangrene in his left leg and the doctors considered that amputation was necessary to save his life. He refused such treatment. Although he was a paranoid schizophrenic his mental illness did not render him automatically incapable of making a decision about his medical treatment.
- Although C believed that he was a world-renown doctor, the experts considered that he passed the 3-stage test therefore he had capacity to decide about his medical treatment.

# Sidaway v. Bethlem Royal Hospital Governors [1985] AC 871

## **Facts**

The claimant suffered from pain in her neck, right shoulder, and arms. Her neurosurgeon took her consent for cervical cord decompression, but did not include in his explanation the fact that in less than 1% of the cases, the said decompression caused paraplegia. She developed paraplegia after the spinal operation.

## **Judgment**

Rejecting her claim for damages, the court held that consent did not require an elaborate explanation of remote side effects. In dissent, Lord Scarman said that the Bolam test should not apply to the issue of informed consent and that a doctor should have a duty to tell the patient of the inherent and material risk of the treatment proposed.

# Bolitho v. City and Hackney Health Authority [1997] 4 All ER 771

## Facts

A two-year old boy suffered brain damage as a result of the bronchial air passages becoming blocked leading to cardiac arrest. It was agreed that the only course of action to prevent the damage was to have the boy intubated. The doctor who negligently failed to attend to the boy said that she would not have intubated had she attended. There was evidence from one expert witness that he would not have intubated whereas five other experts said that they would have done so.

## Judgment

- weighing of risks against benefit in order to achieve a defensible conclusion
- judge will be entitled to choose between two bodies of expert opinion and to reject an opinion which is 'logically indefensible'.
- Court sets the law not the profession (in "a rare case")
- it was decided that not intubating the child in the particular circumstances at hand was not a negligent way to take, even though the expert opinion on the matter was divided.

# Children & Consent

- Gillick vs West Norfolk and Wisbech AHA 1985; Lord Justice Wolf rules that children under 16 can give consent
- Can't refuse (Re R 1982) but related to complexity of procedure, age and understanding
- If parent\* give consent then it overrides minors under 16
- >16: able to give/withhold consent





# Fraser Guidelines: specific for contraception

It is lawful for doctors to provide contraceptive advice and treatment without parental consent providing certain criteria are met. The professional must be satisfied that:

- the young person will understand the professional's advice;
- the young person cannot be persuaded to inform their parents;
- the young person is likely to begin, or to continue having, sexual intercourse with or without contraceptive treatment;
- unless the young person receives contraceptive treatment, their physical or mental health, or both, are likely to suffer;
- the young person's best interests require them to receive contraceptive advice or treatment with or without parental consent.

# Children & Consent

## **Who can give consent:**

- ✦ Those with Parental responsibility: mother automatically, married couple with children together, unmarried father on birth certificate AFTER 1/12/2003, marries mother, signed authorised parental responsibility agreement/order from court, or;
- ✦ Legal Gaurdian

# Capacity

- “Every adult has the capacity to decide whether to consent to, or refuse, proposed medical intervention, unless it is shown that they cannot understand information presented in a clear way” GMC. Seeking patients’ consent: the ethical considerations
- Patients must be able to;
  - Comprehend
  - Believe
  - Retain
  - Weigh up
- More stringent requirement if adverse effects are worse eg refusal of life saving treatment would require a lot of effort to prove the patient was competent eg involving psychs etc

# Mental Capacity Act 2005

- Designated Lasting Power of Attorney (LPA's) registered with registered with Office of Public Guardian who can make health care decisions.
- Independent Medical Advocates appointed by the Office of Public Guardian can make healthcare decisions for those lacking capacity.
- New Court of Protection to hear capacity cases
- Came into force 2007
- Legal responsibility if carer/health professional fails in duty of care

Patient expresses a wish to leave against advice  
Patient is over 16 years old

Explain details of the necessary treatment and the consequence of the patient not receiving the treatment. Explore other options which may be acceptable to both.

Where the consequences of refusing treatment are serious or life threatening, discuss with senior and seek help from on-call Psychiatry service.

Assess Capacity taking into consideration that patients must be deemed to have capacity unless it can be established that they lack it

A person is unable to make a decision for himself/herself if he is unable to:

- Understand the information relevant to the decision (including information about the reasonably foreseeable consequences of deciding one way or another, or failing to make a decision)
- Retain that information
- Use or weigh that information as part of the process of making the decision, or
- Communicate his/her decision (whether by talking, using sign language or any other means).

If any one of these 4 criteria is not met, there will be an inability to make the decision

**Patient Has Capacity:**

- Document details carefully in the patients notes
- Doctor to complete, and patient to sign 'Leaving Against Advice' form
- Attempt to provide alternative treatment and advise the patient to return if they change their mind
- Allow the patient to leave

**Patient Lacks Capacity:**

- Inform Security and prevent the patient leaving
- Inform Senior & Shift Coordinator
- Try to explain to the patient calmly and use de-escalation techniques
- Follow "Dealing with Violent Patients" guidelines if required
- Treat patient as required
- If patient has left, inform Security and Police if necessary

Name:	PAS Number:
Date Of Birth:	
Diagnosis:	
Treatment Required:	
Consequences Of Refusing Treatment:	

**Capacity Assessment: (all Boxes Must Be Ticked)**

Over 16 years	
Understand the information relevant to the decision	
Retain that information	
Use or weigh that information as part of the process of making the decision	
Communicate his/her decision	

Comments:

I understand the consequences of failing to follow the medical advice given above and I wish to take my own discharge:

Signed:..... Patients Signature	Signed:..... Health Professional's Signature
Name:.....	Name:.....
Date:.....	Designation:.....

Ensure Full Documentation In The Patients Notes And File This With The A&E Record.





# Summary

- ✦ We need consent for everything we do unless it is an emergency
- ✦ Much is implied, but need to be written for many procedures
- ✦ Patients are assumed to have capacity unless shown otherwise
- ✦ If lacking, act in the best interests of the patient
- ✦ If there is time, D/W defence organisation/trust lawyer

