Do You Have Consent?

INCISION

Part 2 – Taking the medical and social history

Obtaining valid patient consent is one of the most fundamental pre-operative responsibilities of surgeons. In 2015 there was an important development in the UK case law – the now well-known Montgomery decision - which resulted in a sharp increase in claims against healthcare professionals generally arising from the consenting process.

Since then we have been carefully monitoring legal and practical developments and gathering real-life case studies from Incision members and other specialist surgeons. Understanding the current legal landscape and the practical challenges will help surgeons keep their processes updated to promote good practice in obtaining consent. In turn, this should help prevent unnecessary claims or regulatory proceedings from arising in the first place and, provided it is properly documented, will make it easier to defend any claims that do arise.

This short series of four guidance notes is intended to help busy Incision members. Even now, nearly four years after Montgomery was decided, we still regularly come across current examples via the medico-legal helpline service of surgeons misunderstanding their obligations.

A recap on the current UK law was provided in Part 1 of this series. he upshot of the legal changes is that the process of consent will often be best approached in these broad stages:

- Obtaining the patient's medical and social history;
- Obtaining consent for ancillary matters, such as clinical photographs;
- Consulting with the patient, including providing patient information leaflets;
- Final consent to go ahead with the intervention/treatment.

In this note we focus on the practicalities of obtaining the patient's medical and social history.

Obtaining the patient's medical and social history

Montgomery makes it clear that surgeons need to give advice about the risks material to that individual patient. It will be almost impossible to do that without a detailed medical and social history that allows the surgeon to gauge what is material to the particular patient.

For example, if the surgeon does not know that the patient is a professional singer, they would not advise of any potential risk (however rare) of permanent damage to the vocal cords during surgery (perhaps due to the need to ventilate under general anaesthetic). In turn, they could be sued in negligence if the patient's voice is permanently damaged during the procedure and the patient contends that they would not have consented to the procedure had they known of that risk.

Each healthcare professional needs to give careful thought to which medical or social factors could potentially make a difference to the advice about the consequences and risks of a procedure for that particular patient.

While this is necessary for all types of surgery, even those where the only alternatives would inevitably lead to death or serious disability, the process is perhaps particularly important for the following types of surgery:

- Medically necessary, but not urgent and can be deferred for some time. In these cases the issue for the patient might not be so much whether to accept the risks of surgery, but when to go ahead so as to manage the potential complications best. For example, if a risk of surgery is slow healing leading to a long recovery period, a patient who is a parent of small children might find that risk easier to accept if the surgery is delayed until the children are all in school. Similarly, if a risk of the surgery is that the patient might not be able to drive for a time after surgery, and the patient's job is dependent on them being able to drive, the patient may wish to defer the surgery until after retirement.
- Not strictly medically necessary, purely elective. The classic examples include aesthetic surgery and some types of eye surgery, but examples exist in most surgical specialisms. In these cases the consenting process can be especially difficult because the very factors that give the patient the desire for the surgery might make the inherent risks more 'material' for that patient. For example, a patient who is so concerned about his aesthetic appearance that he is willing to pay privately for aesthetic surgery is inherently less likely to be able to accept the risk that the surgery might in rare cases leave him with a worse aesthetic appearance. Similarly a patient whose job or hobbies mean that they would like to be able to dispense with spectacles might be least able to cope if rare complications manifest that adversely affect their vision.

After Montgomery surgeons simply must ensure that sufficient information is obtained from each patient to allow them and the patient to assess what risks are most 'material' to them in the particular context.

Surgeons must also document that information as part of the evidence on which their clinical judgement and advice was based. The medical and social history process is a key part of this process.

How to obtain and document the medical and social history

Often, the most convenient method for taking a patient's medical and social history is to have a standard written questionnaire for the patient to fill in before or at the consultation. While a 'checklist mentality' is not necessarily helpful, well-designed forms can be a helpful aide memoire for a busy surgeon to help ensure that all the necessary material is covered with every patient, to give the best possible chance that the surgeon identifies what risks will be particularly 'material' to that patient.

The following is certainly not a prescriptive statement of what a surgeon's questionnaire should contain. Instead it is intended as guidance and 'food for thought' to help you review your current documentation and assess whether improvements can be made to help protect you from complaints and claims.

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In addition to thinking about the content of your template documents for use in the medical and social history-taking process, you should also think about the layout and format. Even a form with a perfectly optimised set of questions could be rendered useless if there is so little space left for the answers that incomplete information is actually obtained or recorded.

Example outline medical and social history form

- Explanation that giving a complete and accurate medical and social history is necessary to enable the surgeon to provide the appropriate advice and care.
- Warning that inaccurate or incomplete answers to the questions could put their health at risk or lead to other unwanted consequences.
- Patient identification details: full name, title, any aliases.
- Patient's address: consider how far the patient has to travel, especially for any follow-up or to treat urgent complications post-discharge.
- Date of birth and age at date of consultation.
- Sex/gender description – having just two options 'male' and 'female' is not enough. If the patient has an inter-sex condition or is gender-fluid for any other reason, it is important to take this into account when considering any risks of the procedure that may be particularly significant for this individual patient.
- Social history:
  - Patient's present or immediate past job/work/career details – any change in job or career contemplated?
  - Any hobbies/interests that are very important to them?
  - Is the patient married/in a civil partnership/in a relationship?
  - Does the patient have children? Number and age? Any further children contemplated?
  - Does the patient have any other caring responsibilities – eg parents, friends, neighbours even animals who rely on them?
  - Language/reading ability considerations – how fluent is the patient in the language the surgeon will be using in the consultation and the language any patient information leaflets are written in? Do they have any difficulties in reading written material (eg poor eyesight, dyslexia, low literacy)? This is crucial, because if the patient can't understand the information provided, they arguably cannot give informed consent. Needless to say, surgeons need to find a way to ensure that the patient is asked about this orally – to have only a written question on a form would defeat its purpose.
  - Any future social factors to consider? Does the patient have any forthcoming events that are important to them that could potentially be affected by the proposed procedure, either inevitably or if complications arise? eg is the patient getting married, attending a special social event, or do they have a holiday booked/paid for? You would be surprised how many complaints and claims arise because the patient 'really wanted to be better in time for my wedding' – the imminent wedding they hadn't thought to mention to their surgeon…
- Past medical and social history.
  - Set out questions to gain sufficient information about the patient's medical and social history including medication being taken, past procedures, past health problems – anything and everything that, to your clinical knowledge, could possibly have a bearing on the risks of the particular procedure in question.
  - Include specific questions about the patient's past mental health. If there is a mental health history, confirm that the patient has the requisite capacity to provide informed consent for the treatment.
  - Consider including questions about the patient's personality type – eg how optimistic are they generally, how resilient when things go wrong.
- Any future medical and social history to consider? Is the patient planning or anticipating other medical procedures, whether in the short or long term? Are those other procedures booked/paid for yet?

Other steps in optimising your template or standard forms

We hope that this note contains helpful guidance about designing or optimising your template forms or documents for use in the process of taking a patient's medical and social history.

If you would like any general comments or feedback on your existing templates or documents, or to discuss the issues raised in this note, then please don't hesitate to call the medico-legal helpline on 0333 010 2826. Our general medico-legal guidance and feedback is of course free, as part of your Incision medico-legal service.

However, if after receiving general medico-legal comments and feedback you would like additional assistance in updating your documents, you have various options. We understand that various companies offer consenting 'systems' that aim to ensure that healthcare professionals use compliant consenting documents and processes. By way of an example only (we do not endorse this or any other provider), here is the website of one such provider https://www.eidohealthcare.com/.

Alternatively, if you would like more detailed and specific legal advice and recommendations on what changes you need to make to your own documents in the context of your particular practice, or would like specialist lawyers to revise your documents for you, then DWF LLP will be delighted to provide those services, at an additional fee that will be discussed and agreed with you in advance.

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