

The case of chester law medical essay

Law



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In discussing the law on informed consent in relation to adult patients, it would be necessary to discuss, what is defined as informed consent. In context, this is when a patient consents to have medical or surgical treatment, even after they have been told of the risks that could occur because of the treatment or surgery[1]. There are three elements to informed consent, first the patient must give voluntary consent, secondly the patient must have the capacity to consent and thirdly the patient must understand the treatment they will be receiving[2]. Informed consent has had different stances especially in case law. Previously in case law the importance of the doctor was emphasised much more, this was illustrated in the case of Bolam[3], which is an important Supreme Court judgement in English tort law which looked at the duty of medical practitioners to give a patient information on the risks involved before undergoing an operation. In this case Mr Bolam argued that they were negligent for not giving him relaxants, not restraining him and for not warning him about the risks involved of the treatment. However, the court held that the doctor had not been negligent and Lord Justice McNair gave the test[4] that ' a man would not be negligent, if he was acting in accordance with the practice, because there was a body of opinion who took the opposite view". Therefore, a medical practitioners would not be seen as being negligent if he was acting in accordance of the medical professional guidelines. This case clearly indicates that the court was taking a doctor centred approach, This was furthered by the case Sidaway[5], which looked at the issue of whether a patient had been given enough information to consent to the surgery. In this case the claimant suffered from pain in her body and as a result she was given a surgical solution. She gave consent to have the surgery, but she was not

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warned by her neurosurgeon that there was a risk that in less than 1 percent of the cases, a side effect of the surgery was that a patient could be paralysed. She developed paralysis of her legs after the spinal operation. Supreme Court held that informed consent did not require any explanation of any remote side effects and her claim for damages was rejected. The test from the Bolam test was applied and the supreme court dismissed the appeal, stating that the judge had been correct in applying the Bolam test and had been entitled to find that the surgeon had acted in accordance with a standard accepted as appropriate by the standards of the medical profession, and that he had not thereby departed from the standard of an ordinary skilled man, in his case the skills of a surgeon[6]. From the previous law on informed consent it can be said that the court was very in favour of the medical profession and their guidelines. However the case of Bolam which was the main focus for informed consent was disputed by many academics even in the case of Sidaway, one of the judges in the case Lord Scarman gave a dissenting judgement he states that the Bolam test should not have applied to the judgement of Sidaway in relation to informed consent as a medical practitioner ought to have a duty to advise the patient of any risk of the treatment proposed[7]. In relation to this case, it is clear to see that the issue of Paternalism arose, this where a patient choice can conflict with a doctor's opinion regarding treatment, so the conflict would be between the patient's choice and the doctor opinion on what is in the best interests of the patient. Paternalism is when the doctor would make a decision, which is not agreed by the patient, this can limit a patient's autonomy[8]. From Sidaway it can be said that the doctor made a decision on the patient's behalf so had limited the patients autonomy, however the <https://assignbuster.com/the-case-of-chester-law-medical-essay/>

court was much more sympathetic towards the doctor. However, from future cases it is shown how there has been a shift in the approach to negligence case and that the courts have now begun to take a patient centred approach and more in favour of a patient's autonomy and right to consent. A significant case is that of Bolitho[9], in this case the claimant was a 2 year old boy who suffered from breathing difficulties, he was admitted to the hospital, the first doctor put a junior doctor in charge of the boy who failed to check on the boy and incubate him, as a result of the delay the boy suffered severe brain damage and died. The child's mother brought a claim of negligence against the doctor; however the court held in this case that when applying the Bolam test that by not incubating the child earlier was not negligence by the doctor, and therefore the case failed. However this case also held that " The court has to be satisfied that the exponents of the body of opinion relied on can demonstrate that such opinion has a logical basis... the judge before accepting a body of opinion as being reasonable... will need to be satisfied that, in forming their views, the experts had directed their minds to the questions of comparative risks and benefits"[10]This indicates that a defendant can be liable for his actions if the court believes that he is negligent. This shows how the court was leaning towards the care of a patient. The change in the approach to consent cases was shown in Bolam; another case that demonstrates how judgements were moving towards a more patient centred approach was that of Pearce[11]. In Pearce the court held that the risk of her child being stillborn was very low, so the doctor not disclosing this risk did not amount to negligence. However Lord Woolfe in this case indicated how the courts approach to consent was changing he states " In a case where it is being alleged that a plaintiff has been deprived

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of the opportunity to make a proper decision as to what course of action he or she should take in relation to treatment... if there is a significant risk which would affect the judgment of a reasonable patient, then in the normal course it is the responsibility of the doctor to inform the patient of that risk, if the information is needed so that the patient can determine for him or herself as to what course he or she would adopt"[12]. So this showed how the courts were calling for doctors to give more information to patients when advising them in relation to consent, this clearly shows that Lord Woolfe, was thinking about the best interests of the patients, this is in stark contrast to Sidaway where the doctors conduct was the only issue looked at. This move towards a more patient approach was shown in a leading case on consent Chester V Asghar[13], in this case the Claimant had not been told that because of surgery, she could be paralysed, in her case there was a less than 2% chance of this occurring, Ms Chester went ahead with the surgery without the knowledge of the risk and as result of the surgery she suffered paralysis. She argued that had she known of the side effects that could have occurred she would not have given immediate consent to have the surgery at that time, she would have taken a second or even a third opinion concerning the treatment. It was held by the leading judgement given by his lord justice Steyn in the Supreme Court that " The duty was owed as much to the patient who, if warned, would find the decision difficult as to the patient who would find it simple and could give a clear answer to the doctor one way or the other immediately"[14]. Here it is shown that the patient was owed a duty of care to be warned of the risk and that it was breached in this case. In addition, it clearly shows that Chester departs from an important principle of fault-based negligence, by looking at the interests of the patient. The patient

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centred approach used in *Chester v Afshar*, leans towards a deontologist viewpoint, they believe that a person is acting right when they are acting in accordance to rights and duties[15]and they do not care about the consequences of being right or wrong[16]. This was clearly discussed in *Chester* where the courts held in favour of the patient, by making the doctor owe a duty of care to disclose the information regarding the treatment to the patient, emphasises that they did not care what the consequences where as long as they had acting correctly in disclosing all the information. The case further indicates that a patient's right to autonomy was respected by the courts when making the decision. Since the case of *Chester*, there is a clear indication that the courts are making decisions that are more patient centred. Another body that looks at the issues surrounding the medical practice is the GMC (general medical commission), this body sets guidelines out for medical practitioners to follow and can bring proceedings against them for being unethical and not complying with the guidelines. The GMC has guidelines for informed consent[17], the guidance indicate a much higher standard of informed consent, then what was previously given in the old law such as the case of *Sidaway*[18], this suggest that the GMC is taking a more patient centred approach, as shown by new case law such as *Pearce* and the case of *Chester and Asghar*. It indicates how a doctor must take into account the issues of a patient when going ahead with procedures. However, *Fovargue and Miola* have a different view of the matter in their article[19]; they discuss how the guidelines are not reflective of the law, and should go back and revisit the 1998 guidance[20]. They state how the previous guidelines included the word " must" more frequently, whereas now the 2008 guidelines state a doctor " should", this shows that a doctor, does not

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have a compulsory duty to follow the guidelines, whereas the word " must" would clearly show a duty[21]. This clearly shows from the article that the GMC guidance and the recent cases on informed consent are not in line with each other. However, it can be shown that to some extent the GMC by providing more guidelines on informed consent view it as an important issue and have made effort by making the 2008 guidelines, to broaden the guidance on how doctors should be approaching the issues of informed consent. As it can hold a doctor accountable for his/her actions if a patient has not given full informed consent, this shows that a doctor would most likely follow the guidelines to protect themselves from any scandals. As Heywood states in his article ' informed consent in the hospital' A further example of how the court is taking the new approach which was adopted by the Chester, is the case of Birch v University College London Hospital NHS foundation trust[22], where the court held that the trust by not giving the claimant any further information in regard to the risks of the treatment had been in breach of duty. This clearly indicates that the case of Chester has had an impact on future law, as lord stated from Birch " Admittedly Chester v Afshar was primarily concerned with causation but, as indicated, Lord Woolf MR's statement of the law was endorsed in the House of Lords. Given that Lord Woolf's approach is advanced by the defendant as a current statement of the law"[23].