

# [The important issue in medical scenarios law medical essay](https://assignbuster.com/the-important-issue-in-medical-scenarios-law-medical-essay/)

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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 nature of the treatment in broad terms[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 concerning the duty of a surgeon to inform a patient of the risks before undergoing an operation. In this case Mr Bolam was a patient at mental health institution run by Friern Hospital Management Committee. He agreed to have electro-convulsive therapy. But he was not given any muscle relaxant, some doctors believed that the drug helped, whilst others believed it didn’t, in this case Mr Bolam’s doctor believed that the muscle relaxant would not make the procedure any different, due to the procedure Mr Bolam suffered some serious injuries, including fractures of theacetabula. He sued for compensation. He argued they were negligent for not issuing relaxants, not restraining him and not warning him about the risks involved. However, the court held that the doctor had not been negligent and Lord Justice McNair gave the test[4]that ‘ a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view’. Therefore, a doctor would not be negligent if he was acting in accordance of the medical guidelines. This case clearly indicates that the judges where very pro doctor at the time. 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 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, that a side effect could be paralysis. She developed paralysis of her legs after the spinal operation. The court held that 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 proper by a responsible body of medical opinion, and that he had not thereby departed from the standard of an ordinary skilled man professing to have those skills as 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, Lord Scarman gave a dissenting judgement stating said the Bolam test should not apply to the issue of informed consent and a doctor should have a duty to tell the patient of any inherent and material risk of the treatment proposed[7]. (More examples on the Bolam test and how it is old law)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. A significant case is that of Bolitho[8], 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 mother brought a claim of negligence against the doctor; the court held that in applying the Bolam test the court held that no incubating the child was not negligence and therefore the mothers claim 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, responsible and respectable will need to be satisfied that, in forming their views, the experts have directed their minds to the questions of comparative risks and benefits’[9]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. When looking at how the approach to consent cases has changed, the case Pearce demonstrated how judges emphasised that the patients views needed to be considered[10]. This move towards a more patient approach was shown in a leading case on consent Chester V Asghar[11], in this case the Claimant had not been told that because of surgery, she could be paralysed, in her case this was a 1-2 % chance, she went ahead with the surgery and as consequence suffered paralysis. She argued that she would not have consented to the surgery at that time had she known of the risk, she would have taken a second or even a third opinion regarding the matter. It was held by lord justice 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"[12]. 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. 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[13], the guidance indicate a much higher standard of informed consent, then what was given in the case of Sidaway[14], this gives the indication that the GMC is taking a more patient centred approach, as shown by Chester and Asghar. It states 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[15], they indicate that the guidelines are not reflective of the law, and should go back and revisit the 1998 guidance[16]. 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 have a compulsory duty to follow the guidelines, whereas the word " must" would clearly show a duty[17]. 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.