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Editorial Open Access

Disclosure of Information, Informed Consent and Physiotherapy

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Editorial

Physiotherapy offers an indispensable aspect of care which is crucial to many aspects of medical and surgical treatment. And, as in all aspects of healthcare, the Physiotherapist has rights, duties and responsibilities, which may, justifiably or not, be challenged in a Court of Law. One such aspect of potential liability concerns disclosure of information and the obtaining of a valid and informed consent from the patient. This is often automatically assumed by the practitioner. Yet, because of the rare case, where a medico-legal challenge ensues, even in a hospital or group practice setting, it is wise to elicit, at the very least, an oral form of consent.

It is probably beyond the interest of most healthcare professionals that legal medicine, just like medicine itself, has undergone and is constantly undergoing a significant evolution. This is no theoretical game but one where, medico-legal principles, operative at the time, may make a critical difference to one's career at the end of a Court liability case.

One aspect that has evolved beyond recognition, concerns the autonomy of the medical patient. In a nutshell, this means that in any aspect of medical or surgical care, physiotherapy not excluded, the patient is master of his fate, in so far as choosing, accepting or refuting any treatment options offered to him. This firstly demands that the patient is fully informed of what the treatment is to be, and secondly it requires acceptance or rejection by the patient. The paternalistic attitude of 'doctor knows best' is long gone, whatever the stakes involved are. This means that, if, after having the situation fully explained to him, a patient decides to refuse treatment, even if this will lead to his death, his wish must be respected. The patient is fully in charge of his body and his medical fate. This does not exonerate the healthcare professional from fully explaining the treatment options available, the alternatives, the possible complications and their chances of occurrence and the likely outcome if the treatment is delayed or not effected. It is based on such information, that the patient is then allowed to choose his treatment.

The Physiotherapist more likely than not, will practice in a world which is normally far removed from the extreme example of ensuing death, as discussed above. However, be he a physiotherapist or a manager of a physiotherapist group, he must be well versed in that aspect of professional guidance in line with the law with regard to gaining consent in Physiotherapy practice. This is especially crucial, but by no means limited, to work involving patients with diminished capacity, which is not a rare occurrence in physiotherapy.

Having stressed the importance of consent, we must remember that for consent to be valid, it requires three conditions, namely, the patient must have the capacity to give consent, the consent must be given voluntarily and sufficient information must have been given about the proposed treatment. Even if one of these crucial elements is missing, the consent is invalid and any/all following interventions may be considered unlawful or even negligent in a Court of Law, with all subsequent implications of liability. Absent valid consent would require minimal effort by the opposing lawyer to make short-shrift of a defendant Physiotherapist before a ruling of liability is reached. Not a matter to be taken lightly.

A record of, at least oral consent to Physiotherapy treatment must be recorded and ideally witnessed. A written consent is required by UK law only for treatment under the Mental Health Act, the Human Tissue Act and the Human Fertilisation and Embryology Act. Only the first is likely to be of relevance to a Physiotherapist.

However prudence would strongly suggest obtaining a **written** consent wherever there is:

- The use of any type of analgesia, be it local, regional, epidural, spinal or anaesthesia.
- Invasive treatment e.g. acupuncture.
- The possibility of worsening of a condition or any type of adverse outcome.
- Circumstances which render the Physiotherapist to feel vulnerable unless feels covered by a reproducible consent.

The valid consent must also be an informed one. Although we have stated that disclosure of information constitutes the basis of validity, we are not bound by the details of such disclosure. It can be one sentence or it can be expressed in an hour's discussion. However the element of an informed consent, which is enshrined in the UK Health Professions Council and the Chartered Society of Physiotherapists Code of Conduct now demands a fair and clear explanation to the patient. The modern, legally sound attitude of an informed consent, especially after *Nadyne Montgomery v Lanarkshire Health Board* UK SC 11 (2015) requires that the disclosed information evaluates the 'nature and purpose of the proposed treatment, together with all significant and material risks, benefits and outcomes of the proposed treatment AND the alternative and comparative treatments that are available for the condition being treated.

The modern tenets of legal medicine may seem fastidious to some and an encumbrance to others. The fact remains the fact remains that one breaks such tenets at one's cost if matters ever reach Court challenge. One may get away with it a thousand times but in one fell swoop, a fateful Court decision may demolish a lifetime's career. On the other hand respecting the 'what should be' will lead to a more serene and happier relationship between Physiotherapist and patient. With all the cards on the table, a patient can never feel or be able to state that he was never consented in a valid and fully informed manner.

When written consent is obtained, it should be recorded on the relevant Health Department consent forms for NHS care in each of the devolved countries, or forms that mirror Health Department requirements for non-NHS care. This ensures that all providers have a consistent approach to the recording of written consent and reduces duplication of effort.

Why is consent needed?

Defence to a claim of 'battery'

Touching any person without their consent may be a civil offence of "battery" and may also be the criminal offence of "assault" or "sexual assault", depending on the nature of the touching. If the unauthorized contact involves the use of an instrument (such as a knife or needle) which breaks the skin, then this may be any one of a range of criminal offences covered by the Offences against the Person Act 1861.

The presence of "consent" may be used as a defence to claims of any of the above offences. The patient's consent is essential for any assessment and/or intervention that involves touching the patient, asking them to remove items of clothing, or using any instrument or modality that involves breaking the skin (in physiotherapy for example, acupuncture, venepuncture or injection therapy).

The patient must have been told of the Consent and Physiotherapy Practice-PD078-September 2011 6 nature of the treatment and its purpose and agreed to this.

In this context the patient has no guarantee that the treatment will be performed by a named or specific person, but they can expect that whoever performs the treatment will be appropriately skilled and competent to perform the task in question. The patient must understand in broad terms what the treatment will involve and which of the patient's identified problems the treatment is intended to address.

Defence to a claim of 'negligence'

Patients may attempt to bring a negligence claim on the basis that they were not given sufficient information about the proposed treatment such that they were not able to make a proper decision about whether to proceed with the treatment suggested i.e. they did not give "informed consent".

Such a claim in negligence usually occurs where the patient has suffered harm as a result of the treatment, but as the law now stands a patient may attempt to bring a claim in negligence simply on the basis of failing to be properly informed of treatment even if no harm subsequently materialises. The right to be able to "make a proper choice" has been incorporated into law (*Chester v Afshar* (2004) UKHL 41).

In this context, a patient must have been informed of and agreed to, not only of the nature and purpose of the treatment, but also they must be informed about the risks of treatment and of the Consent and Physiotherapy Practice–PD078–September 2011 7 alternatives to treatment that may exist, including the option to choose no treatment at all.

What is 'valid' consent?

This simply means that the consent that has been given is right and proper and meets three tests:

The patient must have the capacity to give their consent.

The consent must be given voluntarily

The patient must have been given sufficient information upon which to make their decision.

Note: Section 4-If any one of these three requirements is not met then the consent may not be legally valid and the intervention may be unlawful and/or negligent.

What is 'informed' consent'?

The evidence base for healthcare and professional practice is now internationally accessible but from time to time the terminology is not transferrable, or one term may have different legal meaning in different countries. "Informed consent" is one term that has different legal meaning worldwide.

Whilst the law on consent in countries such as the United States, Canada and Australia was originally based on English case law, since the 1970's each of these countries has developed its own body of case law around "informed consent" and have departed from English law, especially in regard Consent and Physiotherapy Practice-PD078-September 2011 8 to the level and type of information disclosure required to meet legal requirements of the country in question.

It is important for physiotherapists practising in the UK (particularly if they normally practise in the US, Canada or Australia) to understand the law as is required in the UK, and to be able to understand that professional practice literature that originates from the US, Canada or Australia may not be in accord with UK law and thus must be interpreted and/or adapted to meet UK practise contexts.

In UK law, "informed consent" is taken as meaning that the patient has been told of the 'nature and purpose of the proposed treatment, together with all significant and material risks, benefits and outcomes of the proposed treatment AND has been told of all the alternative and comparative treatments that are available for the condition being treated'.

Only when the patient has been provided with all this information, and been able to consider it and give their answer can it be said that the patient has given their "informed consent" to treatment, or indeed their "informed refusal" of treatment.

When should consent be obtained?

Consent should be obtained prior to assessment and/or treatment where the patient has capacity to do so. Provision in law is made to allow emergency treatment without consent due to necessity to save life. It is important to recognize that where on-going treatment is required, the "informed consent" of the patient is an on-going event and not a one-off occurrence, and the Consent and Physiotherapy Practice–PD078–September 2011 9 presence of on-going consent to treatment should be reaffirmed. Consent should be reaffirmed if there are significant changes to the treatment plan, or the patient's condition or the patient reports new information to you.

What types of consent are there?

Consent may be valid in law if it is either explicit (written or oral) or implied (a behaviour of the patient that implies they agree to something happening to them e.g. rolling up a sleeve for a blood pressure check). You must consider the context and circumstances very

carefully before relying on implied consent as the understanding of events may be questioned at a later stage, particularly if your actions are challenged. It is good practice to gain the explicit consent of the patient in all cases where possible and this might be in one of two forms.

Oral

Oral consent (often also called verbal consent) is where the patient gives their consent by speaking to you to tell you their decision. In most cases, oral consent will be acceptable provided an adequate record of the oral consent is documented.

Written

Written consent is only required by law for treatment under sections of the Mental Health Act, Human Fertilisation and Embryology Act and Human Tissue Act. However, the DH-and subsequently the CSP-recommends written consent in the following cases: Where treatment is complex or involves significant risk.

Consent is the voluntary agreement given by a person to allow something to happen to them, and/or to be done to them, and/or to allow their participation in such a procedure. It is a fundamental right that every adult with capacity has the absolute right to determine what happens to their own body. This right is protected in law and is reflected in the Health Professions Council (HPC) standards and the CSP Code of Conduct.