Academy of PHYSICAL MEDICINE

Broadcast Summary

Medico-Legal Issues

With Laurence Butler

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Laurence Butler

- Senior lecturer at The British School of Osteopathy
- Recognised medico-legal expert

Presenting a legal opinion

- All practitioners can do this
- Notes, or a summary, may be requested by solicitors
- Be careful about what you claim to know
- Must be completely impartial/disinterested (under oath) – may be difficult for those paying the bill to understand/accept this
- If commenting on another's notes, speculation has to be kept to a necessary minimum: court/jury/tribunal must be left to weigh the probabilities
- It's an adversarial system, and at the highest level, the interrogators (QCs) are very sharp

Preparation as an Expert

- Training by legal professionals
- Understanding the process
- The wording for declarations
- How to be legally compliant
- How to phrase opinion
    - Ultimately it is the expert's opinion

Whiplash

- "Medco" now responsible for deciding who is allowed to report on injuries such as whiplash.
- Practitioners are considered to be too close to patient to write objective reports
- Reports for legal use cannot be written by the same (for legal use)

Informed Consent

- Law changed in March 2015

- Has not yet filtered through greatly to osteopaths (not sure about other professions)
- Affects how we gain consent:
  - Telling the patient what you intend to do doesn't constitute 'informed' consent
  - Explanation of benefits, what the risks are and what the rarer risks are is necessary.
  - Valid consent
    - Ask "Do you understand what I've just said to you?"
    - Ask the patient for a brief summary to determine level of understanding
  - Difficult for a practitioner, but doesn't matter that it's difficult for a practitioner to work out; the important thing is whether it is difficult for the patients to understand.
  - It's important to give the patient all the information we think is important for them to know so that they can make their own decisions.
  - If we knowingly withhold information we might be in danger of invalidating that process.
  - From this year, it's no longer acceptable to just do what a "reasonable practitioner" would do/say. One must ask what a "reasonable patient" would expect to be told?
  - If you were the patient, what would you expect to know about:
    - What the practitioner is about to do
    - Why they thinks it's appropriate
    - What they thinks the benefits might be
    - What the risks could be
    - What the alternatives are
  - Does the patient ***understand*** what you've said?
- Panels of "expert patients" now being used to determine what is reasonable
- Bolitho Case[1]: Court found that the reasoning the practitioner used for choosing a particular technique was flawed; therefore the action was flawed (regardless of the fact that it might be normal practice in the rest of the profession). See link: http://www.timms-law.com/bolitho-test

- A recent study (which looked only at osteopaths) found that about half of patients had some short-lived, self-limiting adverse reaction to treatment (e.g. soreness). But osteopaths found it difficult to get to grips with expressing this.
- Better to tell the patient more than less – patient is the only person that matters. Knowingly withholding information may invalidate the informed consent process.

- Example – Cervical Manipulation:
  - Explain to the patient the need to ensure that they have no pre-existing weakness which might make it unsafe to treat them
  - Explain the small risk of damage to blood vessels which could cause a stroke
  - Explain the examination itself
  - Ask patient if they feel you have gained enough information, seek consent to proceed

[1] http://www.timms-law.com/bolitho-test

- Areas where mistakes can occur:
  - Failure to examine limbs to check for neuro deficit
  - Key is a good case history
  - Poor examination, palpation or observation of the patient
  - Incomplete physical examination or case history will be deemed to be inadequate.

- There is degree of implied consent in that patients have presented themselves for treatment. But this is very limited – do they know that they have to undress? Do they understand the risks?
- Consent should be renewed, and specific e.g.: if you've been doing massage to the erector spinae muscles and then change to articulation/rocking/mobilisation you should tell the patient what you are doing, especially if you then change to doing something that is significantly different, such as an HVT.
- Consent forms are not essential, but the process of gaining consent should be recorded.

Case History

- Notes must reflect a good process, good granularity
- Handwriting is always poor – so don't worry
- A court is likely to believe that, if it isn't in the notes, it didn't happen
- Need good recording of:
  - Examinations carried out
  - Test results obtained
  - Relevant questions asked (e.g. loss of neuro-function)
- Need to be able to justify clinical reasoning behind the tests:
  - Why you did them
  - How the results informed your treatment
  - Why your treatment was appropriate
- Don't expect patients to know what information you would need without prompting/questioning.
- The fact that you've done the tests is not adequate without clinical reasoning (may suggest an unthinking routine).
- Must be careful not to overlook non-MSK matters
- Use of abbreviations:
  - Be consistent.
  - "NACO" (Nothing Abnormal Complained Of): need to be able to show what your normal questions are and other patients/practitioners could confirm that. The reason I write that is because I ALWAYS ask the same questions.
  - Abbreviations must be translatable to colleagues
- This process can be time consuming, but length and nature of proforma (if any) is far less important than content.
- It's useful to record the differentials in a diagnosis.
- Notes need to have a sense of narrative – writing the notes from a patient's viewpoint.
- Record in the notes that you have obtained consent. E.g. have a symbol to say you have obtained consent and tick it.
- Symbols must be consistent so it is clear that you know what your notes mean and other osteopaths would know what they meant.
- If you can't read another practitioner's notes, start again with your questioning.
- Electronic notes – tick boxes and space for a narrative is helpful, but electronic notes

have caused problems in cases when they've not been used to their full extent.

Communication

- You need to be sure that the patient has understood what you are saying. You can ask whether the patient has understood, or ask whether they have any questions to clarify this.
- How can we genuinely be sure the patient has understood (e.g. patients forget things, sometimes hide things)
- Important to pick up the subtle cues patients which may indicate that a patient is not happy to give consent.
- Patients might feel obliged to do as they're asked because we don't ask often enough whether they're happy.
- We need to explore how each symptom has responded to treatment and document it, not just write 'Patient is better'.
- It's easier to remember a patient, and what happened in a treatment room, if it is written down – court cases will take place many months after the event.

Privacy

- It is easy to cause a problem through oversight
- We should leave the room as patients dress and undress – turning away is unlikely to be adequate. Screens may be an alternative.
- The transition from being dressed or undress means they might want to rearrange items of clothing or items of anatomy within the clothing.
- Patients prefer to have privacy for this.
- Saying 'I have to pop out and wash my hands' is a good way to have a reason to leave the room, particularly if patients say they don't mind if you stay.

Risk

- Research: Arterial Dissection and Manipulation (Biller) – no clear proof that manipulation causes events, but there is a clear association between neck manipulation and vascular injury.
- But neck pain can be associated with vascular damage
- If treating for a musculoskeletal condition and it doesn't respond – consider that there could be another cause

- Montgomery vs Lanarkshire case: https://www.supremecourt.uk/decided-cases/docs/UKSC_2013_0136_Judgment.pdf

- Benefit-Risk Assessments

- Use the mnemonic BRA:
- Benefits
- Risks
- Alternatives
- See download about BRA.

- Other medical practitioners need to understand what we are doing. If they aren't happy with

them they might complain to the governing bodies even if the patient doesn't want to complain and no harm was done.

- Signing consent forms – verbal consent is valid legally. Written consent might not be as useful – you don't know whether the patient read the form.

If you would like to contact Laurence:

l.butler@bso.ac.uk
laurencebutler@yahoo.com