

How notes, records, letters and websites can let you down in court

Giles Eyre

Background: Mrs Hassell had a C5/6 decompression and disc replacement operation performed by a spinal orthopaedic surgeon. She suffered a spinal cord injury during the operation which caused tetraparesis and rendered her permanently disabled.



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Mrs Hassell complained that the surgeon did not warn her that the operation might leave her paralysed and did not discuss other conservative treatments before the decision to have the operation was made. The Trust asserted that the surgeon warned Mrs Hassell about the risks of paralysis and discussed other conservative treatment options. Allegations were also made about the standard of care but this aspect of the claim failed at trial. However, in relation to the failure to obtain informed consent, the claim succeeded, entitling Mrs Hassell to substantial damages.

The judgment

In *Hassell v Hillingdon Hospitals NHS Foundation Trust*¹ the judge had to decide whether the surgeon had given the patient a warning of possible cord injury in consenting her for spinal surgery and the possibility of alternative treatments. Having heard the evidence of both the surgeon and the patient the judge decided, on the balance of probabilities, that the warning was not given and alternative treatments were not discussed. He relied on seven reasons for coming to that conclusion which give an insight into the way a judge's mind works in establishing probable (and therefore, for court purposes, proved) facts:

“The judge’s analysis of the evidence demonstrates the lawyer’s approach to evidence, in which accuracy and consistency are crucial. Predominantly the decision was based on inconsistencies (or what appeared to the judge to be inconsistencies) in the surgeon’s evidence.”

1. The surgeon showed a misunderstanding about the patient’s history which was inconsistent with having had a proper discussion about treatment options. While he claimed in evidence to have discussed conservative treatment options including physiotherapy with Mrs Hassell he understood that Mrs Hassell had already had physiotherapy for her neck. However, the judge held that he could not have had this misunderstanding if there had been a proper discussion with her about other treatment options because she had not had physiotherapy for her neck and upper arm problems and that would have become clear in any discussion.

2. The surgeon was ‘not a good communicator’ about operation risks because when he gave evidence in chief about the risks of the operation he did not include DVT or PE, which in his witness statement he said he would have mentioned, claiming that it was his ‘invariable practice’ to mention them for the cervical discectomy. There was no obvious reason why he should have failed to do so. Although he believed that it was his invariable practice the judge concluded that in fact what he said sometimes differed.

3. The patient’s recollection was clear and carried weight. She recalled discussion about a less serious risk – a hoarse voice - but not the more serious risk of paralysis, which would have been of very real concern for her as the mother of three children and in full time work. She confirmed that situation in a letter of complaint that she wrote.

4. The surgeon asserted in a letter following the surgery that the operation could result in paralysis, adding that the risks were similar to those explained to Mrs Hassell for previous



unreliable, as to whether he mentioned the possibility of further injections as an alternative treatment. In his witness statement he made no mention of mentioning injections although in his oral evidence at court he did.

spinal surgery. However, the earlier letter in relation to the previous surgery said nothing of the risk of paralysis. Therefore, if he had explained the risks to Mrs Hassell as he had for the previous low back surgery he would have failed to mention paralysis.

5. The surgeon's evidence was inconsistent, and therefore regarded by the judge as

that he referred patients to his website to understand better the risks and benefits of the surgery, but the website omitted reference to paralysis, again raising doubt that he in fact did warn of this risk.

7. The risk of paralysis was not expressly referred to in a letter dictated in front of the patient prior to the surgery.

6. The surgeon asserted

Learning points

The judge's analysis of the evidence demonstrates the lawyer's approach to evidence, in which accuracy and consistency are crucial. Predominantly the decision was based on inconsistencies (or what appeared to the judge to be inconsistencies) in the surgeon's evidence.

It might be assumed that knowledge of the import and effect of the decision in *Montgomery* on consent would equip a surgeon to provide proper information in consenting a patient. However, there can be no doubt from this judgment the importance of accuracy both in giving evidence and in any underlying documents relied upon in evidence, and of consistency between oral and other evidence, and of being able to communicate well, both in this case to the patient and to the court. It is also essential to make and maintain clear contemporaneous records and notes to describe and explain what has taken place. ■

References

1. [2018] EWHC 164, <http://www.bailii.org/ew/cases/EWHC/QB/2018/164.html>

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