

INFORMED CONSENT: SOMETIMES IT'S ABOUT MEMORY

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"The single biggest problem in communication is the illusion that it has taken place."

—George Bernard Shaw

Patients have a hard time just remembering all that we tell them, and as far as remembering it accurately, *fuggedaboutit*, as they say in New York City. In our attempt to ameliorate the problem, we now give patients a concise written summary, but it may not explain enough.

As the NY Times reported recently¹ some patients have taken a different approach and are recording office visits on their smartphones. Dr. Randall Porter, a neurosurgeon in Phoenix, video records conversations on an iPad, and posts them to a secure web platform for patients and family to watch as often as necessary. He feels that when patients ask to record conversations "They're not trying to catch us...they're desperate to remember everything we tell them."

Since emotions have a profound impact on memory, faulty memories are even more likely when the discussion is about something major like heart surgery. In 1976, two cardiac surgeons in New York videotaped their preoperative conversations with 20 patients.² Four to six months after surgery, when the patients were tested for recall with a standard protocol, every one of the 20 patients failed to accurately remember major portions of their informed consent interview, and many patients fabricated details that did not occur. Two patients complained that the conversations were very brief. One said: "all he did was lift up my shirt, put a stethoscope on my heart, and that was it." In fact, the videotaped portion of that conversation lasted 24 minutes, which doesn't include at least 10 more minutes of unrecorded discussion. A more recent study by a neurosurgeon had similar findings.³

Aside from those classic but now largely forgotten studies in the medical literature, innumerable reports about the fallibility of human memory have appeared

in both the scientific and lay press. We now know that memories can shift over time. Not only can real memories be distorted, but our relentlessly processing brains can create new and false memories. In a notorious recent example, countless families were torn apart by daughters' mistaken accusations that their fathers had sexually abused them as children.⁴ Almost invariably, the daughters had no such memories until they sought counseling or psychotherapy, and they "recovered" these memories after they were repeatedly asked about the supposed events. Since the persistent questioning implied that they had indeed occurred, the subjects eventually "remembered" them.

Memories aren't stored as single "files" in one spot in the brain, but are assembled from fragments stored in multiple locations. When we try to recall the many different aspects of an event (sound, sight, smell, emotion etc.), it's not surprising it can be remembered inaccurately. And if the event is emotional or traumatizing, distortion becomes more likely. If we subsequently see news stories about the event, or discuss it with others, these fragments also can be unconsciously incorporated into our recollection, which becomes the version we remember as the truth. Though we think we remember where we were on September 11, 2001, for example, there's a good chance we're mistaken.

When a public figure commits this very human error of "misremembering" an acute event, it can have severe consequences for their reputations and careers. NBC's Brian Williams lost his coveted position as anchor of the evening news after he "remembered" having been in a helicopter that came under fire in Iraq; in fact he was in a following helicopter. Hillary Rodham Clinton was hounded mercilessly after she "remembered" running across the tarmac under sniper fire after her plane landed in Bosnia. But Brian Williams and Hillary Clinton may not have been lying; they were present in those highly stressful situations. Rather, over time, their brains may have created false memories. It happens to all of us, whether or not we realize it.

INFORMED CONSENT IN PENNSYLVANIA

The problem of faulty memory is directly relevant to a recent decision by the Pennsylvania Supreme Court that has had a major impact on how physicians across the Commonwealth obtain informed consent. In *Shinal v. Toms*, 2017 WL 2655387 (Pa. June 20, 2017), the plaintiff's recollection was a key component of the Court's verdict.

The plaintiff experienced neurological injury after surgery for a non-malignant brain tumor. She alleged that the surgeon did not inform her of the risks associated with the surgery, and that had she known, she would have chosen a less risky approach. Importantly, it seems that a physician's assistant (P.A.) discussed the procedure with the patient in more detail, and obtained her signature on the consent form.

Since both the surgeon and the P.A. had spoken with the patient, the trial judge instructed the jury that, in determining whether the physician obtained informed consent, it could consider relevant information communicated by the P.A. The jury returned a defense verdict, but on appeal the Pennsylvania Supreme Court reversed the jury's decision and held that *the duty to obtain informed consent belonged solely to the treating physician and was non-delegable*.

The Pennsylvania Supreme Court's decision was rooted in the patient's "memory" of what she had been told, so it's notable that the relevant conversations with the surgeon and the physician's assistant took place separately, in November and December 2007.

The operation was performed in January 2008, and the lawsuit was filed in December 2008. The trial did not occur until April 2014, which means that the decision hinged on Mrs. Shinal's "memory" of discussions that took place more than six years earlier.

As far as I can determine, the defense did not focus on the fallibility of memory. It seems reasonable to wonder if the verdict might have been different if the defense had done so, rather than accepting her account. As a result of many scientific studies, it is now widely recognized by courts that memory can be mistaken, and it is easy to misidentify someone who has been seen briefly only once. Eyewitness testimony is now viewed with increasing skepticism.^{5,6}

CONCLUSION

All doctors must be aware that patients may not remember or may distort much of what they are told. It is wise to keep a careful written or digital record of all communications, and it's likely to become more common for doctors to make recordings for the benefit of their patients. If a patient wishes to make a recording, it should not be feared as potential evidence in a malpractice suit, but rather, as a means of minimizing misunderstanding and thus protecting against a suit.

Locally, perhaps Lancaster General could use the MyLGHealth platform to initiate a trial of video recording of conversations about informed consent.

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