



Consent



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“The firm’s healthcare department is extremely expert, with a great depth of experience. Members are always helpful and approachable, and they provide the advice and support we require very efficiently.

Chambers UK

The law of consent is a constantly evolving landscape. The law of consent has evolved according to the changes in medical practice and expectations of 21st Century society.

All healthcare involves decisions about treatment, investigations and risks. Modern medical practice encourages healthcare professionals to work in partnership with patients to ensure good care.

At the heart of consent are important patient capacity issues and human rights autonomy and self-determination. The Mental Capacity Act 2005 sets out the fundamental principles including: the presumption of capacity, maximising a patient’s ability to make decisions, assessing capacity, making decisions in best interests when a patient lacks capacity and the need for urgent action in emergency situations.

For common law principles the key landmark case is Montgomery [2015] and the materiality test, which focuses on patient’s needs and moves away from medical paternalism.

On refusal of treatment Re C [1995] established the right of a competent adult to refuse medical treatment and the principle that mental illness does not automatically render a patient incapable of making a medical decision. Re MB 1997, the needle phobia case, upheld the right for competent

adults to make decisions even if an unborn baby is harmed. Re B [2002] established the right of a competent patient with capacity to refuse life prolonging treatment . Re T [1992], the Jehovah’s Witness case, established that a patient’s refusal to a particular treatment may not be valid if that decision is made under pressure or duress from another person.

Children and young people pose difficult questions when it comes to issues of competence to consent to treatment. The case of Gillick 1986 established the maturity test when it comes to assessing whether patients under the age of 16 can give consent to treatment. This is not to be confused with the later Fraser guidelines which are concerned only with principles relating to contraception and focus on the desirability of parent involvement and risks for minors.

In addition to the above common law decisions the legislative framework of the Mental Capacity Act 2005 clarifies who can make decisions and how decisions should be made for those who lack or partially lack capacity. There is an extensive Code of Practice which also gives helpful examples of how the Act is intended to work in practice. For further guidance we recommend visiting:

- <http://www.gmc-uk.org/guidance/consent>
- <https://www.rcn.org.uk/get-help/rcn-advice/consent>

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