



Chapter 2: Consent, choice and refusal: adults with capacity

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LATEST!

Montgomery v Lanarkshire – the Supreme Court clarifies the law in relation to risk and informed consent

In March 2015, the United Kingdom Supreme Court, in a unanimous decision in *Montgomery v Lanarkshire Health Board*,¹ made it clear that doctors must ensure their patients are aware of the risks of any treatments they offer and of the availability of any reasonable alternatives.

Doctors can no longer rely on the support of a responsible body of medical opinion – the Bolam test – in deciding what information they should provide to patients.

Mrs Montgomery was an insulin-dependent diabetic. Diabetic women frequently have larger-than-normal babies, which leads to a heightened risk of a condition called shoulder dystocia where the baby's head may descend but the shoulders cannot pass through the pelvis without medical intervention.

Her consultant did not inform her of the 9 to 10 per cent risk of shoulder dystocia, or of the possibility of delivery by caesarean.

During delivery, following shoulder dystocia, the umbilical cord was occluded and her son was born with cerebral palsy and a paralysis of the arm resulting from the vigorous manipulation required to deliver him.

Had he been delivered by caesarean section, he would have been a healthy baby.

The court held that the consultant should have informed Mrs Montgomery of the risks of shoulder dystocia and discussed the possibility of a caesarean.

The court also set out doctors' legal obligations in relation to information provision when seeking a patient's consent to a specific intervention.

Doctors must 'take reasonable care to ensure that the patient is aware of any material risks involved in any treatment, and of any reasonable alternative or variant treatments'.

A 'material risk' is one in which 'a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it'.

In Mrs Montgomery's case, the risk of shoulder dystocia, and the risk of the harm to the child, were relevant to her decision making.

When assessing risks, doctors cannot rely on percentages. The significance of a risk cannot be reduced to its likelihood. Important factors will include:

- The nature of the risk, the effect which its occurrence would have upon the life of the patient
- The importance to the patient of the benefits sought to be achieved by the treatment
- The alternatives available and the risks involved in those alternatives.

When discussing treatment with patients doctors are under an obligation to provide information in a form the patient can understand.

'The doctor's duty is not... fulfilled by bombarding the patient with technical information, which she cannot reasonably be expected to grasp, let alone by routinely demanding her signature on a consent form.'

When seeking the consent of a patient, doctors therefore need to ask themselves three questions:

- Is the patient aware of any risks relevant to his or her decision regarding the proposed treatment?
- Is the patient aware of any reasonable alternatives and their associated risks and benefits?
- Have I taken all reasonable measures to ensure that I have presented this information in a form the patient understands?

There are some exceptions. In an emergency, where the patient may lack capacity, the obligation can be set to one side where the intervention is necessary and in the best interests of the patient.

Patients also retain the right not to be informed of the risks – if a patient does not want to know doctors are under no obligation to tell them – although, according to GMC guidance, a certain minimum of information may need to be given.

Lastly, where a doctor has a reasonable belief that informing a patient would cause them serious harm, legally the information can be withheld.

The Supreme Court makes it clear, however, that this exception should not be abused; it is designed to protect patients from serious harm, not as a means for steering patients away from decisions the doctor disagrees with.

¹ UK Supreme Court. *Montgomery v Lanarkshire Health Board*. 11 Mar 2015.
https://www.supremecourt.uk/decided-cases/docs/UKSC_2013_0136_Judgment.pdf.

Safeguards for living organ donation (page 82)

On 25 January 2013 the Government announced that, following a consultation exercise, it did not intend to proceed with its plan to abolish the Human Tissue Authority.

The Government's response to the consultation can be found at:

<https://www.wp.dh.gov.uk/publications/files/2013/01/Government-Response.pdf>
 (accessed 8 February 2013).
