

Shared decision making

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What is 'SDM'?

The source of the jargon
Legal basis of consent



The Health Foundation
Inspiring Improvement

Summit report:

Leading the way to shared decision making

The critical steps for the NHS Commissioning Board to make 'no decision about me, without me' a reality

February 2012



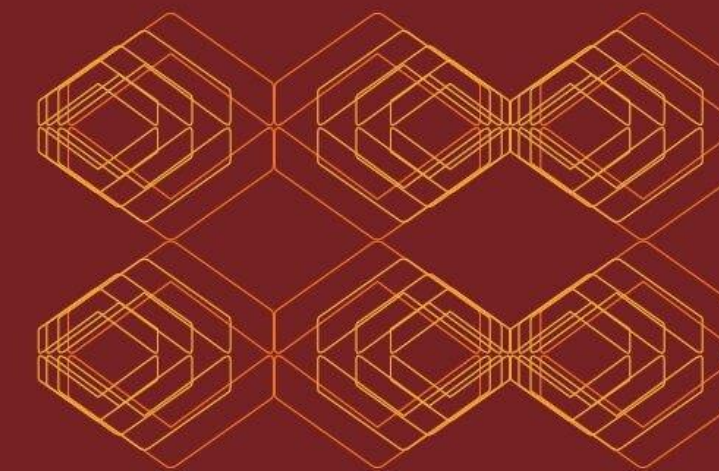
TheKingsFund

Ideas that change health care

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Making shared decision-making a reality

No decision about me, without me



with support from the Foundation for Informed Medical Decision Making





Hilary Term
[2015] UKSC 11
On appeal from: [2013] CSIH 3; [2010] CSIH 104

JUDGMENT

**Montgomery (Appellant) v Lanarkshire Health
Board (Respondent) (Scotland)**

before

**Lord Neuberger, President
Lady Hale, Deputy President
Lord Kerr
Lord Clarke
Lord Wilson
Lord Reed
Lord Hodge**

JUDGMENT GIVEN ON

11 March 2015

Heard on 22 and 23 July 2014



- Consent in tort and crime
- Paternalism - Bolam and Sidaway
- Autonomy - MCA and Human Rights
- Montgomery

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Consent - to what?

- ❖ Trespass: Battery, bodily harm, wounding, involuntary manslaughter.
- ❖ Defences include:
 - ❖ Necessity, self defence, defence of others, insanity and consent.
- ❖ Consent to reasonable surgical interference, horseplay, piercing, dangerous exhibitions.



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Capacity

Bolam 1957

Sidaway 1985

Paternalistic Consent

HRA 1998

Chester 2004

MCA 2005

Tracey 2014

Montgomery 2015

Patient-Centred Consent

Incapacity

Medical Best Interests

Aintree 2013

Winspear 2015

Patient Best Interests

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Bolam 1957

- Bolam complained that he should have been given a muscle relaxant for his ECT. This would have stopped his hip fracture during the convulsion.
- “A medical professional is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art . . .”

Sidaway 1985

- Patient complained that had she been told of the risk of paralysis she would not have consented to the cervical surgery.
- “To decide what risks the existence of which a patient should be voluntarily warned ... is as much an exercise of professional skill and judgment as any other part of the doctor’s comprehensive duty of care ... The Bolam test should be applied.”

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Human Rights Act 1998

- European Convention on Human Rights and Fundamental Freedoms - 1950
- Until 1998, claims of breach would be heard in Strasbourg (European Court of Human Rights)
- S3 (1) HRA 1998 So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights

Which rights are relevant here?

- Article 8 - Right to respect for private and family life
- Everyone has the right to respect for his private and family life, his home and his correspondence.
- There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
- Cases - *Tracey, Winspear*

MentalCapacity



Mental Capacity Act 2005

- ❖ **A presumption of capacity** – every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise;
- ❖ Individuals being **supported to make their own decisions** – a person must be given all practicable help before anyone treats them as not being able to make their own decisions;
- ❖ **Unwise decisions** – just because an individual makes what might be seen as an unwise decision, they should not be treated as lacking capacity to make that decision;
- ❖ **Best interests** – an act done or decision made under the Act for or on behalf of a person who lacks capacity must be done in **their best interests**; and
- ❖ **Least restrictive option** – anything done for or on behalf of a person who lacks capacity should be the least restrictive of their basic rights and freedoms.

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- Patient complained that had she been told of the (10%) risk of shoulder dystocia she would have opted for a Caesarian Section.
- “There is no reason to perpetuate the application of the Bolam test in this context any longer.”
- “The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, 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.”

Montgomery key words

- **REASONABLE !**
- “The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any **material risks** involved in any recommended treatment, and of any reasonable **alternative** or variant treatments. The test of materiality is whether, in the circumstances of the particular case, 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.”

Summary

- Consent is a legal defence to a claim of trespass against the person or a criminal charge of common assault (or worse).
- The legal basis for consent in the medical context arises from international convention, statute and case law. *Montgomery* is the latest iteration.
- Consent requires that the patient has the capacity to make a decision based on the information and choices given to them.
- Such information is
 - as any reasonable patient might require and;
 - any extra information that the doctor should reasonably expected to give to that individual.

Personal tips

- The more odd the 'consent' decision, the deeper the scrutiny of capacity.
- The more odd the 'best interest' decision, the wider the enquiry into vested interests should be.
- Does the decision need to be made now?