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# Factsheet: Key legislation and case law relating to *Decision making and consent*

## About this factsheet

This factsheet sets out some of the key legislation and case law relating to medical decision making and consent in the UK. It is not intended to be a comprehensive list, nor is it a substitute for independent, up-to-date legal advice.

We expect doctors to keep up to date with and practise in line with our guidance and the law.

## Legislation

### England and Wales

#### Mental Capacity Act 2005

This Act provides a legal framework for making decisions on behalf of people aged 16 or over who lack capacity to make decisions themselves. It clarifies:

- who can make decisions, including decisions about medical care and treatment, for people who are unable to decide for themselves
- how those decisions should be made.

Doctors and other healthcare professionals must refer to the [Mental Capacity Act Code of Practice](#), which explains how the Act should work on a daily basis and sets out the steps that those using and interpreting it should follow when:

- assessing a person's capacity
- reaching a decision in the best interests of a person who does not have capacity.

#### Links and downloads

- [Mental Capacity Act 2005](#)
- [Mental Capacity Act Code of Practice](#)
- [BMA's Mental capacity toolkit](#)

## Mental Health Act 1983

This Act provides a legal framework, which sets out when patients can be compulsorily treated for a mental disorder without consent, to protect them or others from harm. It also sets out the rights of patients to challenge the use of compulsory powers through the Mental Health Tribunal.

### Links and downloads

- [Mental Health Act 1983](#)
- [Mental Health Act 1983 reference guide](#)
- [Mental Health Act 1983 \(including links to easy read version\)](#)

## Scotland

### Adults with Incapacity (Scotland) Act 2000

This Act provides ways to help safeguard the welfare of people aged 16 and over who lack the capacity to make some or all decisions for themselves, because of a mental disorder or inability to communicate. It also allows other people to make decisions on their behalf.

The Act sets out the principles that must be applied when making decisions about the needs of adults who lack capacity, including in relation to healthcare.

The Act is supported by Codes of Practice, which set out guidance for those acting under the legislation, including doctors and other healthcare professionals who are treating adults with incapacity. Part 5 of the code of practice covers decisions about medical treatment and research.

### Links and downloads

- [Adults with Incapacity \(Scotland\) Act 2000](#)
- [Scottish Government site for the Act including code of practice for medical practitioners](#)
- [Consent to Treatment: A Guide for Mental Health Practitioners – Mental Welfare Commission](#)

### Mental Health (Care and Treatment) (Scotland) Act 2003

This Act sets out the circumstances in which people with mental disorders can be compulsorily treated for their mental disorder without their consent. The Act puts in place rights and safeguards for patients (including the Mental Health Tribunal and a right of access to independent advocacy services). It also includes measures around named persons and advance statements to ensure service users' rights and to promote their involvement in treatment. Part 1 of the Mental Health Scotland Act 2015 makes provision about the operation of the Mental Health (Care and Treatment) (Scotland) Act 2003.

### Links and downloads

- [Mental Health \(Care and Treatment\) \(Scotland\) Act 2003](#)
- Scottish Government website: [Key provisions of the Mental Health Scotland Act 2015](#)

## Northern Ireland

Decisions about capacity and treatment and care when people lack capacity are currently considered by reference to the common law in Northern Ireland.

### **Mental Capacity Act (NI) 2016**

The Mental Capacity Act (Northern Ireland) 2016 is not yet fully in force. Once it is in force, the Act will provide a single legal framework for both mental health and capacity issues. It will set out the principles for making decisions on behalf of people aged 16 or over who lack capacity to make decisions themselves, including the safeguards that must be put in place.

### **Mental Health (Northern Ireland) Order 1986**

The Mental Health (Northern Ireland) Order 1986 ('MHO') currently covers the assessment, treatment and rights of people with a mental health disorder in Northern Ireland. When the Mental Capacity Act (NI) 2016 is fully in force, the MHO will be repealed in relation to anyone over the age of 16.

### **Links and downloads**

- [Mental Capacity Act \(NI\) 2016](#)
- [Department of Health \(Northern Ireland\) pages about the Act](#), which also links to the codes of practice

## Case law summaries

Although some of the cases cited are not binding in all UK jurisdictions, they provide guidance for courts throughout the UK. Cases heard under English law have persuasive authority in Scotland and Northern Ireland and are generally followed by the courts.

### Montgomery v Lanarkshire Health Board [2015] UKSC 11

#### **The duty to make sure that patients are aware of any material risks involved in treatment and any reasonable alternative treatment options**

Mrs Montgomery, a diabetic woman, was told that she was having a larger than usual baby. She expressed concerns throughout her antenatal care that this might lead to difficulties in delivery. Her consultant did not tell her about the risk of the baby's shoulders being unable to pass through the pelvis during delivery (shoulder dystocia) or discuss the option of a caesarean section. The consultant withheld this information on the basis that, in her estimation, the consequential risk of serious injury to the baby was very small.

During delivery shoulder dystocia occurred and the blood flow through the umbilical cord was compromised. After birth the child was diagnosed with cerebral palsy, which had been caused by oxygen deprivation. He also suffered a brachial plexus injury.

The Supreme Court held the following.

- An adult with capacity is entitled to decide which, if any, of the available forms of treatment to undergo.
- Doctors are under a duty to take reasonable care to make sure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments.
- The test for materiality was whether, in the circumstances, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor was or should have been reasonably aware that the particular patient would be likely to attach significance to it.
- A doctor's advisory role involves making sure that the patient understands the seriousness of their condition, and the anticipated benefits and risks of the proposed treatment and any reasonable alternatives, so that they can make an informed decision.
- Doctors are entitled to withhold information about risk from a patient if they reasonably consider that its disclosure would be seriously detrimental to the patient's health. This is a limited exception and doctors must not withhold information because they think it might cause the patient to opt for treatment that the doctor does not consider is in the patient's best interests.

## Thefaut v Johnston [2017] EWHC 497 (QB)

### The duty to give patients accurate information and adequate time and space to make decisions

Mrs Thefaut was experiencing severe pain in her back, and pain and numbness in her leg. She discussed options with her surgeon. This included being told that without surgery she would recover within 12 months. She also received a letter that recommended surgery, stated there was a 90% chance it would address her leg pain, and suggested there was 'every chance' that her back pain would also settle. The letter did not mention the following.

- the option of not performing the surgery and the likely timeframe for recovery without surgery
- the inherent risk that the procedure could exacerbate her condition.

Mrs Thefaut proceeded with the surgery. Afterwards, she reported that her back pain remained and that the pain in her leg was worse than before the surgery.

The High Court held the following.

- The informed consent process fell below the required standard, as Mrs Thefaut was presented with information that understated the risks, overstated the chances of success, and did not set out the option of not having surgery.
- A patient should be given 'adequate time and space' in which to make decisions.
- A doctor's advisory role includes the need to remove or minimise jargon, so that the information given to patients is clear and can be understood.

## Wye Valley NHS Trust v B [2015] EWCOP 60

### Placing weight on the beliefs and values of patients who lack capacity

B lacked capacity to decide whether to agree to the amputation of his leg. He was strongly opposed to the operation and had maintained that position over a sustained period of time. It was considered that not undergoing the operation would lead to his death within a matter of days.

The Court of Protection held the following.

- An enforced amputation would not be in B's best interests. The court stressed the need to give proper weight to the wishes, feelings, beliefs and values of patients lacking capacity.

## Kings College Hospital NHS Foundation Trust vs C [2015] EWCOP 80

### Assessing a patient's capacity when they make a decision that is considered unwise

C attempted suicide by taking paracetamol tablets with alcohol and suffered kidney failure as a result. Without renal dialysis, C's death was deemed almost inevitable. C refused to consent to this treatment.

The Court of Protection held the following.

- A person with capacity is entitled to decide whether or not to accept medical treatment. The right to refuse treatment extends to declining treatment that would save the life of the patient.
- A person must not be judged to lack capacity to make a decision solely because they make a decision that is considered to be unwise.

## Re B (Adult, refusal of medical treatment) [2002] 2 All ER 449

### The right of a patient who has capacity to refuse life-prolonging treatment

B had become tetraplegic, suffering complete paralysis from the neck down, and needed artificial ventilation in order to sustain her life. She asked for the ventilation to be withdrawn but the doctors caring for her refused her request.

The High Court held the following.

- A mentally competent patient with a serious physical disability has the same right to refuse treatment as any other person with capacity. Their refusal must be respected, even if it will likely result in their death.
- Doctors should not allow the question of mental capacity to be confused with the consequences of the patient's decision, however serious the consequences.
- Doctors must not allow their emotional reaction to or strong disagreement with the decision of the patient to cloud their judgment in answering the question of whether the patient has the mental capacity to make the decision.

## Re MB (Medical Treatment) [1997] 38 BMLR 175 CA

### Factors that may affect a patient's capacity to refuse treatment

MB needed a caesarean section but withdrew consent at the last moment because of her phobia of needles.

The Court of Appeal held the following.

- An individual's capacity to make particular decisions may be temporarily affected by factors such as fear, confusion, shock, fatigue, pain or drugs. Doctors must be satisfied that such factors are operating to such a degree that the individual is unable to make the decision.

## Re C (Adult, refusal of treatment) [1994] 1 All ER 819

### The principle that mental illness does not automatically mean a patient lacks capacity and the right of a competent adult to refuse medical treatment

C had paranoid schizophrenia and was detained in Broadmoor secure hospital. He developed gangrene in his leg but refused to agree to an amputation, which doctors considered was necessary to save his life.

The High Court held the following.

- C's capacity was not so impaired by schizophrenia as to render him incapable of understanding the nature, purpose and effects of the treatment advised. Hence, the fact a person has a mental illness does not automatically mean they lack capacity to make decisions about medical treatment.
- Patients who have capacity can make their own decisions to refuse treatment, even if those decisions appear irrational to the doctor or may place the patient's health or life at risk.