Consent represents a fundamental principle of Medical Law based on a patient’s self-autonomy. It is both legal and medical requirement. Consent can be given by the patient, by proxy (eg lasting power of attorney), by courts (eg use of deputes) or implied through necessity (reference should be made to various professional guidelines eg Dept of health – Good Practice in Consent. Lord steyn in Chester and Afshar stated: “A rule requiring a doctor to abstain from performing an operation without the informed consent of a patient serves two purposes. It tends to avoid the occurrence of a particular physical injury the risk of which a patient is not prepared to accept. It also ensures that due respect is given to the autonomy and dignity of the patient.”

The judgment in R (Burke) v GMC:

‘‘When a competent patient makes it clear that he does not wish to receive treatment which is, objectively in his best interests, it is unlawful for doctors to administer that treatment. Personal autonomy or the right to self determination prevails.’’

WHAT IS CONSENT?

*There must be genuine agreement to the treatment.

*Requirements: The patient is competent? The patient is sufficiently informed. The consent is totally voluntary.

FORMS OF CONSENT

*Legally consent does not have to be in a specific form.

*Consent can be: expressed (eg an operation consent form); implied; informed.

COMPETENCE

*S. 1 (2) MCA 2005 – Patient is presumed of competent in absence of evidence to the contrary

NB: capacity is issue specific

*R (N) v Dr M, A NHS Trust – burden of proof is on Doctor to prove the patient lacked capacity.

*S. 2 (1) MCA 2005 – definition of a patient lacking capacity.

*A Code of Practice lists condition resulting in impairment.

*S. 3 (1) MCA 2005 – person unable to make a decision (in which 4 conditions are considered)

*S. 3 (2) MCA 2005 – how an explanation should be given eg use of lay language.

*S. 1 (4) MCA 2005 – a person is not to be treated as unable to make a decision merely because it is unwise. - Re B (Consent to Treatment: Capacity)

*Re C (Adult: Refusal of Treatment) – low hurdle of consent. Patient will have capacity if he can comprehend and retain treatment information, believes the information, and has arrived at a clear choice. CF R (N) v Dr M - Patient lacked capacity as she did not understand the nature of the treatment, so unable to make decision.

*S. 5 (1) MCA 2005 – A doctor must take reasonable steps to establish whether P has capacity; have a reasonable belief that P lacks capacity; reasonably believes that the treatment is in P’s best interests.

SUFINCIENTLY INFORMED

*There is no Doctrine of Informed Consent – Re T (Adult: Refusal of Treatment).

*If given false/inadequate information then could be claim in battery/criminal proceedings - Appleton v Garrett

* If not given advice about risks of treatment could lead to a claim in negligence – R v Tabaussum. P must know the nature and quality of the act.

*Negligence (in not informing the patient of all the relevant info): Sidaway v Bethlem HM (level of risk/info to P – only 1% risk), Bolam test will apply. Also if p asks for all of the risks, d must tell. D can take into account emotional state of p (ppearce v united Bristol NHS);

*Rlyth v Bloomsbury, (p’s who ask for info about their treatment), Chester v Afshar (not sufficiently warned of the risks).

*Professional guidelines: DOH Good Practice in Consent (2001) and GMC Codes of Practice.

VOLUNTARY CONSENT

*There must be no evidence of duress, undue influence, deceit or fraud. Consent must be: freely, informing the patient, the patient is not under duress or pressure, and they have a reasonable understanding of the treatment.

*Principle of autonomy prevails – every competent adult p has the right to refuse treatment, even if refusal will result in death. – Re T (Adult: Refusal of Treatment)

TREATMENT WITHOUT CONSENT

*GMC Codes of Practice (2009)

*Criminal offences e.g. R v Healy

*Civil claims in torts of assault/battery/negligence e.g., Chatterton v Gerson , Freeman v Home Office

*Judicial Review: St George’s Healthcare NHS Trust v S