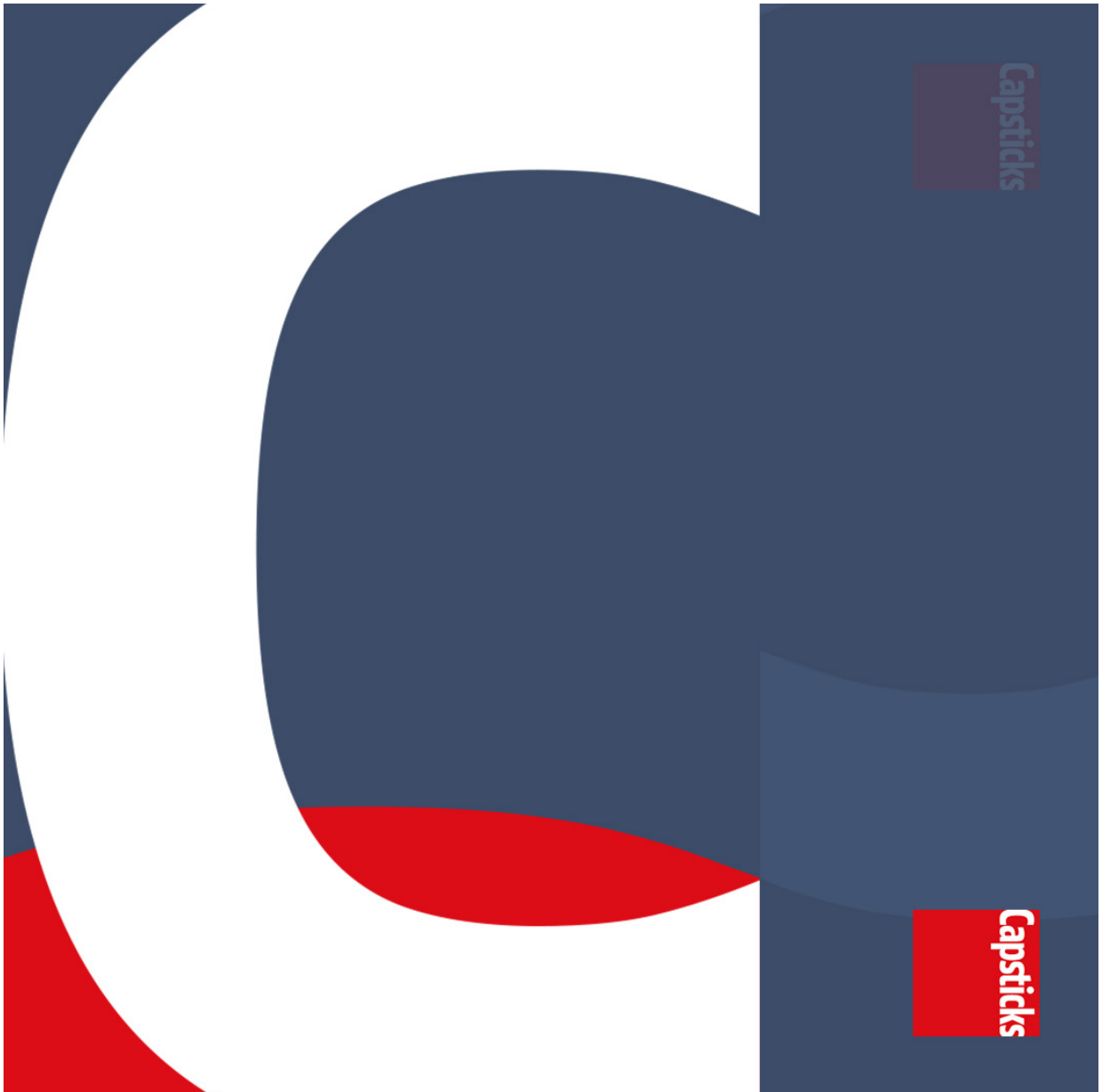


# Montgomery

The law of informed consent: what surgeons need to know



The law on consent - the duty of a healthcare professional to advise a patient on the risks of a particular treatment - has evolved over the years. However, the legal test was clarified by the Supreme Court in the case of *Montgomery v Lanarkshire Health Board* [2015] UKSC 11. It is essential that all healthcare professionals/beauticians/therapists are aware of, and understand, the practical implications of this very important judgment. This guidance note has therefore been prepared to help practitioners understand what the legal test says and how to comply with this in practice.

## The case of Montgomery

Mrs Montgomery was expecting her first baby. During the latter stages of her pregnancy, Mrs Montgomery was advised by her doctors about the best mode of delivery for her unborn child. Mrs Montgomery was advised to have a natural birth rather than a caesarean section. She followed that advice. Tragically, the birth became complicated by a shoulder dystocia (an obstetric emergency where the baby's shoulder becomes stuck during delivery), and as a result the baby was born with very serious, life-changing injuries.

Mrs Montgomery sued for compensation for her child's injuries. The legal case focused on the nature of the advice given to Mrs Montgomery about the mode of delivery, and specifically whether Mrs Montgomery ought to have been advised to have a caesarean section rather than a natural birth. Following an Appeal, the case was referred to the Supreme Court, which ruled that Mrs Montgomery had not been properly warned of the particular risks associated with a natural birth in her individual circumstances.

In this regard, it was relevant that Mrs Montgomery was quite small, that she was a type 1 diabetic, and that this was her first baby. These were all factors that potentially increased the risk of shoulder dystocia, the possibility of which was assessed to be 9%-10%. The Court concluded that Mrs Montgomery should have been specifically warned of this risk and her claim succeeded.

## The duty to advise a patient to take a risk: the legal test

In reaching its decision, the Supreme Court emphasised that the advice provided to Mrs Montgomery had to be considered in the context of Mrs Montgomery's individual circumstances. A doctor is therefore under a duty to take reasonable care to ensure that a patient is aware of any material risks involved in any recommended treatment. There is also a duty to advise a patient of any reasonable alternative or variant treatments, including the option of not undergoing treatment at all. The test of materiality is whether, when taking everything into account, an average person in the patient's position would be likely to consider that the risk is significant, or whether the doctor is, or should be, aware that the particular patient would be likely to consider the risk significant.

## Why surgeons should care about informed consent

The legal test in *Montgomery* is very wide ranging. It is not confined to the duty of a doctor. It applies to all healthcare professionals, beauticians and/or therapists in all circumstances where a patient decides to proceed with treatment or if a patient is being advised not to undergo treatment.

## Practical points

The practical points to take away from this case are:

- The Court will closely assess the facts of a case and pay close attention to the particular characteristics of the patient and what risks were "material" to this particular patient.
- There must be a dialogue between the patient and the healthcare professional, the aim of which must be to ensure that the patient is in a position to make an informed decision – in most cases a signed consent form is not going to be sufficient. Notes of the discussions with a patient are therefore more important than ever. This heralds the end of the "tick box culture".
- The test applies to any circumstance where a patient is being advised on making a choice – not just the formal "consent to treatment".
- The test will be applied to both procedures which aim to improve a patient's health and to non-therapeutic procedures.
- It is important to manage a patient's expectations.

## What does a healthcare professional need to do?

Healthcare professionals should continue to provide a patient with information leaflets on treatment and any other documents relating to the risks of treatment and/or any aftercare advice. However, in addition, in the light of the *Montgomery* judgment it is advisable that a clear and detailed written note is made in the patient's records by the healthcare professional evidencing their discussion with the patient before the treatment is commenced.

A suggested series of questions is set out on the opposite page. Of course, this may need to be adapted depending on the type of treatment and/or a health professional's practice. The aim of asking such a series of questions is for a health professional to be in a better position to defend any claim which may subsequently be brought.

<b>Patient's Name</b>	
<b>Patient's DOB</b>	
<b>Data of consultation</b>	
<b>Patient's circumstances/background</b>	Discuss with the patient their circumstances (e.g. occupation, whether they are responsible for caring for anyone, what their own needs are, whether they have any pre-existing conditions, whether they are currently taking any medication, whether they have suffered complications following any other treatment) and set them out in detail here.
<b>Purpose of treatment</b>	Discuss with the patient why they want to have the treatment. What is the purpose? Why is it important to them? Record the details.
<b>Patient's concerns</b>	Ask the patient if they have any concerns or specific questions. If so, detail them here and set out the discussion you have with them about their concerns and what your advice was.
<b>Material risks of treatment</b>	These are going to be case specific. "Material" means that this particular patient would attach significance to the risk given his/her circumstances or you should be aware that they would attach significance to the risk. Record here what you have discussed with the patient and confirm that you have properly familiarised yourself with this patient's history from the notes available.
<b>Alternative/variant treatments</b>	Are there any? What have you discussed with the patient? For example, less invasive options, more invasive options, the option of doing nothing. Discuss the pros and cons of each option with the patient and record your discussion here.
<b>Patient's decision</b>	Does the patient wish to proceed with the treatment (and not the alternatives discussed) in the light of their discussion with you? Why have they decided to proceed?
<b>Signature of healthcare professional</b>	I confirm that this form accurately records the discussion between [patient's name] and I on [date] ..... [Name] ..... [Date]
<b>Signature of patient</b>	I confirm that this accurately records the discussion between [healthcare professional's name] and I on [date] ..... [Name] ..... [Date]

Capsticks advise health professionals and institutions on all aspects of consent. For further information please get in touch with a member of our team.

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*The information contained in this note is for general guidance purposes only. It should not be relied upon as a substitute for legal advice on specific facts or matters and we recommend that you contact your usual legal adviser for more detailed advice, if necessary.*

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