



## Consent and Healthcare

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The purpose of this article is to explore issues relating to consent for medical record sharing in healthcare ('consent'). This article considers the existing models of consent within healthcare and provides a critical analysis of the current policy debate surrounding consent.

A lack of understanding of consent forms a major barrier, both by patients and clinicians. From a legal perspective, consent is defined in terms of an agreement or process by which the rights of individuals to agree or to refuse to share their medical record are upheld. In practical terms, consent refers to the process by which a health care provider informs a consumer of their options for sharing of medical records, and associated risks and benefits, and supports them to make a decision about their care. In reality the lack of understanding prevents full and open discussions about consent choices which undermines the Data Protection Act concept of "explicit consent". This issue will become paramount on introduction of the imminent Data Protection Directive which has an emphasis on explicit informed consent.

This article does not deal in detail with the perhaps less controversial area of consent for medical record sharing for direct care (for example treatment by a GP or a surgeon). It focuses instead on sharing of medical record information for indirect care purposes such as research, paying for treating, auditing care services and planning for care. However, there are strong parallels to be drawn on a sociological level.

*Montgomery v Lanarkshire Health Board*<sup>1</sup> marks a significant shift in the test to be applied when considering whether a patient has given consent to medical treatment. We also believe that this concept should be extended to cover consent for indirect care. It has put clinicians' practice of consenting patients back into the litigation spotlight. Lord Kerr remarked that: '[since Sidaway] ...patients are now widely regarded as persons holding rights, rather than as the passive recipients of the care of the medical profession. They are also widely treated as consumers exercising choices... The idea that patients were medically uninformed and incapable of understanding medical matters was always a questionable generalisation.'<sup>2</sup> The more informed patients are, the more well equipped they become in choosing whether to consent to medical record sharing for both direct and indirect care. We argue that consent is a key concept in the provision of health care which has ethical, legal and practical dimensions.

<sup>1</sup> [2015] UKSC 11

<sup>2</sup> *Montgomery v Lanarkshire Health Board* [2015] UKSC 11