

birthrights

Consenting to treatment

Just like everyone else...

Pregnant women have the right to make their own decisions about their bodies in the same way as everyone else.

It is against the law to give medical treatment to a pregnant woman unless she agrees to it. This is known legally as giving consent.

Basic principles

Every person has the right to make decisions about their body for themselves. This is known as the principle of autonomy. It is protected under the common law of England and Wales, and the common law in Scotland, and Article 8 of the European Convention on Human Rights. See our factsheet, [Human Rights in Maternity Care](#).

Pregnant women are entitled to make autonomous decisions in the same way as any other person, and their decisions must be respected, regardless of whether health professionals agree with them.

The principle of autonomy creates a legal requirement to seek a person's consent whenever they are given any medical treatment.

The only exceptions to this are in rare cases: either when a person does not have the capacity to make their own decisions; or in an emergency when a person cannot consent because of their physical condition.

If a person's consent is not obtained, the medical treatment will be against the law. It will be negligent, and in England and Wales, it will also constitute the crime of battery, and a civil wrong of trespass to the person.

Failure to obtain consent also violates Article 8 of the European Convention. If the harm that occurs as a result is serious, it will breach Article 3 of the European Convention prohibiting inhuman and degrading treatment.

When is consent required?

Consent is required for every medical procedure, however minor.

Consent must be sought before any examination or investigation is carried out, or any care or treatment is provided.

The fact that you have consented to a particular procedure in the past does not mean that you consent automatically to the same procedure again. Consent must be sought each time a procedure is performed.

If circumstances change or new information becomes available and the benefits or risks of the treatment change as a result, then fresh consent should be sought.

Sometimes, a healthcare professional may ask for advance consent to treat problems that could arise while you are unable to give further consent. For this reason, consent forms for caesarean section will often list other procedures which you are asked to 'pre-authorise' in case they should become necessary during the operation and you unable to give her consent because you are under general anaesthetic or lacks capacity. Any procedure not mentioned on the form may only be carried out if it will prevent death or serious harm.

In the case of *Konovalova v Russia* (2015), the European Court of Human Rights held that women's consent must be sought for all medical care provided during labour and this included consent for medical students to be present during a birth. As a result, any person who is providing maternity care should be clear about their status and explain if they are a student, so that you can decide whether you wish to receive care from them.



birthrights

What counts as consent?

For consent to 'count' in the law, a person must genuinely agree to receive treatment.

This means that you must be well-enough informed about the treatment, and cannot have been put under undue influence, pressured or bullied into receiving the treatment by healthcare professionals or family members. These requirements are explained in detail below.

What information should I be given?

You must be given information about any proposed procedure in advance. The information should cover any material risks, any alternative treatments which are available, and the risks of doing nothing.

In the Supreme Court case, *Montgomery v Lanarkshire Health Board* (2015), the court stated that the test for whether a risk is a 'material' one, is whether a reasonable patient would attach significance to the risk, or whether the doctor should be aware that the particular patient would attach significance to it. This means that there must be a genuine dialogue between doctor and patient and the assessment of risk must be sensitive to the individual's characteristics. Statistics alone will not determine whether a risk is significant for a particular patient. For example, the risk of complications for future pregnancies after a c-section might be statistically small, but it would be more significant for a woman who wished to have multiple children than for a woman who did not.

Hospitals cannot only rely on printed leaflets or online material to provide relevant information; there must always be a personal discussion between you and the health professional (*Montgomery v Lanarkshire Health Board* (2015)).



Giving misleading information about your medical condition or the proposed treatment, or not giving you relevant information, may mean that consent was not valid. The failure to provide appropriate information may also leave the healthcare professional open to a successful claim of negligence if you suffer harm as a result of the treatment.

If you ask specific questions, a healthcare professional must give full, honest and objective answers. The [GMC guidance](#) advises doctors to encourage their patients to ask questions.

The healthcare professional regulators, the [General Medical Council](#) (GMC) and the [Nursing and Midwifery Council](#) (NMC), produce guidance on consent explaining in detail what information doctors and midwives are expected to provide as well as how consent should be recorded.

In Scotland, the Scottish Executive Health Department has produced a [guide on consent](#).

The Royal College of Obstetricians and Gynaecologists also provides advice on consent, and on specific procedures and the risks associated with those procedures, including [caesarean section](#), [operative vaginal delivery](#), and [participating in research while in labour](#).

What is undue influence?

A healthcare professional must explain the risks of a procedure to you, including risks to your unborn child, and may recommend a particular clinical option. However, they must unduly influence you to accept their advice.

Undue influence could include physical restraint, threats to withdraw care, repetitive and unwanted discussion of risks, imposing an arbitrary time limit for a decision, and putting pressure on other family members.

A threat to refer you to social services would constitute undue influence. Such a threat should never be used to intimidate, bully or coerce you into accepting a particular medical procedure for you or your unborn child. Consent that is

birthrights

given on this basis may not constitute valid consent, and the healthcare professional may be legally liable if they performed the medical intervention. See our factsheet, [Social Services and Maternity Care](#).

Should consent be recorded in writing?

Consent does not need to be recorded in writing. Consent may be given verbally or even with a gesture, for example by holding out your arm for blood pressure to be checked.

It is usual practice to sign a consent form for surgical procedures, but the use of a consent form does not reduce the need for a fully informed dialogue between you and the health professional (*Montgomery v Lanarkshire Health Board* (2015)).

A signed consent form and/or medical notes are evidence of consent but do not prove it was obtained: they may be contradicted by other evidence that consent was not well-enough informed or freely given.

The [GMC's guidance](#), [Department of Health's reference guide](#) and the [Scottish guide on consent](#) contain further information on the form consent should take.

What happens in an emergency?

In an emergency, the general principle is that if a patient is unable to make their wishes known, treatment can be given without their consent in order to save their life or prevent serious deterioration in the patient's condition.

If there is time, the patient's next-of-kin should be involved in decisions about their care.

It is very rare that an emergency arises during labour that would necessitate treatment without consent. The fact that health professionals believe there is a risk to the baby's life does not give them the power to perform procedures, such as assisted birth, without consent.

Can I decline treatment?

Yes. The courts in England and Wales have upheld the rights of patients 'to make important medical decisions affecting their lives for themselves: they have the right to make decisions which doctors regard as ill advised' (*Re MB (Adult, medical treatment)* (1997)). The Scottish courts have taken the same approach (*Law Hospital NHS Trust v Lord Advocate* (1996)).

A mentally competent patient has an absolute right to decline medical treatment for any reason, rational or irrational, or for no reason at all, even where that decision may lead to his or her own death.

A mentally competent woman may decline treatment even where that might lead to death or serious harm to her or her baby (*St George's Healthcare NHS Trust v S* (1997)).

Can I withdraw consent?

Yes. Once given, consent remains valid for the relevant procedure unless it is withdrawn.

Consent can be withdrawn at any time. If the healthcare professional has any doubts about whether a woman has withdrawn her consent, they should stop the procedure as soon as possible, have a conversation with the woman and only continue if she has given her consent.

What is mental capacity?

It is always assumed that a person has the mental capacity to consent to treatment (or to decline it) unless it can be shown that they do not. In England and Wales, this principle is enshrined in the [Mental Capacity Act 2005](#) which governs decisions about whether a person lacks capacity and how they can be treated if they do. The same principle applies in Scotland under the Adults with Incapacity (Scotland) Act (AWIA) 2000.

In order to lack capacity under the law, a person must be unable to make a decision for

birthrights

themselves because of a problem in the functioning of their mind. A person might lack capacity in relation to some decisions and not others.

The fact that a woman may have made a decision that health professionals believe is not in her or her baby's best interests is not a reason by itself to decide that she lacks capacity.

If a woman is deemed to lack capacity, decisions about her treatment must be made in her best interests. The Mental Capacity Act and the Adults with Incapacity (Scotland) Act set out the factors that should be taken into account in deciding someone's best interests. This includes taking account of any written statement of preferences or wishes, which could include a birth plan.

Where there is serious doubt or dispute about a person's capacity or best interests, it will be necessary for health professionals to obtain expert psychological and/or psychiatric evidence about the person's state of mind. In some cases where there are concerns whether or not a proposed treatment is in a person's best interests, the Court of Protection, or the sheriff court in Scotland, can be asked to make a ruling. It may make a binding decision regarding treatment or may appoint a deputy to make decisions on behalf of the patient.

The [Mental Capacity Act 2005 Code of Practice](#) and the [Scottish Code of Practice](#) give further detail on how the law should be applied.

If a woman is being treated for a mental disorder under the [Mental Health Act 1983](#), or the [Mental Health \(Care and Treatment\) \(Scotland\) Act 2003](#), that does not necessarily mean that she lacks capacity in relation to decisions about her maternity care. She should be treated in the same way as any other woman unless she has been assessed to lack capacity.

Will giving birth affect my capacity to consent?

If you have capacity before giving birth and you do not suffer from a condition that affects your mental capacity, the experience of giving birth is very unlikely to affect your capacity to consent to treatment.

[Royal College of Obstetricians and Gynaecologists guidance](#) and [guidance on consent from the Association of Anaesthetists of Great Britain and Northern Ireland](#) state that special care must be taken when obtaining consent from women who are in labour, particularly if they are under the influence of narcotic analgesics (opiate-derived painkilling drugs).

What happens if I lose capacity?

If you suffer from a condition that may cause you to lose capacity during your pregnancy or labour, you could make an 'advance decision' about your maternity treatment under the Mental Capacity Act 2005.

An advance decision will have the same effect as a decision made in labour and must be followed by healthcare professionals. This advance decision can be withdrawn at any time.

An advance decision must meet certain criteria set out in the Mental Capacity Act 2005. It must, for example, make it clear which treatments you are refusing and it must be signed and witnessed. If an advance decision declines life-sustaining treatment when life is at risk, it must clearly state this. An advance decision cannot request specific medical treatment, it can only decline treatments.

A written statement of wishes or preferences, such as a birth plan, that does not qualify as an advance decision under the Act, does not legally bind a healthcare professional like an advance decision. However, it should be used to guide any decisions if you lose capacity.

What is the legal status of a birth plan?

birthrights

A birth plan is a statement of a woman's preferred plan of care during labour and postnatally. It does not have any formal legal status, but it ought to be respected by healthcare professionals unless the woman gives her consent to a different plan of care.

A birth plan may be used as evidence of consent or lack of consent if a woman later challenges the treatment that she has received.

If treatment that a woman has requested in her birth plan is clinically contra-indicated (i.e. there are medical reasons for not providing the treatment), she should be told the reasons for refusing to provide the treatment.

Healthcare providers have a duty to prevent avoidable suffering, and so refusal of pain relief, or other forms of support during labour should be considered with reference to each woman's individual circumstances and not solely on the basis of a hospital guideline or policy.

Can I decide what treatment my baby receives?

Yes. Consent for any medical treatment or procedure, including the administration of a drug, must be sought from a person with 'parental responsibility' for the baby. This always includes the baby's mother, but the baby's father has parental responsibility only if certain criteria are met. You can find a summary of parental responsibility on the [NHS Choices website](#) and in Scottish government [guidance](#). If parents decline treatment for their child, healthcare professionals should respect their decision.

Parents should not be forced into consenting to treatment by the threat of a referral to social services. A referral should only be made if there is a risk of significant harm to the baby.

In some circumstances, including if parents disagree about treatment, healthcare professionals may approach the High Court for an order declaring that treatment is in a child's best interests and should be carried out.

Disclaimer: Our factsheets provide information about the law in the UK. The information is correct at the time of writing (April 2017). The law in this area may be subject to change. Birthrights cannot be held responsible if changes to the law outdate this publication. Birthrights accepts no responsibility for loss which may arise from reliance on information contained in this factsheet.