ORCHARD FAMILY PRACTICE
Key principles of Consent
For consent to be valid:

1. The patient must be competent – mental capacity is decision-specific. Assessment of a person's capacity should be based on his/her ability to understand, retain and weigh in the balance the information relevant to a particular decision. The person must also be able to communicate the decision. A patient who is unable to make a decision about a complex proposal is not necessarily incapable of making any decisions at all, and may be perfectly able to consent where the issues are simpler. The starting point in the case of adults over 18 years of age is always to presume that they have capacity until it is shown otherwise.

2. The patient must have sufficient information to make a choice – without adequate information, patients are unable to make decisions about their treatment. The information provided should, for example, include: an explanation of the investigation, diagnosis or treatment; an explanation of the probabilities of success, or the risk of failure or harm associated with options for treatment. The patient should be given time to ask questions.

Montgomery V Lanarkshire Health Board.
The law on informed consent has changed following this recent Supreme Court judgment. Doctors must now ensure that patient are aware of any "material risks" involved in a proposed treatment, and of reasonable alternatives. This is a significant change to the previous "Bolam test" which asks whether a doctor's conduct would be supported by a responsible body of medical opinion. This test will no longer apply to the issue of consent.

This is a move towards the "reasonable patient" standard of consent which is already prescribed in the GMC consent guidelines. Patients should be informed of any risks that a reasonable person in the same position would attach significance to. This includes rare but potentially serious complications.

It is only appropriate to withhold information if you believe that giving it would cause the patient 'serious harm'. In this context, 'serious harm' means more than the patient may become upset or decide to refuse treatment.

3. **The patient must be able to give his/her consent freely** – pressuring patients into consenting to treatment invalidates the consent. To ensure that consent is freely given, patients should, where possible, be given time

to consider their options before deciding to proceed with a proposed treatment. Be aware, too, that patients' friends and relatives may also try to exert their influence and that this can be subtle but, nevertheless, powerful. When treating patients under 18, consent must be obtained from:

- Someone with parental responsibility for them
- A person aged 16 or 17 if they are deemed capable of making informed decisions, or
- Someone under 18 if they are deemed Gillick competent. That is, they have the maturity and intelligence to fully understand the nature of the treatment, the options, the risks involved and the benefits. While there is no statute in Northern Ireland setting out the general principles of consent, common law dictates that touching a patient without valid consent may constitute the civil or criminal offence of battery.

Patients who withhold consent

There are certain circumstances where treatment may be administered to patients who refuse to provide consent.

- Part IV of the Mental Health (Northern Ireland) Order (1986) states that patients who are detained under the Order may receive treatment for their condition without their consent. Treatment for physical disorders unrelated to the mental condition remains subject to common law principles.

- The Public Health Act (Northern Ireland) (1967) says that a magistrate may order for patients suffering from certain infectious diseases to be medically examined and detained in a hospital without their consent. Article 37 of the Health and Personal Social Services (Northern Ireland) Order (1972) allows healthcare professionals to make arrangements for patients who are unable to care for themselves (such as the elderly or infirm) to be moved to care homes.

  However, the Order does not allow doctors to treat these patients without their consent, so treatment is dependent on common law principles.

Patients who lack capacity

Patients who lack capacity should not be denied necessary treatment simply because they are unable to consent to it. However, in Northern Ireland there is no statutory provision to allow for someone to provide consent for medical examinations, care or treatment on behalf of an adult without capacity. Some exceptions to this, where healthcare professionals may intervene and provide care to patients without capacity, are listed above.

Any decision that is taken on behalf of an incompetent patient must be taken in his or her best interests. Where there is doubt about whether a patient has capacity or what action would be in their best interests, the High Court can give a ruling on the lawfulness or unlawfulness of a proposed intervention. The Official Solicitor to the Supreme Court can advise on the appropriate procedure if necessary.

Verbal or written consent?

There are very few occasions where the law specifically requires written consent – for example, in relation to the storage and use of gametes and embryos in fertility treatment. But in the main, verbal consent is just as valid as written consent.

Consent is a process – it results from open dialogue, not from getting a signature on a form.

Completed consent forms provide some evidence that consent was obtained, but mean little beyond that – it is important to realise that they do not constitute proof that the consent was valid. If there is any dispute over whether valid consent was obtained, the key issue will not be whether the patient signed a form or not, but whether they were given all the information they needed to make a considered decision. It is, therefore, crucial that the essential elements of discussions with the patient are documented in the medical record.

The notes do not need to be exhaustive, but should state the nature of the proposed procedure or treatment and itemise the risks, benefits and alternatives brought to the attention of the patient. Any particular fears or concerns raised by the patient should also be noted.

Failure to obtain valid consent

A significant proportion of clinical negligence claims are settled simply because valid consent was not obtained. In theory, where harm has befallen the patient and consent was not obtained, this could also give rise to claims for assault or battery and, in extreme cases, criminal charges, but fortunately this is exceptionally rare.

Disregarding the GMC's advice on consent can sometimes result in charges of professional misconduct and action by the GMC on the doctor's registration.

Further information

- GMC, *Consent: Patients and Doctors Making Decisions Together* – www.gmc-uk.org/guidance

- BMA, Consent Toolkit: 3rd edition (2007) – www.bma.org.uk
- Department of Health, Social Services and Public Safety – *Reference Guide to Consent for Examination, Treatment or Care* (2003) – www.dhsspsni.gov.uk/consent-referenceguide.pdf
- Mental Health (Northern Ireland) Order 1986 Code of Practice, Chapter 5.