

Children and Consent to Medical Treatment

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Medical Treatment and Consent: Adults

‘he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.’

Bolam v Friern Hospital Management Committee [1957] 1 WLR 582 per McNair J



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Adult Capacity to Consent

Mental Capacity Act 2005, Section 3(1)

For the purposes of section 2, a person is unable to make a decision for himself if he is unable—

- a) to **understand** the information relevant to the decision,
- b) to **retain** that information,
- c) to **use or weigh** that information as part of the process of making the decision, or
- d) to **communicate** his decision (whether by talking, using sign language or any other means).



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Adult Capacity to Consent

Mental Capacity Act 2005, Section 1

- 4) A person is not to be treated as unable to make a decision merely because he makes an **unwise** decision.



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How Much Information Must Adults Be Given?

Battery

‘what the court has to do in in each case is to look at all the circumstances and say ‘Was there a real consent?’... once the patient is informed in broad terms of the nature of the procedure which is intended, and gives her consent, that consent is real, and the cause of the action on which to base a claim for failure to go into risks and implications is negligence, not trespass.’

Chatterton v Gerson [1981] QB 432 (QBD)



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How Much Information Must Adults Be Given?

Negligence

‘An adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo ... The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments.’

The test of ‘materiality’ is:

‘whether, in the circumstances of the particular case, a reasonable person in the patient’s position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it.’

Montgomery v Lanarkshire Health Board (2015)



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Adults and Medical Treatment in a Nutshell

- They can make up their own minds, but they need to have sufficient information to do so, and if that is not provided, then the doctor will be liable for harms they suffer.
- We assume they are competent unless there is evidence to the contrary, and if they are, we leave them to the consequences of their own decisions.
- There are people who believe this approach is wrong, that we should be more paternalistic but that's a debate for another lecture another day.



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Parents and Decisions about Children

‘It is abundantly plain that the law recognises that there is a right and a duty of parents to determine whether or not to seek medical advice in respect of their child, and, having received advice, to give or withhold consent to medical treatment’

Lord Scarman, *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112

parental authority “exist[s] for the performance of their duties and responsibilities to the child” and hence “must be exercised in the best interests of the child”.

Lord Justice Ward, *Re A (Children)* [2001] 1 Fam 147 (HL)



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Courts and Decisions about Children

‘although the parents have parental responsibility, overriding control is by law vested in the court exercising its independent and objective judgment in the child’s best interests.’

Francis J, *Great Ormond Street Hospital v Yates* [2017]

‘The dominant matter for the consideration of the court is the welfare of the child ... the word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded’

In Re McGrath (Infants) (1893)



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Talking to Children about Illness

‘Effective communication between doctors and children and young people is essential to the provision of good care’

General Medical Council

‘children and young people can expect to be kept as fully informed as they wish, and as is possible, about their care and treatment’

British Medical Association

‘Optimal ethical decision making requires: open and timely communication between members of the healthcare team and the child and family; respecting the values and beliefs of those involved; and the application of fundamental ethical principles, including respect for human rights.’

Royal College of Paediatrics and Child Health



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Treatment of Older Children: 'Gillick competence'

'I would hold that as a matter of law the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed. It will be a question of fact whether a child seeking advice has sufficient understanding of what is involved to give a consent valid in law. Until the child achieves the capacity to consent, the parental right to make the decision continues save only in exceptional circumstances.'

Lord Scarman, *Gillick v West Norfolk and Wisbech AHA* [1986] 1 AC 112



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Assessing Capacity to Consent

competence is a matter of ‘not merely an ability to understand the nature of the proposed treatment...but a full understanding and appreciation of the consequences both of the treatment in terms of intended and possible side effects and, equally important, the anticipated consequences of a failure to treat.

Lord Donaldson, *In Re R (A Minor) (Wardship: Consent to Treatment)* [1992] Fam 11

‘You must decide whether a young person is able to understand the nature, purpose and possible consequences of investigations or treatments you propose, as well as the consequences of not having treatment. Only if they are able to understand, retain, use and weigh this information, and communicate their decision to others can they consent to that investigation or treatment.’

General Medical Council, *0–18 years: guidance for all doctors* (2018, 2nd edition)



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Treatment of Young People: Consent and Capacity

Family Law Reform Act 1969, Section 8

- 1) The consent of a minor who has attained the age of sixteen years to any surgical, medical or dental treatment which, in the absence of consent, would constitute a trespass to his person, shall be as effective as it would be if he were of full age; and where a minor has by virtue of this section given an effective consent to any treatment it shall not be necessary to obtain any consent for it from his parent or guardian.



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When Children and Young People Refuse Treatment: Retreating from Gillick?

I find that A is a boy of sufficient intelligence to be able to take decisions about his own well-being, but I also find that there is a range of decisions of which some are outside his ability fully to grasp their implications. Impressed though I was by his obvious intelligence, by his calm discussion of the implications, by his assertion even that he would refuse well knowing that he may die as a result, in my judgment A does not have a full understanding of the whole implication of what the refusal of that treatment involves.

Justice Ward, *Re E*



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When Children and Young People Refuse Treatment: Retreating from Gillick?

When making this decision, which is a decision of life or death, I have to take account of the fact that teenagers often express views with vehemence and conviction – all the vehemence and conviction of youth! Those of us who have passed beyond callow youth can all remember the convictions we have loudly proclaimed which now we find somewhat embarrassing. I respect this boy's profession of faith, but I cannot discount at least the possibility that he may in later years suffer some diminution in his convictions.

Justice Ward, Re E



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Re R: Refusal by Gillick-competent children

In a case in which the "*Gillick* competent" child refuses treatment, but the parents' consent, that consent *enables* treatment to be undertaken lawfully.

[a *Gillick*-competent] child can consent, but if he or she declines to do so or refuses, consent can be given by someone else who has parental rights or responsibilities. The failure or refusal of the "*Gillick* competent" child is a very important factor in the doctor's decision whether or not to treat, but does not prevent the necessary consent being obtained from another competent source.

Lord Donaldson, *In Re R (A Minor) (Wardship: Consent to Treatment)* [1992] Fam 11, 23G.



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Re W: Refusal by Young People

There is ample authority for the proposition that the inherent powers Q of the court under its *parens patriae* jurisdiction are theoretically limitless and that they certainly extend beyond the powers of a natural parent ... There can therefore be no doubt that it has power to override the refusal of a minor, whether over the age of 16 or under that age but 'Gillick competent.' ... by authorising the doctors to treat the minor in accordance with their clinical judgment, subject to any restrictions which the court may impose.

Lord Donaldson, *In re W (A Minor) (Medical Treatment: Courts Jurisdiction)* [1993] Fam 64, 81.



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...

- 3) **Nothing in this section shall be construed as making ineffective any consent which would have been effective if this section had not been enacted.**



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AB v CD

The parents retain parental responsibility in law and the rights and duties that go with that. One of those duties is to make a decision as to consent in medical treatment cases where the child cannot do so.

Mrs Justice Lieven, *AB v CD*



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What Should We Do?

- No override children lightly
- Work to articulate what it is about children's decision-making that lacks the qualities that demand complete respect for self-determination
- Be honest and open about the law's stance on children's decisions



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