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Child's Right to Consent to or Refuse Medical Treatment.

Children face many obstacles in enforcing the rights they have. They may be unaware that they have rights in a particular situation. They may lack the confidence, life experience or social skills or needed to take steps to enforce their rights. Another barrier that often impedes children from exercising their rights is the lack of clarity just what those rights are. There are a number of situations where the rights of children are unclear. Arguably, the most serious of these is the lack of clarity in relation to their ability to give an effective consent to, or to refuse, medical treatment and their right to have their confidentiality preserved. Various statutory provisions and codes of practice impact upon these issues and these are sometimes inconsistent and ambiguous.

One might expect to find provisions about consent to health care in the Health Act 1956 but the topic is not there addressed (other than a power given to health nurses to enter a school, early childhood centre or kindergarten and examine students without the need to obtain consent from the child or a parent).

The Care of Children Act 2004 (like its predecessor the Guardianship Act 1968) contains a clear statement that 16 and 17 year olds can give an effective consent to medical treatment. No consent from a parent or guardian is needed. The Guardianship Act did not deal specifically with the situation of children under 16 years and there was much uncertainty whether consent to their treatment had to be given by a parent or guardian or whether children might be able to consent to treatment in some situations. Some judges and legal commentators took the view that it was implicit in the specific powers given to 16 and 17 year olds that children under 16 could not give an effective consent. Health professionals who could face criminal or civil proceedings for assault if they treat a child without the requisite consent tended to take a cautious approach and require parental approval for any treatment of children under 16 years.

Between 1985 and 1996 there were four developments which added weight to the view that children under 16 years might, in some situations, be able to give an effective consent to medical, surgical and dental treatment:

- A landmark decision of the English House of Lords in 1985 (the *Gillick* case) revisited the common law and dismissed the view that under-16s are never able to make decisions about their own health care. A majority of the judges held that, if the individual child is of sufficient age and understanding to make a reasoned and informed choice about the treatment proposed, then the child can give an effective consent.
- The New Zealand Bill of Rights Act 1990 grants every New Zealander the right to refuse to undergo any medical treatment: s11. No age restriction is placed on this right.
- The United Nations Convention on the Rights of the Child, ratified by New Zealand in 1993, conferred on children the right to express their views freely in all matters that affect them and to have their views given due weight: Article 12.1.

- Right 7 of the Code of Health and Disability Consumers' Rights 1996 gave every consumer of health and disability services the right to be provided with such services only if they have made an informed choice and have given informed consent. Consumers are presumed competent unless there are reasonable grounds for believing they lack competence. Right 7 does not apply where statute law or the common law provides otherwise.

These developments all gave support for a view that a child's ability to consent to medical treatment is not based on having attained a fixed chronological age but on the capacity of the individual child. It is for the health professional to determine whether or not a particular child has capacity to consent to the particular treatment proposed.

Despite these changes, there remains considerable uncertainty about the position of children under 16. The Ministry of Health, in a publication *Consent in Child and Youth Health* (1998), while acknowledging that the matter had not been tested in court, favoured the view that doctors could treat children who are *Gillick*-competent without their parents being involved and that children under 16 can effectively consent to or refuse medical treatment where they are of sufficient age and maturity to weigh the implications. Because there had been no considered judicial determination of the issue many health professionals took a conservative view and sought consent from both child and parent..

It was hoped that Care of Children Act 2004 (which replaced the Guardianship Act from 1 July 2005) would resolve these uncertainties. A large majority of those who made submissions on the Bill pressed for changes that would clarify the position of under-16s, most proposing a capacity-based test along the lines of the *Gillick* principle. A few submitters proposed a fixed age (such as 12 years) at which children would be able to give an effective consent. Ministry of Justice officials advised the Select Committee considering the Care of Children Bill that it might be amended to bring the statutory position into line with the common law: Ministry of Justice advice to Justice and Electoral Committee 8 March 2004, 81..It is surprising and unfortunate that the opportunity was not taken to amend the Bill to resolve these ambiguities. As Professor Skegg, a medico-legal expert has remarked "New Zealand medical law is complicated enough without health practitioners having to grapple with these complexities". The current law is difficult for health practitioners and, if they get it wrong, they could face criminal or civil proceedings for assault. Skegg quoted one of the judges in *Gillick* who commented that it is "verging on the absurd" to suggest that a boy aged 15 could not consent to a medical examination of some trivial injury or even to have a broken arm set..

Making the best sense one can of the complexities, the legal position seems to be:

Children aged 16 and 17 years

Children in this age group can give an effective consent to, or can refuse, any medical, surgical or dental treatment (including blood donation) and their consent or refusal cannot be given on their behalf (or overridden by) a parent or guardian: s36(1) Care of Children Act. The health professional treating the child is not required to assess the capacity of the child.

Children aged under-16 years

While views differ on this important issue, the better view is that the common law, as restated in *Gillick*, applies and children in this age group can consent to, or refuse, any medical, surgical or dental treatment if they have sufficient age and understanding to weigh the implications of the treatment and make a reasoned choice. A primary school child might be able to give an effective consent to a dental examination or the bandaging of a wound but would probably not be able to give a valid consent to a surgical operation or to medication which carried a risk to health. A 15 year old would certainly have the power to consent to routine or low risk medical treatment including minor surgery: It is for the health professional who is asked to treat the child to make the necessary assessment of the child's capacity to give an effective consent. If any treatment is risky or controversial health professionals are likely to seek parental consent for fear of having to face criminal or civil proceedings for assault or a complaint to their professional body or to the Health and Disability Commissioner.

A careful analysis of the legal position of under-16s has been recently undertaken in P Skegg, R Paterson (eds) *Medical Law in New Zealand* Thomson/Brookers 2006 at para 6.31. Skegg refers to conflicting High Court decisions on the point and then struggles to unravel the complexities of the Care of Children Act. He refers to other indicators that children can consent to medical consent if they have the necessary capacity including those referred to above. He also refers to a decision of the Family Court that a 15 year old was competent to consent to a vaccination to which his mother was opposed. Professor Skegg at page 195 summed up the position:

“Given the indecisive and conflicting High Court decisions, the matter is not entirely free from doubt. Nevertheless, the better view is that minors' common law capacity to consent to medical treatment has not been extinguished by the New Zealand legislation, and that the consent of those under the age of 16 will sometimes be effective in law, be it for the purpose of the criminal law, the law of torts or the Code of Health and Disability Consumer's Rights”.

Where a child under 16 years lacks capacity to give consent who can consent on the child's behalf

The Care of Children Act gives a child's guardians the right to decide any important matter '*for* the child', '*with* the child' or to '*help* the child' to decide the matter. Medical treatment (other than routine medical treatment) is listed as an important matter: s16(1)(c) and (2)(c). While the Act does not specifically say so, logic suggests that guardians will make decisions *for* babies and young children and *with* teenage children. In the case of children approaching the age of 18 years a guardian can *help* the child to make the decision by offering information and advice. Where a child has two or more guardians, the guardians have a duty to consult and cooperate in matters of the child's care, development and upbringing: s5(c). A parent who is not a guardian has no statutory authority to make important decisions for a child although he or she has a right to be consulted: see s5(a) & (c).

Where guardians cannot agree

Where a child's guardians cannot agree on an important matter, either guardian can apply to the Family Court for a direction on the matter: s44. Care of Children Act. There have been several cases in which the Courts have given rulings on disputes about a child's medical treatment. It has approved blood transfusions, a cochlear implant, surgical treatment to correct a birth defect, and immunisation against meningococcal disease. Circumcision of an 11 year old boy has been refused, the Court determining that any decision should be deferred until the boy turned 16 when he could decide the matter for himself.

Girls of any age can consent to an abortion

A girl of any age can consent to or refuse an abortion and her consent or refusal cannot be overridden by a parent or guardian. This provision was first enacted in 1977 by s25A Guardianship Act and was carried through into s38 Care of Children Act despite objection from some groups.

Sterilisation of a child

A guardian has no power to consent to the sterilisation of a child where the child lacks the capacity to consent by reason only of his or her young age. A guardian would appear to have the power to consent to the sterilisation of a child whose capacity is impaired by an intellectual handicap: s7 Contraception, Sterilisation and Abortion Act 1977. Despite this provision, doctors are inclined to seek approval from a court before acting on the consent of parents of an intellectually disabled child.

Consent to mental health assessment and treatment

The consent of a parent or guardian to any assessment or treatment of a child of or over the age of 16 years for a mental disorder is not a sufficient consent for the purposes of the Mental Health (Compulsory Assessment and Treatment) Act 1992. Again there are questions whether a competent child under the age of 16 years can consent to or refuse consent to such treatment

Consent of under-16s who are parents

There are some under-16s who are themselves parents of a child. The uncertainty that surrounds the right of under-16s to consent to their own medical treatment does not affect their power to give or refuse consent to medical or surgical treatment of their child.

Children's right to confidential treatment

Even where a health professional is able to treat a child on the basis of the child's consent, questions arise whether the health professional is able to, or is obliged to, preserve the child's confidentiality. Can a doctor treat a child without informing his or her parents or guardians? Obviously, if the consent of a parent or guardian is required they must be advised of the proposed treatment. If parental consent is not necessary, the child is entitled to have his or her privacy respected: see Right 1(2) Code of Health and Disability Consumers' Rights 1996 and Article 16 UN Convention on the Rights of the Child. The Health Information Privacy Code lists exceptions to the general rule that health information cannot be disclosed without the express or implied consent of the person to whom the information relates. Rule 11(2)(d) permits disclosure where

the health provider has a reasonable belief that this is necessary to lessen a serious or imminent danger of harm to the patient or the public. There are no special rules in respect of children's confidentiality vis a vis their parents or guardians but some would argue that parents have a right to be told of any significant health problems or proposed treatment affecting their children. Again in this area there is a lack of certainty as to the legal position. Australian surveys have shown that teenagers often fail to seek medical treatment because of their anxiety that the health professional may inform their parents. Such issues arise particularly where a child asks to be fitted with contraceptive device or be prescribed contraceptive pills without the knowledge of a parent.

Robert Ludbrook
r_ludbrook@hotmail.com

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