ST JOHNS BUILDINGS

Capacity – Children – Gillick competence

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Gillick Competence or Mental Capacity

- Until the child reaches the age of 16 the relevant inquiry is as to whether the child is *Gillick* competent.
- Once the child reaches the age of 16:
  - the issue of *Gillick* competence falls away, and
  - the child is assumed to have legal capacity in respect of medical treatment unless
  - the child is shown to lack mental capacity as defined in sections 2(1) and 3(1) of the Mental Capacity Act 2005.
- A 16 year old is not presumed Gillick competent in all aspects of their decision making
- *Gillick Competence* and the Mental Capacity Act 2005 are not analogous, related or the same.

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Gillick v West Norfolk and Wisbech AHA [1986] AC 112

- A girl under the age of 16 had the legal capacity to consent to medical examination and treatment, including contraceptive treatment, if she had sufficient maturity and intelligence to understand the nature and implications of the treatment
- The rights of parents to determine such matters ended when a child achieved sufficient intelligence and understanding to make her own decision
- A judgement had to be made of what was best for a particular child. Parents were the best judges of that in the majority of cases but there might be circumstances where it was desirable, in a girl's best interests, that a doctor was entitled to give contraceptive advice and treatment without the permission or even knowledge of the parents

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Gillick v West Norfolk and Wisbech AHA [1986] AC 112

- In such circumstances the doctor had to be satisfied that:
- (a) the girl understood his advice
- (b) he could not persuade her to tell or allow him to tell her parents
- (c) she was likely to have sexual intercourse with or without contraceptive treatment
- (d) unless she received such advice or treatment her physical or mental health was likely to suffer
- (e) her best interests required such advice or treatment without the knowledge or consent of her parents.

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Gillick v West Norfolk and Wisbech AHA [1986] AC 112

[189] …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."

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THE SCOPE OF A COMPETENT CHILD'S CONSENT

- Whilst a minor, of any age, has the right to consent to medical treatment s/**he does not have an right to refuse consent to medical treatment** where the Court concludes that that treatment is in his best interests (for this purpose diagnostic procedures are included): ***Re W (A Minor) (Medical Treatment: Court's Jurisdiction) [1993] Fam. 64***, Lord Donaldson at Page 78 C-E
- A child, whether *Gillick* competent or 16 or over, is **not**, as a matter of domestic law autonomous in the same way as an autonomous adult, and whose decision is not determinative.
- The 16 year and 17 year old child is presumed Gillick competent. This presumption requires rebuttal evidence if it is asserted a young person cannot consent to medical treatment or the withdrawal of treatment for themselves.

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A NHS Trust v X [2021] 4 WLR 11 (Sir James Munby)

"It is clearly established in English law that an adult (that is, someone who has reached the age of 18) is presumed, unless proved otherwise, to have capacity to decide whether or not to accept medical or surgical treatment. It is equally clear that a capacitous adult has an absolute right to accept or refuse treatment, for reasons good or bad or, indeed, for no reason at all, and even if the consequence of refusal is the certainty of very serious harm or even death. The decision of a capacitous adult is therefore determinative…the only function of the court is to give effect to it, whether or not it might accord with his judicially-determined best interests. Indeed, the court is not concerned to evaluate, let alone to impose an outcome determined by, his best interests."

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A NHS Trust v X [2021] 4 WLR 11 (Sir James Munby)

- No child (that is, someone who has not reached the age of 18) has such an absolute right
- The child's wishes will be given due regard but they will not be determinative of the course that the court adopts.
- Even if the child is Gillick competent where the consequence of the child's decision is likely to be serious risk to health or death the Court can overrule the child's decision

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Bell v Tavistock & Portman NHS Trust & Ors [2020] EWHC 3274

- Keira Bell received assessment and treatment of puberty blockers [PB] & aged 16 cross sex hormones [CSH]. KB had been diagnosed with gender dysphoria, identifying as male having been ascribed a female gender at birth
- KB stopped her cross sex hormone treatment when she no longer identified as male and became increasingly concerned about the process of assessment and consent taken from her to treatment
- KB launched a JR. KB sought a declaration that consent should not be taken from children for prescription of CSH but rather the court must authorize such treatment in children

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Bell v Tavistock & Portman NHS Trust & Ors [2020] EWHC 3274

- The court made a factual finding that the treatment was experimental and that the majority of those who take PB go on to CSH, thus are on a pathway to greater medical interventions
- 138. "It follows that to achieve *Gillick* competence the child or young person would have to understand not simply the implications of taking [puberty blockers] but those of progressing to cross-sex hormones…"

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Bell v Tavistock & Portman NHS Trust & Ors [2020] EWHC 3274

î38. *"…The relevant information therefore that a child would have to understand, retain and weigh up in order to have the requisite competence in relation to [puberty blockers], would be as follows: (i) the immediate consequences of the treatment in physical and psychological terms; (ii) the fact that the vast majority of patients taking [puberty blockers] go on to [cross-sex hormones] and therefore that s/he is on a pathway to much greater medical interventions; (iii) the relationship between taking [cross-sex hormones] and subsequent surgery, with the implications of such surgery; (iv) the fact that [cross-sex hormones] may well lead to a loss of fertility; (v) the impact of [cross-sex hormones] on sexual function; (vi) the impact that taking this step on this treatment pathway may have on future and life-long relationships; (vii) the unknown physical consequences of taking [puberty blockers]; and (viii) the fact that the evidence base for this treatment is as yet highly uncertain."*

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Bell v Tavistock & Portman NHS Trust & Ors [2020] EWHC 3274

145 "the conclusion we have reached is that it is *highly unlikely* that a child aged 13 or under would ever be *Gillick* competent to give consent to being treated with [puberty blockers]. In respect of children aged 14 or 15 we are also *very doubtful* that a child of this age could understand the long-term risks and consequences of treatment in such a way as to have sufficient understanding to give consent"

For 16 year olds:

146 "in the light of the evidence that has emerged, and the terms of this judgment, clinicians may well consider that it is not appropriate to move to treatment, such as [puberty blockers] or [cross-sex hormones] without the involvement of the court."

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Bell v Tavistock & Portman NHS Trust & Ors [2020] EWHC 3274

- Where the consequences of the treatment are profound, the benefits unclear and the long-term consequences to a material degree unknown, it may be that *Gillick* competence cannot be achieved, however much information and supportive discussion is undertaken
- The Trust appealed to the Court of Appeal

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The Court of Appeal - [2021] EWCA Civ 1363

76. The *ratio decidendi* of *Gillick* was that it was for doctors and not judges to decide on the capacity of a person under 16 to consent to medical treatment. Nothing about the nature or implications of the treatment with puberty blockers allows for a real distinction to be made between the consideration of contraception in *Gillick* and of puberty blockers in this case bearing in mind that, when *Gillick* was decided 35 years ago, the issues it raised in respect of contraception for the under 16s were highly controversial in a way that is now hard to imagine. A similar conclusion was reached by Silber J in connection with abortion in *R (Axon) v. Secretary of State for Health* [2006] QB 539 at para [86].

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The Court of Appeal - [2021] EWCA Civ 1363

[89] We conclude that it was inappropriate for the Divisional Court to give the guidance concerning when a court application will be appropriate and to reach general age-related conclusions about the likelihood or probability of different cohorts of children being capable of giving consent. That is not to say that such an application will never be appropriate. There may be circumstances where there are disputes between one or more of clinicians, patients and parents where an application will be necessary, even if they are difficult to envisage under the service specification and SOP with which this case is concerned.

Appeal allowed. SC refused permission.

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