

Young People, Medical Care and Capacity

Overview

This factsheet explains the competing legal rights relevant to the provision of healthcare to young people. It looks at when young people may consent to treatment and when they are entitled to require confidentiality in respect of their healthcare.

What is meant by the expression “young people”?

We use the expression “young people” throughout this factsheet. This is not a term with a strict definition. In using it, we are referring to children – those under the age of 18 – who nevertheless have the intelligence, judgement and maturity to be involved in decisions about their medical care.

There is no pre-determined age at which a child becomes a young person. Instead, it is a question of capacity: does the particular child concerned have the legal capacity to participate in decisions affecting them of a medical nature?

Assessing Capacity

“Capacity”, in this context, can be used interchangeably with “understanding”. There is no empirical test for determining whether a young person has capacity. That must be assessed on a case-by-case basis.

Further, the test of capacity is context-specific. A young person might have capacity for some purposes, but not for others. For example, a young person might have the understanding to make a decision about a straightforward procedure but lack the capacity to consent to serious or high-risk treatment.

To have capacity, a young person ought to be able to understand, retain, use and weigh up information relevant to the particular medical decision. They ought to be able to appreciate the possible consequences of receiving or refusing treatment.

Commonsense tells us that understanding increases with age, and that a young person is more likely to have capacity the older they are. Whilst correct as a general proposition, it does not follow that a younger child will not have the same capacity as an older child. An emotionally-mature, intelligent and perceptive ten-year-old may have a comparable understanding to an unworldly or naïve fourteen-year-old.

There is a legal presumption that young people aged sixteen and older will have capacity. This presumption may be rebutted, for example, if the young person is vulnerable or has particular needs (such that his or her capacity is not likely to be commensurate with age).

Parental Responsibility

Parental Responsibility is the legal terminology for the bundle of rights many people assume one has just by virtue of being a parent – namely the right to make decisions about a child’s upbringing. A parent who has parental responsibility is entitled to participate in all important decisions affecting a child’s upbringing.

Parental responsibility includes the responsibility of parents to make decisions for children about medical treatment. It is important that this is viewed as a parental obligation, rather than a parental right. For so long as a child lacks understanding, those with parental responsibility are required to make decisions for him or her about a range of issues, to include medical ones. The rights surrounding the medical care belong to the child, but he or she is too young to exercise them properly.

The parental obligation exists for the benefit of the child rather than his or her parents. It exists only for so long as needed for the protection of the child or his or her property.

With understanding begins the gradual transfer of this obligation from the holders of parental responsibility back to the young person. Understanding, or capacity, means the young person is now able to make those decisions. At sixteen, there is a presumption that that transfer will be complete. At eighteen, when the young person becomes a legal adult, it is complete (different mechanisms exist to protect vulnerable adults or those with special needs, which are beyond the scope of this factsheet).

Consent to Treatment

This issue was looked at in a very famous case heard by the House of Lords (as it was then) in October 1985, *Gillick – v – West Norfolk and Wisbech Area Health Authority and Another* [1986] 1 FLR 224. Usually abbreviated to just *Gillick*, the case concerned the prescription of contraception to a girl under sixteen without her parents’ knowledge or consent.

The decision confirmed the principle that it is a young person’s right to make his or her own decisions about medical treatment when he or she has capacity.

Gillick continues to be the leading case on the developing autonomy of young people over twenty-five years later.

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One of the Judges in *Gillick* was Lord Fraser, whose speech laid down five guidelines about the provision of contraceptive advice and treatment without parental consent. Known as “the Fraser Guidelines”, these are:

- The young person will understand the professional's advice;
- The young person cannot be persuaded to inform their parents;
- The young person is likely to begin, or to continue having, sexual intercourse with or without contraceptive treatment;
- Unless the young person receives contraceptive treatment, their physical or mental health, or both, are likely to suffer, and
- The young person's best interests require them to receive contraceptive advice or treatment with or without parental consent.

The expressions “*Gillick* competent” and “the Fraser Guidelines” are often used interchangeably when referring to young people’s understanding. They are in fact the same principle, albeit expressed in slightly different ways.

Gillick was concerned with the provision of contraception, but the principles identified apply to other treatments. Likewise, the case particularly focussed on doctors’ obligations to provide care to young people, but the provision of medical care by doctors, but the basis on which the House of Lords decided applies to other health professionals.

General Medical Council (GMC) guidance suggests healthcare professionals encourage young people to involve their parents in making decisions about treatment. Whether they do is a decision for the particular young person. In most cases, and applying *Gillick*/the Fraser Guidelines, the healthcare professionals providing treatment should abide by the decisions made by a young person with capacity.

Refusal of Treatment

Gillick/the Fraser Guidelines apply to the active provision of medical treatment to young people.

Do they also apply to situations where young people refuse medical treatment that healthcare professionals consider is in their interests?

This question was answered by the Court of Appeal in two cases from the early 1990s. Those decisions support these propositions:

- A young person may refuse the provision of medical treatment that healthcare professionals advise;
- A parent may not override that refusal;
- The refusal could be overridden by the court, however. The High Court has certain residual powers, derived from the duties of the Crown to protect its subjects. Those powers entitle it to override a young person’s decision to refuse medical treatment, if his or her welfare requires that outcome.

Therefore, a young person who is otherwise competent to make decisions about medical treatment does not (presently) have an absolute right to refuse medical treatment.

Patient Confidentiality

As a general rule, a young person is entitled to the same right to confidentiality as an adult in the provision of healthcare.

A young person who asks for information about him or her, or medical treatment provided, to be kept confidential from parents, should usually have that request respected.

In limited circumstances, patient confidentiality may be overridden. In common with adult patients, patient confidentiality belonging to a young person may be overridden and information disclosed:

- Where there is an overriding public interest in the disclosure, or
- Where the disclosure is required by law.

Patient confidentiality belonging to a young person may also be overridden, and information disclosed, if the healthcare provider judges that it is necessary in the interests of a young person who lacks the understanding to consent to the disclosure.

As with adult patients, healthcare providers must disclose otherwise confidential information obtained from young people if necessary to protect the young person, or someone else, from risk of death or serious harm. Such situations may include if:

- A child or young person is at risk of neglect or sexual, physical or emotional abuse;
- The information would help in the prevention, detection or prosecution of serious crime, or
- A child or young person is involved in behaviour that might put them or others at risk of serious harm (for example, serious substance addiction, self-harm, etc).

Access to Medical Records

Young people are entitled to access their own health records. They are also entitled to allow, or prevent, access by others (including parents).

Data protection principles apply to young people as they do to adults.

A healthcare provider might only refuse to give a young person (who otherwise has capacity) access to their medical records and information, if to do so would cause them serious harm.

Please feel free to discuss your own position and concerns. Contact your nearest office on:

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