

Spotlight on: Capacity and the Extremes of Age

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The issue

- ‘all medical treatment is preceded by the patient’s choice to undergo it’, but only where the patient has the legal capacity to exercise that choice.
- A person’s capacity waxes and wanes over time, as the young mature they gain capacity, as we age we might lose it.
- What does law says about capacity and the rights of very young, and very old?

The test for competence

What is the test for competence?

- A person has decision-making capacity if they are able to understand the nature of the suggested treatment, weigh up the consequences of and communicate his or her decision.

In Re C (Adult: Refusal of Treatment) [1994] 1 WLR 290; *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112, 169).

It is a functional test

- That is ‘whether, at the time the decision had to be made, the person **could** understand its nature and effects’
PBU & NJE v Mental Health Tribunal [2018] VSC 564, [154] (Bell J).
- It is not an outcome test that is whether they are making a good or wise decision.

The level of maturity and understanding

- Varies with the complexity and seriousness of the decision.
- A person may be capable of making a decision about some things, but not about others.

Competence is presumed

- The presumption is that every adult (and in most jurisdictions, in this context, that means a person over 16) is competent unless the contrary is established.

Children

The test

- Is one of competence, not age.
- ‘If the law should impose upon the process of “growing up” fixed limits where nature knows only a continuous process, the price would be artificiality and a lack of realism in an area where the law must be sensitive to human development and social change.’

[Gillick v West Norfolk And Wisbech Area Health Authority](#) [1986] AC 112 (Lord Fraser Of Tullybelton).

Gillick's case

‘... a minor's capacity to make his or her own decision depends upon the minor having sufficient understanding and intelligence to make the decision and is not to be determined by reference to any judicially fixed age limit...’ (Lord Scarman)

A person does not

- ‘Become’ Gillick competent at a set age.
- They precocious 14-year-old may be competent;
- The developmentally delayed 20-year-old may not be.

Codification

- NSW - a child over 14 can give consent
Minors (Property and Contracts) Act 1970 (NSW) s 49.
- SA – a person under 16 can give consent provided two doctors are ‘of the opinion that the child is capable of understanding the nature, consequences and risks of the treatment ...’
Consent to Medical Treatment and Palliative Care Act 1995 (SA) s 12.

The very old

The old

- Don't cease to be competent, just because they are old, or just because treatment **can** be imposed.
- Children cannot override their parent's decisions.

If the patient is not
competent

Treatment

- ‘such as a reasonable person would in all the circumstances take, acting in the best interests of the assisted person’ can be given.

In Re F [1990] 2 AC 1 (Lord Goff).

- Some statutory provisions authorize treatment of the non-competent eg *Guardianship and Administration Act 2000* (Qld) s 63(1).

Mental illness

- a person who is mentally ill is not necessarily not competent.
- a person who is not competent is not necessarily mentally ill;
- A person is not mentally ill, nor not competent, because they are making unwise decisions.

Conclusion

- The test for competence does not depend on age.
- If the patient can consent, their consent is required.
- Consent requires that they broadly understand what you are about to do.

If the patient is not competent

- The fact that a person is mentally ill, or making unwise decisions does not mean they are not competent.
- The fact that they are not competent does not mean they are mentally ill.
- If a person is not competent, you can administer treatment that is indicated by their condition and is in their best interests.

Thank you for your attention.

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