Children and adolescents

Who can give consent?

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Case histories are based on actual medical negligence claims or medicolegal referrals; however certain facts have been omitted or changed by the author to ensure the anonymity of the parties involved.
Can children and adolescents consent to their own medical treatment? Do general practitioners owe teenagers a duty of confidentiality? This article examines the legal obligations of GPs when obtaining consent to medical treatment from patients who are under 18 years of age.

Case history

Talia Wood, a 15 year old schoolgirl, attended her general practitioner. She asked the GP if everything she said during the consultation would be kept 'secret'. The GP replied that she could not provide an absolute guarantee but, generally, any information provided to her by a patient would be kept confidential. Talia then told the GP that she had a boyfriend and she would like to start the oral contraceptive pill. She had also heard about the new cancer vaccine and was interested to know if she should have this as well. Talia said that she did not want her parents to know about her visit to the GP. Talia, her two sisters and parents had been patients of the practice for many years. The GP was aware that Talia's parents did not believe in vaccination and had refused to allow the children to have the routine childhood immunisations. The GP thought that Talia's parents would be unlikely to consent to their daughter commencing on the pill and receiving the vaccine against human papillomavirus. The GP was uncertain of her legal position in treating a 15 year old patient without the consent of her parents.

Consent for the medical treatment of patients under 18 years of age is generally provided by parents. However, there are circumstances in which patients under the age of 18 years can consent to their own treatment. The common law recognises that a child may have the capacity to consent to medical treatment on their own behalf, and without their parents' knowledge. This common law position is based on a 1985 English House of Lords judgment, *Gillick v Wisbech Area Health Authority*.[1] In this case, the issue to be determined was whether a medical practitioner could provide contraceptive advice and prescribe contraceptives to a child under the age of 16 years, without the prior knowledge or consent of her parents. The Court determined that there were circumstances in which a child could consent to their own medical treatment. In order to do so, the child must have a sufficient understanding and intelligence to enable him or her to understand fully what is being proposed, including an understanding of the nature and effects of any procedures. This is often referred to as 'Gillick competence'. The judgment held that: 'Provided the patient, whether a boy or girl, is capable of understanding what is proposed and of expressing her or his own wishes, I see no good reason for holding that he or she lacks the capacity to express them validly and effectively and to authorise the medical man (or woman) to make the examination or give the treatment which he (or she) advises.'[1]

The level of maturity required to provide consent will vary with the nature and complexity of the medical treatment. For example, the level of maturity required to provide consent for the treatment of a superficial graze will be much less than that required to provide consent for the commencement of the oral contraceptive pill. In *Gillick*, the judges determined that the concept of absolute authority by a parent over a child or adolescent was no longer

acceptable. Because this absolute authority no longer existed, the House of Lords held that even though it will, in most cases, be in the patient's best interests to have parental consent, there may be special occasions when the best interests of the child or adolescent may be served without it. The House of Lords thought medical practitioners should not disregard the wishes of parents when it was simply convenient to do so but suggested that when: 'the girl refuses either to tell the parents herself or to permit the doctor to do so and in such cases the doctor will, in my opinion, be justified in proceeding without the parents' consent or even knowledge provided he is satisfied on the following matters:

(a) that the girl (although under 16 years of age) will understand his advice
(b) that he cannot persuade her to inform her parents or to allow him to inform the parents that she is seeking contraceptive advice
(c) that she is very likely to begin or to continue having sexual intercourse with or without contraceptive treatment
(d) that unless she receives contraceptive advice or treatment her physical or mental health or both are likely to suffer
(e) that her best interests require him to give her contraceptive advice, treatment or both without parental consent'.[1]

These principles, as established in *Gillick*, were endorsed as part of Australian common law in *Marion's case*.[2]

There is also specific legislation in New South Wales and South Australia that relates to the medical treatment of children. In NSW, the *Minors (Property and Contracts) Act 1970* provides some guidance regarding the medical and dental treatment of children and adolescents. Section 49 of this Act states that a medical practitioner who provides treatment with the consent of a child 14 years or over will have a defence to any action for assault or battery. This Act does not assist a medical practitioner in a situation where there is a conflict between a child and their parent and a parent can still potentially override a child's consent to treatment. In SA, the *Consent to Medical Treatment and Palliative Care Act 1995* outlines the legal requirements for obtaining consent by medical and dental practitioners. The Act states that a child 16 years and over can consent to their own medical treatment as validly as if an adult. Additionally, a child under the age of 16 years can consent to medical procedures if:

- the medical practitioner is of the opinion that the patient is capable of understanding the nature, consequences and risks of the treatment and the treatment is in the best interests of the health and wellbeing of the child, and
- that opinion is corroborated in writing by at least one other medical practitioner who has personally examined the child before the treatment was commenced.

Discussion

Recently, the medical duty of confidentiality owed to children and adolescents has come under threat. In 2004, the Federal Health Minister suggested changing the law to remove the right of patients under 16 years of age to doctor-patient confidentiality and, in the United Kingdom, the High Court considered an application seeking a declaration that doctors were under a positive duty to consult parents where a patient under the age of 16 years was seeking advice about contraception and abortion.[3] Ultimately, the Australian law was not changed. The application to the High Court of England and Wales was unsuccessful and, in January 2006, the Court confirmed the findings in *Gillick*. Accordingly, medical practitioners can continue to reassure patients under the age of 18 years that their autonomy and confidentiality will be respected.

Risk management strategies

It is important that GPs are aware of the legal position with respect to consent to medical treatment of children, especially in circumstances in which the patient requests that their parents are not informed. Depending on the specific circumstances, consent to medical treatment of a patient under the age of 18 years may be provided by either the:

- patient
- parent or legal guardian
- Court (eg. for permanent sterilisation procedures)
- other agencies (eg. in NSW the consent of the Guardianship Board is required for 'special medical treatment'. Special medical treatment includes the prescription of long term injectable contraceptives such as Depo Provera).

It should be noted that no consent is required in emergency situations if it is impractical to do so. In the case of a medical emergency (where treatment is immediately necessary to save the life of a patient or to prevent serious injury to their health), and the patient is not able to consent to the required treatment at the time, a medical practitioner may perform emergency treatment.

While in many cases it is preferable to obtain the consent of both the child and the parent for medical treatment, there may be specific circumstances in which the best interests of the child or adolescent may be served without the parents' consent.

Summary of important points

- Consent issues involving children and adolescents are complex.
- In certain circumstances, patients under 18 years of age can consent to their own treatment without the knowledge or consent of their parents.
- If uncertain about your legal obligations in a particular situation involving the consent of a child or teenager to medical treatment, seek advice from a colleague and/or your medical defence organisation.

Conflict of interest: none.

References

1. *Gillick v West Norfolk and Wisbech Health Authority & Anor* (1984) QB 581, (1985) 3 All ER 402.
2. *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.
3. *Axon, R (on the application of) v Secretary of State for Health* [2006] EWHC 37 (Admin).

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