

### THE COMMON LAW - The *Gillick*-competence test

Gillick competence is a term used in medical law to describe when a minor may be able to consent to his or her own medical treatment, despite a young age.

A young person under 18 years of age is legally competent to consent to medical treatment if he or she is capable of understanding the nature and consequences of that treatment. The High Court of Australia settled this common law test for determining a young person's competence in a case commonly known as *Marion's case*. The majority of the Court held that:

*A minor is capable of giving informed consent when he or she achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed.*

The majority in *Marion's case* followed a decision of the English House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority*. In *Gillick*, it was held that a young girl was competent to consent to contraceptive advice and treatment if she had a sufficient understanding and intelligence to enable her to understand fully what was proposed.

The test focuses on an assessment of the individual young person's level of maturity and understanding in relation to the treatment proposed. This means that, before the age of 18 (when a young person legally becomes an adult), there is no fixed age at which it is possible to say, in advance of such an assessment, that a young person is automatically capable of consenting to medical treatment generally, or to specific types of medical treatment. Thus, while a young person of, say, 10 years of age may have the necessary intelligence and understanding of what is proposed to consent to the administration of a course of antibiotics to treat a sore throat, he or she may not, at the same time, possess sufficient understanding to consent to the removal of his or her tonsils in the case of acute tonsillitis. In short, before the age of majority, competence to consent operates on a continuum which ranges from the point at which a young person is clearly able to consent to the medical treatment proposed to that at which he or she is clearly unable to do so.

The test may prove difficult for medical practitioners, with whom the assessment of *Gillick*-competence initially rests, to apply in practice. The imprecision of the test places a significant onus on that assessment. Medical practitioners sued for providing medical treatment to a young person without consent bear the onus of proving that they believed that the young person was of sufficient maturity and understanding to consent to the treatment in question.

The justification for the *Gillick* test is that it accords with experience and psychology in recognising that the point at which a young person has capacity to consent to particular medical treatment varies with each individual and cannot be constrained artificially by a fixed-aged test. Further, the flexibility of the test

allows the law to develop in accordance with social experience. And the heavy responsibility that the test places on medical practitioners is acceptable because the responsibility is in the hands of a “learned and highly trained profession regulated by statute and governed by a strict ethical code which is vigorously enforced”. Lord Scarman said in *Gillick*:

*The truth may well be that the rights of parents and children in this sensitive area are better protected by professional standards of the medical profession than by “a priori” legal lines of division between capacity and lack of capacity to consent since any such general dividing line is sure to produce in some cases injustice, hardship and injury to health.*