Legal issues and consent in paediatrics

Dr Sally Old
Legal Issues and Consent in Paediatrics

• Current legislation and guidance
• Who can consent to treatment
• Refusing treatment – what are a child’s rights?
• Avoiding problems in practice – some cases
Please note …

• Law applicable to England and Wales

• Discussing theoretical situations …

• … seek specific advice on individual cases
The Importance of Consent

- Good Clinical Care
- Based on the ethical principle of autonomy
- Legal / Regulatory requirement

“Every human being of adult years and sound mind has a right to determine what shall be done with his own body; a surgeon who performs an operation without the patient’s consent commits an assault”

Schloendorff v Society of New York Hospital 1914
GMC Guidance

Consent: patients and doctors making decisions together

0–18 years: guidance for all doctors

Working with doctors Working for patients

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GMC Consent guidance

- Emphasis on “partnership”
- Emphasis on providing information
- Places responsibility for ensuring patients have information they need squarely upon the doctor
- Specifies what you *must* inform patients
How much information? Montgomery and its aftermath

JUDGMENT

Montgomery (Appellant) v Lanarkshire Health Board (Respondent) (Scotland)

JUDGMENT GIVEN ON

11 March 2015

Heard on 22 and 23 July 2014.
Sri Lankan wins lawsuit against NHS as midwives fail to explain why she needed to feed her son due to language barrier

Daily Telegraph 13/4/2018
GMC Standard: ‘The Particular Patient’

- 28: “The amount of information about risk that you should share with patients will depend on the *individual* patient and what they want or need to know. Your discussions with patients should focus on their *individual* situation and the risk to *them*.”

Who can obtain consent?
GMC guidance

- Responsibility is with the doctor providing treatment
- This can be delegated to a person who is:
  - Suitably trained and qualified
  - Has sufficient knowledge of the proposed investigation or treatment
  - Understands, and agrees to act in accordance with GMC guidance
Main duties –0-18

- Safeguard and protect the health and well-being of children and young people

- Well-being includes treating children and young people as individuals and respecting their views

- Must also consider parents and others close to a child, but the child as patient must be the doctor’s first concern

- Children and young people may be particularly vulnerable and need to be protected from harm

- Doctors should always act in the best interests of children and young people
GMC 0-18

Treatment can be given if

- The young person has capacity and has consented or
- There is authority from someone with parental responsibility or
- If authorised by court

In an emergency, treatment can be provided without consent if it is needed to prevent the death or serious deterioration of the health of the patient.

Paragraph 22
Consent – children

- A young person aged over 16 can be presumed to have capacity to give consent

- *Under Section 8 of the Family Reform Act 1969 the legal age of consent for medical, surgical or dental treatment is 16 or over. In such cases there is no legal requirement to get authority from the parent or guardian.*

- The decision must relate to therapeutic treatment
Gillick v West Norfolk & Wisbech AHA
R(Axon) v SoS for Health

- Doctor can provide contraceptive, abortion and STI advice and treatment without parental knowledge or consent to young people under 16 provided that:
  - first they understand all aspects of the advice and its implications
  - doctor cannot persuade the young person to tell their parents or to allow doctor to tell them
  - in relation to contraception and STIs, the young person is very likely to have intercourse with or without such treatment
  - their physical or mental health is likely to suffer unless they receive such advice or treatment
  - It is in the best interests of the young person to receive the advice and treatment without parental knowledge or consent

- Silber J noted that the best judges of a young person’s welfare are almost invariably the parents
Consent given by competent children

- Consent can be given by
  - child aged 16+
  - competent child under 16

- Competent child’s consent to have treatment cannot be overruled by parental authority

- Only a Court can overrule if a competent child consents to treatment
What if a competent child *refuses* consent?  
GMC Guidance 0-18

- 32. You should seek legal advice if you think treatment is in the best interests of a competent young person who refuses. You must carefully weigh up the harm to the rights of children and young people of overriding their refusal against the benefits of treatment, so that decisions can be taken in their best interests. In these circumstances, you should consider involving other members of the multi-disciplinary team, an independent advocate, or a named or designated doctor for child protection. Legal advice may be helpful in deciding whether you should apply to the court to resolve disputes about best interests that cannot be resolved informally.
Authority vs Consent

- If overriding the child’s wishes and proposing to give treatment, bear in mind that having legal authority is not the same as having the child’s consent and cooperation.

- There may be very significant practical barriers to administering treatment against a child’s wishes and it may permanently damage the relationship with the patient.
Children/young people with capacity refusing consent

- …it is not advisable to rely on the consent of a parent with parental responsibility to admit or treat a child who is competent to make the decision and does not consent to it. Although in the past the courts have found that a person with parental responsibility can overrule their child’s refusal, such decisions were made before the introduction of the HRA and since then court decisions concerning children and young people have given greater weight to their views.

19.39 Mental Health Act Code of Practice 2015
Options if Child Refuses Treatment

- Accept refusal is in child’s best interests
- Persuade child to cooperate, time permitting
- Treat on basis of parental authority if child lacks capacity
- Court if there is a question re competence/best interests/authority
Treatment can be given if

- The young person has capacity and has consented or
- **There is authority from someone with parental responsibility** or
- If authorised by court

In an emergency, treatment can be provided without consent if it is needed to prevent the death or serious deterioration of the health of the patient.

*Paragraph 22*
Parental responsibility

Birth mother.

Married fathers, even if subsequently divorce.

Unmarried fathers, named on birth certificate, of children born after 1 December 2003 in England and Wales.

Parental Responsibility Agreement.

Adoptive parents have parental responsibility.

Other bodies may have parental responsibility in addition to parents.

Parental responsibility is lost if child is adopted.

Parental responsibility can be removed by a court.
Children and young people who lack the capacity to consent

Authority of only one parent required in most situations.

But court has stated ‘small group of important decisions’ should not be taken by one when other disagrees.

Decision must be considered to be in the best interests of the child.

If there is parental disagreement with regard to provision of authority, it may be necessary to seek a decision from the court.

You should still involve the child in decisions.
Can someone with PR delegate authority?

- Children Act s(3) 5 allows a person who ‘has care’ although not PR to do ‘what is reasonable in all the circumstances of the case for the purpose of safeguarding and promoting the child’s welfare’
- Does not need to be confirmed by parent in writing, but probably easier for the doctor if it is.
GMC 0-18

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Paragraph 22
Best Interests

- As a doctor, you will always need to act in the patient’s best interests.
- Whilst the parents will usually act in the interests of their child, if you believe that they are not doing so you may need to act.
- Seek advice of local Child Protection team.
Assessment of best interests

GMC 0-18 years guidance

- What is clinically indicated.
- Views of the child or young person insofar as they can express them.
- Views of parents.
- Views of others close to the child or young person.
- Cultural, religious or other beliefs.
- Views of other healthcare professionals involved.
- Which choice will at least restrict the child’s future options?
Best Interests

Aintree University Hospitals NHS foundation Trust v James
[2013] UKSC 67

- The Supreme Court rejected the idea that decisions could be made on the basis of what a 'reasonable patient' might want and emphasised the need to consider the individual

- "The most that can be said, therefore, is that in considering the best interests of this particular patient at this particular time, decision-makers must look at his welfare in the widest sense, not just medical but social and psychological; they must consider the nature of the medical treatment in question, what it involves and its prospects of success; they must consider what the outcome of that treatment for the patient is likely to be; they must try and put themselves in the place of the individual patient and ask what his attitude to the treatment is or would be likely to be; and they must consult others who are looking after him or interested in his welfare, in particular for their view of what his attitude would be."
Making decisions to limit treatment in life – limiting and life-threatening conditions in children: a framework for practice (RCPCH)

- Try to reach agreement about decisions, including with the child where possible
- Team working ‘teams can develop moral responsibility by reasoning together’
- Use of second opinions – ‘does conform to principles of good ethical decision making and the due process that good clinical governance requires’.
- Importance of advance care planning

Arch Dis Childhood 2015:100 s1-s23
Example 1

- You have been treating a 14-year old boy for congenital heart problems. You recommend further surgery but the boy rejects this option, saying he would rather die.

- His parents are very distressed, and disagree about treatment. The father insists the treatment is given but the mother does not want to go against her son’s wishes.

- You get a letter from the father’s solicitor insisting that the operation is done this week, or he will sue.

- What do you do?
Options if Child Refuses Treatment

- Accept refusal is in child’s best interests
- Treat on basis of parental authority if child lacks capacity
- Persuade child to cooperate, time permitting
- Court if there is a question re competence/ best interests/authority
Example 2

- An 8 year old girl falls and sustains a compound fracture of her arm. She comes in to A&E accompanied only by the family au-pair who does not speak or understand English well.
- Can the au pair provide authority to treat?
Example 3

- A 16 year old girl with leukaemia shows you an Advance Directive refusing further chemotherapy which would be potentially curative.

- Her parents both support her decision and plan to take her home to die.

- Is the Advance Directive binding?

- What should you do?
Options if Child Refuses Treatment

- Accept refusal is in child’s best interests
- Persuade child to cooperate, time permitting
- Treat on basis of parental authority if child lacks capacity
- Court if there is a question re competence/ best interests/authority
Example 4

- A mother who is HIV positive refuses to allow her daughter, who is 3, to be tested for HIV.
- You are concerned that the girl has HIV too.
- What steps can you take?
Remember…

▪ Be prepared to justify your decision

▪ Keep good records

▪ Seek advice
How to contact us

Membership
  t  0800 716 376
  e  membership@themdu.com

Medico-legal team
  t  0800 716 646
  e  advisory@themdu.com

Website
  themdu.com

@the_mdu
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