



## Medical Treatment of Children

By Shona Anne Thomas



Shona Anne Thomas  
Associate  
**Medico Dento Practice**  
T: +603 6208 5919  
E: sat@lh-ag.com

Conceptions of childhood have varied across time.<sup>1</sup> Generally, it is considered as either a natural biological stage of development or a modern idea.<sup>2</sup> Many countries, including Malaysia, define a “child” as a person under the age of 18 years.<sup>3</sup>

### Consent for medical treatment

A child is regarded to be within the category of those legally incompetent to give consent and decide on what medical treatment they should have until they turn 18.<sup>4</sup> In most cases, the issue of consent to medical treatment rarely arises where young children are concerned as they are clearly incapable of making decisions and their parent or guardian acts as decision maker.<sup>5</sup> Here, parental consent will allow the doctor to carry out the necessary treatment for the child without the risk of being sued for battery.

The grey area of consent in medical treatment arises when dealing with older children. A prime example of this is the English case of *Gillick*,<sup>6</sup> whereby:

- A child of about 15 years went to the health authority to get advice on contraception without her parents’ knowledge.
- At the time, the health department’s circular stated that the prescription of contraception was a matter for the doctor’s discretion and that it could be prescribed to those under 16 without parental consent in exceptional cases.
- Upon knowledge, the child’s mother sought a declaration to challenge the validity of the advice stated in the circular.
- The House of Lords (in ruling in favour of the health authority) held that in certain circumstances, a child could consent to treatment, and that his or her parent could not veto said treatment.

<sup>1</sup> Philippe Ariès, *Centuries of Childhood: A Social History of Family Life* (1962)

<sup>2</sup> Encyclopedia.com, “Theories of Childhood” (<https://www.encyclopedia.com/children/encyclopedias-almanacs-transcripts-and-maps/theories-childhood>)

<sup>3</sup> Child Act 2001, s 2 (1)

<sup>4</sup> This is the position in Malaysia

<sup>5</sup> McHale, et al, *Health Care Law: Text and Materials* (Sweet & Maxwell, 2001)

<sup>6</sup> *Gillick v West Norfolk & Wisbech AHA* [1985] 3 All ER 402 (HL)



- The main test applied by the House of Lords was “whether the child had sufficient understanding and intelligence to enable full understanding of what is proposed”.<sup>7</sup>

The principles in *Gillick* have been revisited and adopted to varying extents in England and some other Commonwealth jurisdictions (such as Australia, Canada and New Zealand). In Malaysia, however, the *Gillick* principle has yet to be tested on similar facts as the underlying principles have only been considered and recognised in our courts in the context of disputes over public law.<sup>8</sup> Suffice to say that the position in Malaysia differs from the position in England as not much autonomy has been given to children to decide their own medical treatment.

### The Child Act 2001

The provisions of the Child Act 2001 (**Child Act**) apply to children who need care, protection and rehabilitation. Among others, the meaning of a “child in need of care and protection” includes circumstances where a child needs to be examined, investigated or treated for the purpose of restoring or preserving his or her health; and the parent or guardian neglects or refuses to have him or her examined, investigated or treated.<sup>9</sup> In other words, the legislation also covers situations of child abuse and neglect.

Thus, if a child falls within the ambit of this provision, parental consent is not required to restore and preserve the child’s health. When a child in need of medical examination or treatment is presented before a doctor, the latter:<sup>10</sup>

- shall conduct (or cause to be conducted) an examination of the child;
- may, in examining the child and if so authorised by a “protector” or police officer, administer (or cause to be administered) such procedures and tests as may be necessary to diagnose the child’s condition; and
- may provide (or cause to be provided) such treatment as is considered necessary because of the diagnosis.

<sup>7</sup> Ibid, p. 423; per Lord Scarman

<sup>8</sup> *Prudential Assurance Malaysia Berhad v Kerajaan Malaysia* [2003] MLJU 43, (HC); *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 (SC)

<sup>9</sup> Child Act 2001, s 17(f)

<sup>10</sup> Ibid, s 21



However, if the doctor finds that the child needs hospitalisation, he or she must get the required authorisation from the “protector” or police officer.<sup>11</sup> For the purposes of providing timely medical care, it is highly recommended that doctors, particularly paediatricians, familiarise themselves with the key requirements of the Child Act as well as the guidelines provided by the Ministry of Health, Malaysia.

### Author’s comments

It is observed that:

- The Child Act makes no mention of taking into account the wishes of the child.
- The Malaysian Court for Children<sup>12</sup> takes a very paternalistic approach.

This is in stark contrast with Art 12 (1) of the United Nations Convention on the Rights of the Child (UNCRC), which provides that a child who is capable of forming his or her own views must be given the right to express those views freely in all matters affecting the child (the views of the child being given due weight in accordance with the age and maturity of the child).

Given that 25 years have passed since Malaysia ratified the UNCRC, it is high time that Parliament make significant efforts to amend the Child Act and reform the area of law concerning the medical treatment of children. This will provide doctors with much-needed clarity and certainty in providing treatment to children who have reached maturity and have the required capacity to make their own decision.

Editor: Koay Sook Kuan

If you have any queries, please contact the author, **Shona Anne Thomas** ([sat@lh-ag.com](mailto:sat@lh-ag.com)).

Published by the Medico Dento Practice

© Lee Hishammuddin Allen & Gledhill. All rights reserved.

<sup>11</sup>

Child Act 2001, s 22

<sup>12</sup>

This court is constituted under s 11 of the Child Act 2001