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LEGAL ASPECTS OF CHILD AND PARENTAL RIGHTS

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The principles which govern the relationship between the legal capacities of children, the responsibilities of parents and the limits of State intervention are best exemplified in the field of medical decision-making. This is primarily because the health of children is evidently the most basic and essential element in protecting their welfare. It is therefore somewhat perplexing to discover that issues relating to child and parental rights in the context of consent continue to generate debate as a matter of conflict rather than consensus in the best interests of the child.

Conflict of rights and responsibilities

In determining the interplay of rights and responsibilities, three essential factors should be taken into account :

- the limit of parents' powers and duties;
- the extent of children's rights (whether to be protected or to exercise autonomy); and
- the limits of State paternalism exercised through the Courts.

Central issues

Although there are many queries, which have been posed in the field of medical issues affecting children, they can be reduced to two central questions :

1. Who decides what medical procedures or treatment are appropriate for a child?
2. On what criteria ought such decisions to be based?¹

1. In answer to “who decides” there are any number of possibilities, with the parents presumed to front the queue in virtue of the authority vested in them as parents. Although parental authority has often been portrayed as the granting of power for the best interests of the child rather than an end in itself. This also leads to the issues raised when parents are not in agreement, and to the intervention of the state in resolving the stalemate.

Children themselves could be presumed to be the logical answer to the question, particularly when they have acquired a certain age and/or level of understanding. Under Maltese law the situation at present only contemplates the Courts hearing the opinion of a child aged fourteen and over, **as of right**, in some cases.² Proposals for amendment have been made to the effect that children’s wishes should be considered according to age and understanding.

The other choice rests with an alternative agency, such as a court, taking the final decision however the mode of intervention may not always be clear. Locally, a request for medical procedures without parental consent would invariably be addressed to the Courts where the trend has been to rely heavily on the doctor’s opinion in preference to that of the parent(s). The classic cases involve refusal by parents to consent to a blood transfusion for their child on the grounds of their religious beliefs.³

2. The second query, namely the choice of criteria, is much more difficult to answer. A strongly supported argument holds that all medical decisions affecting individual children should be taken on an individualistic basis applying the welfare principle / the best interests principle / the paramountcy principle – all describe actions taken in the child’s best interests to a varying degree, depending on state legislation.

The opposing argument is founded in the belief that failure to establish reasonably clear criteria can lead to widespread

variations in the treatment or non-treatment of children with broadly similar medical conditions. However it is hard to reconcile this latter viewpoint with the commitment to children's rights.

In the final analysis, most countries refer to their courts to resolve any such difference of opinion. These in turn, do all they can to ensure that due deference is given to the expertise of the medical profession, interfering only on issues perceived as within the domain of fundamental public policy. A British authority on the subject concludes that it has become "clear that the courts will respect the clinical freedom of doctors and refuse to force them to act against their clinical judgement"⁴

Consent

The general premise widely, if not universally, accepted is that the consent of the patient is required for any medical examination or procedure. This principle is founded in the idea of self-determination that gives rise to the immediate query whether a child can be in a position to exercise such self-determination or whether an adult must do this for him or her.⁵

At Maltese law, it is the parents who must make any necessary decisions on behalf of their child and it is only when an emergency situation arises that a third party in good faith may intervene.⁶ Where parents disagree regarding the giving of consent, the court may make attempts to resolve the deadlock and give such directions as it may deem fit in the best interests of the child.⁷ Little, if any, consideration is given to the age of the child so that a seven-month-old, a seven-year-old and a seventeen-year-old are both treated on a par. This issue is currently under review.

Exceptions to parental consent

1. The State may restrict parental discretion directly through legislation or indirectly through the courts.

2. In some legislations the child's own view may prevail over that of a parent in instances where there is a conflict.

3. There are instances where the medical profession may proceed lawfully without parental consent. This follows the doctrine of necessity which allows anyone – not only the doctor – to render first aid.

Capacity

Should parental consent be viewed simply as a **substitute** consent to be made available only when the child lacks capacity, or should it be viewed as an **alternative** consent remaining available despite the child's capacity?⁸ Yet again should both consents be taken into account? And what happens in relation to medical confidentiality?

Competence or capacity is a legal concept imputing decisional authority in a certain domain. Competent patients have the right to decide whether to accept or reject proposed medical care. Children are one of the categories of people, together with the elderly and the mentally ill, that are commonly denied to have competence.⁹ The decision as to capacity must therefore take into account the element of paternalism displayed by the state when the decision proposed by the parents is deemed outside the parameters deemed acceptable in the best interests of the child."the court fuses the principle of child autonomy with the practice of intervention...."¹⁰

International Law

Apart from national legislation, these issues of consent and parental and child rights are regulated by standards of international law.

For the medical profession, the point of departure might well lie with the **Declaration of Helsinki**.¹¹ In 1964 the 18th the World

Medical Assembly made recommendations guiding medical doctors in biomedical research involving human subjects and the association revised the document in 1975, 1983 and 1989. With reference to consent, the declaration makes the position of the doctor very clear, particularly in the light of Article 12.

Article 11

In case of legal incompetence, informed consent should be obtained from a legal guardian in accordance with national legislation. Where physical or mental incapacity makes it impossible to obtain consent, or when the subject is a minor, permission from the responsible relative replaces that of the subject in accordance with national legislation.

Article 12

Whenever the minor child is in fact able to give a consent, the minor's consent must be obtained in addition to the consent of the minor's legal guardian.

The European stand on the subject comes from the much more recent Council of Europe initiative. The Convention for the Protection of Human Rights and the Dignity of the Human Being with regard to the Application of Biology and Medicine known as the **Convention on Human Rights and Biomedicine (BC)** drafted by the Council of Europe Steering Committee and adopted on the 4th April 1997 comes into force on the 1st December 1999.¹² An Additional Protocol to the BC, on transplantation of organs and tissues of human origin is also in the final stages of drafting and the text should be finalised by the end of 1999.¹³

Article 6(1)

An intervention may only be carried out on a person who does not have the capacity to consent, for his or her direct benefit

Article 6 (2)

Where according to law, a minor does not have the capacity to consent to intervention... the intervention may only be carried out with the authorisation of his or her representative or an authority or a person or body provided for her by law... the opinion of the minor shall be taken into consideration as an increasingly determining factor in proportion to his or her age and degree of maturity.

This article does not deal with the refusal of authorisation. Where there is a conflict between the parents and the authority or any person provided for under national law, it will be the responsibility of the authority so provided to settle the problem, bearing in mind the fundamental rights of the child.

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*"... in certain situations which take account of the nature and seriousness of the intervention as well as the minor's age and ability to understand, the minor's opinion should increasingly carry more weight in the final decision. This could lead to the conclusion that the consent of the minor should be necessary, or at least sufficient for some interventions."*¹⁴

The Declaration of Helsinki and the BC must, however be reviewed in consideration of the all-encompassing **United Nations Convention on the Rights of the Child (CRC)**

Article 8(1)

The protection of the child's right to life requires that, despite such justification as may be drawn from the parents' fundamental right to freedom of religion and freedom to manifest this religion and their right to provide their children with religious and moral education in conformity with their own convictions, their refusal

*should not be taken into account by the doctor, even if the patient's immediate survival is not at stake.*¹⁵

Article 12 (1)

The child should have the right to freely express his or her opinion on any matter concerning him or her and the child's opinion should be taken into account according to age and degree of maturity (also referred to as age and understanding).

There should be no dispute regarding the position of the child in the interpretation of all three international documents. Children require an adult to give consent on their behalf in virtue of lack of legal capacity, but their consent must be taken into consideration along with that of the person representing their best interests. Failure to respect this right should be accountable at law but failing legal representation for children makes the situation even more difficult to enforce.¹⁶

Regarding the child who is unable to offer consent or refuses to participate, the Journal of Medical Ethics makes the following point about the CRC :

“ Pediatric medicine abounds with examples of issues which the Convention could not settle without further interpretation. There are, for example many types of case which concern the respective powers of parents and children to grant or withhold consent to medical treatment. If the relevance of the Convention to the medical profession were thought to depend upon its capacity to shed light on these hard cases, then it would be a document with only a slight claim upon the attention of doctors in liberal democracies. Perhaps then, the strongest basis for the Convention's claim on the attention of the medical profession in general, and pediatricians in particular, is in the opportunity it provides for an appraisal of the broader implications and limitations of appeals to children's rights in medical ethics.”¹⁷

This position is also based on the more general principles to be found in the **European Convention on Human Rights (ECHR)**: Articles 2 and 8 and in the **Covenant on Civil and Political Rights**: Articles 6(1), 17 and 23(1).

Conclusion

The dilemma between parents' rights and child rights continues to perplex the medical profession often caught up between the two. Determining whether the patient has the necessary capacity to give consent remains the crucial element to solving the quandary.

While international law is clear on the issue of child and parental rights in the field of consent, the local position still requires clarification and begs reform. Until such time as our law amends the capacity of the child to be interpreted according to age and understanding rather than just age, Maltese doctors will be bound to respect the wishes of parents over children. The fact that our courts have steadfastly stood behind doctors in ensuring that such wishes are truly in the best interests of the child is, at least, some consolation.

References:

¹Bainham A, *Children : The Modern Law*, Jordan Publishing Limited, 1998, pages 242 - 243.

²Chapter 16, Laws of Malta, Section 131.

³Series of cases before the Second Hall, Civil Court re Jehovah Witnesses

⁴Montgomery J, *Health Care Law* , Oxford University Press 1997 , page 420.

⁵McHale J and Fox M, *Health Care Law: Text and Materials*, Sweet and Maxwell 1997, chapter 6.

⁶Chapter 16 Laws of Malta, section 131.

⁷Chapter 16 Laws of Malta, sections 131f133 and 149.

⁸Bainham A, *ibid* page 254

⁹Mortier F, *Competence in Children : A Philosophical Perspective*, in "Understanding Children's Rights" edited by Verhellen E, University of Ghent 1996, pages 83 - 98.

¹⁰Lowe N. and Juss S., *Medical Treatment – Pragmatism and the Search for Principle*, *Modern Law Review*, 56, 1993, page 865 quoted in *Children's Rights : A Comparative Perspective*, edited by Freeman M., Dartmouth Publishing 1996, pages 93 -111

¹¹<http://www.vitreoussociety.org/journal/instruct/helsinki.htm>

¹²To date the Convention has not been signed by Malta (Council of Europe : 22 November 1999.

¹³Council of Europe as on 22 November 1999 : <http://stars.coe.fr/doc/doc99/edoc8342.htm>

¹⁴vide decisions 255 of 23.6.1993 Hoffmann case (Commission v.Austria) and 260 of 24.6.1993 Kokkinakis case (Commission v. Greece)

¹⁵Scalabrino M, *Rules and Principles of International Law in the Field of Health*, in "The human rights, ethical and moral dimensions of health care," Council of Europe 1998, pages 45 - 53.

¹⁶Malta signed the European Convention on the Exercise of Children's Rights in February 1999, but has failed to ratify mainly because children do not, as yet, have a right to separate legal representation.

¹⁷*Briefings in Medical Ethics*, 1991 quoted in *Medical Experimentation with Children*, McLean S, in *Children, Rights and the Law*, edited by Alston P, Parker S., Seymour J., Clarendon Press 1993, page 190.