

Fraser guidelines or Gillick competence?

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Fraser guidelines, Gillick competence; phrases that anyone involved in the care of children will have heard. However, there is often confusion regarding the meaning of these two terms and they are frequently used as substitutes for each other, as if they were interchangeable rather than two distinct but related terms.

It is a principle of English law (that is the law in England and Wales), and indeed in many countries, that consent is needed before medical treatment is commenced on a patient. Without the consent of the patient a criminal offence is committed and the patient may bring a civil action against the health-care professional who initiated the treatment. There are, of course, provisions within English law that when a patient is unable to consent, treatment may be provided in their best interests without subjecting the health-care professional to criminal or civil liability.

The fact that a patient may be a child, who is under the age of 18 years in English law, does not remove the need for consent to be provided. In 1969, the Family Law Reform Act provided that 'a minor who has attained the age of 16 years' could provide consent on their own behalf and that this consent was to be as effective as if they were an adult (section 8 (1)). However, this provision obviously did not apply to those under 16 years of age.

In 1985, Mrs Gillick brought her concerns regarding guidance on contraceptive advice and treatment for girls under the age of 16 to the courts. One of the issues the case had to address was whether it was possible for a child under the age of 16 to provide effective consent. That is, consent which would be legally valid and absolve the health-care professional providing treatment from criminal and civil liability; as consent of an adult would.

There were two outcomes from the Gillick case. One was that it became lawful to provide contraceptive advice and treatment to girls under the age of 16, subject to certain guidelines (Fraser guidelines). The other was that in certain circumstances a child under the age of 16 could now give consent in their own right ('Gillick competence'). Confusion has arisen regarding the two terms as a result of a fallacy that Mrs Gillick objected to the use of the term 'Gillick competence' and that the Fraser guidelines were introduced in its place. However, there is no evidence that Mrs Gillick objected to the use of the term.

Fraser guidelines refer to a specific set of guidelines that

Lord Fraser proposed in the Gillick case. The guidelines state that contraceptive advice or treatment can be provided to a child under 16 without parental consent or knowledge provided that the health-care professional is satisfied:

1. That the girl will understand his advice
2. That he cannot persuade her to inform her parents or allow him to inform the parents that she is seeking contraceptive advice
3. That she is likely to begin or to continue having sexual intercourse with or without contraceptive treatment
4. That unless she receives contraceptive advice or treatment her physical or mental health or both are likely to suffer
5. That her best interests require him to give her contraceptive advice, treatment, or both without parental consent.

Although initially confined to contraceptive advice and treatment, Fraser guidelines can now be extended to cover abortion and sexually transmitted infections, as both these require that the girl is having sexual intercourse, a key aspect of the guidelines.

Gillick competence, on the other hand, refers to the fact that some children under the age of 16 are able to give consent. The key to whether the child can give consent is their emotional and intellectual maturity and their ability to understand the proposed treatment. Those children who are deemed by the health-care professional to be Gillick competent are the ones who can provide consent for the proposed treatment. Although the Gillick case was concerned with contraceptive advice and treatment for girls under 16, the principle that a child under 16 can consent to treatment on their own behalf has been extended to boys, and to treatment and advice other than for contraception.

It should be noted that the first point in the Fraser guidelines, that of understanding, may refer to the process of determining Gillick competence and it can then be seen that the two terms are not interchangeable. Rather, as shown above, they are two different concepts: Fraser guidelines referring to specific guidance that must be followed by the health-care professional to provide specific treatment to a child; and Gillick competence referring to the ability of the child to give consent.

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Gillick v West Norfolk and Wisbech Area Health Authority and another
[1985] 2 BMLR 11