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Special Medical Procedures – when is treatment authorisation required? A look at the test through the lens of gender dysphoria

In a presentation at the March 2017 Medico-Legal Congress in Sydney, HBA solicitor Will Goodheart and Partner Mark Birbeck explored 'special medical procedures' - the types of medical treatments that neither a child nor its parent can consent to and require authorisation by the Family Court. HBA focussed on the legal test that determines which treatments require authorisation and how treatments for gender dysphoria have brought the effectiveness of this test into question.

Children and consent to treatment

Unlike adults, all people under the age of 18 are presumed to lack decision-making capacity. Unless a child is deemed to be '*Gillick competent*', consent must be obtained from either a parent or legal guardian or a court, or there must be some other justification that renders the treatment lawful, for example, an emergency situation.

The term '*Gillick competent'* is derived from the decision in *Gillick v West Norfolk and Wisbech Area Health Authority* A.H.A [1986] 1 AC 112, 184. Here it was established that if a child is mature enough to fully understand the nature and consequences of a proposed treatment, they can provide their consent. If a child is found to lack the capacity to consent to a procedure, a parent or guardian can do so on their behalf.

Special medical procedures

So what is a special medical procedure? The test was created by the High Court in the cornerstone case of *Re Marion*. The question here was whether Marion's parents were able to consent to the sterilisation of their mentally disabled daughter. The purpose of the sterilisation was to prevent pregnancy and held improve Marion's behavioural issues.

The High Court held that Marion's parents were not able to consent to the procedure without authorisation. They outlined three factors that led to this conclusion:

- the procedure was invasive and irreversible
- there was a significant risk of making the wrong decision, and the consequences of a wrong decision were particularly grave
- the treatment was non-therapeutic.

The treatment was considered to be 'non-therapeutic" as the purpose of the sterilisation was to

prevent menstruation and pregnancy, not to save Marion's life. Hence the High Court held that authorisation is only required in cases where the procedure is not clinically necessary.

Is the test effective?

The factors have been applied in many cases (and for procedures other than sterilisation), and have been effective in most circumstances. For example, parents don't have to seek authorisation for surgery to remove cancer. The invasiveness and irreversibility of any treatment is eclipsed by the need to save the child's life.

On the other hand, procedures such as breast enhancement surgery or organ donation will require authorisation, as they are not essential and involve invasive measures.

From all this we can see that the fundamental question is whether the treatment is necessary.

This is where treatment for gender dysphoria has caused problems.

Gender Dysphoria

Children with gender dysphoria feel that their physical gender does not match the gender they are on the inside. The treatment involves two stages: stage 1 involves the provision of puberty blocking medication, and stage 2 comprises cross-sex hormone treatment.

There is no medical consensus as to what causes gender dysphoria, however, it is generally agreed by the doctors, families and the Court, that gender dysphoria is a condition that requires treatment.

If this is the case, why does the Court have any say in whether the child gets treated? Does the test place treatment for gender dysphoria into the "special" category of procedures?

Therapeutic/Non therapeutic

The first part of the test is the therapeutic/non therapeutic distinction. In general, it has been held that if a procedure is therapeutic, court authorisation is not required.

Chief Justice Nicholson gave an example of the difference between a therapeutic and non-therapeutic treatment; he illustrated that a hysterectomy required to treat uterine cancer would be 'therapeutic', but a hysterectomy to prevent menstruation and pregnancy in an otherwise healthy female would be 'non-therapeutic'. So it all comes down to the purpose of the treatment.

With regards to gender dysphoria, evidence presented in the case of *Re Bernadette* indicated that the risks associated in providing hormone treatments are 'minor in comparison' to the risks if they are not carried out. Professor Z gave evidence that children could suffer serious psychological problems if treatment is not given, and not providing treatment can result in the children later requiring invasive surgeries.

Most importantly, it was agreed that if a child is reliably diagnosed with gender dysphoria, then the

only viable course of action is hormone treatment.

If the doctors believe that treatment for gender dysphoria is a necessity, a strong argument can be made to suggest that the treatment is therapeutic.

Invasive and Irreversible nature of the treatment

The next part of the test is the invasive and irreversible nature of the treatment.

Aside from the risks inherent to any medical procedure, there is the risk with these treatments, that a child's body is being irreversibly changed based on a condition that may in time go away. The expert evidence in *Re Kevin* and *Re Bernadette* showed that there are irreversible effects from the treatments including changes to the skeleton, muscles and voice. The experts also stated that there is a significant risk that the treatment could lead to infertility.

This lasting effect of the treatment leads to the final consideration:

Risk of making wrong decision

The Court must also consider whether there is a significant risk of making a wrong decision, and whether the consequences of the wrong decision are particularly grave.

In the case of *Re Alex,* Chief Justice Nicholson stated that "there are significant risks in embarking on a process that will alter a child's gender". The risk of regret may have been on his mind. What if Alex, after receiving the irreversible treatments, realised that he had made the wrong decision?

This confronting issue of regret has been addressed in a number of cases. In *Re Jamie* Dr C stated that some children with gender dysphoria do not progress in adulthood with an ongoing transsexual identity, and the doctors agreed that the rate of "regret" with reversal of gender is unknown.

So what is the result?

The *Re Marion* factors were first considered with respect to gender reassignment treatment for a minor, in the case of *Re Alex* (heard in 2004).

In *Re Alex*, Justice Nicholson analysed the expert evidence that was provided at that time concerning the nature and causes of gender dysphoria and concluded that "the current state of knowledge would not, in [his] view, enable a finding that the treatment would be for a 'malfunction' or 'disease'". This essentially meant that the treatment was not therapeutic and therefore authorisation was required.

This decision set a precedent whereby any treatment aimed at addressing a child's gender dysphoria, no matter how minimally invasive or irreversible, was viewed as a "special medical procedure" requiring authorisation.

This trend was maintained until the Full Court of the Family Court appeal of *Re Jamie* in 2014.

Here, the Court found that authorisation was not required for the first stage of treatment but was required for the second. The reasoning was twofold: there was a significant risk of the wrong decision being made as to Jamie's capacity to consent to treatment, and the consequences of such a wrong decision would be particularly grave.

Interestingly, the Court found that if a child is found to be *Gillick* competent then the child can consent to stage two treatment without court authorisation. However, the question of whether the child is *Gillick* competent is still a matter to be determined by the Court.

It was essentially held that the therapeutic benefits of the treatment must be weighed against the risks involved and the consequences which arose from a treatment being irreversible.

Summary

The recent case law developments concerning treatment for gender dysphoria confirm that parents are lawfully able to consent to the first stage of hormonal treatment on behalf of their children, but that court involvement is required as part of the consent process for stage 2 treatment. In addition, when a minor possesses a sufficient understanding of the nature and consequences of stage 2 treatment, she or he has legal capacity to consent to that aspect of treatment, but the finding of competency must be made by a court.

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