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Autonomy: Only for Adults?

• “A mentally competent patient has an absolute right to refuse to consent to medical treatment for any reason, rational or irrational, or for no reason at all.” Re MB Court of Appeal, 1997
• But note:
  • Statement only applies to adults (18 & over)
  • Must be “mentally competent”
  • MHA 1983 can override refusal
  • 2nd & 3rd bullet points – Articles 12, 14 & 25 CRPD
Significance of the CRPD

- “Underlying philosophy is to “move decisively away from treating persons with disabilities as ‘objects’ to be managed or otherwise ‘cared’ for towards treating them as equal human ‘subjects’ capable of directing their own lives...”
- “…One of the more striking things about the UN CRPD is that the concept of ‘best interests’ is banished to the margins. Indeed it only occurs once and in the context of children’s rights. This sends a powerful signal that the only measure of the man is himself or herself and that wellbeing is to be determined subjectively”
- Gerard Quinn & Suzanne Doyle, 2012

Article 7 CRPD: Children with disabilities

1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.
2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.
3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.

(Thus reflects Articles 3 and 12 of CRC)
Key CRC Rights

- Best interests of the child - primary consideration in all actions concerning children (Article 3)
- Respect for the views of the child (Art 12).
- States respect the responsibilities, rights and duties of parents to make decisions in relation to their children - this must be ‘in a manner consistent with the evolving capacities of the child’ (Article 5).

Evolving capacities of the child

- An acknowledgment that children’s development towards independent adulthood must be respected and promoted throughout childhood
- Linked to Article 12 – views of the child given due weight in accordance with age and maturity of child
  (Implementation Handbook on the Rights of the Child, 2007)
CRC: Respect for the views of the child (Article 12)

- States parties shall assure to the child who is capable of forming his or her own views 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.’
- Underlines children’s status as individuals with human rights, views and feelings of their own
- No lower age limit
- Presume child has capacity to form his/her own view – not for child to prove such capacity [CRC Committee GC 12]

Article 3 CRPD: General Principles

- (a) Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;
- ....
- (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.
Decision-making under the CRC

- Best Interests
- Parental Decisions
- Views of Child
- Evolving Capacity

Link between Article 3 and 12 CRC

- Best interests of the child, established in consultation with the child
- There is no tension between articles 3 and 12 – one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing the child
- CRC GC 12, 70-74
Link between Articles 5 and 12 CRC

• Article 5: “the child has a right to direction and guidance, which have to compensate for the lack of knowledge, experience and understanding of the child and are restricted by his or her evolving capacities, as stated in this article.”
• “The more the child himself or herself knows, has experienced and understands, the more the parent, legal guardian or other persons legally responsible for the child have to transform direction and guidance into reminders and advice and later to an exchange on an equal footing. This transformation will not take place at a fixed point in a child’s development, but will steadily increase as the child is encouraged to contribute her or his views.”
• Stimulated by giving due weight to views of child under Art 12
• CRC GC 12, 84 - 85

Legal Capacity and Consent to Treatment (UN Special Rapporteur on Health, 2009)

• Competence to consent: status known as legal capacity
• Legal capacity is presumed in adult persons and renders them the right to consent to, refuse or choose an alternative medical intervention. A patient’s actual decision – however contrary to professional advice – has no bearing on legal capacity
• Children’s legal capacity is approached differently throughout the world, such as by use of a competency test to establish sufficient maturity to provide consent or requirements for parental consent [“Gillick competence”]
• Given sufficient maturity, the child’s consent should be sought [See also CRC GC on Adolescent Health]
Under 18s and Refusal of Treatment

• Can rely on child/young person’s consent if competent (u16) or have capacity (16/17)
• Child/young person able to decide: “refusal could be overruled if it would in all probability lead to the death of the child/young person or to severe permanent injury.”
• [post HRA 1998] Unwise to rely on parental consent to override refusal – may be necessary to apply to the court “to determine whether it is lawful to treat the child.”
• “Where the treatment involved is for mental disorder, consideration should be given to using mental health legislation”
• (Department of Health, 2009)

Under 18s unable to decide: basis for informal admission/treatment

- MCA 2005
  - 16/17 & lacks capacity
  - Best interests
  - No deprivation of liberty

- Parental consent
  - U18 lacks capacity/competence
  - Parent (PR) consents
  - Decision within ZPC
Lacking Capacity v Lacking Competence

Inability to Decide

- Due to immaturity
- Due to impairment of disturbance in functioning of mind/brain

Connection between the CRPD and the CRC: Points for Discussion

- How do Articles 3 & 5 CRC and Article 7 CRPD sit with:
  - Core principles of the CRPD (Article 3)
  - Article 12: “persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life”
  - Article 25: provision of health care “on basis of free and informed consent”

- Is there a tension between “best interests” and giving due weight to the views of the child in accordance with the age and maturity of the child?

- Are we clear on the circumstances in which the basis for making decisions on behalf of the child is the child’s disability rather than immaturity? And should we address these differences differently?
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