

# Medical law in south australia

[Family](#), [Parenting](#)



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## **Introduction**

In the present practices of medical law in South Australia, a number of considerations are underlined whenever issues of conflict of interest arise especially among the parents, child, and the medical practitioner. Whereas the child's interest becomes paramount and supersedes the interest of the parent, one would reason that the law itself creates certain gaps as the parents are vital participants in the wellbeing of the child and arguably would wish the best for the child. Such limitations on parental authority form the basis of this paper which highlights the pros and cons of the statute. Child Health and Social Welfare

In establishing laws regarding the family, matters in South Australia, the Court in charge of family issues will ponder on the wishes of the child when evaluating what the ultimate interest of the child is and such interest will supersede other interests from different quotas when adjudicating on recovery orders, parenting, and location. Australia has a uniform insurance policy called the Medicare which encompasses all Australian adults as well as the children who live in the Federal government save for Norfolk Island. All the groups are entitled to the scheme as long as they are legitimate citizens of Australia, has been accorded a visa of

permanent stay, has the New Zealand nationality, or if such a person has requested for a permanent visa through application.

Medicare offers non-paid medical services as a public patient in a civic facility and a small fee or sponsored medication for selected therapeutic, eye services, and dental care. Sometimes, Medicare entails offering assistance on medications offered by associates of health practitioners like dietitians, speech pathologists, and physiotherapist.

## **Consent to Medical Treatment**

In South Australia, the persons from the age of sixteen are regarded as mature to make decisions about their medical attention and any other decision is considered secondary. Particularly, in every jurisdiction, the approval (consent) of the child alone may be enough in most situations especially on an occasion when the child is considered to have adequate knowledge to understand and appreciate fully what is tabled. Such an aspect is called the Gillick test. Accordingly, in South Australia, the test has been incorporated by law and entails matters that as much as the child accepts and the physician is convinced that the child has the capacity of knowing the nature, impacts, risks of the medication and that such a medication are for the wellbeing of the child's health and welfare. Additionally, the decision of the doctor is authenticated by a similar practitioner who had at one point examined the same child and acquired the same results as the second practitioner. Ideally, children can only be permitted the latitude to take part in medical findings with the permission of both the parent and the child in situations in which the research is not against the best interest of the

child<sup>[footnoteRef: 4]</sup>. Such a decision can be looked at from different perspectives as highlighted below.

## **Human rights perspective**

The basic and most fundamental right of every person is the right to life and bodily integrity as well as having the right to enjoy sexual and reproductive health exclusively. Secondly, all persons in South Australia have the right to make an informed decision regarding their medical treatment. On this basis, parental consent in my view should be considered especially when evaluating whether the present legal, policy frameworks and regulatory frameworks offer reasonable procedures to assert the choices of a person with disability and the procedure to evaluate if one has the capacity to give accurate and cognizant consent and well-thought representation when offering requests for sterilization steps where the aim of the matter is considered unfit to give free and accurate consent. Similarly, a request for issues regarding best interest test should be evaluated as it pertains to sterilization and reproductive rights.

Ideally, when one evaluates the provisions of the argument above with respect to a person with mental disability, it becomes authoritatively difficult to prove if the person making the consent is competent enough in that state and if he or she has adequate knowledge to make the right judgment and decision voluntarily. In so far as the law recommends to a given extent consent of an authority where one is deemed incompetent to make a rightful judgment, one feels it should be comprehensive enough to encompass

details and opinions of the guardians and parents as long as one is perceived to be with a mental disorder.

Such argument can be elaborated with the case of Burke, “ R (on the application of) v The General Medical Council Rev 1, Court of Appeal – Administrative Court [2005] QB 424”. Here, Leslie Burke suffered from an illness which was slowly advancing implying that he would require basic hydration and diet at some point in the medication process. As was the case, he hoped he would remain in a stable condition until the last stages of the condition. He had the concerns that the General Medical Council Guidelines would make a decision to direct doctors to regulate and withdraw the artificial nutrition and hydration when he desired to proceed with the medication irrespective of any eminent pain and suffering. Contrary to the point at the time, in July 2004 Leslie Burke pursued a judicial review on the guideline which literary became successful as Munby J offered six declarations, in which three of the six declarations were in line with Mr. Burke concerns, while the rest offered a given portion of specific passages in the GMC Guidance as unlawful. Consequently, GMC appealed and in accepting the appeal, the Court of Appeal put aside all the six declarations given by Munby J. The main argument of Leslie Burke’s concern was that while he was able to resolve for himself at the time, he hoped to inspire medical decisions to be done on his behalf as soon as he lost fair judgment. Ideally, Burke’s concern was who and how the best interest should be assessed.

However, Justice Munby's conversation of the association between autonomy, best interests as well as the wishes of the patient was regarded as redundant by the Court of Appeal. The Court explained the concept of best interests as vis-à-vis the context within which it is applied but not to the extent of much significance when evaluating the condition with which one is concerned. The Court of Appeal ruled that essential capacity is the aspect of having the wherewithal and requisite and if one chooses to employ it while function rationally having what it takes appreciate, preserve, consider and assess (like process) and think about the knowledge applicable to the subject matter. Therefore, one can deduce that in the absence of it, the parental opinion should be sought. Similarly, even in the abundance of it in the case of a child, it would make sense out of the wealth of experience of the parent in whose custody the child has been over the years, to give a history or account of the condition of the child.

Consequently, the decision to sterilize persons with disabilities should not be a one-person decision. Factors such as the presence of and effectiveness of programs and services to maintain persons with disabilities in handling their reproductive as well as sexual health needs, and to establish if there are methods at hand to be present without any sense of discrimination should be handled with care and consortium. A distinction should be made between adults and children with disability especially on the aspect of law governing medical pronouncement in Australia is buttressed with two rivaling policy considerations. The policies are considerations for patient's autonomy and the safeguarding of patient's welfares. In as much as the doctors will have

similar treatments both for the adult and children patients, special consideration should be enforced when handling children with disabilities.

For the case of children with disabilities, it is difficult to establish their abilities to make concrete decisions with regard to their medical concerns hence calling for advanced input. The decision should be based on the relevant entity or persons to act on their behalf while making such crucial decisions. It, therefore, call for two approaches to establishing the competency of such children which are status based approach and functional assessment. In the status based approach, a person is considered to be either competent or incompetent with respect to the class they belong in the society. In functional assessment aspect, a person will be regarded as either competent or incompetent by considering the kind of decision abilities and capabilities. Former Chief Justice Nicholson in *ReAlex* stated that the circumstances surrounding a minor to make decisions concerning his health a not very clear. The determination of such difficulties is not supported by the scarcity of the case law pertaining medical treatment pronouncements for the juveniles in Australia.

Similarly, additional pronouncements were made in the case of *Gillick v West Norfolk and Wisbech Area Health Authority andra Anor* (1985) 3 All ER402 [HL] where matters of competence and were discusses. The Gillick test or standard is primarily from England where a child of sixteen years or younger is evaluated on whether he or she can consent rightfully for medical attention without having to involve the parents' knowledge and permission. The Gillick test is crafted from the position of the House of Lords in the *Gillick*

V West Norfolk case and today binds in England, Wales, Canada, New Zealand, and Australia. The Court wanted to find out if the juvenile beforehand could give consent for the proposed medical treatment. Lord Scarman held that “ As a matter of Law the parental right to determine whether or not their minor child below the age of sixteen will have medical treatment terminates if andwhen the child achieves sufficient understanding and intelligence to understand fully whatis proposed”. Much as Mrs. Gillick failed in her application, the incident milestone decision and has gone viral not just in law but also for social, health practitioners and educationists. In summary, based on the discussion above one can conclude that decision making and consenting should not be left in totality for the child. Parents play a vital in the growth and development of the child and should be regularly consulted before, during, and after the medical process.