Article in *Seen and Heard*, Volume 34 | Issue 1 | 2024

ENDING THE *GILLICK* ENIGMA: A CALL FOR A STATUTORY TEST TO DETERMINE A CHILD'S CAPACITY TO DECIDE

Dr Camilla Parker KC(Hon), Just Equality

Introduction

> *'The Government should consult on the introduction of a statutory test for competency, or "child capacity", for children under 16. This consultation should be wide-ranging and consider the wider implications of this reform on other areas of law affecting children.'* (Joint Committee on the Draft Mental Health Bill, January 2023)

History will tell whether the Joint Committee's recommendation that the government should consult on the need for a statutory 'child capacity' test marks an important milestone in the development of children's law, or is destined to become a mere footnote. The recommendation seeks to address the 'significant concerns' that, due to the lack of a statutory test for decision-making, children 'will not benefit fully from the rights and safeguards' in the government's proposed amendments to the Mental Health Act (MHA) 1983 (Joint Committee, para. 218). However, as the Joint Committee highlighted, the lack of a clear and consistent approach to determining a child's ability to make decisions for him or herself is a current and ongoing concern that extends far beyond the reform of the MHA 1983:

> *'The concept of* Gillick *competence was established following a decision by the House of Lords in the 1985 case* Gillick v West Norfolk*, that a child aged under 16 can consent to medical treatment if they are deemed by professionals to have the maturity and intelligence to understand what is involved … The Children Act 1989 does not provide any direction on how to determine a child's capacity for understanding. Therefore, the principles of* Gillick *have been widely adopted by safeguarding agencies and clinicians as a "test" to help guide professionals in assessing a child's maturity and understanding when making their own decisions. However … the concept is "broad" and "ambiguous", and there is no single method or defined set of questions by which it can be assessed. We have heard from multiple contributors to this inquiry that there are significant inconsistencies in how it is applied in practice.'* (Joint Committee, p 216)

As observed by the Joint Committee, although its inception concerned decisions about a child's medical treatment, the concept of *Gillick* competence now has a far greater reach. It has become integral to decision-making in matters relating to children. For example, determining whether the child is willing and able to consent to the proposed intervention is a key part of the planning and provision of the child's care. It is also relevant to whether a Deprivation of Liberty has arisen (*Re T (A Child*) (2021)).

The reforms to the MHA 1983 are now on hold (the King's Speech made no mention of a Mental Health Bill). However, the Joint Committee's recommendation has highlighted a significant gap in the law and therefore requires careful consideration, irrespective of the fate of the Mental Health Bill. Accordingly, with the aim of stimulating further debate on the need for a statutory test, this article first considers the origins of the concept of '*Gillick* competence' and the uncertainties surrounding it and, secondly, how such a test might be developed.

1. '*Gillick* competence': origins and uncertainties

As is well known, the term '*Gillick* competence' derives from the 1985 case of *Gillick v West Norfolk and Wisbech AHA* ('*Gillick'*), in which the House of Lords confirmed that a child aged under 16 can consent to their own medical treatment if they have sufficient understanding and intelligence to do so. The outcome was summarised by Mr Justice McFarlane (now President of the Family Division), who noted the irony that Mrs Gillick:

> *'… succeeded in her quest to clarify the law relating to the autonomy of young people under the age of 16 years. Unfortunately for her, as we all know, the clarification given by their Lordships was to establish exactly the opposite of the outcome sought by the claimant … whose endeavour … gave birth to a legal being, the* Gillick *competent child.'* (McFarlane, 2011, p 479)

The rejection of Mrs Gillick's contention that because of their age (younger than 16 years), children lack the legal capacity (i.e., legal authority) to consent to their own medical treatment was clear and firm. The House of Lords held that if they have the requisite understanding and intelligence to make the decision in question, children can consent to their medical treatment. Lord Fraser (whose decision was supported by Lord Scarman and Lord Bridge) regarded as 'absurd' the suggestion that a 15-year-old child 'could not effectively consent' to medical treatment and 'was not disposed' to hold that a girl aged under 16 could not give valid consent to contraceptive advice or treatment 'merely on account of her age'. Crucially, there was no statutory provision that compelled him 'to hold that a girl under the age of 16 lacks the legal capacity to consent to contraceptive advice, examination and treatment provided that she has sufficient understanding and intelligence to know what they involve'.

It is also noteworthy that neither of the two dissenting judges disagreed with this point. One (Lord Brandon) made no comment and while Lord Templeman doubted that a child could be capable of deciding 'to practise sex and contraception', he agreed with the general principle that 'a doctor may lawfully carry out some forms of treatment with the consent of an infant patient', depending on 'the nature of the treatment and the age and understanding of the infant'.

Gillick is therefore a significant milestone in the development of law relating to children and their rights. It established that age alone did not dictate whether a child could consent to his or

---