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Brief 462114
Introduction
Outline essay's goals: critical discussion of whether the ability of the courts/parents to override the medical treatment decisions of minors in harmful situations is justified.
Overview of structure:
Summary of law
Philosophical issues
Is the law justified?
Outline of argument:
In cases where children are acting autonomously, the law is not justified.
Overview of the Law
General rule with adults: patients must consent to treatment; non-consensual treatment is battery.
Exception: if the patient lacks 'capacity', outline the definition of capacity given in ss.1-3 of the Mental Health Act 2005.
Defined as ability to make treatment decisions, including ability to remember, understand and communicate decisions.
Doctors must take steps to assist an adult in having capacity, and it is irrelevant whether they approve of a capable adult's decision.
Adults are presumed to have capacity.
General rule with under 16s: presumed not to have capacity unless proved 'Gillick-competent'. This requires:
Sufficient ability to understand the treatment and consequences;
Sufficient maturity to weigh information and make decisions;
Life-experience, including exposure to different philosophies and world-views;
Ability to understand any moral or family issues involved.
General rule with 16-18-year-olds: presumed to have the capacity to consent to treatment, but not refuse it. In the latter case, must be proven Gillick-competent.
If a minor is not Gillick-competent:
Parents may make the decision on the child's behalf (part of their parental responsibility).
Alternatively, the court may make the decision if in the best interests of the child (and can override parent's wishes).
Can Overriding Consent be Justified?
Requiring consent bolsters and supports autonomy, a core principle of medical law.
Define autonomy (e.g. quote Oshana's definition). Note it includes respect for beliefs perceived as irrational by others.
Respecting autonomy = necessary to allow people to lead flourishing existences, + acknowledges that people tend to know better what is in their best interests.
Autonomy = particularly important in medical context, as freedom to choose when one's bodily integrity is breached is part of autonomy's core.
Autonomy = treated as a right in Western tradition, e.g. European Convention on Human Rights include a right to autonomously speak, choose religion etc.
Autonomy is usually seen as infringed by paternalism.
Define paternalism (see Beauchamp & Childress, p.178 for a good definition).
Western tradition typically rejects paternalism – e.g. it is battery to override consent of most adults.

However, paternalism does not always infringe autonomy.
Autonomy requires capacity to understand & process relevant information and an uncoerced environment to ensure the decisions are truly free.
If any of these factors are lacking, paternalism can be justified.
Paternalism can exist in degrees, e.g. giving a person extra information ('soft paternalism') vs completely overriding their stated decision ('hard paternalism').
Depending on how much the person lacks the capacity for autonomous decision-making, different degrees of paternalism can be justified.
E.g., encountering a misinformed person might justify soft paternalism (they only lack some capacity), while treating a comatose person might justify hard paternalism (as they have no capacity).
This shows that overriding the decisions of children will only be justified if they lack capacity/freedom.
Is the Law Justified in Overriding Children's Consent?
Some children obviously lack capacity (e.g. babies and toddlers).
Older children may also lack capacity (research shows parts of the brain involved in decision making are not yet developed in many teenagers and that they are also more likely to lack key mental facilities).
It is therefore important to ascertain that a child is sufficiently developed.
Factors 1-2 of the Gillick test are a test of sufficient development.
Demonstrate this with an overview of the facts + outcome of Re JM.
Children are more likely to be insufficiently free/uncoerced.
Children are more likely to be indoctrinated/involuntarily cut off from other perspectives (particularly re. religion).
This can impact health decisions, e.g. Jehovah's Witnesses/blood transfusions (especially given anecdotal evidence of a high degree of coercion in some religious communities, see e.g. Re T which involved a coerced adult).
It is therefore important to ascertain that a child is sufficiently free.
Factors 3-4 of the Gillick test are designed to ascertain if the child is sufficient free.
Demonstrate this with an overview of the facts + outcome of Re L.
Paternalism is therefore justified in cases where the child is not Gillick-competent, as they are not capable/free.
Children are less likely to have capacity, so presuming incapacity is justified.
However, in theory there will be children who are developed enough and free, and so able to autonomously refuse treatment. In these cases, paternalism = unjustified.
This makes it problematic that, in practice, the courts seem unwilling to ever hold a child competent to refuse treatment, no matter how mature. The threshold might, therefore, be impossible to meet in practice in refusal of treatment cases.
Demonstrate with the facts + outcome of Re E (involved a very mature child).
Note that he chose to end treatment after turning 18 (showing his decision was persistent and considered).
Note also that the court relied on the fact that he was insufficiently informed as to the horrific nature of his potential death to argue that he lacked capacity, but unlike with adults the doctors were not under an obligation to apply soft paternalism and give him the necessary information (which he arguably would have understood and therefore would have become capable).
The double standard for over 16-year-olds also demonstrates this.
Some argue this is justified: it is easier to understand the consequences of accepting treatment versus rejecting it. However autonomy surely requires both: one cannot meaningfully choose to accept treatment without understanding the implications of rejecting it.
As such, while in theory the requirements of Gillick-competence are justified, in practice they are applied in an unjustified manner.
Conclusion
The law is justified in overriding the choices of children in cases where they are incapable of making autonomous decisions.
However, the current law appears to make it impossible for a child to choose to refuse treatment in harmful situations, even where they are autonomous. This is unjustified.
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