



Children's
Rights Alliance
for England

FAQ - Full Answer



“I’m 15 and I’m a patient in an adolescent psychiatric ward because I got very stressed and started cutting myself. I don’t want to be here and I don’t think it’s helping me. They say that because I’m a voluntary patient I can’t appeal the placement. But I never volunteered to come, my parents put me here.”

The law on the compulsory treatment of under-16 year-olds

Doctors and nurses run the risk of committing a criminal assault if they treat patients without proper consent, or being charged with false imprisonment if they detain them in a hospital against their will. So the law has always had to be clear about what consents are necessary, and what checks and procedures are necessary for compulsory treatment.

Young people aged 16 and over can consent to medical treatment in their own right ([section 8](#) of the Family Law Reform Act 1969). In 1986, in a landmark case of *Gillick v West Norfolk & Wisbeck Area Health Authority* the House of Lords ruled that children under that age could also consent to treatment if they had ‘*sufficient understanding*’ to ‘*understand fully what is proposed*’. This is sometimes known as “Gillick competence”.

Under the *Gillick* approach, as a 15 year-old you can consent to medical treatment yourself, if you are deemed competent. However, first, it is the doctors who decide whether you are competent or not. Second, subsequent cases have watered down your rights under *Gillick*. In particular, judges ruled that refusing treatment was different from consenting to it, and that parents could give a valid consent in cases where their competent children had refused treatment. One case was about a mentally ill 15 year-old with “fluctuating” capacity (*Re R* ([1992] Fam. 11). Another concerned a 16 year-old girl with anorexia who did not consent to being force fed (*Re W* ([1992] All ER 627).



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Compulsory treatment and the Human Rights Act and European Convention on Human Rights

Under Article 5 of the [European Convention on Human Rights](#) (ECHR) you have a right to liberty which can only be restricted in certain circumstances. These include being “of unsound mind”. However, everyone who loses their liberty has an absolute right to have this decided speedily by a fair hearing and to periodic review of any detention that isn't for a fixed period.

But in 1988 the European Court of Human Rights ruled on a case where a 12 year-old boy had been hospitalised by his mother. With the help of his father (who did not have parental rights) the boy applied to the Court arguing that he had been deprived of his liberty, and lost. The Court said that the conditions in the hospital did not amount to deprivation of liberty and that his mother was simply exercising her parental right to secure his best interests (*Nielsen v Denmark*).

Recently the UK courts and the European Court of Human Rights have considered a number of cases about deprivation of liberty in a mental health institution. The most important for this question is a case against the UK in 2004 (*HL v UK*). This was taken on behalf of 48 year old man with severe autism who was admitted to Bournemouth Hospital “informally” by the doctors but against the wishes of his carers with whom he had lived happily for the previous three years. The man lacked capacity and could not express his wishes and his carers were forbidden to visit him. His case was taken first to the House of Lords, where he lost, and then to the European Court of Human Rights. The European Court ruled that HL had been deprived of his liberty without the right to a legal review and this had breached his rights under Article 5 of the ECHR.

As a result, the Government brought in new laws under the [Mental Capacity Act 2005](#) and the [Mental Health Act 2007](#) to ensure that people without capacity could not be deprived of liberty without procedures to challenge this. Specific provision was made for 16 and 17 year olds: the new law makes clear that they cannot be admitted to hospital against their wishes even if their parents consent on their behalf ([section 43](#) of the 2007 Act).



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But because of the Nielsen case, the Government said it did not have to change the law for children and young people under 16 who are deemed to lack capacity, even though they seem to be in the same position as the man in the “Bournewood case”. So all these new laws exclude under-16 year-olds.

CRAE believes that this is wrong. Nielsen was a young boy and he was relatively free at the hospital, for example able to go out with permission, visit friends and relatives and even return to school. The court said his detention wasn't much different from parents locking the front door at night. But many young people in the UK who are informally held in psychiatric wards against their will are older and have much less freedom than Nielsen did. It's time their rights were respected.

What you can do

Despite the limitations of your rights, it is open to the doctors to decide that you are Gillick competent. They could then accept your desire to leave the ward, take the matter to court or seek to “section” you for compulsory treatment (for what this means, see explanations by [Mind](#) and [Great Ormond Street Hospital](#)).

The [guidelines](#) on treating under-18 year-olds from the General Medical Council (GMC), the organisation registering doctors and setting standards, says:

You should seek legal advice if you think treatment is in the best interests of a competent young person who refuses.

It also reminds doctors that the benefits of treating the young person should be weighed against the harm that may be done by overriding their refusal.



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How can you show you are Gillick competent?

The GMC guidelines say to doctors:

You must decide whether a young person is able to understand the nature, purpose and possible consequences of investigations or treatments you propose, as well as the consequences of not having treatment. Only if they are able to understand, retain, use and weigh this information, and communicate their decision to others can they consent to that investigation or treatment. That means you must make sure that all relevant information has been provided and thoroughly discussed before deciding whether or not a child or young person has the capacity to consent.

The capacity to consent depends more on young people's ability to understand and weigh up options than on age. When assessing a young person's capacity to consent, you should bear in mind that:

(a) at 16 a young person can be presumed to have the capacity to consent

(b) a young person under 16 may have the capacity to consent, depending on their maturity and ability to understand what is involved.

It is important that you assess maturity and understanding on an individual basis and with regard to the complexity and importance of the decision to be made. You should remember that a young person who has the capacity to consent to straightforward, relatively risk-free treatment may not necessarily have the capacity to consent to complex treatment involving high risks or serious consequences. The capacity to consent can also be affected by their physical and emotional development and by changes in their health and treatment.



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So you need to show three things:

- ◆ You should show the doctors that you fully understand the benefits of receiving treatment in the unit (and if you don't feel you fully understand this ask, as they must give you "all relevant information").
- ◆ You should also show you understand what might happen if you don't stay in the unit. This could be a variety of outcomes, some good, some bad.
- ◆ Finally you need to show that you have weighed up these choices and decided that it is in your best interests to leave. Find as many sensible reasons to support this decision as you can.

The doctors don't have to *agree* with your decision, they just have to judge if you have *capacity to make the decision*. Although the Mental Capacity Act 2005 does not apply to under 17s (see above), the doctors should ask the same questions as this Act sets out in working out if you have capacity to decide whether to be treated:

- ◆ Do you understand the relevant information?
- ◆ Can you retain the information long enough to make the decision?
- ◆ Can you use and weigh up the information in making your decision?
- ◆ Can you communicate your decision by any means?

If the doctors do decide you are competent, then they could allow you to discharge yourself. But they will only do this if they agree with you that (on balance) it is in your best interests.

If they don't agree, then they have a duty to act in your best interests. They may:

- ◆ do nothing,
- ◆ ask a judge at the High Court to decide who is right about your best interests, you or the doctors and your parents,
- ◆ seek a section for compulsory treatment (section 2 and 3 of the Mental Health Act 1983).

You will get a lawyer or advocate if the last two happen, who must act on your instructions.



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If the doctors decide to do nothing, to just to follow your parents' wishes and treat you as an informal patient without rights of your own, you can make a complaint about this decision. The hospital or unit will have **an official complaints procedure**. You can get help with this from your **Patient Advisory and Liaison Service** (PALS) and from an advocate from **NHS Complaints Advocacy**, a free and independent service that can help you make a complaint about an NHS service.

You can also challenge your placement under the Human Rights Act. You would need to talk to a <http://www.crae.org.uk/media/26302/CRAE-children-and-lawyers-guide.pdf> about this as it would involve an application for judicial review. Generally you should make a complaint first before going to court, but this is not always necessary, particularly if your case is very urgent. [Contact CRAE](#): we'd be happy to help.