

COMPETENT ADULTS 1. **Non-consenting adult patients** General Rule: A dr cannot provide treatment without consent of competent p. Non-consent can lead to Battery / Negligence claims or a Criminal Offence - *Chatterton v Gerson*. *Note the exceptions: implied consent to touching in ordinary course of life (*Collins v Wilcock*); forced treatment and public policy (*Robb v Home Office*); CF *St George's Healthcare NHS Trust v S*; notifiable diseases - Public Health (Control of Disease) Act 1984, Public Health (Infectious Diseases), Regulations 1985; The Mentally Ill; Mental Health Act 1983 eg to prevent suicide - *Savage v South Essex Partnership NHS Foundation Trust*. 2. **Refusal of treatments that cannot be consented to** *No right to demand treatment *Proper medical treatment does not constitute an offence - *R v Brown* *Certain treatments e.g. Female Circumcision (FGMAG 2003) *Body Dysmorphic Disorder **COMPETENT PATIENTS 1. Adults (lacking capacity)** *This is now governed by Mental Capacity Act (MCA) 2005. P's are presumed to be able to consent (s1(2) MCA) *Under s. 27 MCA there are a list of activities that it is not possible to substitute consent by another on behalf of the p eg marriage. ***Otherwise: Advanced Decisions (living wills) s24 MCA:** *must be made when person over 18; competent when decision made; only relevant if person lacks capacity to consent to treatment; only allows negative decisions ie to refuse treatment and its continuation; if decision involves the denial of life-saving treatment, it must be in writing, signed and witnessed. *s25 - an advance decision can be invalid if: P with capacity has withdrawn the decision; P creates an LPA after the decision giving the LPA the power to make the decision; P has done anything else inconsistent with the directive in the advance decision - *HE v A Hospital NHS Trust* (P did something inconsistent with previous decision ie became a muslim) *note s26(1) *Protects medical practitioner if acts in good faith. **Lasting Power of Attorney** - s. 9 MCA 2005 *Allows another person to make the decision on behalf of an incompetent p eg welfare and medical decisions. *P must be over 18 and have capacity *There are strict formalities given under schedule 1 MCA. **Deputies** - s16 MCA *If p lacks capacity to decide on a personal welfare issue, the ct can make decision or appoint a Deputy to do so. *Reference made to the p's best interests. *A Deputy has the power to give or refuse consent to medical treatment. **The concept of best interests of p** *Application to Court *s. 4 MCA 2005 and COP - decision makers to take into account all relevant factors that it would be reasonable to consider they must not make a decision based on what they would do. **Re F (Mental Patient: Sterilisation)* *S1(6) - the least restrictive action to ensure the patients rights and freedoms. *s4 - when deciding a p's best interests, the ct or deputy must consider all relevant circs. *Ref: Code of Practice (DCA 2007) and factors to consider under s4. **Re Y (Mental Patient: Bone Marrow Donation)* **Use of force** *Ministry of Justice COP 2009. Restraint is the use of or threat of force to secure an act which is p resists OR a restriction of p's liberty of movement, whether or not p resists. Where p is deprived of liberty then the Deprivation of Liberty COP also applies *conditions: lack of capacity, authorisation must be sought, in p's best interests, s6 MCA it is both necessary and proportionate. **2. Children (lacking capacity)** *s. 1 Family Law Reform Act 1969 - all persons under 18 *A child aged 16-17: s. 8 Family Law Reform Act 1969 - can consent to treatment (but not cosmetic, tissue donation or research in which Gillick is used) *Below 16 - A Gillick Competent Child - *Gillick v Norfolk AHA*: Must have "sufficient understanding and intelligence to enable him or her to understand fully what is proposed" per Lord Scarman. *Re T (Jehovah's Witness) / Re E (Jehovah's Witness) / Re S (Jehovah's Witness)* *If a child cannot consent a person with Parental Responsibility can consent for a child (DoH 2001:a) *Defence of Necessity - s.3(5) Children Act 1989 *A Court Order, s. 8 Children Act 1989, *Glass v UK*, disagreement between Parties.

ABORTION types of abortion: spontaneous abortion ie miscarriage, medical abortion induced by taking drugs, surgical abortion (vacuum or suction). Ethical issues of abortion: The moral status of the foetus - is the foetus a person? The rights of the pregnant women - does the pregnant women have the right to decide if she is going to carry the baby to full term? **MORAL STATUS OF FOETUS** *The foetus is a person from the moment of conception: The foetus is not yet a person but has the potential to be one. Because we do not know when life begins the safest assumption is that it begins at conception. *Foetus becomes a person at 14 days (primitive streak) *Foetus becomes a person from quickening (movement). *Foetus becomes a person at viability. *Foetus becomes a person when it is capable of sensation this is around 20-24 weeks *Foetus becomes a person at birth. *Personhood does not begin until some time after birth. *Right to self-determination emphasises physical invasiveness of abortion - Jarvis Thomson 'The Violinist'. *Rights of the pregnant women: right to privacy, right to bodily integrity, right to equality. Does the law give the women the right to an abortion? **LEGAL STATUS OF THE FOETUS** *A foetus is not a person until it is born: "the foetus cannot have any right of its own at least until its born and has a separate existence from the mother." *Paton v BPAS* *See also the Congenital Disabilities Act. *So what is the foetus? *Attorney General's Reference (no 3 of 1994)* (1998) - Lord Mustill: the foetus is a unique organism. **St George's Healthcare NHS Trust v S* (1998) Judge LJ states that a 36 week foetus is "not nothing: it is not lifeless and is certainly human". **ABORTION: THE LAW** *Offences Against the Person Act 1861, s58 and s59 - procuring the miscarriage of a woman by a third party. *The Infant Life (Preservation) Act 1929, s1(1) introduced the offence of child destruction. The killing of a child "capable of being born alive". Not committed if done in good faith for purpose of only preserving the mother's life *R v Bourne*. *The Abortion Act 1967 as amended by s37 Human Fertilisation and Embryology Act 1990 - S1(1) states that a person shall not be guilty of an offence under the law of abortion when termination is performed by a registered medical practitioner and two registered medical practitioners have formed the opinion in good faith. **THE ABORTION ACT** - must satisfy grounds(a) that the pregnancy has not exceeded its **twenty-fourth week** and that the continuance of the pregnancy would involve **risk**, greater than if the pregnancy were terminated, of injury to the **physical or mental health** of the pregnant woman or any existing children of her family. Unclear as to what physical or mental health means. Women's reasons? Also re time limit - moral issues in relation to late abortions. (b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or (c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or (d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped. **How does the law balance the competing interests? Is there a balance?**

LIABILITY BEFORE BIRTH - *Types of Action: 1. Action by child - congenital disability, wrongful life claim, wrongful birth claim, wrongful contraception claim, wrongful birth claim. **Action by child - prenatal injury** *Claims brought on behalf of child born in a damaged state as a result of negligence of another during birth *A child born after 1976 is granted a cause of action by the Congenital Disabilities (Civil Liability) Act 1976 *Child born before that date is owed a common law duty of care. *Causation can be a major stumbling block *Congenital Disabilities (Civil Liability) Act 1976 s1(1): The Act enables a child to sue for damages in respect of injuries inflicted before birth. The child must be "born disabled as a result of another's negligence". *S4(1): The child must be born alive, there is no action for wrongful death *Disabled is given a wide mean to encompass any person with a deformity, disease or abnormality including predisposition (whether or not susceptible of immediate diagnosis) to physical or mental defect in which there are a number of hurdles to overcome: 1. The disabilities were caused by an "occurrence" that affected either parent's ability to have a normal healthy baby, be it mother during pregnancy or during the course of bir (s1(1) and (2)). 2. The person responsible for this occurrence was liable to the affected parent(s). There must be a breach of a duty of care to this. 3. The *Bolam* test applies. *There are also a number of defences: S1(4) the defendant is not answerable to the child if at that time either or both of the parents were of the risk of their child being disabled; but if it is the child's father this does not apply if the mother did not consent. This was amended in s1(4) Congenital Disabilities (Civil Liability) Act 1976 - extends liability to occurrences during assisted conception. **Human Fertilisation and Embryology Act 1990** **Child: wrongful life claim** *Claims brought as a result of a failure to abort after the occurrence of a defect. **Mackay v Essex AHA* - To impose such a duty would be contrary to public policy because it would violate the sanctity of human life and devalue the life of a handicapped child. There was no proper measure of damages representing the different between the child's disabled existence and non-existence, ct thought that neither the doctor nor the mother were under a legal obligation to the foetus to terminate its life. Open up floodgates to claims by children born handicapped against their mothers for not having an abortion. **Action by parent: wrongful contraception claim** - cases where the parents were deprived of the opportunity to avoid the conception or pregnancy. *wrongful pregnancy - a dr is not liable to any future or potential partner of his patient of whom he has no knowledge - *Goodwill v British Pregnancy Advisory Service*. However, owes a d of c to both partners if they come together. *Breach of duty? - Governed by the *Bolam* principle **Fallows v Randle* - The *Bolam* principle had no application when what the judge has to decide is, on balance, which of the explanations of failure is to be preferred. This is a question of fact which the judge has to decide on the ordinary basis of a balance of probabilities. Also have to show c has suffered loss. *Specific problems - Failure to diagnose pregnancy at time of sterilisation *Allen v Bloomsbury Health Authority / Crouchman v Burke*. Information disclosure - *Thake v Maurice* ***Damages:** 2 main heads: 1. 'mother's claim': those that derive from the pregnancy itself. 2. 'parent's claim': those that derive from the upkeep of the resulting child - *Udale v Bloomsbury AHA* (these costs are not recoverable for public policy reasons). The coming of a child into the world is an occasion for rejoicing". CF *Eneh v Kensington and Chelsea and Westminster AHA* - disabled's child maintenance costs were recoverable. **McFarlane v Tayside Health Board* - pregnancy and childbirth do qualify as personal injury, but the costs of bringing up a healthy child is not recoverable. **Parkinson v St James and Seacroft University Hospital NHS Trust* - Mrs P gave birth to a disabled child following an negligent sterilisation. Extra costs associated with bringing up a child with a "significant disability" could be claimed. **Groom v Selby* - Unnoticed pregnancy child developed meningitis after birth as a result of contracting salmonella from mother's birth canal. Was child normal at birth or disabled as a consequence of negligence? **Rees v Darlington Memorial Hospital NHS Trust* - healthy child who was born following a negligently performed sterilisation to a severely visually handicapped mother. Rejected her claim for the extra costs of child care occasioned by her disability, but allowed a conventional award. *Parents of a child might seek damages against dr or pre-natal counsellor who has failed to either advise them of the risk of congenital illness or to carry out the correctly interpret appropriate diagnostic procedures which would have disclosed abnormality in the foetus. Effect of *McFarlane*? *Rand v East Dorset HA*.

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